



**Department of Energy**  
Washington, DC 20585

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AUG 11 2011

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

Application for Exception

Name of Petitioner: GE Appliances & Lighting  
Date of Filing: March 2, 2011  
Case Number: TEE-0077

This Decision and Order considers an Application for Exception filed by GE Appliances & Lighting (GE) seeking exception relief from, or, in the alternative, the establishment of a new product class under, the provisions of 10 C.F.R. Part 430, specifically those related to Energy Conservation Program: Energy Conservation Standards and Test Procedures for General Service Fluorescent Lamps and Incandescent Reflector Lamps (Lighting Efficiency Standards). In its exception request, GE asserts that the firm will face a special and serious hardship, gross inequity, and an unfair distribution of burdens if required to adhere to the Lighting Efficiency Standards codified at 10 C.F.R. § 430.32. If GE's Application for Exception were granted, GE would receive exception relief from the energy conservation standards applicable to general service fluorescent lamps, which become effective on July 14, 2012, for a "modified-spectrum linear fluorescent lamp" which GE introduced to the market in June 2010. As set forth in this Decision and Order, we have concluded that GE's Application for Exception should be denied.

**I. Background**

**A. Lighting Efficiency Standards**

The Lighting Efficiency Standards, located within 10 C.F.R. Part 430, were published as a final rule by the Department of Energy (DOE) on July 14, 2009, 74 Fed. Reg. 34080 (2009 Final Rule), pursuant to Part A of Title III of the Energy Policy and Conservation Act, as amended, 42 U.S.C. §§ 6291-6309 (EPCA). EPCA sets forth the Energy Conservation Program for Consumer Products Other Than Automobiles and covers consumer products and certain commercial products, including General Service Fluorescent Lamps (GSFLs).

EPCA provides for minimum standards for energy efficiency for, *inter alia*, GSFLs and Incandescent Reflector Lamps (IRLs) and directs DOE to conduct two cycles of rulemakings to



determine whether to amend these standards. 42 U.S.C. § 6295(i). DOE concluded the first cycle of rulemaking with the issuance of the 2009 Final Rule on July 14, 2009. 74 Fed. Reg. 34080. EPCA provides that any new or amended energy conservation standard that DOE prescribes be designed to “achieve the maximum improvement in energy efficiency ... which the Secretary determines is technologically feasible and economically justified.” 42 U.S.C. § 6295(o)(2)(A).

The product for which GE seeks exception relief is a 4-foot medium bipin GSFL. The current Lighting Efficiency Standards require this product to have a minimum average lamp efficiency of 75 lumens-per-watt (lm/W). However, under the revised Lighting Efficiency Standards effective as of July 14, 2012, such a 4-foot medium bipin GSFL will need to satisfy a minimum energy conservation standard of 89 lm/W for correlated color temperature less than or equal to 4500, or 88 lm/W for correlated color temperature greater than 4500 and less than or equal to 7000. *See* 74 Fed. Reg. at 34082.

## **B. Standards for Exception Relief**

Section 504 of the DOE Organization Act authorizes DOE to make adjustments to any rule, regulation or order issued under EPCA, consistent with the purposes of the Act, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens. 42 U.S.C. § 7194(a). *See also* 74 Fed. Reg. at 34099. This authority has been delegated by the Secretary to the DOE Office of Hearings and Appeals (OHA). *See* 10 C.F.R. Part 100, Subpart B.

## **C. Application for Exception**

GE Appliances & Lighting, an operating division of General Electric Co., is a leading manufacturer and marketer of lighting products, including GSFLs.

During the rulemaking which resulted in the 2009 Final Rule, GE commented that it was researching and developing a 4-foot medium bipin GSFL that imitates the color quality of a modified-spectrum incandescent lamp using a different technological approach. Expecting that these lamps would not be able to meet the minimum efficiency requirements as amended by the rulemaking, GE recommended that DOE either set separate efficiency standards for “modified-spectrum fluorescent lamps” at 67 lm/W (*i.e.*, below the standards set forth in EPCA) or exempt such lamps from the Lighting Efficiency Standards. DOE did not accept either recommendation.

In June 2010, subsequent to the issuance of 2009 Final Rule, GE introduced into the market a GSFL which it describes as a “modified-spectrum linear fluorescent lamp” (the GE MSLFL). This product is marketed under the brand name Reveal, and is sold by XXXXXX major retailers. The GE MSLFL is able to achieve a 75 lm/W level, thereby meeting the current energy efficiency standard but falling significantly below the 89 lm/W standard which becomes effective for such GSFLs on July 14, 2012.

In its Application, GE seeks an exception from the Lighting Efficiency Standards for the GE MSLFL or, in the alternative, the establishment of a distinct product class for modified-spectrum

GSFLs. GE argues that, absent such relief: (1) a distinct consumer utility provided by the GE MSLFL will be eliminated from the market, and (2) GE will face special hardship, inequity, and an unfair distribution of burdens.

GE asserts that modifying the light spectrum of a GSFL to reduce the yellow portion of the spectrum, where the red and green eye receptors cross, results in better color discrimination but lower lumens. Such modification results in great improvement of color vision tasks, better comfort sensation and, for those with red-green color deficiency, improvement of their color vision, according to a study commissioned by GE. GE states that DOE recognized the unique consumer utility of modified-spectrum lamps by the establishment in the 2009 Final Rule of a separate product class for Modified Spectrum Incandescent Reflector Lamps.

Unlike modified-spectrum incandescent lamps that use subtractive measures to filter out unwanted wavelengths, the GE MSLFLs directly emit light only at wavelengths needed to achieve the desired color differentiation. According to GE, the physical consequence of this technology is a decrease in lumens due to a portion of the emitted light moving from a more eye-sensitive color region to color regions with lower photopic sensitivity (with lowered measured lumens) to achieve the visual effect. This decrease in lumens reduces the measured lm/W by approximately 20%.

GE states that it has invested XXXXXXXXXXXXXXXXXXXX in the development of the GE MSLFL and will be required to remove the product from the market in less than two years if DOE does not grant the relief requested by its Application. The nature of “modified-spectrum linear fluorescent lamps,” according to GE, precludes such products from meeting the relevant DOE efficiency standards effective July 14, 2012.

GE argues that approval of exception relief will not negatively impact energy savings. Even though GE MSLFLs produce fewer lumens, GE states that, because the lamps are perceived as just as bright as a standard fluorescent lamp of the same wattage, they do not involve the use of additional energy. GE argues in its Application that to penalize modified-spectrum GSFL products without a corresponding benefit to national energy savings creates an inequity for these products and their potential manufacturers.

Finally, GE argues that in the absence of exception relief for the GE MSLFL, a separate product class should be created for “modified-spectrum fluorescent lamps”: (1) such a product class is appropriate as the 2009 Final Rule recognized the value and distinction of modified-spectrum lamps in the context of incandescent lamps, and (2) such products could be labeled and marketed for “residential use only” and sold in packages of only two bulbs in order to reduce the market size and associated efficiency impact of such products.

#### **D. Comments**

We received five sets of comments on GE’s Application, all in opposition to the approval of exception relief, from the following organizations: (1) Northwest Energy Efficiency Alliance, transmitted March 31, 2011 (NWEAA Comments); (2) Osram Sylvania Inc. (OSI), dated April 1,

2011 (OSI Comments); (3) Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy and Natural Resources Defense Council, dated April 1, 2011, with supplemental comments by the American Council for an Energy-Efficient Economy, dated June 24, 2011 (collectively, ASAP/ACEEE/NRDC Comments); (4) Earthjustice, dated April 1, 2011 (Earthjustice Comments); and (5) Pacific Gas and Electric Company, Southern California Gas Company, San Diego Gas and Electric, and Southern California Edison (collectively, the California Investor Owned Utilities or CA IOUs), dated April 8, 2011 (CA IOU Comments).

The primary concerns raised by those commenting on GE's Application are as follows:

(1) Failure to Meet Requirements for Exception: It was noted that OHA's authority to grant exception relief is limited to situations that are consistent with the purposes of EPCA and are necessary to prevent special hardship, inequity, or unfair distribution of burdens and that OHA precedent has established that the burden is on a petitioner to establish the requisite conditions for an exception. Exception relief is inappropriate when sales of the subject product account for an insignificant share of the applicant's annual revenues. GE's Application failed to provide the requisite economic data (*e.g.*, sales and market share information) that would support a finding that the removal of GE MSLFLs would result in special hardship, inequity, or unfair distribution of burdens. Any loss of investment in developing the GE MSLFL would not qualify as a serious hardship for a company with GE's resources. GE cites no gross inequities if it is precluded from marketing the GE MSLFL or competitive disadvantage from the application of the Lighting Efficiency Standards to the GE MSLFL.

Further, GE's Application did not demonstrate that its product could not be designed (or redesigned) to meet the Lighting Efficiency Standards effective July 14, 2012, while still maintaining the lighting output that GE believes is unique to the GE MSLFL. OSI, also a manufacturer of GSFLs, commented that the GE MSLFL design is "not the only means by which fluorescent lamps can achieve modified-spectrum properties satisfying consumer preferences for different color effects." OSI Comments at 2. Incandescent lamps produce light through the heating of filaments and can achieve modified-spectral qualities only through additions to the bulb that filter out yellow light. In contrast, fluorescent lamps produce light when mercury in the bulb emits ultraviolet radiation which strikes the phosphors in the bulb, and the spectral qualities of a fluorescent lamp is a product of the mixture of phosphors contained in the bulb. By enhancing red light (rather than reducing yellow light as the GE MSLFL), OSI states that it has "developed and marketed a modified-spectrum lamp that satisfies [the Lighting Efficiency Standards]...while providing comparable consumer utility to [the GE MSLFL]..." OSI Comments at 3. Nothing inherent in the designing of GSFLs precludes providing consumer utility while meeting the Lighting Efficiency Standards.

(See Earthjustice Comments, OSI Comments, and CA IOU Comments.)

(2) Discretionary Business Decision: It was noted that the GE MSLFL was not being produced or marketed at the time of the issuance of the 2009 Final Rule. With full knowledge that the product that it was developing did not meet the Lighting Efficiency Standards, GE made a discretionary business decision to continue the development of the product and introduced the

GE MSLFL approximately 11 months after the issuance of the 2009 Final Rule. OHA exception relief is available to eliminate the impact of DOE regulations as opposed to a burden attributable to a discretionary business decision of a petitioner.

(See Earthjustice Comments and OSI Comments.)

(3) Exception Relief or Establishment of a Separate Product Class is Impermissible, Violates the “Anti-Backsliding” Provision and Creates a Loophole: The concern was expressed that, whether through the granting of the exception requested or the establishment of a separate product class, OHA would violate the mandate of EPCA and the regulatory intent of the 2009 Final Rule. It was argued that EPCA prohibits DOE from amending a standard in such a way as to decrease the minimum energy efficiency of a product and granting of GE’s Application would violate such “anti-backsliding” prohibitions of EPCA. Further, granting the Application would create a loophole through which any manufacturer could produce similar products without compliance with the Lighting Efficiency Standards and such products, through lower pricing or otherwise, could displace the market for those GSFLs which were in compliance with the Lighting Efficiency Standards. As a result of such a loophole, the energy efficiencies anticipated by the adoption of the 2009 Final Rule would be dissipated.

Others commenting on GE’s request for the establishment of a separate product class raised objections to GE’s proposed definition of “modified-spectrum linear fluorescent lamps” as anti-competitive – GE’s definition would codify the definition of the product class in such a way as to favor the technology used in the GE MSLFL to the exclusion of other potential methods or technologies.

(See NWEAA Comments, OSI Comments, ASAP/ACEEE/NRDC Comments, Earthjustice Comments, and CA IOU Comments.)

(4) Proposed Marketing Restrictions Would Be Ineffective: In its Application, GE proposed certain marketing and labeling requirements to reduce the market share and associated efficiency impact of any new product class of “modified-spectrum linear fluorescent lamps.” Comments indicated that labeling bulbs for “residential use only” and limiting packages to two bulbs each would be insufficient to prevent broader use of such bulbs in commercial applications.

(See NWEAA Comments, ASAP/ACEEE/NRDC Comments, and Earthjustice Comments.)

(5) Significant Loss of National Energy Savings: GE’s contention that there would be no loss of energy savings because the GE MSLFLs use the same wattage as traditional T8 or T12 lamps was challenged. According to those commenting, (a) the GE MSLFLs would in fact substitute for lower wattage lamps that comply with the 2012 standards; (b) granting exception relief would result in a significant loss of national energy savings; and (c) granting the exception would allow many consumers to continue to use higher-wattage, less-efficient lamps even after the new DOE fluorescent lamp standards take effect in July 2012.<sup>1</sup>

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<sup>1</sup> Specifically, the CA IOUs stated: “Lower lumen 32 watt MSLFLs could be purchased as replacement lamps for low wattage T8s, such as 25W, 28W or 30W products, resulting in an increase of 2-4 watts per lamp.” While

(See ASAP/NRDC/ACEE Comments and CA IOU Comments.)

### E. GE's Supplemental Comments

In response to the comments received by OHA on GE's Application, GE filed supplemental comments dated June 10, 2011 (GE Supplemental Comments).

GE argues in its Supplemental Comments that DOE recognized in the 2009 Final Rule the appropriateness of GE seeking exception relief for the GE MSLFL: "[a]lthough DOE did not have enough information in the [2009] Final Rule to make a determination, it specifically noted that if GE successfully developed its MSLFL it should seek exception relief from DOE's Office of Hearing and Appeals...." GE Supplemental Comments at 1, *citing* 2009 Final Rule, 74 Fed. Reg. at 34099.

Noting that every business decision is, in one sense, discretionary, GE states that OHA has recognized that a decision characterized as "discretionary" does not preclude the grant of exception relief. Unlike cases where petitioners did not take reasonable account of their regulatory obligations, GE states it "was vigilant in its regulatory obligations, raised this very issue in the rulemaking and acted pursuant to DOE's instructions." GE Supplemental Comments at 1.

GE cites *Maytag Corporation*, OHA Case No. TEE-0022 (2005) (*Maytag*),<sup>2</sup> as support for exception relief being provided for products introduced after the effective date of applicable efficiency standards and unable to meet those standards: "similar to the products at issue in *Maytag* where DOE had recognized a separate product class for other product configurations (e.g., the 'top-mounted freezer' and 'side-mounted freezer' variations), DOE has also established separate product classes for other modified-spectrum products (e.g., incandescent lamps). As DOE specifically suggested that GE pursue OHA relief should these products be introduced, it must have determined that post-promulgation creation of a separate product class for this product was a possible solution." GE Supplemental Comments at 2. GE argues that to require the GE MSLFL to comply with the Lighting Efficiency Standards would be a gross inequity in that it would require the product to comply with rules that do not properly apply to it, would compare them to products that are not comparable, and would cripple GE's efforts to market the product. Denying relief would be a disincentive to product innovation and frustrate consumer demand.

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ACEEE stated: "Today (2011), many consumers use 40 W fluorescent tubes. But once the 2012 standards go into effect, few if any 40 W lamps will meet the new standards. Instead, most complying lamps will be 28 or 32 W, using a thinner diameter tube than today's 40 W lamps. If exception relief is granted, many residential applications will be able to use 40 W tubes, thereby using 8-12 W more power than if exception relief is not granted."

<sup>2</sup> Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of the cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

In response to OSI's comments that OSI has a product that provides the same utility as the GE MSLFL and meets the Lighting Efficiency Standards, GE states that it has been unable to locate such a product and suggests that OSI is confusing compact fluorescent bulb lamps with linear fluorescents tube lamps, which are the subject of its Application. GE states that the GE MSLFL is different from the types of lamps discussed by OSI in that the GE MSLFL is attempting to mimic GE's Reveal incandescent lamp, which is dramatically different from the standard triphosphor lamps and standard incandescent lamps. GE maintains that, based on DOE's recognition of the efficiency differential between modified-spectrum products and traditional lamps and the unique consumer utility of modified-spectrum products in incandescent lamps, the GE MSLFL should be granted an exception from the Lighting Efficiency Standards.

GE believes that studies submitted with its Application and Supplemental Comments support the unique consumer utility of the GE MSLFL and its potential benefit for individuals with red-green color deficiency. GE notes that OSI has provided no studies to support similar benefits of the lamps it is advocating. Since OSI would be able to manufacture its lamps after July 14, 2012, only GE would be materially damaged if a product class is not created for "modified-spectrum linear fluorescent lamps." GE Supplemental Comments at 3.

Finally, GE defends its alternative proposal of the creation of a new product class for "modified-spectrum linear fluorescent lamps." GE states that the new "modified-spectrum linear fluorescent lamps" product class that it is proposing at 75 lm/W represents only a 15.7% reduction from the Lighting Efficiency Standard of 89 lm/w, which is less than the 25% reduction provided for modified-spectrum incandescent lamps." GE Supplemental Comments at 5-6. Further, since GE believes that the GE MSLFL will use the same wattage as existing higher lumen lamps used by consumers, GE believes there will be no loss of energy savings.

## II. Analysis

### A. Establishment of a Distinct Product Class

We initially address GE's alternative request for relief, *i.e.*, that OHA establish a new product class under Lighting Efficiency Standards for GSFL products with modified-spectrum light, such as the GE MSLFL. This request goes beyond the scope of OHA's exception authority. Persons subject to the various product efficiency standards of Part 430 may apply to OHA for exception relief. *See Diversified Refrigeration, Inc.*, OHA Case No. VEE-0073 (2001); *Midtown Development, L.L.C.*, OHA Case No. VEE-0073 (2000); *Amana Appliances*, OHA Case No. VEE-0054 (1999). In this regard, Section 504 of the Department of Energy Organization Act authorizes OHA to make adjustments of any rule or order issued under EPCA, 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). *See generally* 10 C.F.R. Part 1003, Subpart B (OHA Procedural Regulations).

Thus, OHA's exception authority is limited to providing relief to a specific manufacturer with respect to a specific product or products regulated by DOE. OHA cannot exercise its exception authority to create a new product class under a regulation which would be applicable to all

persons covered by a DOE regulatory standard. The establishment of a product class is appropriately done as part of a rulemaking proceeding. As such, it has been OHA's practice when granting exception relief to an applicant for a particular product to grant such relief only until DOE elects to establish a new product class for such product in a subsequent rulemaking. *See, e.g., Spacepak/Unico, Inc.*, OHA Case Nos. TEE-0010, TEE-0011 (2004).

Therefore, since we lack the authority, we will not consider arguments advanced by GE in its Application that OHA establish a distinct product class for "modified-spectrum linear fluorescent lamps."

#### **B. Clarification on Language in 2009 Final Rule on the GE MSLFL**

In GE's Application and Supplemental Comments, GE suggests in various places that its Application has special merit as it is being filed at the specific suggestion of DOE in the 2009 Final Rule. GE's strongest assertion is set forth in its Supplemental Comments: "At the outset, GE would like to note that it was DOE itself that recognized in the [2009] Final Rule the appropriateness of seeking the exception relief requested herein. Although DOE did not have enough information in the [2009] Final Rule to make a determination, it specifically noted that if GE successfully developed its MSLFL it *should* seek exception relief from DOE's Office of Hearings and Appeals...." GE Supplemental Comments at 1 (emphasis added).

We do not believe this is a fair characterization of DOE's comments in the 2009 Final Rule and believe it is appropriate to clarify the DOE comments cited by GE. As explained below, the language appearing in the 2009 Final Rule is standard language used by DOE to note the availability of exception relief.

In response to the DOE's Notice of Proposed Rulemaking issued in April 2009 (74 Fed. Reg. 16920 (April 13, 2009)), GE submitted comments dated June 12, 2009, which were also attached to its Application for Exception. Those comments discussed, *inter alia*, that GE was then researching and developing a 4-foot medium bipin modified-spectrum fluorescent lamp which was expected to be commercially released prior to the effective date of the efficiency standards to be established by 2009 Final Rule. GE did not expect that its lamps would be able to meet the minimum standards expected to be set in the 2009 Final Rule and requested that DOE either set separate lower efficiency standards for "modified-spectrum fluorescent lamps" or exempt such lamps from the standards. 74 Fed. Reg. 34080 at 34099. GE's suggestion was for an efficiency standard level for such lamps of 67 lm/W. GE Application, Attachment A at 5.

In response, DOE noted that the modified-spectrum product described by GE would fall within the statutory definition of "general service fluorescent lamp" and, therefore, would be subject to the statutory minimum efficiency requirements for GSFLs. 74 Fed. Reg. 34080 at 34099. EPCA set the minimum efficiency standards for such GSFLs at 75 lm/W. 42 U.S.C. 6295(i)(1). Granting GE's request would have constituted backsliding from the statutory requirements, which is impermissible under EPCA. 74 Fed. Reg. 34080 at 34099.

Because the subject lamps were still under development at the time of DOE's rulemaking, DOE had insufficient data to evaluate this type of lamp. Even if such "modified-spectrum" lamps



were capable of meeting the statutory minimum efficiency requirements, DOE had no evidence that such lamps would offer a distinct utility to consumers or be required in the general service fluorescent market and, therefore, could not establish a separate product class. With respect to GE's request, the 2009 Final Rule concluded: "...DOE notes that if the company successfully develops its modified-spectrum fluorescent lamp and *believes that it warrants exemption* from DOE's amended standards, it *may be possible* for GE to seek exemption relief from...[OHA] pursuant to 10 CFR Part 1003." 74 Fed. Reg. 34080 at 34099 (emphasis added).

We do not read the language in the 2009 Final Rule to be a directive to GE or to be an assessment by DOE of the product GE had under development. Virtually identical language appears elsewhere in the 2009 Final Rule with respect to similar requests (see, for example, 74 Fed. Reg. 34080 at 34101) and merely recites existing procedures with respect to DOE regulations issued under EPCA.

### **C. Exception Relief Resulting from Special Hardship, Inequity, or Unfair Distribution of Burdens**

In considering GE's Application for Exception, we first observe that the agency's adoption of the revised Lighting Efficiency Standards is fully consistent with the policy objectives of EPCA. The higher lm/W standard adopted for GSFLs by DOE was designed "to achieve the maximum improvement in energy efficiency . . . which the Secretary determine[d] is technologically feasible and economically feasible and economically justified" and will "result in significant conservation of energy." 74 Fed. Reg. at 34082, *quoting* EPCA, 42 U.S.C. §§ 6295(o)(2)(A), 6295(o)(3)(B). In promulgating the new standard, the agency estimated, with regard to GSFLs, that as a result of the new efficiency gains, consumers will save up to \$67.06, on average, over the lifetime of the typical GSFL product. 74 Fed. Reg. at 34083. In addition, DOE estimated that the new GSFL standards will save approximately 3.83 to 9.94 quadrillion British thermal units (Btu) of energy over 30 years (2012-2042). In view of the nation's increasing energy needs, the benefits of energy conservation cannot be overstated. In addition, the higher efficiency standard will have substantial environmental benefits by contributing to the overall reduction of greenhouse gas emissions and air pollution. *Id.*

Consequently, an exception to the revised efficiency standard is warranted only in those limited circumstances where relief is necessary to prevent a special hardship, inequity, or unfair distribution of burdens. 10 C.F.R. § 1003.20; 42 U.S.C. § 7194(a). 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., Sauder Fuel, Inc.*, OHA Case No. TEE-0059 (2009); *Diversified Refrigeration, Inc.*, OHA Case No. VEE-0079 (2001); *Amana Appliances*, OHA Case No. VEE-0054 (1999); *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). We have carefully considered GE's Application for Exception. For the reasons below, we have determined that GE has failed to justify the approval of exception relief for the GE MSLFL product.

We find initially that GE has failed to show that the firm will suffer a special hardship if it fails to receive exception relief. While OHA does not utilize a rigid definition of “special hardship,” a petitioner alleging “special hardship” must demonstrate that application of a DOE regulation to the petitioner would have such a negative impact upon it as to jeopardize its financial health or viability. See *Sauder Fuel, Inc.*, OHA Case No. TEE-0059 (2009); cf. *Stacey Oil Co.*, OHA Case No. VEE-0056 (1999) (extraordinary impact of reporting on a company operating at a considerable loss). GE’s Application states that it will face serious hardship as it has invested XXXXXXXXXXXXXXXXXXXXXXXX in the development of the GE MSLFL and will be required to remove the product from the market in less than two years if DOE does not grant the exception relief requested by its Application. However, GE provides no financial information with respect to its income from the GE MSLFL or with respect to the percentage of its total income represented by sales of the GE MSLFL. Even had such information been provided, we find it unlikely that it would have demonstrated that the potential removal from the market of the GE MSLFL would jeopardize the financial viability of GE.

GE also advances the following arguments in support of its claim for exception relief: (1) the lower efficiency standards established under the 2009 Final Rule for modified-spectrum *incandescent* lamps justifies lower efficiency standards for its modified-spectrum linear *fluorescent* lamps; (2) GE will suffer an inequity and an unfair distribution of burdens in the absence of exception relief since it is the only lighting manufacturer that produces a modified-spectrum linear fluorescent lamp, which cannot meet the efficiency standards established by the 2009 Final Rule; (3) our decision in *Maytag* indicates that requiring the GE MSLFL to comply with the Lighting Efficiency Standards would be a gross inequity since it would require its GE MSLFL product to meet an efficiency standard applicable to products that are not comparable, and would effectively prevent GE from marketing the product.<sup>3</sup> For the reasons below, we find each of these arguments unpersuasive.

We do not agree that GE has suffered an inequity or is entitled to exception relief for its modified-spectrum GSFL because the Lighting Efficiency Standards establish a different class of product, and lower minimum efficiency, for incandescent lamps with the modified-spectrum feature. Congressionally-mandated product classes for incandescent lamps do not imply that parallel product classes must be developed for categories of fluorescent lamps with similar sounding names.

As explained by the agency in the preamble to the 2009 Final Rule, the modified-spectrum product class for incandescent lamps was compelled by EPCA since the modified-spectrum

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<sup>3</sup> In connection with this argument, GE contends that while the GE MSLFL has lower lm/W, it is perceived as just as bright, if not brighter, than a standard fluorescent of the same wattage and, therefore, such product is penalized without any corresponding benefits to national energy savings. GE essentially argues that, due to the higher perceived brightness of modified-spectrum GSFLs, “lumens-per-watt” is an inappropriate measure of efficiency with regard to its new GE MSLFL product. However, the “lumens-per-watt” measure of efficiency adopted by the agency is specifically prescribed by the EPCA. See 42 U.S.C. § 6295(i)(1)(B). Thus, to consider an alternative measure of efficiency, e.g. one based upon brightness relative to wattage, is beyond our exception authority. Moreover, GE was fully aware of the required “lumens-per-watt” measure of efficiency at the time it elected to move forward with the development of the GE MSLFL. Thus, any alleged inequity incurred by GE can be attributed to its own discretionary business decision, as discussed below.

feature for incandescent lamps existed prior to DOE's promulgation of the revised standards. EPCA prevents DOE from establishing an efficiency standard that is "likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially *the same as those generally available in the United States at the time of the Secretary's finding*" (i.e., at the time of the issuance of new efficiency standards). 42 U.S.C. § 6295(o)(4) (emphasis added); 74 Fed. Reg. at 34100. The agency therefore established a separate product class and minimum efficiency modified-spectrum incandescent lighting, noting that "if DOE were to regulate modified-spectrum lamps within the same product class as standard-spectrum lamps, this could result in an energy conservation standard that would eliminate the modified-spectrum utility from the IRL market." *Id.* Thus, the distinction prescribed by statute and recognized in the Lighting Efficiency Standards for modified-spectrum lamps is limited to incandescent lamps.

Unlike modified-spectrum incandescent lamps, the modified-spectrum utility for GSFLs was not recognized in the statute and did not exist at the time of either the enactment of the statute or the present rulemaking. GE acknowledged that the GE MSLFL had not been introduced to the market until eleven months following the issuance of the 2009 Final Rule. Moreover, GE and all those commenting on its Application for Exception agreed that the technology between incandescent and fluorescent lamps is different. Therefore, no inequity exists that would warrant the approval of exception relief for GE's modified-spectrum GSFL based upon the DOE establishing a separate class of product, and product efficiency, for modified-spectrum incandescent lamps.

Instead, we find that to the extent that any inequity exists, it results from GE's discretionary business decision to continue development of a product and, then, introduce it to market knowing that it would not meet published efficiency standards that were scheduled to take effect two years later. 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). We agree with GE that, to some extent, every decision can be viewed as a discretionary decision.<sup>4</sup> In unique mitigating circumstances, a firm might be granted exception relief where the business decision was the most viable among more precarious options. *See, e.g., Viking Range Corp.*, OHA Case No. VEE-0075 (2000). However, GE has made no such showing in this case.

In the present situation, GE undertook the development of a product knowing that the product was subject to statutory efficiency standards that were scheduled to be enhanced by the terms of the statute itself. GE had notice of the statutory requirements as early as 1992 and was still unable to meet the statutory efficiency standard for GSFLs when it filed comments with DOE in

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<sup>4</sup> Every research and development project faces many challenges, such as whether the technology to support the product is feasible, whether the market desires the product, and whether the cost of development and manufacturing of the product can be supported by the market. Another challenge for any new product is whether it can meet standards established by the industry or the government.

2009. GE apparently was able to achieve the threshold efficiency required by EPCA (75 lm/W) the following year when it introduced the GE MSLFL to the market; however, at that time, in accordance with the regulatory scheme required by EPCA, the efficiency standards were scheduled to be enhanced. GE had knowledge of those enhanced efficiency standards and had participated in the rulemaking establishing them. Any inequity which exists in the present situation arises from GE's decision to invest in the development of a product which the firm knew did not meet the anticipated regulatory standards.

Finally, GE has misplaced reliance on our decision in *Maytag*. According to GE, *Maytag* is precedent in the present case for OHA granting exception relief for a product unable to meet the applicable efficiency standards when the product was developed after the effective date of such standards. In its Supplemental Comments, GE writes:

In *Maytag*, OHA was persuaded that DOE would have established a separate product class for automatic defrost refrigerator-freezers with bottom-mounted and through the door ice if such products had existed when the Refrigerator Efficiency standards were promulgated. Similar to the products at issue in *Maytag* where DOE recognized a separate product class for other product configurations (e.g., the "top-mounted freezer" and "side-mounted freezers" variations), DOE has also established separate product classes for other modified spectrum products (e.g., incandescent lamps)... Similar to *Maytag's* arguments in its successful petition, to require GE's new product to comply with the 2012 standards would be a gross inequity in that it would require the product to comply with rules that do not properly apply to it, would compare them to products that are not comparable, and would exclude GE's new product from the DOE standards program and cripple our efforts to market the product.

GE Supplemental Comments at 2. However, the circumstances in *Maytag* are markedly different from the present case.

We acknowledge that in *Maytag*, we granted exception relief from the provisions of 10 C.F.R. Part 430, specifically related to Energy Conservation Program for Consumer Products: Energy Conservation Standards for Refrigerators, Refrigerator-Freezers and Freezers (Refrigerator Efficiency Standards), for a new product that had been developed by Maytag, an automatic defrost refrigerator-freezer, with bottom mounted freezer and through-the-door ice service. The Refrigerator Efficiency Standards establish energy efficiency equations which limit energy usage for eighteen classes of refrigerator products. In establishing these standards, DOE recognized through-the-door ice service as an important feature in establishing separate classes of automatic defrost refrigerator-freezers with and without this addition, e.g. Class 3 (with top-mounted freezer without through-the-door ice service) and Class 6 (with top-mounted freezer with through-the-door ice service). 10 C.F.R. § 430.32(a).<sup>5</sup> However, since through-the-door ice

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<sup>5</sup> In addition, the agency had established a separate class of product (Class 5) for "Refrigerator-Freezers – automatic defrost with bottom-mounted freezer without through-the-door ice service," as well as separate classes of automatic defrost refrigerator-freezer for "side-mounted freezer without through-the-door ice service" (Class 4) and "side-mounted freezer without through-the-door ice service" (Class 7).

service was not offered with bottom-mounted freezers at the time the Refrigerator Efficiency Standards were promulgated, there was no energy efficiency standard established for Maytag's new product within the eighteen classes of product established. At the same time, Maytag's new product clearly fit within the regulatory definition of "electric refrigerator-freezer," 10 C.F.R. § 430.2, and it would be unable to meet the Class 5 energy standard due to the energy loss inherent in adding through-the-door ice service. We therefore granted exception relief for Maytag's new product, setting an efficiency standard allowing for the incremental energy use attributable to the through-the-door ice service feature, which was a feature generally available on the covered product in question (refrigerators) at the time of the Secretary's finding during the rulemaking.

The circumstances that existed in *Maytag* are not present in this case. Unlike the through-the-door ice service feature in *Maytag*, the modified-spectrum feature for GSFLs did not exist at the time the 2009 Final Rule was promulgated, nor was it even recognized as a feature that is wanted or necessary even if developed.<sup>6</sup> In describing modified-spectrum GSFLs, the agency stated in the preamble that "[w]hile these lamps may in the future provide a distinct utility to consumers . . . , at this time, DOE has no evidence that this utility in fact exists or is even required of the general service fluorescent market, because there is no such product yet developed." 74 Fed. Reg. at 34099.<sup>7</sup>

#### D. Conclusion

As explained above, OHA does not have the authority to establish product classes and, further, GE has not carried its burden in establishing that application of the Lighting Efficiency Standards to the GE MSLFL would result in GE sustaining special hardship, inequity, or unfair distribution of burdens. Having weighed all of the relevant considerations in this case, we conclude that GE has failed to justify the approval of the exception relief it seeks.

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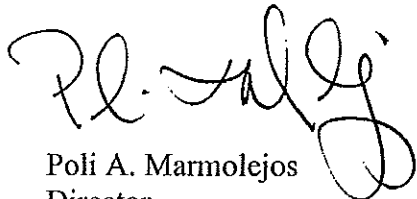
<sup>6</sup> We further note that, in addition to the agency's prior recognition of the through-the-door ice service as a desirable utility, Maytag submitted evidence of a market research study showing that a predominant share of its customers surveyed were favorable to the through-the-door ice service feature of its new refrigerator with bottom-mounted freezer. *See Maytag* at 2. GE has not made this showing in this case. While GE has submitted evidence indicating that modified-spectrum lighting does create a distinct utility in GSFLs (*see* GE Supplemental Comments at 2-3, Attachment B), there is no clear evidence that this utility is necessary or in demand.

<sup>7</sup> As an added equitable consideration, we note that the exception relief granted in *Maytag* fell well within the parameters of the revised Refrigerator Efficiency Standards, and thus was consistent with the energy conservation objections of EPCA and the agency. In the present case, however, GE seeks exception relief that would set a 75 lm/W efficiency standard for its new product, which is no higher than the present standard and significantly below the 89 lm/W minimum average lamp efficiency standard for 4-foot medium bipin GSFLs established by the Lighting Efficiency Standards, effective July 14, 2012. The requested exception relief, therefore, contravenes Congressional and DOE energy conservation goals.

It Is Therefore Ordered That:

(1) The Application for Exception filed by GE Appliances & Lighting on March 2, 2011, is hereby denied.

(2) Any person aggrieved or adversely affected by the denial of a request for exception relief filed pursuant to § 504 of the Department of Energy Organization Act (42 U.S.C. 7194) may appeal to the Federal Energy Regulatory Commission, in accordance with the Commission's regulations.



Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date:

AUG 11 2011