

## Case No. VEE-0075

November 3, 2000

### DECISION AND ORDER

#### OFFICE OF HEARINGS AND APPEALS

#### Application for Exception

Case Name: Viking Range Corporation

Date of Filing: June 16, 2000

Case Number: VEE-0075

This Decision and Order considers an Application for Exception filed by Viking Range Corporation (Viking) seeking exception relief from the provisions of 10 C.F.R. Part 430, Energy Conservation Program for Consumer Products: Energy Conservation Standards for Refrigerators, Refrigerator-Freezers and Freezers (Refrigerator Efficiency Standards). In its exception request, Viking asserts that the firm would suffer a serious hardship and an unfair distribution of burdens if required to adhere to the Refrigerator Efficiency Standards that become effective July 1, 2001, codified at 10 C.F.R. § 430.32. If Viking's Application for Exception were granted, Viking would receive a twelve-month extension for compliance with the energy efficiency standards applicable to the firm's built-in refrigerator line. As set forth in this Decision and Order, we have concluded that Viking's Application for Exception should be granted in part.

## I. Background

### A. Refrigerator Efficiency Standards

The Refrigerator Efficiency Standards, 10 C.F.R. Part 430, were published as a final rule by Department of Energy (DOE) on April 28, 1997, 62 Fed. Reg. 23102, as mandated by Congress in Part B of Title III of the Energy Policy and Conservation Act, as amended, 42 U.S.C. §§ 6291-6309 (EPCA). In the EPCA, Congress directed that DOE review and revise energy conservation standards applicable to refrigerator products, promulgated by the agency in 1989, 54 Fed. Reg. 47916 (November 17, 1989). EPCA, § 325(b)(3)(B), 42 U.S.C. § 6295(b)(3)(B). The new Refrigerator Efficiency Standards were designed to reduce energy use in classes of refrigerator products by up to 30 percent relative to the prior standards, and thereby reduce consumer costs as well as emissions of air pollutants associated with electricity production. [\(1\)](#) The Refrigerator Efficiency Standards become effective July 1, 2001.

### B. The Present Proceeding

#### (1) Application for Exception

Viking markets a diverse line of kitchen appliances for cooking, cleanup and refrigeration. Viking initially specialized only in the manufacture of cooking ranges. However, in 1995, Viking decided to enter the built-in refrigerator market in order to offer consumers a more complete product line for kitchen redesign. Upon entering the refrigerator industry, Viking business practice was to "source" its built-in refrigerator products from other manufacturers and label them for sale under its own brand name. In 1997, Viking began sourcing its built-in refrigerators from Whirlpool Corporation (Whirlpool), which continued until Whirlpool terminated its sourcing agreement with Viking in September 1999. Viking then began sourcing its built-in refrigerators from Amana Appliances (Amana). However, in late 1999, Amana was acquired by Goodman Manufacturing, L.P., and soon thereafter, Amana announced its intention to end its production of built-in refrigerators. Thus, seeking to preserve its built-in refrigerator business, Viking made the decision to purchase Amana's built-in refrigerator production equipment and to manufacture its own refrigerators. After a period of negotiations, Viking acquired Amana's built-in refrigerator manufacturing line in April 2000, and moved the production equipment from Iowa to Viking's facilities located in Greenwood, Mississippi. Viking began producing its own built-in refrigerators in August 2000.

Viking now claims in its Application for Exception, however, the firm would suffer a serious hardship and unfair distribution of burdens if required to adhere to the July 1, 2001 effective date of the revised Refrigerator Efficiency Standards, 10 C.F.R. § 430.32, in its manufacture of built-in refrigerators. Viking maintains that the firm does not have sufficient time before the effective date of the Refrigerator Efficiency Standards to redesign and retool its product line to meet the more energy restrictive

standards. According to Viking, the built-in refrigerator design acquired from Amana only marginally meets the present refrigerator energy efficiency standards, adopted in 1993. Viking therefore asserts that substantial engineering and testing will be required to develop a compliant cabinet design, and the firm must construct or acquire suitable laboratory test facilities before this redesign work can proceed. Based upon estimated lead time necessary for retooling the line, Viking projects that the firm will be unable to begin pilot production of compliant built-in refrigerators until May 2002. Viking therefore requests exception relief in the form of a twelve-month extension to comply with the July 1, 2001 revised standards.

## (2) Comments and Response

Following the receipt of Viking's Application, we received comments from interested parties<sup>(2)</sup> regarding the bases for Viking's exception request. Some of these comments are supportive of Viking's request for exception relief. However, Viking's competitors in the relatively small built-in refrigerator industry raised issues in opposition to Viking's claims. These competitors include Sub-Zero Freezer Co., Inc. (Sub-Zero), which accounts for the predominant share of the built-in refrigerator market, GE Appliances (GE) and Whirlpool Corporation (Whirlpool). The principal issues raised by these commenters are summarized below.

Serious Hardship. With respect to Viking's claim of serious hardship, the commenters assert that it is inappropriate to grant Viking exception relief to insulate the firm from its own conscious business decision to acquire the built-in refrigerator line from Amana. Whirlpool and GE assert that Viking was certainly aware that the redesign work was necessary to comply with the July 2001 efficiency standards. Indeed, Whirlpool and GE charge that the lack of redesign work undoubtedly figured into Viking's negotiated price for the Amana line, and Viking would therefore receive an unfair windfall if granted exception relief from the revised standards that the remainder of the industry must comply with.

Unfair Distribution of Burdens. Commenters also dispute Viking's claim that the firm will incur an unfair distribution of burdens if required to meet the new efficiency standards. While it is noted that Viking may account for less than .05% of total refrigerator sales in the United States, Viking accounts for a greater portion of built-in refrigerator sales. In any event, it is argued that Viking is in no worse position than many other small manufacturers doing business in the refrigerator industry that are also required to meet the revised standards. In this regard, Sub-Zero, one of Viking's direct competitors in the built-in refrigerator line, filed comments contesting Viking's claim for exception relief. Sub-Zero agrees, as a small manufacturer, that the redesign costs are burdensome but asserts "as a competitor, we would expect that DOE would be sensitive to the issue of fair and equitable treatment of all small manufacturers." Sub-Zero Comments (filed August 9, 2000) at 1. Moreover, Sub-Zero submits that Viking "does have financial backing of a large corporation to draw upon." *Id.* at 2.

Concerning Viking's expenditures to move the built-in refrigerator manufacturing operations to Greenwood, MS, it is similarly argued by its competitors that any hardship is attributable to a conscious business decision by Viking. GE asserts that until its acquisition of Amana's built-in product line, it was Viking's business practice to "source" refrigerator products from other manufacturers and label them with its own brand. GE maintains that Viking could "source" its built-in refrigerator line until its own redesign work is complete.

Competitive Advantage. Commenters further argue that if exception relief were approved, Viking would improperly receive a substantial competitive advantage resulting in increased market share in this highly competitive industry. As noted by Whirlpool and GE, other manufacturers will be required to pass through their redesign costs in the prices of refrigerators meeting the July 1, 2001 standards, while at the same time these refrigerators will necessarily be smaller in interior capacity. Thus GE claims that, during the one-year period of exception relief, Viking "would be given a marketing advantage to sell out-moded, but larger, units at a higher price . . . [and] a competitive advantage because every compliance dollar that Viking saves can be spent on sales-enhancing features and advertising." GE Comments (filed August 11, 2000) at 4.

On September 8, 2000, Viking filed a Response to matters raised in the comments. Concerning its claim of hardship, Viking maintains that the sale/purchase of Amana's built-in refrigerator product line was "as is" and "[a]bsolutely no consideration was given in the purchase price as a result of the status of compliance with the 2001 energy standards." Response at 2. Thus Viking asserts that the firm will receive no "windfall" by the approval of exception relief, in view of the substantial investment the firm must make to bring into production a redesigned built-in model meeting the revised efficiency standards.

Viking further reasserts its claim that the firm will suffer an unfair distribution of burdens in the absence of exception relief. According to the firm, Viking is a relatively small company with its built-in refrigerator sales accounting for only .05% of the total U.S. residential refrigeration market and 2.4% of the built-in refrigeration market. Viking asserts that the firm made the decision to purchase Amana's built-in refrigeration line as a matter of survival after being informed by Amana in late 1999 that it would no longer source its refrigerators from Amana and "there is no other alternative for sourced supply of built-in refrigerators to Viking Range." Response at 3. Viking contends that failure to grant the requested exception relief "would effectively remove Viking Range as a competitor from the built-in refrigeration market, thereby reducing competition in a product category where competition is already greatly limited . . ." *Id.* In addition, Viking maintains that the firm will have no significant competitive advantage if exception relief were approved due to the small, specialized nature of its market position. Finally, Viking argues that the firm will have no cost advantage since it is currently investing the capital necessary to redesign its built-in refrigerator product line.

On September 28, 2000, we convened a conference (10 C.F.R. § 1003.61) upon the request of Viking to further discuss the issues underlying the firm's Application for Exception. Finally, on October 10, 2000, Viking submitted other additional information and documentation clarifying key matters discussed at the conference.

## C. Standard for Exception Relief

In promulgating the final rule of the Part 430 regulations, the agency stated as follows with regard to Applications for Exception relief:

Section 504 of the Department of Energy Organization Act authorizes DOE to make adjustments of any rule or order issued under the Energy Policy and Conservation Act, consistent with the other purposes of the Act, if necessary to prevent special hardship, inequity, or unfair distribution of burdens. 42 U.S.C. § 7194(a).

...

In exercising its authority under section 504, DOE may grant an exception from an efficiency standard for a limited time, and may place other conditions on the grant of an exception.

DOE will require an application for exception to provide specific facts and information relevant to the claim that compliance would cause special hardship, inequity or an unfair distribution of burdens.

62 Fed. Reg. at 23108-09. Prior decisions of this office as well as the courts clearly place the burden upon the applicant to establish the basis for its claim for exception relief from DOE regulatory provisions. *See, e.g., Amana Appliances*, 27 DOE ¶ 81,006 (1999); *Whirlpool Corp.*, 14 DOE ¶ 81,023 (1986); *White Consolidated, Inc.*, 13 DOE ¶ 81,045 (1985); *Exxon Corp. v. Department of Energy*, 802 F.2d 1400, 1407-08 (Temp. Emer. Ct. App. 1986) ("great deference" accorded to agency in applying standards for exception relief); *City of Long Beach v. Department of Energy*, 754 F.2d 379, 386 (Temp. Emer. Ct. App. 1985).

## II. Analysis

We have carefully considered the Application for Exception filed by Viking, the comments of interested parties, Viking's response to those comments as well as the additional information provided by the firm. On the basis of the record before us and the standards governing the approval of exception relief set forth above, we have concluded that Viking's Application for Exception should be granted in part. For the reasons set forth below, we are persuaded that Viking would suffer an unfair distribution of burdens<sup>(3)</sup> if required to adhere strictly to the July 1, 2001 effective date of the Refrigerator Efficiency Standards. More specifically, we have determined that Viking will be granted a six-month extension, until January 1, 2002, for compliance with the Refrigerator Efficiency Standards.

Prior to discussing the factors leading to our determination, we must first address the contention raised by commenters that it is inappropriate to grant Viking exception relief to insulate the firm from its business decision to enter the refrigerator manufacturing business, having full view of the July 1, 2001 efficiency standards on the horizon. It is well-settled in prior decisions of this office that a firm may not receive exception relief to alleviate a burden attributable to a discretionary business decision rather than the impact of DOE regulations. *See, e.g., Big Muddy Oil Processors, Inc.*, 12 DOE ¶ 81,006 at 82,521 (1984); *341 Tract Unit of the Citronelle Field: Exxon Co., USA, et al.*, 10 DOE ¶ 81,027 at 82,649-50 (1983). Having examined the unique circumstances of this case, however, we have concluded that Viking should not be precluded from exception relief on this basis.

Viking has established that rather than merely a discretionary business decision, the firm's acquisition of Amana's built-in refrigerator manufacturing line was a matter of business survival and reflected the most prudent option available to the firm at that time. The built-in refrigerator industry is both small and specialized and, consequently, Viking's options for sourcing from other manufacturers are very limited. Viking states that it has approached Sub-Zero on a number of occasions since entering the built-in refrigerator market, but Sub-Zero has consistently refused to supply refrigerator products to any company. Similarly, another potential manufacturer, Kolpak, has been unwilling to source product to Viking due to Kolpak's exclusive sourcing arrangement with GE. Finally, as noted in its exception application, Whirlpool terminated its sourcing agreement with Viking in September 1999 and soon thereafter, Amana informed Viking that it would cease to produce built-in refrigerators altogether. The situation that Viking found itself in late 1999 was certainly not of its own making since the firm was not in control of decisions made by Whirlpool and Amana. Instead, Viking was forced by circumstances to make an immediate decision whether to leave the built-in refrigerator industry or purchase Amana's production equipment and begin manufacturing its own refrigerators.

We agree with Viking that its decision to acquire Amana's production line was a prudent one. Viking has explained that it is critical for the firm to be able to offer a built-in refrigerator<sup>(4)</sup> as part of its product line since it is an integral part of the kitchen design concept which it offers consumers. Indeed, Viking submits that sales of its other kitchen products could suffer if it were not able to offer built-in refrigerators as part of its kitchen redesign package, since many consumers in this niche market place a premium on their appliances having a uniform appearance.

We have therefore determined that Viking's purchase of the Amana line did not constitute the type of discretionary business decision that would bar our consideration of the firm's request for exception relief. We now turn to the factors that have led us to conclude that limited exception relief should be approved.

### (1) Factors Supporting Exception Relief

Section 325 of the EPCA directs the agency to evaluate seven factors in formulating the conservation standard that was ultimately incorporated into the Refrigerator Efficiency Standards, 10 C.F.R. Part 430: economic impact on the manufacturers and consumers, net consumer savings, energy savings, impacts on product utility, impact on competition, need for energy conservation, and other relevant factors. EPCA § 325(o)(2)(B)(I), 42 U.S.C. § 6295(o)(2)(B)(I); *see* 62 Fed. Reg. at 23106. While these factors were considered by the agency in promulgating a conservation standard for the refrigerator industry at large, we believe that these

same factors are useful in our evaluation of Viking's claim for exception relief. As set forth below, we have concluded that when these factors are weighed and balanced, the July 1, 2001 effective date of the Refrigerator Efficiency Standards results in an unfair distribution of burdens as applied to Viking under the unique circumstances of this case.

With regard to economic impact, the record supports Viking's claim that the firm will be unable to complete the required redesign and retooling of its built-in refrigerator line to meet the July 1, 2001 effective date of the new standards.<sup>(5)</sup> Viking has provided a detailed timetable, with best and worse case scenarios, showing the steps necessary before comports built-in refrigerators can be brought into production by the firm. The commenters, including those in opposition to exception relief, do not dispute Viking's assessment that substantial lead time is required to bring into production refrigerators meeting the new efficiency standards. It is apparent from the comments as well as the record in a related proceeding that other refrigerator manufacturers began redesign work early in 1999, to meet the July 1, 2001 deadline. *See Amana Appliances*, 27 DOE ¶ 81,006 (1999). Indeed, the July 1, 2001 effective date adopted by the agency was based upon its recognition that apart from a substantial capital investment, the industry required a considerable amount of lead time to meet the important energy conservation goals of the regulations. *See* 62 Fed. Reg. at 23108. We therefore accept Viking's claim that in the absence of exception relief, the firm will be required to shut down its built-in refrigerator manufacturing line pending completion of redesign and retooling. Such a shutdown would severely jeopardize Viking's small share of the niche built-in refrigerator market and have a collateral negative impact upon its sales of other products since the firm would then be unable to offer a complete line of kitchen appliances.

With respect to consumer cost and energy consumption, we believe that the potential savings would be insubstantial in comparison to the damaging impact upon Viking's business if exception relief were denied. In adopting the Refrigerator Efficiency Standards, the agency noted that there will initially be price increases in virtually all classes of refrigerators reflecting re-engineering costs passed through by manufacturers, but there will be net cost savings to consumers over the life-cycle of the more energy efficient refrigerators as a result of cumulative energy cost savings. *See* 62 Fed. Reg. at 23109-10. We believe that the exception relief approved in this decision will have minimal impact on these national energy conservation objectives based upon Viking's small market share. Built-in refrigerators comprise only a small percentage (a little more than 1 percent) of the total refrigerator market and Viking's sales represent only 2.4 percent of the built-in refrigerator market. Thus, Viking calculates that of the total U.S. residential refrigeration market, the firm accounts for only .05 percent of refrigerator sales.<sup>(6)</sup> In any event, consumers will have a choice whether to purchase Viking refrigerators during the six-month period of exception relief or more energy efficient built-in refrigerator model, since the energy efficiencies must be clearly labeled on all models.

For similar reasons, we do not believe that there will be a substantial impact upon competition in the built-in refrigerator market. GE argues that during the period of exception relief, Viking will have a competitive advantage since Viking will be able to offer a lower cost built-in refrigerator, that is also larger in interior volume capacity under the old energy efficiency standards. We find, however, that the competitive impact of Viking's alleged cost/price advantage and interior volume advantage is speculative. Viking is currently incurring substantial re-engineering costs as the firm works to develop a built-in refrigerator conforming to the Refrigerator Efficiency Standards, and the firm will likely deem it necessary to pass through a portion of these costs in the prices of its refrigerators sold during the exception relief period. Moreover, Viking's cost per unit of production is likely higher than its larger competitors that produce a greater volume of built-in refrigerators, due the inherent economies of scale. Finally, while some consumers may find the incrementally greater volume capacity of the older model refrigerator attractive, we believe that many consumers will also be drawn to the greater energy efficiency and cost savings of the newer models.<sup>(7)</sup> In sum, we believe that there is an appreciably greater risk of negative impact upon competition (and consumer choice) in the built-in refrigerator industry if Viking were forced to withdraw from this select market with few competitors, than may result from any competitive advantage Viking might experience during the short period of exception relief.

## (2) Exception Relief

Accordingly, we have concluded that Viking's Application for Exception should be granted in part. We do not believe, however, that Viking should be granted the full twelve months of exception relief from the July 1, 2001 effective date of the Refrigerator Efficiency Standards as requested by the firm. As an outgrowth of our conference with Viking, we requested that Viking provide an updated projection, with best case and worse case scenarios, of the firm's timetable for completing the necessary redesign and retooling of its built-in refrigerator line. In response to our request, Viking submitted confidential information showing step-by-step that under the best case scenario, with no setbacks under a very aggressive schedule, the firm may be able to begin production of conforming built-in refrigerator models as early as December 2001. Under Viking's worse case scenario, production of conforming models would not begin until July 2002.

It is apparent that Viking requested twelve months of exception relief in order to afford the firm sufficient time to meet all contingencies under the worse case scenario. However, we believe at this time that Viking should only be granted the minimum amount of exception relief necessary to alleviate the undue burden confronting the firm. *See, e.g., Cincinnati Gas & Electric*, 27 DOE ¶ 80,138 (1998). Such minimal exception relief is consistent with the energy conservation goals of the Part 430 regulations, while giving Viking due incentive to achieve compliance as soon as practicable. We will therefore grant Viking six months exception relief from the July 1, 2001 effective date of the Refrigerator Efficiency Standards, until January 1, 2002, to begin production of built-in refrigerators conforming to the revised efficiency standards set forth in 10 C.F.R. § 430.32. If this relief should prove to be insufficient, Viking may file a request for extension of exception relief by not later than September 1, 2001. In such request, Viking must fully explain and document why additional time is necessary.

It Is Therefore Ordered That:

(1) The Application filed by Viking Range Corporation (Viking) on June 16, 2000, is hereby granted as set forth in paragraphs (2) and (3) below, and in all other respects denied.

(2) Viking is granted an extension of six months until January 1, 2002, to comply with the energy efficiency standards applicable to refrigerator/freezers, set forth in 10 C.F.R. § 430.32 (effective July 1, 2001), in the firm's manufacture and sale of built-in refrigerators.

(3) In the event, the relief granted in paragraph (2) above is insufficient to enable Viking to bring into production built-in refrigerators conforming to 10 C.F.R. § 430.32, Viking may file a request for extension of exception relief by not later than September 1, 2001. Such request must clearly set forth the basis for Viking's claim for additional exception relief as well as the scope of the relief requested.

(4) Any person aggrieved by this Decision and Order may file an appeal with the Office of Hearings and Appeals within thirty (30) days of service, in accordance with the procedures set forth in 10 C.F.R. Part 1003, Subpart C. Any person aggrieved or adversely affected by the denial of exception relief in this Decision and Order may file an appeal to the Federal Energy Regulatory Commission, in accordance with the procedural regulations of that agency.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 3, 2000

1. 1/ For each of eighteen classes of refrigerator products, the Refrigerator Efficiency Standards establish energy efficiency equations which limit energy usage. These equations are expressed in kilowatt-hours per year (kWh/yr). For example, the consumption equation for the class of "Refrigerator-Freezers -- automatic defrost with top-mounted freezer without through-the-door ice service" is a maximum of "9.80AV+276.0," where AV is the "adjusted volume" of the particular unit. "Adjusted volume" in turn is defined as 1.63 times the freezer volume plus the fresh food volume.

2. 2/ These interested parties include: 1) GE Appliances, 2) Mississippi Economic Council, 3) Northland Corporation, 4) Sub-Zero Freezer Co., Inc., 5) W.C. Wood Company, and 6) Whirlpool Corporation.

3. 3/ In its Application for Exception, Viking alternatively claims that the firm will suffer a "serious hardship" in the absence of exception relief. Under precedents governing the approval of exception relief, a claim of "serious hardship" may be established only where the applicant is able to show that it would suffer irreparable financial injury in the absence of exception relief. *See, e.g., Adobe Refining Company*, 12 DOE ¶ 81,026 at 82,631-33 (1985). As noted above, certain commenters argue that Viking must not be granted exception relief to alleviate the financial burden associated with the firm's purchase and relocation of Amana's product line, or the financial burden of redesigning and retooling its product line. In its Response, however, Viking makes clear that the firm is not claiming financial hardship, and is in fact proceeding to make the capital investment necessary to develop conforming refrigerator products. Response at 3. Instead, Viking is claiming that the firm will suffer a disproportionate adverse impact in the absence of exception relief since the firm would be required to shut down its refrigerator production operations pending completion of redesign and retooling. Accordingly, we will focus our analysis of Viking's exception application on the firm's claim of unfair distribution of burdens.

4. 4/ Viking offers both a 48 in. wide, side-by-side built-in refrigerator/freezer and a 36 in. wide, bottom-mount built-in refrigerator/freezer.

5. 5/ Viking states that only after acquiring the built-in refrigerator line from Amana did Viking become aware that Amana had begun only preliminary redesign work with respect to its built-in refrigerator line. According to Viking, Amana did not fully reveal the status of its redesign work during the negotiations due to the proprietary nature of this information. Regarding whether Viking was compensated for the lack of redesign work, Viking asserts that "the sale/purchase of Amana's built-in refrigerator product line, design, equipment and tooling was "as is". Absolutely no consideration was given in the purchase price as a result of the status of compliance with the 2001 energy standards." Response at 2. Viking therefore maintains that the firm is in a position similar to its competitors and must make the substantial capital investment necessary to design conforming built-in refrigerators.

6. 6/ In hard numbers, Viking states in its Application for Exception that the firm has annual sales of approximately 3500 units of the approximately 150,000 built-in refrigerators sold industry wide, while total domestic sales of all types of refrigerators are approximately 8 million units annually. Using these numbers, Viking calculates that the firm's sales are .04375% of total refrigerator sales in the United States. Viking Application for Exception at 3.

7. 7/ Viking further points out that the July 1, 2001 effective date of the Refrigerator Efficiency Standards applies to new production; manufacturers may continue to sell older model "finished goods in inventory" even after that date. Viking submits that this works to the advantage of its larger competitors (Sub-Zero, GE and Whirlpool) since these manufacturers maintain a large finished goods inventory. By contrast, Viking states that its production of built-in refrigerators is "build-to-order," i.e. to specification upon receipt of purchase orders from customers, and thus no finished goods inventory is maintained at Viking.