

**BEFORE THE
U.S. DEPARTMENT OF ENERGY
WASHINGTON, D.C. 20585**

In the Matter of:)
)
)
Whirlpool Corporation,) Case Number: 2013-SE-1420
Respondent)
)
)

ORDER

By the General Counsel, U.S. Department of Energy:

1. In this Order, I adopt the attached Compromise Agreement entered into between the U.S. Department of Energy (“DOE”) and Whirlpool Corporation (“Respondent”). The Compromise Agreement resolves the case initiated to pursue a civil penalty for distribution in commerce in the U.S. of units of a basic model of a covered product that failed to meet the energy conservation requirements as described at 10 C.F.R. § 430.32(a).

2. DOE and Respondent have negotiated the terms of the Compromise Agreement that resolve this matter. A copy of the Compromise Agreement is attached hereto and incorporated by reference.

3. After reviewing the terms of the Compromise Agreement and evaluating the facts before me, I find that the public interest would be served by adopting the Compromise Agreement, which completes the adjudication of the case.

4. Based on the information in the case file and Respondent’s admission of violation in the Compromise Agreement, I find that Respondent committed Prohibited Acts as described at 10 C.F.R. § 429.102(a)(6). *See* 42 U.S.C. §§ 6302, 6316.

5. Accordingly, pursuant to 10 C.F.R. § 429.120 and 42 U.S.C. § 6303, **I HEREBY ASSESS** a civil penalty of \$5,329,800 **AND ORDER** that the Compromise Agreement attached to this Order is adopted.

/signed/

4-25-14

Anne Harkavy
Acting General Counsel

Date

**BEFORE THE
U.S. DEPARTMENT OF ENERGY
Washington, D.C. 20585**

In the Matter of:)
)
Whirlpool Corporation) Case Number: 2013-SE-1420
(refrigerators/refrigerator-freezers/freezers))
)

COMPROMISE AGREEMENT

The U.S. Department of Energy (“DOE”) Office of the General Counsel, Office of Enforcement, initiated this action against Whirlpool Corporation (“Respondent”) pursuant to 10 C.F.R. § 429.122 by Amended Notice of Proposed Civil Penalty, alleging that Respondent distributed in commerce in the United States refrigerator-freezer basic model 8TAR81 (“basic model 8TAR81”), which DOE determined, based on testing of four (4) units of the basic model and calculations in accordance with 10 C.F.R. Part 429, Subpart C, Appendix A, was not in conformity with the applicable energy conservation standard. *See* 10 C.F.R. § 430.32(a). The four (4) units that DOE tested consumed an average of eight percent (8%) more energy than permitted by the applicable energy conservation standard. Respondent, on behalf of itself and any parent, subsidiary, division or other related entity, and DOE, by their authorized representatives, hereby enter into this Compromise Agreement for the purpose of settling this specific enforcement action.

I. DEFINITIONS

For the purposes of this Compromise Agreement, the following definitions shall apply:

- (a) “Act” means the Energy Policy and Conservation Act of 1975, as amended, 42 U.S.C. § 6291 *et seq.*
- (b) “Adopting Order” means an Order of the General Counsel adopting the terms of this Compromise Agreement without change, addition, deletion, or modification.
- (c) “Distribute in Commerce” or “Distribution in Commerce” means to sell in commerce, to import, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.
- (d) “DOE” means the U.S. Department of Energy.
- (e) “DOE Rules” means DOE’s energy and water conservation regulations found in Title 10, Parts 429 and 430 of the Code of Federal Regulations.
- (f) “Manufacture” means to manufacture, produce, assemble, or import.
- (g) “Notice” means the Amended Notice of Proposed Civil Penalty issued by DOE to Respondent on April 11, 2014, and captioned as case number 2013-SE-1420.
- (h) “Parties” means DOE and Respondent.

- (i) "Respondent" means Whirlpool Corporation and any parent, subsidiary, division or other related entity.
- (j) "Test Notice" means the Test Notice issued by DOE to Respondent on December 6, 2012, and captioned as case number 2013-SE-1420.

The Agreement further incorporates by reference all of the definitions found within 42 U.S.C. § 6291 and 10 C.F.R. § 430.2.

II. RECITALS

WHEREAS, DOE, pursuant to 42 U.S.C. § 6291 *et seq.*, is responsible for promulgating and enforcing the energy and water conservation requirements set forth in DOE Rules; and

WHEREAS, DOE has promulgated energy conservation standards for refrigerator-freezers at 10 C.F.R. § 430.32(a); and

WHEREAS, basic model 8TAR81 is a "covered product" as defined in 10 C.F.R. § 430.2; and

WHEREAS, DOE, on December 6, 2012, sent Respondent the Test Notice informing Respondent that DOE had conducted an assessment test pursuant to 10 C.F.R. § 429.104 of one unit of basic model 8TAR81 on October 15, 2012, and that, based on DOE's assessment test, DOE had reason to believe basic model 8TAR81 may not meet the applicable energy conservation standard, and that DOE intended to test additional units of basic model 8TAR81; and

WHEREAS, DOE, on November 5, 2013, issued a Notice of Noncompliance Determination finding that, pursuant to 10 C.F.R. § 429.110, basic model 8TAR81 was not in conformity with the applicable energy conservation standard; and

WHEREAS, the November 5, 2013 Notice of Noncompliance Determination was based on DOE's testing of four (4) units of basic model 8TAR81 that consumed an average of eight percent (8%) more energy than permitted by the applicable energy conservation standard; and

WHEREAS, on January 4, 2013, Whirlpool completed testing of units of basic model 8TAR81 manufactured in July 2012 and found that those units did not meet the applicable energy conservation standard; and

WHEREAS, DOE, on January 31, 2014, initiated an action to assess a civil penalty for distributing units of basic model 8TAR81 in commerce in the United States; and

WHEREAS, Respondent, prior to receiving the Test Notice, had no actual knowledge that any units of basic model 8TAR81 were consuming more energy than permitted by the applicable energy conservation standard; and

WHEREAS, Respondent took immediate action after receiving the Test Notice; and

WHEREAS, Respondent presented test data to DOE demonstrating that a significant population of units within basic model 8TAR81 may have individually met the applicable energy conservation standard, but that an uncertain population of units within basic model 8TAR81 did not meet the applicable energy conservation standard due to varied and distinct causes, including performance changes of certain components supplied by other manufacturers; and

WHEREAS, notwithstanding the fact that the 8% average exceedance of the four (4) units tested by DOE in this action is smaller than the average exceedances at issue in certain prior DOE enforcement actions involving similar home appliances, the substantial size of the civil penalty in this action reflects changes in DOE's settlement practices since those prior settlements as reflected in DOE's updated enforcement policy statement, "Civil Penalties for Energy Conservation Standards Program Violations," which DOE released on March 13, 2014; and

WHEREAS, DOE has previously reduced penalties imposed in prior compromise agreements to reflect the then-recent initiation of DOE's enforcement program and DOE did not apply a similar transition adjustment in its penalty calculation in this later matter; and

WHEREAS, solely for the purposes of this Compromise Agreement, Respondent admits:

1. Whirlpool has manufactured and distributed in commerce in the United States basic model 8TAR81; and
2. Since July 26, 2011, Whirlpool has distributed in commerce in the United States at least 26,649 units of basic model 8TAR81; and
3. Basic model 8TAR81 is subject to the conservation standard set forth at 10 C.F.R. § 430.32(a); and
4. DOE testing of basic model 8TAR81, conducted pursuant to 10 C.F.R. § 429.110, demonstrates that the basic model is not in compliance with the applicable energy conservation standard set forth at 10 C.F.R. § 430.32(a); and
5. The four (4) units tested by DOE exceeded the applicable energy conservation standard by an average of approximately eight percent (8%); and

WHEREAS, Respondent has cooperated fully with DOE in connection with this investigation; and

WHEREAS, DOE, pursuant to 42 U.S.C. §§ 6296, 6302, and 6303, and 10 C.F.R. Part 429, Subpart C, is authorized to assess civil monetary penalties against any manufacturer that knowingly distributes in commerce any new covered product that is not in conformity with an applicable energy or water conservation standard; and

WHEREAS, DOE, as the agency charged with developing and administering a balanced and coordinated national energy policy, concludes that this Compromise Agreement properly balances the policies recognized in the Energy Policy and Conservation Act and is the appropriate way to resolve this matter;

NOW, THEREFORE, in consideration of the foregoing and the mutual agreements set forth below, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree as follows:

III. TERMS OF THE AGREEMENT

1. **Adopting Order.** The Parties agree that the provisions of this Compromise Agreement shall be subject to final approval by the General Counsel by incorporation of such provisions by reference in the Adopting Order without change, addition, modification, or deletion.
2. **Obligations of Respondent.**
 - a. Respondent agrees to pay the sum of \$5,329,800, as full satisfaction of the civil

penalty proposed in the Notice, within thirty (30) calendar days of the issuance of an Adopting Order.

- b. Respondent agrees to abide by the terms of the Notice of Noncompliance Determination, issued on November 5, 2013, captioned under case number 2013-SE-1420.

3. **Obligations of DOE.**

- a. In express reliance on the covenants and representations in this Compromise Agreement and to avoid further expenditure of public resources, DOE agrees to accept Respondent's performance pursuant to paragraph III.2.a in lieu of taking additional enforcement action against Respondent related to basic model 8TAR81, including but not limited to assessing any additional possible financial penalties under the Act or DOE Rules.
- b. DOE agrees to issue promptly an Adopting Order adopting this Agreement.
- c. DOE agrees to terminate this enforcement action with prejudice upon Respondent's completion of its Obligations in accordance with section III.2.a, above.

4. **Jurisdiction.** This Compromise Agreement is entered pursuant to DOE's authority to interpret and enforce its rules for water and energy conservation and to enter into its own agreements interpreting and applying those rules. The Parties agree that DOE has jurisdiction over Respondent and primary jurisdiction over the matters contained in this Compromise Agreement and has the authority to enter into this Compromise Agreement.
5. **Effective Date.** The Parties agree that this Compromise Agreement shall become effective on the date on which the General Counsel issues the Adopting Order. As of that date, the Adopting Order and this Compromise Agreement shall have the same force and effect as any other Order of the General Counsel.
6. **Payment Instructions and Late Payments.** The Parties agree that all payments shall be made in a timely manner and in a method set forth in the attached "Payment Instructions." Respondent acknowledges and agrees to comply with the "Late Payment" provisions provided therein.
7. **Limitations.** Nothing in this agreement binds any other agency of the United States government beyond DOE.
8. **Waivers.** Respondent agrees not to seek judicial review or otherwise contest or challenge the validity of the terms and penalties set out in this Compromise Agreement or the Notice associated with this case. If either Party (or the United States on behalf of DOE) brings a judicial action to enforce the terms of this Compromise Agreement, neither Respondent nor DOE shall contest the validity of the Compromise Agreement, and Respondent waives any statutory right to a trial *de novo*. Respondent hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504, relating to the matters addressed in this Compromise Agreement.
9. **Final Settlement.** The Parties agree and acknowledge that this Compromise Agreement shall constitute a final settlement between the Parties. This Compromise Agreement resolves only issues addressed in the Compromise Agreement.

10. **Merger.** This Compromise Agreement constitutes the entire agreement between the Parties and supersedes all previous understandings and agreements between the Parties, whether oral or written.
11. **Modifications.** This Compromise Agreement cannot be modified without the advance written consent of both Parties.
12. **Severability.** If any provision of this agreement is held to be invalid, illegal, void, or unenforceable, then that provision is to be construed by modifying it to the minimum extent necessary to make it enforceable.
13. **Authorized Representative.** Each party represents and warrants to the other that it has full power and authority to enter into this Compromise Agreement.
14. **Counterparts.** This Compromise Agreement may be signed in any number of counterparts (including by facsimile or electronic mail), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.
15. **No Admission.** Except as specifically provided for in this Compromise Agreement, by entering into this Compromise Agreement, Respondent does not admit any issue of fact or law alleged by DOE, or any liability under EPCA, or any act of wrongdoing or any liability of any kind. Except in an action to enforce the terms of this Compromise Agreement, this Compromise Agreement shall not be admissible in any administrative or judicial proceeding. Nothing in this Compromise Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Compromise Agreement.

/signed/

 Laura L. Barhydt
 Assistant General Counsel for
 Enforcement
 U.S. Department of Energy

April 22, 2014

 Date

/signed/

 D. Jeffrey Noel
 Vice President
 Whirlpool Corporation

April 21, 2014

 Date