

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

In the Matter of:)
)
W.W. Grainger, Inc.) Case No.: EXC-13-0003
)
Filing Date: February 19, 2013)
_____)

Issued: March 19, 2013

Decision and Order

This Decision and Order considers an Application for Exception filed by W.W. Grainger, Inc. (Grainger 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 request, the Applicant asserts that it will suffer serious hardship, gross inequity, and an unfair distribution of burdens if it is 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, Grainger would receive exception relief from the energy conservation standards applicable to its LumaPro private label 700 series T8 GSFLs until July 14, 2014. As set forth in this Decision and Order, we have concluded that Grainger’s Application for Exception should be denied.

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 (Jul. 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

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).

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 (Apr. 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) (Jan. 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 (Jul. 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, 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

Grainger, headquartered in Lake Forest, Illinois, is a distributor of various products, including 700 series and 800 series T8 GSFLs. Grainger Application at 2. Grainger serves approximately two million customers worldwide and its sales products include “lighting and electrical products, power and hand tools, material handling equipment safety and security supplies, pumps and plumbing supplies, cleaning and maintenance supplies, building home inspection supplies, vehicle and fleet components and many other items primarily focused on the facilities maintenance market.” *Id.* Through its wholly-owned subsidiary, Granger International, Inc., Grainger imports its LumaPro private label 700 series T8 GSFLs from XXX.³ *Id.* at 5. Thus, as an importer of fluorescent lamps, Grainger is considered a “manufacturer” for purposes of this Application for Exception Relief with respect to its LumaPro private label.⁴ XXX. *Id.*

²Available at:

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

³ Grainger has claimed confidentiality as to the location of its manufacturers.

⁴ 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) (emphasis added). In its Application, Grainger also requests exception relief for its “subsidiaries and affiliates.” Grainger Application at 1. However, it is unclear whether Grainger’s subsidiaries and affiliates are covered

Grainger seeks exception relief because it asserts that volatility in the rare earth market, driven largely by Chinese production and export policies, has led to significant price increases and shortages of the rare earth oxides necessary to produce compliant GSFLs, which causes it serious hardship and burdens with regard to its LumaPro private label 700 series T8 GSFLs. *Id.* at 8-9. In support of its Application, Grainger cites to prior cases in which we granted exception relief to Philips Lighting Company (Philips), GE Lighting (GE), Osram Sylvania, Inc. (OSI), Ushio America, Inc. (Ushio), and Satco Products, Inc. (Satco), among others. *Id.* at 1-2; *see also Philips Lighting Co., et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003 (2012); *Ushio America, Inc.*, OHA Case No. EXC-12-0004 (2012); *Satco Products, Inc.*, OHA Case No. EXC-12-0009 (2012).⁵ Grainger maintains that if OHA denies its application after having granted exception relief to its competitors, its competitors would have an unfair competitive advantage by continuing to market lower cost 700 series T8 GSFLs for a period of two years while Grainger is precluded from doing the same. Grainger Application at 13-14. Grainger also provided information regarding its current sales of the various 700 series T8 GSFLs that it sells and markets. *Id.* at 3-4.⁶ Finally, Grainger stated that it entered the GSFL market with its 700 series T8 GSFL products prior to the publication of the 2009 Final Rule on July 14, 2009, which was in 1995.⁷ *Id.*

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 Dev., L.L.C.*, OHA Case No. VEE-0073 (2000); *Diversified Refrigeration, Inc.*, OHA Case No. VEE-0073 (2001).

We have carefully reviewed Grainger’s Application for Exception and have determined that the firm’s request for exception should be denied as it has not sufficiently demonstrated that it would suffer “special hardship, inequity, or unfair distribution of burdens” if we denied its Application. *See* 42 U.S.C. § 7194(a). In previous decisions, where we granted exception relief, we determined that temporary exception relief for a period of two years was warranted due

“manufacturers” under the EPCA. Consequently, our consideration of the present Application will be limited to Grainger.

⁵ Decisions issued by the DOE Office of Hearings and Appeals (OHA) are available on the OHA website at: <http://energy.gov/oha/product-efficiency-cases>.

⁶ As required by OHA Regulations, 10 C.F.R. §1003.23, interested parties were duly served by Grainger and provided the opportunity to comment on the Application for Exception. We received no comments on Graingers’s Application.

⁷ Grainger states that it started selling 700 series GSFLs in 1995 and began selling 700 series GSFLs under its private label, LumaPro, in January 2010.

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 Co., et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003. In addition, in subsequent decisions, we granted equivalent exception relief to domestic manufacturers who market 700 series T8 GSFLs, finding that the circumstances which compelled our approval 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 Int'l, Inc.*, OHA Case No. EXC-12-0008 (2012); *Satco Products, Inc.*, OHA Case No. EXC-12-0009 (2012); *Westinghouse Lighting Corp.*, 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), and Satco, by continuing to market lower-cost 700 series GSFLs for a period of two years while other domestic manufacturers were precluded from doing so. Also, critical to our analysis was that if customers were unable to purchase 700 series GSFLs from Ushio, Halco, PQL, Litetronics, and Satco, 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 Int'l, Inc.*, at 5; *Satco Products, Inc.*, at 5.

However, in the instant case, we find that Grainger does not face the same challenges and constraints that impacted Ushio, Halco, PQL, Litetronics, Satco, and Westinghouse in our prior cases. As stated in our prior decisions, 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)). Thus, these factors 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).

Here, if Grainger is denied exception relief, the firm will not be precluded from continuing to market XXX the 700 series T8 GSFLs that it sells, and therefore, will not suffer a significant economic impact. In its Application, Grainger states that in 2011, lighting products comprised approximately 6% of its total sales. Grainger Application at 3. The 700 series T8 GSFLs constituted XXX of its total lamps sales, and of the 700 series T8 GSFLs that Grainger sold, the LumaPro brand constituted XXX. *Id.* at 3-4. XXX.

Therefore, we conclude that denying Grainger exception relief is warranted as Grainger will not suffer an unfair economic burden or significant loss of revenue from a denial of this Application. As explained above, the LumaPro brand 700 series T8 GSFLs constitutes XXX percentage of Grainger's total sales of the 700 series T8 GSFLs. Moreover, while Grainger asserts that a denial of its Application will damage relationships with customers who will rely on other manufacturers for their entire purchase orders, customers will still be able to purchase the 700 series T8 GSFLs from Grainger through XXX brands. Indeed, Grainger's Application demonstrates that XXX constitutes XXX of its 700 series T8 GSFLs sales, XXX. Thus, we are

not convinced that its customers have a stronger preference for the LumaPro brand, such that they would stop purchasing Grainger's products altogether if this Application is denied. Based on the foregoing, Grainger has not demonstrated that denial of relief will result in the significant losses of revenues of the 700 series T8 GSFLs.

Finally, we also deny Grainger exception relief due to its late decision to begin selling the LumaPro brand 700 series T8 GSFLs, which was in January 2010. XXX. Thus, the instant case is also distinguishable from the facts which compelled our approval of exception relief in prior decisions, which involved companies whose products were already in the stream of commerce well before the DOE promulgated the 2009 Final Rule. Here, Grainger began selling the LumaPro brand 700 series T8 GSFLs after DOE promulgated the 2009 Rule. XXX. Thus, Grainger had a few months to avert the business decision to import and sell the LumaPro brand 700 series T8 GSFLs. As it is well-settled that a firm may not receive exception relief to alleviate burdens attributable to discretionary business decisions, rather than the impact of DOE regulations, we cannot grant Grainger exception relief to sell the LumaPro brand 700 series GSFLs on this basis as well. *See DLU Lighting USA*, OHA Case No. EXC-12-0010 (2012).

Accordingly, we conclude that Grainger has not met its burden of establishing that it is entitled to exception relief.

It Is Therefore Ordered That:

- (1) The Application for Exception filed by W.W. Grainger, Inc., on February 19, 2013, 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: March 19, 2013