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

In the Matter of:)
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Ushio America, Inc.) Case No.: EXC-12-0004
)
Filing Date: April 2, 2012)
)
_____)

Issued: June 21, 2012

Decision and Order

This Decision and Order considers an Application for Exception filed by Ushio America, Inc. (Ushio 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, Ushio would receive exception relief from the energy conservation standards applicable to its 700 series T8 GSFLs for a period of two years, from July 14, 2012, to July 14, 2014. As set forth in this Decision and Order, we have concluded that Ushio'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

Ushio is a manufacturer of specialty and general illumination lighting products, including 700 series and 800 series T8 GSFLs.³ In its Application for Exception, Ushio 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. GSFLs are available in a number of different configurations and lengths. The lamps also vary in diameter: T12 (1.5 inch diameter), T8 (1 inch diameter), T5 (5/8 inch diameter).

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

³XX. 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).

Ushio Application at 4, *citing* U.S. Department of Energy, Critical Materials Strategy, December 2011, at 25. Ushio states that only lamps using predominantly triphosphor coatings found in rare earth will be able to meet the new GSFL standards. *Id.* at 5. As a result, the T5 GSFLs and 800 series T8 GSFLs, which use triphosphor coatings, comply with the new Lighting Efficiency Standards. However, the 2009 Final Rule effectively precluded the manufacture of T12 GSFLs, which generally use only less expensive, more abundant halophosphor coatings, and 700 series T8 lamps, whose coatings are comprised of a mixture of halophosphors and triphosphors. *Id.* at 4-5. Relying heavily on a report that NEMA submitted to the DOE in December 2011, Ushio argues that implementation of the Lighting Efficiency Standards, requiring manufacturers to use significantly greater amounts of triphosphor-producing rare earth to produce compliant lamps, will likely lead to additional price increases and shortages that will create “special hardship, inequity, and unfair distribution of burdens for U.S. manufacturers and consumers.” Ushio Application at 10; *see also* Ushio Application, Appendix B (Report of the National Electrical Manufacturers Association to the U.S. Department of Energy: Recent Developments Affecting United States Manufacturers of General Service Fluorescent Lamps and the Impact of Energy Conservation Standards Effective July 19, 2012 (Dec. 5, 2011) (“NEMA Report”)).

In support of its Application, Ushio also expresses its support for identical requests for exception relief filed by Philips Lighting Company (Philips), GE Lighting (GE), and Osram Sylvania, Inc. (OSI), pending before OHA at the time Ushio submitted its Application, and states that it is entitled to the same relief, if any, granted to those firms.⁴ Ushio maintains that if OHA granted exception relief to the other manufacturers, but denied Ushio’s Application, Ushio would be relegated to selling 800 series T8 GSFLs, and not 700 series T8 GSFLs, and thus would be left at a serious competitive disadvantage. Ushio Application at 15. Not only would Ushio face the loss of revenue from the 700 series T8 lamps, but the company would also likely face the corresponding losses of sales of other products. *Id.* According to Ushio, while the company is known for its specialty lighting products, much of its general lighting business arises from its ability to offer a diversified product line. For example, many of Ushio’s customers routinely place orders for multiple products because doing so is more cost-effective and efficient. Ushio maintains that, if the company is unable to offer its customers the 700 series 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 Ushio’s loss of revenue not only from the 700 series GSFLs, but also from any number of its other products. Ushio Application at 15. In supplemental documents submitted in connection with its Application, Ushio provided information regarding its sales and projected losses in revenue if its major competitors received exception relief and Ushio did not. Ushio Application, Appendix A; *see also* Letter from Ushio to OHA, May 9, 2012.

⁴ Given the similarities in the Applications and arguments in the exception requests filed by Philips, GE, and OSI, we consolidated the three cases and, in an April 16, 2012, Decision and Order, granted exception relief. *See Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003. 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>.

C. Comments

We received one interested party comment regarding Ushio's Application, submitted jointly by Earthjustice and the Appliance Standards Awareness Project (ASAP). The groups noted in their comment that it was unclear from Ushio's Application whether the firm's T8 GSFL manufacturing facilities were located outside China. They indicated their support for Ushio's request for exception relief only if Ushio demonstrates that its 700 series T8 GSFLs are produced in factories experiencing the rare earth supply problems currently faced by GSFL production facilities outside of China because, "based on information submitted to OHA to date, only those production facilities currently experience 'special hardship, inequity, or unfair distribution of burdens' within the meaning of 42 U.S.C. § 7194." Earthjustice and ASAP Comments, filed April 9, 2012, at 3-4.

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 Ushio's Application for Exception and have determined that the firm's request for exception should be granted. In *Philips Lighting Company, et al.*, we acknowledged that the Agency's assumptions and projections in the 2009 Final Rule regarding the availability of sufficient quantities of rare earth elements to replace 700 series T8 GSFLs with 800 series T8 GSFLs had been rendered inaccurate by unforeseen circumstances outside the control of the manufacturers, namely the production and export limitations imposed by China. *Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003 at 11. We also noted the volatility of the rare earth market and found that projections for future rare earth supply and prices remained uncertain. *Id.* at 11-12. Finally, we concluded that domestic manufacturers were precluded from competing "on a level playing field in relation to their Chinese counterparts" due to China's rare earth pricing policies. *Id.* at 12. Given these facts, we concluded that insufficient quantities of the rare earth triphosphors necessary to meet the new GSFL standards were reliably available and, therefore, exception relief was warranted. Consequently, finding that exception relief was consistent with the energy conservation goals of the EPCA, we granted the applicants exception relief for a period of two years. *Id.* at 12-14.

In the present case, we find that the volatility in the rare earth market continues, and, as a result, domestic manufacturers remain subject to fluctuations in rare earth supply and prices for the foreseeable future. We further find that these circumstances, which compelled our approval of exception relief for three major domestic manufacturers in *Philips Lighting Company, et al.*, with

respect to their 700 series T8 GSFLs, have by consequence created a gross inequity for domestic manufacturers like Ushio. If Ushio is denied exception relief, the firm will be precluded from continuing to market 700 series T8 GSFLs, while Philips, GE, and OSI may continue to do so for a period of two years. As a result, Philips, GE, and OSI would have an additional competitive advantage over smaller domestic manufacturers, an unintended consequence both of the existing regulations and of our subsequent exception relief to the three companies, which we determined to be warranted. Therefore, in this case, we find that granting Ushio exception relief is also warranted in order to prevent inequities among the domestic lighting manufacturers.

Moreover, 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., 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 result in a significant adverse economic impact upon Ushio. The company has demonstrated in its Application and supplemental materials that denial of relief will result in losses in revenues of not only the 700 series T8 GSFLs, but also residual losses across its product line. Moreover, it is also likely that allowing certain companies to market 700 series T8 GSFLs but not others will adversely impact consumers by disrupting current market supply and distribution chains. The three companies previously granted an exception to continue marketing 700 series T8 lamps do not supply every domestic lighting wholesaler and retailer. Therefore, by allowing certain companies to continue manufacturing and marketing the 700 series T8 lamps but not others, domestic consumers would not only be deprived of the opportunity to choose among different brands for the lamps, potentially increasing their costs as well, but also, in some instances, may be unable to obtain these lamps from their traditional and most convenient sources.

In addition, Ushio 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. 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; Ushio Application at 12.

In determining whether to grant exception relief in this case, we have given due consideration to the concern expressed by Earthjustice and ASAP in their joint comments regarding whether Ushio's manufacturing operations face the difficulties regarding rare earth supply and pricing as

common to T8 production facilities outside of China. In its Application and supplemental materials, Ushio has documented that its T8 lamps are produced xxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx and has persuasively demonstrated that these manufacturing operations are subject to the same volatility and uncertainty caused by the Chinese production and export policies as those we described in *Philips Lighting Company, et al.* However, while the volatility of the rare earth market remains an important factor, it is not the linchpin of our finding that exception relief is warranted in this case. As noted above, even if Ushio xxxxxx xxxxxxxxxxxxxxxx is able to secure sufficient quantities of rare earth triphosphors xxxxxx xxxxxxxxxxxxxxxx for 800 series T8 GSFLs, Ushio 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. 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 Ushio 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 Ushio America, Inc., on April 2, 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), Ushio America, Inc., 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, 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: June 21, 2012