Case Nos. VEA-0015, VEA-0016 and VEA-0017

March 2, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeals

Names of Petitioners: Sub-Zero Freezer Co.

GE Appliances

Whirlpool Corporation

Dates of Filing: December 1, 2000

December 5, 2000

December 15, 2000

Case Numbers: VEA-0015

VEA-0016

VEA-0017

Sub-Zero Freezer Co. (Sub-Zero), GE Appliances (GE), and Whirlpool Corporation (Whirlpool) filed appeals of our November 3, 2000 decision, granting Viking Range Corporation (Viking) a six-month exception from the 2001 energy appliance efficiency standards for built-in refrigerators. Viking Range Corp., 28 DOE ¶ 81,002 (2000). As discussed below, we have granted the appeals in part. As a result, the six-month exception will be limited to 475 refrigerators per month and will be subject to a monthly reporting requirement.

I. Background

The Energy Policy and Conservation Act (EPCA) directed the DOE to review and revise the 1989 energy conservation standards applicable to refrigerators. See EPCA §325(b)(3)(B), 42 U.S.C. § 6295(b)(3)(B); 54 Fed. Reg. 47916 (November 17, 1989). Pursuant to that direction, in 1997, the DOE finalized new standards that become effective on July 1, 2001. 62 Fed. Reg. 23101 (April 28, 1997).

The DOE Organization Act (DOEOA) authorizes the DOE to grant exceptions to EPCA standards. 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 new 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.

The DOE'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.

Viking markets a diverse line of appliances for cooking, cleanup and refrigeration. Viking initially specialized in cooking equipment but in 1993 decided to add built-in refrigerators as a product line. Viking historically purchased those refrigerators from Whirlpool. When, in late 1999, Whirlpool terminated that arrangement, Viking purchased from Amana Appliances (Amana) for several months until Amana decided to stop manufacturing built-in refrigerators. In April 2000 Viking purchased the Amana equipment and moved the equipment to its new facility in Greenwood, Mississippi. Greenwood is located in the Mississippi Delta, one of the most impoverished areas in the United States.

In June 2000, Viking requested that OHA grant it an exception from the new refrigerator efficiency standards for built-in

refrigerators. Specifically, Viking requested a 12-month extension to comply with the standards. Viking contended that it was unable to meet the July 1, 2001 deadline, and that its unique circumstances warranted exception relief.

Viking's three competitors - Sub-Zero, Whirlpool, and GE - filed comments in opposition to Viking's request.(1) The competitors did not challenge Viking's contention that it was unable to meet the deadline; instead, the competitors argued that Viking's inability to meet the deadline was the result of its own discretionary business decisions and that an exception would cause them competitive harm.

In our November 3 decision, we granted Viking's request in part. Viking, 28 DOE ¶ 81,002. Specifically, we granted Viking a six-month extension to meet the new standards, based on our conclusion that the application of the July 1, 2001 effective date to Viking would create an unfair distribution of burdens. With respect to the underlying facts, we found that

(i) Viking historically outsourced the manufacture of its built-in refrigerators;

(ii) as of 1999, four firms manufactured built-in refrigerators: Sub-Zero; Whirlpool; Diversified Refrigeration, Inc. (DRI), which supplied GE; and Amana;

(iii) in the fall of 1999, Whirlpool announced that it would no longer supply Viking;

(iv) because Sub-Zero and DRI similarly would not supply Viking, Amana was Viking's only outsourcing choice;

(v) Viking purchased refrigerators from Amana for several months, until Amana decided to stop producing built-in refrigerators and to leave the market;

(vi) Viking purchased Amana's built-in refrigeration equipment in April 2000 and moved the equipment from Amana's plant in Iowa to Viking's plant in Mississippi;

(vii) Amana's lack of progress on meeting the standards precluded Viking from achieving compliance by the July 1, 2001 effective date;

(viii) In the absence of exception relief, Viking would not be able to sell built-in refrigerators for six months, which would jeopardize its share of the built-in refrigerator market and have a collateral negative impact on its sales of other appliances; and

(ix) The grant of exception relief would have minimal impact on national energy conservation objectives and on Viking's competitors.

Sub-Zero, Whirlpool, and GE appealed the decision. In their appeals, Sub-Zero and Whirlpool opposed the relief granted in the November 3 decision. GE, on the other hand, abandoned its opposition to the request and merely requested a technical modification, i.e., that the exception relief be expressly limited to the refrigerator models for which Viking sought relief.

In conjunction with its appeal, Sub-Zero requested an evidentiary hearing on five issues. We granted Sub-Zero's request for a hearing on three of those issues. Sub-Zero Freezer Co., 28 DOE _____ (January 31, 2001). Those three issues were (i) whether, when Viking purchased Amana, Viking had outsourcing options, (ii) whether the burden of not selling built-in refrigerators for six months would be significant, and (iii) whether a six-month extension of the deadline would give Viking a significant competitive advantage. We denied Sub-Zero's request for an evidentiary hearing on two issues. Those issues were: (i) whether having a built-in refrigerator that will meet the July 1, 2001 deadline is a vital part of Viking's business strategy and (ii) whether Viking knew of Amana's lack of progress necessary to meet the July 1, 2001 deadline. We concluded that evidence on the latter issues would not produce material evidence.

Subsequent to our January 31 decision, Sub-Zero declined the opportunity for an evidentiary hearing. Sub-Zero maintained that Viking, not Sub-Zero, should have the burden of presenting evidence on the identified issues.

During the pendency of the appeals, we requested a variety of information from the parties.

First, we requested that Viking identify the models for which it sought relief and its volume of sales of those models during each month in 1999 and 2000. Viking provided this information.

We also requested that the parties comment on a possible limitation on the exception relief to address the appellants' concern that exception relief would give Viking a competitive advantage. We proposed to limit the number of units produced during the period of exception relief, and we requested the parties' views on such a limitation. Letters dated December 8, 2000 & January 12, 2001 from Thomas L. Wieker, Deputy Director, Office of Hearings and Appeals, to the parties. Sub-Zero and Whirlpool viewed such a limitation as an improvement over the November 3 decision but nonetheless inadequate to address their concern of competitive harm. Viking and GE disagreed with such a limitation, arguing that such a limitation was anti-competitive.

On February 1, 2001, GE's supplier, DRI, filed its own exception application. Diversified Refrigeration, Inc., Case No. VEE-0079. DRI contended that it was unable to meet the deadline because of a shortage of engineer staff. We are considering that application in a separate decision.

In addition to requesting information and comments concerning a limitation on relief, we also requested information related to the

claims of Sub-Zero and Whirlpool that an exception would cause them competitive harm.

We requested information on the parties' ability and intent to stockpile non-compliant refrigerators(2) prior to the July 1, 2001 effective date. To the extent that Viking's competitors are able to stockpile, such stockpiling would ameliorate the impact of a Viking exception; similarly, to the extent that Viking is able to stockpile, Viking's need for exception relief is reduced. Sub-Zero did not submit information; Whirlpool, Viking and DRI submitted information and denied that they could significantly stockpile.

We also gave Sub-Zero and Whirlpool the opportunity to submit information to support their claim that the relief put them at a cost disadvantage, i.e., their expected change in marginal cost related to out-of-pocket manufacturing costs. Sub-Zero declined this opportunity, but Whirlpool submitted the information.

Finally, all parties agreed that the built-in refrigerator market comprises a very small segment of the domestic refrigerator market. In 1999, over 9 million refrigerators were produced, of which approximately 140,000 were built-in refrigerators. It is also agreed that Sub-Zero has over half of the built-in refrigerator market, that Viking has roughly three percent, and that the remainder is divided between Whirlpool and DRI's customer, GE.

Sub-Zero and Whirlpool filed final briefs, and we held oral argument on February 27. The hearing panel included an economist.

II. Analysis

A. Whether Viking Can Produce or Purchase Compliant Models Beginning July 1, 2001

It is undisputed that Viking cannot produce compliant refrigerators by the July 1, 2001 deadline. Sub-Zero argues, however, that Viking has the burden of establishing that Viking is unable to obtain built-in refrigerators from another manufacturer.

Viking has made a reasonable demonstration that it cannot obtain built-in refrigerators from another manufacturer. It is undisputed that none of the manufacturers involved in these proceedings - Sub- Zero, Whirlpool, and DRI - will sell to Viking, presumably for their own competitive reasons.(3) In our January 31 decision, we advised the parties that we knew of no other source of built-in refrigerators, and we offered to hold an evidentiary hearing on the issue whether other manufacturers existed. Sub-Zero declined this opportunity, and none of the manufacturers known to us - all of which are involved in these proceedings - has suggested an alternative source for Viking.

Based on the foregoing, we have concluded that Viking has made a reasonable demonstration that it will not be able to produce or purchase compliant models by the July 1, 2001 deadline.

B. Whether Viking's Inability to Have Compliant Models on July 1, 2001 Warrants Exception Relief

As indicated in our November 3 decision, we believe that Viking's inability to meet the July 1, 2001 deadline under these circumstances warrants limited exception relief. Sub-Zero and Whirlpool disagree, raising the following issues.

1. Whether Viking's Inability to Meet the Deadline Results From Discretionary Business Decisions

Sub-Zero argues that Viking's inability to meet the deadline results from a variety of discretionary decisions and, therefore, that exception relief is unwarranted. Sub-Zero cites, as discretionary business decisions, Viking's decision to enter the built-in refrigerator market by outsourcing while developing its own production capability, Viking's decision to purchase the Amana equipment, and Viking's decision to move the Amana equipment from Amana's plant in Iowa to Viking's plant in Mississippi. Sub-Zero argues that if Viking had devoted greater resources to developing its own production capability, Viking could have met the deadline.

As an initial matter, we observe that the characterization of a decision as "discretionary" does not preclude the grant of exception relief. In one sense, every decision is "discretionary": the word "decision" denotes the making of a choice. Under that use of the word "discretionary", any need for relief could be traced to the discretionary decision to begin the business for which an exception is sought. Accordingly, the 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 of 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).

We do not believe that Viking's choices were unreasonable in light of the July 1, 2001 deadline. In 1993, Viking decided to enter the built-in refrigerator market, and Viking approached each appellant about serving as its supplier. In 1995, Viking arranged to purchase from Whirlpool and began to do so in 1997, the year that the new standards were announced. Viking continued to purchase from Whirlpool until Whirlpool's termination of the agreement in 1999. Viking then purchased from Amana, and, when Amana decided to stop producing built-in refrigerators, Viking purchased Amana's equipment and moved the equipment to Viking's Mississippi plant. Those decisions were reasonable and do not reflect a cavalier attitude toward the July 1, 2001 deadline. The possibility that a different set of decisions might have permitted Viking to meet the deadline does not mean that the path Viking chose precludes it from receiving exception relief. Thus, we reject the argument that Viking's reliance on outsourcing until it could establish its own production capability precludes relief.(4)

Given the foregoing, we believe that Viking's various business choices do not preclude a grant of exception relief. Accordingly, we proceed to consider arguments that the burden to Viking, its employees, community and suppliers, of not being able to produce built-in refrigerators for six months is less than the burden to the appellants if exception relief is granted.

2. Whether the burden of not selling built-in refrigerators for a six-month period outweighs the alleged harm to competitors

Sub-Zero argues that Viking has not established that the burden to Viking outweighs the competitive harm that Sub-Zero and Whirlpool would suffer if we permitted Viking a six-month extension in which to sell its non-compliant refrigerators.(5)

We believe that it is clear that, in the absence of relief, Viking, its employees, its community, and its suppliers would suffer a significant burden. A six-month suspension of its refrigerator sales involves a loss of profit on each of the sales, the lay-off of employees, and a disruption to Viking's relationship with its suppliers. In addition, as we stated in the January 31 decision, we believe that it is a generally accepted proposition that a firm's six-month suspension of sales of an existing product line jeopardizes the firm's market share of that line and has serious consequences on its ability to be competitive in the future. Indeed, Whirlpool itself argues that a short-term reduction in sales of built-in refrigerators would jeopardize its market share of refrigerators and related kitchen appliances. Whirlpool December 15, 2000 submission at 2. Accordingly, arguments that attempt to minimize the impact of a six-month suspension of sales on Viking, its employees, community, and suppliers are without merit.

In contrast, we question whether the appellants would experience harm from the grant of exception relief. The appellants' primary concern is that Viking could use the lower production cost of the non-compliant refrigerators to gain market share. The appellants argue that Viking will not pass through its design and retooling cost during the relief period. We do not agree. As we indicated in the January 31 decision, firms pass through costs unless precluded by market conditions or a desire to increase market share. The exception relief will not change market conditions, which will apply to all the manufacturers of built-in refrigerators. Moreover, we believe that a limit or "cap" on the number of units that can be produced pursuant to the exception relief largely ameliorates any concern about increased market share. Indeed, Sub-Zero and Whirlpool indicate that such a limitation would help address their concern. Tr. at 24-25, 53-55. As explained below, we believe that the imposition of a cap is appropriate.

C. Whether A Cap on the Exception Relief is Appropriate

As indicated above, during the briefing period, we advised the parties that, if we were to uphold the grant of relief, we would seriously consider limiting the exception relief to a specific number of refrigerators. Viking opposed such a limit, arguing that Viking did not want any constraints on increasing its sales. GE supported Viking, arguing that a cap would be anti-competitive.

After considering this matter carefully, we have concluded that it is appropriate to place a cap on the relief. A cap on the relief accomplishes two important objectives. First, as indicated above, a cap addresses the appellants' 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. Thus, the purpose of a cap is not to "punish" the recipient of exception relief, as suggested by Viking and GE, see Tr. at 35, 79. Rather, the purpose of a cap is to avoid creating an advantage to the recipient during the pendency of the relief and to provide a firm limit on any incentive for non-compliance with the efficiency regulations.

In choosing the number for the cap, we believe that the number should permit the firm to operate normally but should be designed to assure competitors that the recipient of relief is not at a competitive advantage. If we must err, we believe that it should be on the side of caution in order to recognize that competitors are the ones that took all the necessary steps to comply with the standards. This is an important matter, particularly given the recent promulgation of new efficiency standards for other appliances. See 66 Fed. Reg. 3312 (January 12, 2001), amended 66 Fed. Reg. 8745 (February 2, 2001) (clothes washers); 66 Fed. Reg. 3335 (January 12, 2001), amended 66 Fed. Reg. 8745 (February 2, 2001) (commercial heating, air conditioning and water heating equipment); 66 Fed. Reg. 7169 (January 22, 2001), amended 66 Fed. Reg. 8745 (February 2, 2001) (central air conditioners and heat pumps). We do not want this decision to have the effect of inviting non-meritorious applications for exception from those new standards. In this increasingly important area of appliance energy efficiency, we realize that the changes required for manufacturers are substantial. The availability of exception relief to adjust for serious mis-steps toward compliance helps to make the system work properly.(6) Nevertheless, an exception should be framed in a way that allows a manufacturer only to get back on schedule towards compliance without serious interruptions, not to gain advantage over its competitors. Accordingly, although we continue to believe that Viking is entitled to six months of exception relief (from July 1, 2001 to December 31, 2001), we are modifying the relief as follows: (i) the relief is limited to specific models for which Viking sought relief (SB482, SB485, and BB362), (ii) the relief for all three models combined is limited to the production of a maximum of 475 refrigerators in any given month, and (iii) 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 refrigerators of each model produced in the reporting month and showing Viking's progress in achieving compliance.

III. Conclusion

As the foregoing indicates, we have concluded that the appeals of our November 3 decision should be granted in part and that the exception relief should be limited as specified above.

It Is Therefore Ordered That:

(1) The Appeals filed by Sub-Zero Freezer Co., GE Appliances, and Whirlpool Corporation be and hereby are granted in part as

set forth in Paragraphs 2, 3, and 4 below.

(2) The six months of exception relief - from July 1, 2001 to December 31, 2001- approved in Viking Range Corp., 28 DOE ¶ 81,002 (2000), be and hereby is limited as set forth in Paragraphs 3 and 4 below.

(3) The relief is limited to model numbers SB482, SB485, and BB362, and the relief for each month for all three models combined is limited to a maximum production of 475 refrigerators.

(4) For each month of the exception relief, Viking shall file a report showing (i) the number of non-compliant refrigerators produced that month, broken down by model number, and (ii) Viking's progress in achieving compliance with the new standards. The report shall be due by the 15th of the month immediately following the reporting month.

(5) This is a final order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 2, 2001

(1)Sub-Zero comments dated August 7, 2000; Whirlpool comments dated August 10, 2000; GE comments dated August 10, 2000.

(2)We use the term "non-compliant refrigerators" to refer to those that comply with existing standards but will not comply with the new standards.

(3)Sub-Zero and Whirlpool have not stated why they will not supply Viking; DRI is limited by an exclusive agreement to manufacture for GE.

(4)This argument appeared primarily in Sub-Zero's final brief which was accompanied by an affidavit of a former Viking employee and a Viking memorandum to distributors. Because we reject this argument as unpersuasive, we need not address Viking's objection at oral argument to the inclusion of the material in the record. See Transcript of February 27, 2001 Hearing (hereinafter "Tr.") at 13.

(5)No one disputes that the impact of the requested exception on energy conservation goals is de minimis. Over 9 million refrigerators are sold each year; as explained below, we are granting a six-month exception for a maximum of 2850 refrigerators.

(6)Scholars have recognized the importance of the "safety valve" function that the exceptions process provides. See, e.g., Alfred C. Aman, Jr., "An Analysis of Exceptions to Administrative Rules," 1982 Duke L.J. 277.