

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of:)		
)		
Ascent Battery Supply, L.L.C.)	Case No.:	EXC-12-0012
)		
Filing Date: September 11, 2012)		
_____)		

Issued: November 16, 2012

Decision and Order

This Decision and Order considers an Application for Exception filed by Ascent Battery Supply, L.L.C. (Ascent or the Applicant), seeking exception relief from the applicable provisions of 10 C.F.R. Part 430, 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, the Applicant asserts that it will face a serious hardship, gross inequity, and an unfair distribution of burdens if required to comply with the Lighting Efficiency Standards, set forth at 10 C.F.R. § 430.32(n)(3), pertaining to its 700 series T8 General Service Fluorescent Lamps (GSFLs). If its Application is granted, Ascent would receive exception relief from the energy conservation standards applicable to its 700 series T8 GSFLs for a period of two years from the applicable date of the Lighting Efficiency Standards, from July 14, 2012, to July 14, 2014. As set forth in this Decision and Order, we have concluded that Ascent’s Application for Exception should be granted.

I. Background

A. Lighting Efficiency Standards

Title III of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6291 *et seq.*) (EPCA or the Act) established the Energy Conservation Program for Consumer Products Other Than Automobiles, designed to improve energy efficiency of covered major household appliances. GSFLs were among the consumer and commercial products subject to the program. Amendments to Title III of the EPCA in the Energy Policy Act of 1992, P.L. 102-486, established energy conservation standards for certain types of GSFLs. 42 U.S.C. § 6295(i)(1); 10 C.F.R. § 430.32(n)(1); *see* 74 Fed. Reg. 34080, 34082-83 (July 14, 2009).

The amendments to Title III of the EPCA also direct the U.S. Department of Energy (DOE or the Agency) to conduct two cycles of rulemakings to determine whether to amend these standards.¹ 42 U.S.C. §6295(i)(3)-(4). Following the first review cycle, DOE concluded that the standards should be updated, and the Agency ultimately issued the Lighting Efficiency Standards, published in the *Federal Register* as a final rule by DOE on July 14, 2009. 74 Fed. Reg. 34080, 34082; 10 C.F.R. § 430.32(n)(3).

During the rulemaking process leading to the adoption of the Lighting Efficiency Standards, the GSFL industry raised a concern that the higher GSFL efficiency standards proposed by DOE would necessitate substantially increased quantities of “rare earth” oxides used to produce phosphor coating for GSFLs, and that the industry potentially faced significant supply constraints imposed by China, the primary source of rare earth. *See* Notice of Proposed Rulemaking (NOPR), 74 Fed. Reg. 16920, 16973-74 (April 13, 2009). In a Technical Support Document (TSD) that the Agency issued in support of the NOPR, the DOE acknowledged that the proposed Lighting Efficiency Standards would result in increased demand for rare earth, but determined that there would be sufficient supply to meet the increased demand. *See* TSD, Appendix 3C (Rare Earth Phosphor Availability and Pricing), January 2009.²

The National Electrical Manufacturers Association (NEMA), an industry trade association, then expressed concerns that DOE had underestimated the increase in demand for rare earth oxides as well as the supply problems that the industry was likely to face. *See* 74 Fed. Reg. 34080, 34139 (July 14, 2009). In the 2009 Final Rule, DOE acknowledged the concerns regarding potential shortages of rare earths as a result of Chinese policy, noting that China currently supplies some 95 percent of the rare earth market and had taken steps to restrict the exportation of rare earth resources. *Id.* at 34140. Nonetheless, the Agency concluded at that time that the higher GSFL efficiency standards adopted by the 2009 Final Rule were technologically feasible and economically justified. *See id.* at 34141-42.

B. Application for Exception

Ascent, headquartered in Hartland, Wisconsin, is a wholly-owned domestic subsidiary of Batteries Plus, L.L.C. (Batteries Plus). Since May 2009, Ascent has sold a variety of lighting products exclusively to Batteries Plus, including 700 series and 800 series T8 GSFLs.³ *See* Ascent Supplemental Submission, October 19, 2002, at 4. Ascent is considered a

¹ The EPCA provides that any new or amended energy conservation standard that DOE prescribes must 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).

² Available at:
http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/app_3c_lamps_standards_nopr_tsd.pdf

³ Ascent’s Application mistakenly indicates that the firm entered the lighting industry in 2010. *See* Application at 2. However, in a supplemental submission, the firm notes that “further investigation has shown that Ascent was selling the 700 series T8 GSFL in the domestic market as early as May 2009, with significant preparations, including financial investments in place by the third quarter of 2008.” *See* Ascent Supplemental Submission, at 4; *see also Id.*, Appendices A-I.

“manufacturer” for purposes of this Application for Exception Relief.⁴ In its Application for Exception, Ascent cites one of our prior decisions granting exception relief to Philips Lighting Company (Philips), GE Lighting (GE), and Osram Sylvania, Inc. (OSI), as well as several subsequent decisions in which we granted similar relief to other manufacturers. Ascent Application at 1; *see also Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003.⁵ Ascent maintains that if OHA denies its Application for Exception, while having previously granted exception relief to its competitors, the firm will suffer gross hardship and an unfair distribution of burdens because it will be relegated to selling only 800 series T8 GSFLs while the other manufacturers may continue marketing the less expensive 700 series T8 lamps. Ascent Application at 2. In addition to the loss of revenue from the 700 series T8 lamps, Ascent projects that it will lose sales of other products across its product line. *Id.* at 9-10. According to Ascent, if the company is unable to offer its customers the 700 series T8 GSFLs while other manufacturers are able to do so, its customers are likely to turn to those other manufacturers for their entire order, resulting in Ascent’s loss of revenue not only from the 700 series T8 GSFLs, but also from any number of its other products. *Id.* at 10. In supplemental documents submitted in connection with its Application, Ascent provided specific information regarding its current sales and projected losses in revenue if its major competitors received exception relief and Ascent did not. Ascent Supplemental Submission, Appendix A at 2.

C. Comments

We received one interested party comment regarding Ascent’s Application, submitted jointly by Earthjustice, the Appliance Standards Awareness Project, the Northwest Energy Efficiency Alliance, and the Northwest Power and Conservation Council (hereinafter collectively referred to as “the Advocates”). Comments, filed September 21, 2012. In the comment, relying on a prior decision of this office, *DLU Lighting USA*, the Advocates oppose our approval of the requested exception relief. *See DLU Lighting USA*, OHA Case No. EXC-12-0010 (2012). In *DLU Lighting USA*, DLU, the applicant-manufacturer, entered the domestic lighting market with its 700 series T8 GSFLs in February 2012, nearly three years after the DOE promulgated the 2009 Final Rule and well after the volatility and shortages in the rare earth market became common knowledge in the lighting industry. Consistent with our previous cases, we concluded that DLU’s decision to bring its 700 series T8 GSFLs to market, knowing that they did not comply with the impending Lighting Efficiency Standards, constituted discretionary business decision not warranting relief. In their comment in this case, the Advocates maintain that Ascent should not be granted exception relief because any hardship the company may suffer is the result of its own discretionary business decision to enter the market with its 700 series T8 GSFLs in 2010,

⁴ Ascent imports T8 lamps from a third-party foreign manufacturer and sells the lamps domestically under the company’s private label. The company has claimed confidentiality with regard to the location of its foreign manufacturing operations. *See* Ascent Application at 2. The EPCA defines “manufacturer” as “any person who manufactures a consumer product.” 42 U.S.C. § 6291(12). Under the Act, the term “manufacture” means to “manufacture, produce, assemble, or import.” *Id.* at 6291(10).

⁵ Decisions issued by the DOE Office of Hearings and Appeals (OHA) are available on the OHA website at: <http://www.oha.doe.gov/eecases.asp>.

after the DOE promulgated the 2009 Final Rule setting forth the new Lighting Efficiency Standards. Comments at 1.

In response to the Advocates' comments, Ascent filed a supplemental submission, which demonstrates that it entered the market in May 2009, rather than in 2010 as it erroneously stated in its Application. Ascent further notes in its supplemental submission that lighting manufacturers were not made aware of the impracticability of complying with the new Lighting Efficiency Standards until December 2011, when the DOE issued the December 2011 *Critical Materials Strategy* report in which it confirmed that there were critical shortages of rare earth materials. See Ascent Supplemental Submission at 5-6; see also U.S. Department of Energy, *Critical Materials Strategy*, December 2011 (2011 DOE Strategy Report).⁶ Thereafter, the Advocates filed supplemental comments in which the groups took issue with Ascent's position, characterizing the company's statement as a "suggestion that only DOE's public acknowledgement of the rare earth supply problem could adequately inform regulated parties" Supplemental Comments, filed October 29, 2012, at 1. The Advocates disagree, and maintain that "when the market conditions that render a standard impracticable to meet were existent or reasonably foreseeable at the time of that manufacturer's business decision [to enter the market], that manufacturer's obligation to meet the impracticable standard is correctly labeled 'a burden attributable to [that] discretionary business decision, rather than the impact of DOE regulations.'" *Id.* at 1-2 (citing *DLU Lighting USA*, OHA Case No. EXC-12-0010 at 4).

II. Analysis

Section 504 of the Department of Energy Organization Act, 42 U.S.C. § 7194(a), authorizes the Secretary of Energy to make "such adjustments to any rule, regulation, or order" issued under the EPCA, consistent with the other purposes of the Act, as "may be necessary to prevent special hardship, inequity, or unfair distribution of burdens." The Secretary has delegated this authority to the DOE Office of Hearings and Appeals (OHA), which administers exception relief pursuant to procedural regulations codified at 10 C.F.R. Part 1003, Subpart B. Under these provisions, persons subject to the various product efficiency standards of Part 430 promulgated under DOE's rulemaking authority may apply to OHA for exception relief. See, e.g., *Amana Appliances*, OHA Case No. VEE-0054 (1999); *Midtown Development, L.L.C.*, OHA Case No. VEE-0073 (2000); *Diversified Refrigeration, Inc.*, OHA Case No. VEE-0073 (2001).

We have carefully reviewed Ascent's Application for Exception and have determined that the firm's request for exception should be granted. In *Philips Lighting Company, et al.*, we determined that temporary exception relief for a period of two years was warranted due to a number of factors, namely the volatility of the rare earth market and uncertainty regarding future rare earth supply and prices stemming primarily from production and export limitations imposed by China, as well as the ensuing inability of the applicants to consistently obtain sufficient quantities of rare earth triphosphors necessary to meet the new GSFL standards. See *Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003. In subsequent decisions, we granted equivalent exception relief to other domestic manufacturers who market 700 series T8 GSFLs, finding that the circumstances which compelled our approval

⁶ Available at: http://energy.gov/sites/prod/files/DOE_CMS2011_FINAL_Full.pdf.

of exception relief in *Philips Lighting Company, et al.*, had by consequence created a gross inequity. See *Ushio America, Inc.*, OHA Case No. EXC-12-0004 (2012); see also *Halco Lighting Technologies*, OHA Case No. EXC-12-0005 (2012); *Premium Quality Lighting, Inc.*, OHA Case No. EXC-12-0006 (2012); *Litetronics International, Inc.*, OHA Case No. EXC-12-0008 (2012); *Satco Products, Inc.*, OHA Case No. EXC-12-0009 (2012); *Westinghouse Lighting Corporation*, OHA Case No. EXC-12-0011 (2012). Specifically, we concluded that Philips, GE and OSI would have an unfair competitive advantage over other firms like Ushio, Halco, Premium Quality Lighting Products, Inc. (PQL), Litetronics International, Inc. (Litetronics), Satco Products, Inc. (Satco), and Westinghouse Lighting Corporation (Westinghouse) by continuing to market lower-cost 700 series GSFLs for a period of two years while other domestic manufacturers were precluded from doing so. In approving exception relief in *Ushio America, Inc.*, and again in *Halco Lighting Technologies* and the subsequent cases in which we have granted exception relief to GSFL manufacturers, we found that this competitive advantage was an unintended consequence of both the 2009 Final Rule and the exception relief we determined to be necessary in *Philips Lighting Company, et al.* We noted further that if customers were unable to purchase 700 series GSFLs from Ushio, Halco, PQL, Litetronics, Satco, and Westinghouse, those firms would suffer not only the losses of these sales revenues but also residual losses across their product lines as a result of being unable to offer a full slate of lighting products. See *Ushio America, Inc.*, at 5; *Halco Lighting Technologies* at 5; *Premium Quality Lighting, Inc.*, at 5; *Litetronics International, Inc.*, at 5; *Satco Products, Inc.*, at 5; *Westinghouse Lighting Corporation* at 4-5.

In the present case, we find that Ascent faces the same challenges and constraints that impacted Ushio, Halco, and the other manufacturers in the related cases cited above. If Ascent is denied exception relief, the firm will be precluded from continuing to market 700 series T8 GSFLs, while its main competitors may continue to do so for a period of two years. Therefore, as in our prior decisions, we find in this case that granting Ascent exception relief is warranted in order to prevent this inequity.

Moreover, as in *Ushio America, Inc.*, and the subsequent cases in which we granted exception relief to GSFL manufacturers, we believe that other factors favor the granting of exception relief in this case. In prior decisions, we determined that the same factors considered by the agency in promulgating energy conservation standards are useful in evaluating claims for exception relief. See, e.g., *Ushio America, Inc.*, at 5 (citing *Viking Range Corp.*, OHA Case No. VEE-0075 (2000); *SpacePak/Unico Inc.*, OHA Case Nos. TEE-0010, TEE-0011 (2004)). These factors, set forth in section 325 of the EPCA, include the economic impact on the manufacturers and consumers, net consumer savings, energy savings, impact 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). As noted above, given the current state of the rare earth market, we have concluded that failure to provide exception relief in this case is likely to have a significant adverse economic impact upon Ascent. The Applicant has persuasively demonstrated in its Application and supplemental materials that denial of relief will result in not only the significant losses of revenues of the 700 series T8 GSFLs, but also residual losses across its product line. Ascent Application at 9-10; see also Ascent Supplemental Submission, Appendix A at 2. Moreover, we have previously concluded that allowing certain companies to market 700 series T8 GSFLs but not others is likely to adversely impact consumers by disrupting current

market supply and distribution chains, potentially resulting in increased costs and fewer options for consumers. *See, e.g., Ushio America, Inc.*, at 5; *Halco Lighting Technologies* at 5.

In addition, Ascent maintains in its Application that granting exception relief in this case would not result in an increase in energy consumption and does not contravene the EPCA's goal of energy conservation. Ascent Application at 11-12. We agree. As we noted in *Philips Lighting Company, et al.*, the new Lighting Efficiency Standards effectively preclude the manufacturing of certain types of GSFLs, namely T12 GSFLs (lamps with a 1.5 inch diameter), and the majority of the rule's projected energy savings will be attained through the elimination of those lamps from the market. *See Philips Lighting Company, et al.*, OHA Case No. EXC-12-0001 at 13. Moreover, the difference between the 700 series and 800 series T8 GSFLs is the amount of light produced (lumens per watt), not the amount of energy consumed. Thus, while the 800 series T8 GSFLs are brighter, the lamps operate at the same wattage, consuming the same amount of energy. *Id.* at 8.

In determining whether to grant exception relief in this case, we have also considered the concern expressed by Earthjustice, the Appliance Standards Awareness Project, the Northwest Energy Efficiency Alliance, and the Northwest Power and Conservation Council in their joint comments regarding whether the serious hardship, gross inequity, and unfair distribution of burdens that Ascent experiences is the result of its own discretionary business decision to enter the market after the company knew or should have known of the volatility in the rare earth market. As noted above, Ascent initially indicated in its Application that it entered the lighting market in 2010. However, Ascent has since convincingly established that it, in fact, entered the market in May 2009, and began its preparations to do so in 2008, well before the DOE promulgated the 2009 Final Rule. The company has also established that it was unaware of the extent of the volatility of the rare earth market when it decided in 2008 to add GSFL lamps to its business model and, in fact, did not become aware of the extent of the critical shortages and price spikes in rare earth materials until well after the DOE issued the 2009 Final Rule. Based on the information the company had at the time, Ascent believed that moving forward with its entry into the domestic lighting market was a sound business decision. Consequently, Ascent, like the other domestic manufacturers to whom we have previously granted relief, was "the victim of a shifting rare earth market," rather than a company that knowingly chose to enter the market well after the critical shortages and pricing shifts in the rare earth market became known in the lighting industry. *Compare DLU Lighting USA*, OHA Case No. EXC-12-0010 at 5 (manufacturer entered market in February 2012, three years after DOE promulgated 2009 Final Rule) *with, e.g., Westinghouse Lighting Corporation*, OHA Case No. EXC-12-0011 (2012) (manufacturer established in the market prior to publication of 2009 Final Rule).

Moreover, as discussed in section I., A., *supra*, while concerns existed prior to the DOE's promulgation of the 2009 Final Rule regarding the potential for rare earth shortages due to Chinese production and export policies, the agency believed at that time that the enhanced Lighting Efficiency Standards for GSFLs were "technologically feasible and economically justified." *See* 74 Fed. Reg. 34080 at 34141-34142. It was not until 2011 that the DOE altered its analysis concerning the availability of rare earth materials. *See* 2011 DOE Strategy Report at 3; *see also Philips Lighting Company, et al.*, OHA Case No. EXC-12-0001 at 11 ("We find that the agency's assumptions and projections in the 2009 Final Rule, regarding the availability of

sufficient rare earth elements to meet the revised GSFL standards, have been overtaken by unforeseen circumstances and are no longer valid.”). Ascent should not be faulted for choosing to enter the market in May 2009, when the DOE itself was unaware at that time of the scope of the volatility of the rare earth market.

Finally, although Ascent has claimed confidentiality with regard to the location of its foreign manufacturing facilities, the information and supporting materials provided by the company persuasively demonstrate significant disruptions and uncertainties experienced by those manufacturing facilities in their supply of rare earth phosphors required to produce GSFLs. Moreover, while the volatility of the rare earth market remains an important factor, it is not the critical basis of our finding that exception relief is warranted in this case. As noted above, even if Ascent’s manufacturing facilities are able to secure sufficient quantities of rare earth triphosphors to meet the firm’s supply orders for 800 series T8 GSFLs, Ascent would remain at an unfair competitive disadvantage by being unable to manufacture and market 700 series T8 GSFLs while its competitors are allowed to do so. Consistent with our prior decisions, granting exception relief is appropriate to preclude any unintended competitive disadvantages among domestic manufacturers resulting from the regulations and our previous exception relief.

Based on the foregoing, we conclude that Ascent has met its burden of establishing that it will face a gross inequity and an unfair distribution of burdens in the absence of exception relief.

It Is Therefore Ordered That:

(1) The Application for Exception filed by Ascent Battery Supply, L.L.C., on September 11, 2012, is hereby granted as set forth in paragraph (2) below.

(2) Notwithstanding the requirements of 10 C.F.R. §430.32(n)(3), which sets a compliance date of July 14, 2012, applicable to T8 general service fluorescent lamps (GSFLs), Ascent Battery Supply, L.L.C., is hereby authorized to continue to manufacture 700 series T8 GSFLs (4-foot medium bipin, 2-foot U-shaped, and 8-foot slimline and high output) subject to the currently applicable efficiency standards, contained in 10 C.F.R. § 430.32(n)(1), for a period of two years from the compliance date of the new Lighting Efficiency Standards, until July 14, 2014. The present exception relief is limited to T8 GSFLs produced at manufacturing facilities facing critical shortages of rare earth elements required in the manufacture of higher efficiency T8 GSFLs, as described in the foregoing decision.

(3) Any person aggrieved by this grant of exception relief may file an appeal with the Office of Hearings and Appeals in accordance with 10 C.F.R. Part 1003, Subpart C.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 16, 2012