Case No. VEA-0018

May 9, 2001

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Whirlpool Corporation

Date of Filing:March 30, 2001

Case Number:VEA-0018

This determination considers an Appeal filed by Whirlpool Corporation (Whirlpool) of a Decision and Order issued by the Office of Hearings and Appeals (OHA) on March 2, 2001. *Diversified Refrigeration, Inc.*, 28 DOE ¶ , Case No. VEE-0079 (March 2, 2001) (*Diversified*). In the Decision and Order, OHA granted Diversified Refrigeration, Inc. (DRI) a limited exception from the revised standards 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), that become effective July 1, 2001. 10 C.F.R. § 430.32. In its Appeal, Whirlpool argues that the exception relief granted to DRI should be withdrawn or, in the alternative, modified. As set forth in this Decision and Order, we have concluded that Whirlpool's Appeal must be denied.

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

DRI is a manufacturer of built-in refrigerators, located in Selmer, Tennessee. On February 1, 2001, DRI filed an Application for Exception(2) from the Refrigerator Efficiency Standards, claiming that it is unable to meet the deadline because of a loss of engineering staff and difficulty in recruiting new hires. On this basis, DRI requested a six-month exception from the July 1, 2001 effective date of the Refrigerator Efficiency Standards applicable to built-in refrigerators. DRI contended that, in the absence of relief, it would have to shut down its factory. DRI's sole operation is manufacturing built-in refrigerators for sale to GE Appliances (GE). DRI employs a significant number of the 4,600 residents of Selmer, Tennessee.

After consideration of additional information supplied by DRI, well as the comments of interested parties,(3) OHA determined that DRI should be granted exception relief. There was no dispute in the proceeding that DRI would be unable to produce compliant refrigerators by the July 1, 2001 deadline. As noted above, DRI's only operation at its Tennessee plant is the production of built-in refrigerators. Therefore, in the absence of relief, DRI would not be able to operate, resulting in a substantial loss of income, a layoff of its workers, the disruption of its relations with suppliers and with GE, and serious consequences on its long-term ability to be competitive. Thus, OHA concluded that DRI would suffer an unfair distribution of burdens in the absence of such relief.

Nonetheless, Sub-Zero and Whirlpool argued that DRI is not entitled to exception relief since DRI's inability to comply resulted from its own lack of diligence and "discretionary business decisions" rather than an unfair distribution of burdens. OHA determined, however, that DRI's failure to begin compliance efforts earlier or to undertake more aggressive compliance efforts later were not "discretionary business decisions" that preclude the grant of relief. OHA stated in part:

> [T]he mere fact that a firm would not need exception relief had it made a different choice or a different set of choices does not preclude exception relief. Instead, exception relief is not appropriate where a firm makes a choice that does not reasonably take into account its regulatory obligations. In such cases, we refer to the choice as the "primary" cause for the firm's difficulty. *See, e.g., Ince Minerals Corp.*, 3 DOE ¶ 81,136 at 83,498 (1979) (firm's financial difficulties attributable to its incorrect assessment of quality of reserves rather than DOE regulations).
>
> From hindsight, it is clear that DRI should have begun its efforts to produce compliant refrigerators earlier than it did. It is also possible that DRI, and its customer GE, could have taken more aggressive steps to comply. On the other hand, all parties agree that developing compliant refrigerators involves significant engineering effort, and the record indicates that DRI encountered significant difficulties hiring and retaining, either as employees or on a contract basis, the number of engineers that it needed. DRI attributes these problems to the competitive environment for engineers, which was exacerbated in the refrigeration industry by the approaching effective date of the new standards. Accordingly, it appears to us that the primary cause of DRI's inability to meet the deadline was its failure to anticipate the unusual degree of difficulty it would encounter in obtaining sufficient engineering staff.

Diversified at 5.

OHA also rejected an alternative argument by Sub-Zero and Whirlpool that the burden to DRI of not meeting the deadline does not outweigh the competitive harm they would suffer if DRI were granted a six-month extension to sell non-compliant refrigerators through the approval of exception relief. OHA found that Sub-Zero and Whirlpool had not shown that they would experience real harm on the basis of their speculation that DRI, and its customer GE, could use the lower production cost of the non-compliant refrigerators to gain market share.

Moreover, OHA determined that placing a limit or "cap" on the number of units that DRI can produce during the exception relief period would largely ameliorate the concern about loss of market share. The *Diversified* decision observes that a cap on the relief accomplishes two important objectives. First, a cap addresses Sub-Zero's and Whirlpool's concerns about competitive harm. Second, a cap helps to assure that, in the future, firms will not view exception relief as a short-term alternative to compliance and that recipients of relief will expeditiously bring themselves into compliance. Accordingly, on the basis of historic production data supplied by DRI, OHA ruled that DRI is entitled to six months of exception relief, from July 1, 2001 to December 31, 2001, limited as follows: (i) the relief is limited to DRI's side-by-side refrigerators, (ii) the relief during the period July 2001 through November 2001 for all models combined is limited to a maximum production of 1,600 refrigerators in any given month, (iii) the relief for the month of December 2001 is limited to a maximum production of 800 refrigerators, and (iv) the relief is contingent upon the filing of monthly reports, due by the 15th of the month after the reporting month, listing the number of each model produced in the reporting month and showing DRI's progress in achieving compliance.

(2) Appeal

In its Appeal, Whirlpool reiterates its argument that DRI is not entitled to exception relief since "DRI's inability to comply with the 2001 [standards] is a result of its own discretionary business decision to pursue consumer-visible projects rather than energy compliance" and thus "it is clearly not unfair for DRI to suffer burdens associated with the consequences of its own decisions." Whirlpool Appeal at 2. Whirlpool therefore urges OHA to withdraw the exception granted to DRI in *Diversified*.

In the alternative, Whirlpool argues that OHA should modify the exception relief granted to DRI, specifically the production caps and reporting requirements placed upon such relief, claiming that more stringent limitations are appropriate "in order to better achieve the purposes intended by the OHA and to mitigate competitive harm to Whirlpool and other manufacturers." Whirlpool Appeal at 4. In addition to the production cap imposed, Whirlpool submits that OHA should limit DRI's production of side-by-side refrigerator models during the months of March through June 2001, to prevent DRI from banking its inventory of non-compliant products prior to July 1, 2001. Commensurate with this requested modification, Whirlpool asserts that the production reporting requirements specified by OHA in the decision should commence March 2001. Whirlpool further maintains that in addition to the reporting requirements already imposed, OHA should require DRI to report on a monthly basis the portion of its engineering resources the firm has devoted to energy compliance as compared to other product initiatives. According to Whirlpool, "OHA should ensure that DRI is devoting substantially all its available resources towards energy compliance to ensure that an extension for the exception relief is not necessary." Whirlpool Appeal at 5.

On April 11, 2001, DRI filed a Response in opposition to Whirlpool's Appeal. GE filed comments on April 13, 2001, also urging that Whirlpool's Appeal be rejected and the exception relief granted in *Diversified* be upheld.

II. Analysis

We have carefully considered the contentions raised by Whirlpool and have determined that Whirlpool's Appeal must be denied. Regarding its initial argument, Whirlpool has presented nothing that would lead us to disturb the determination reach in *Diversified* that DRI's inability to meet the July 1, 2001 deadline did not result from the kind of "discretionary business decision" that would preclude exception relief. As noted above, Whirlpool's argument in this regard was thoroughly considered in the decision, and Whirlpool has not shown in its present Appeal that the determination reached is either legally or factually incorrect.

Nor are we persuaded that additional production limitations should be imposed on DRI for the four-month period, March through June 2001, prior to the effective date of the Refrigerator Efficiency Standards. Whirlpool claims that the failure to consider the possibility and prevent DRI from banking inventory prior to July 1, 2001 was an "oversight" by OHA. This is incorrect. As noted in the decision, OHA solicited information on this very issue from DRI and interested parties, as part of the considerable volume

of evidence received and considered by OHA:

> Third, we requested information on the parties' ability and intent to stockpile non-compliant refrigerators prior to the July 1, 2001 effective date. To the extent that manufacturers are able to stockpile, such stockpiling would ameliorate the impact of an exception granted a competitor; similarly, to the extent that an exception applicant is able to stockpile, its need for exception relief is reduced. Diversified, Viking, and Whirlpool responded, but Sub-Zero did not.

Diversified at 3-4 (footnote omitted). Thus, this matter was fully considered in fashioning the exception relief granted to DRI, and Whirlpool's claim that a modification is warranted due to "oversight" is without foundation. Whirlpool has presented nothing to persuade us that the production caps specified in the decision, beginning in July 2001, do not adequately address the potential competitive harm to DRI's competitors. We therefore deny Whirlpool's request to place production limitations upon DRI beginning in March 2001. Correspondingly, Whirlpool's request to extend DRI's reporting requirements back to March 2001 is also denied.

Finally, we are unconvinced by Whirlpool's contention that more detailed reporting requirements are necessary to ensure that DRI is progressing appropriately toward production of compliant refrigerators. In addition to the number of non-compliant refrigerators produced during the exception period, the *Diversified* decision requires DRI to report on a monthly basis its progress in achieving compliance with the new standards. Whirlpool maintains that DRI should also be required to report the portion of its engineering resources devoted to energy compliance as compared to other product initiatives. Whirlpool argues that this will ensure that an extension of exception relief is not necessary. However, we fail to see how a more stringent reporting requirement will better accomplish this desired result. The reporting requirement already imposed enables us to monitor DRI's progress toward compliance.(4) DRI is fully aware that the firm would carry a heavy burden to justify and document any claim for an extension of exception relief. We find speculative, at best, Whirlpool's supposition that a more stringent reporting requirement would give DRI added incentive to achieve compliance.

It Is Therefore Ordered That:

(1) The Appeal filed by Whirlpool Corporation on March 30, 2001, of the Decision and Order issued by the Office of Hearings and Appeals of the Department of Energy on March 2, 2001, *Diversified Refrigeration, Inc.*, 28 DOE ¶ , Case No. VEE-0079 (March 2, 2001), is hereby denied.

(2) This is a final Order of the Department of Energy from which Whirlpool Corporation may seek judicial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 9, 2001

(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)The DOE Organization Act (DOEOA) authorizes the DOE to grant exceptions to standards adopted under the EPCA. DOEOA § 504(a), 42 U.S.C. 7194(a). The DOEOA permits adjustments "consistent with the purposes" of EPCA, "as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens." The preamble to the notice promulgating the Refrigerator Efficiency Standards specifically refers to this provision. 62 Fed. Reg. at 23,108-09. As the preamble indicates, the DOE may grant an exception for a limited time and may place other conditions on the grant of relief, including conditions related to the effects of the relief on competition. *Id.* at 23,109. OHA's procedural regulations set forth the procedures applicable to exception applications. 10 C.F.R. Part 1003, Subparts B and C. Subpart B provides the procedures for considering an exception request. Subpart C provides the procedures for an appeal of an exception decision.

(3)DRI is one of four firms that manufacture built-in refrigerators. The other three are Viking Range Corporation (Viking), Whirlpool, and Sub-Zero Freezer Co. (Sub-Zero). All of DRI's competitors, as well as its customer GE, participated in the DRI exception proceeding.

(4)In its response to Whirlpool's Appeal, DRI continues to assert its "commitment to compliance with the July 2001 standards as soon as possible." DRI Response at 4.