June 30, 2006

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Unico, Inc.

Date of Filing: January 19, 2006

Case Number: TEA-0008

The present Appeal filed by Unico, Inc. (Unico), relates to a Decision and Order issued by the Office of Hearings and Appeals (OHA) on December 20, 2005, granting exception relief to Energy Savings Products, Ltd. (ESP) from the provisions of 10 C.F.R. Part 430, pertaining to energy conservation standards for central air conditioners and heat pumps (Air Conditioner Standards). *Energy Savings Products, Ltd.*, 29 DOE ¶ 81,015 (2005) (*ESP*). ESP sought and obtained exception relief on the basis that the firm is a manufacturer of small duct, high velocity (SDHV) air conditioning equipment, and would suffer a gross inequity, serious hardship and an unfair distribution of burdens if forced to comply with the 13 SEER energy efficiency standard effective January 2006, 10 C.F.R. § 430.32(c). Unico claims in its Appeal, however, that the air conditioning products manufactured by ESP do not meet the regulatory definition of "*Small duct, high velocity systems*," 10 C.F.R. § 430.2, and thus is not entitled to receive the exception relief granted.

I. Background

A. Air Conditioner Standards

The Air Conditioner Standards in 10 C.F.R. Part 430 were published as a final rule by the Department of Energy (DOE) on January 22, 2001, 66 Fed. Reg. 7170, 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, *inter alia*, that DOE administer an energy conservation program for specified consumer products, including central air conditioners and heat pumps. The program prescribed by the EPCA consists essentially of three parts: testing, labeling, and Federal energy conservation standards. The DOE measures the seasonal cooling performance of central air conditioners in terms of a Seasonal Energy Efficiency Ratio (SEER) while

the seasonal heating performance of heat pumps is measured in terms of Heating Seasonal Performance Factor (HSPF).

Since 1992, the Federal energy conservation standards for central air conditioners were set at a minimum of 10 SEER/6.8 HSPF for split system air conditioners and heat pumps, and 9.7 SEER/6.6 HSPF for single package air conditioners and heat pumps, pursuant to the National Appliance Energy Conservation Act of 1987, Pub. L. 100-12 (NAECA). However, the present Air Conditioner Standards increase that level to 13 SEER as the mandatory efficiency standard for most central air conditioners and central air conditioning heat pumps manufactured for sale in the United States as of January 23, 2006. For split-system air conditioners, the most common type of residential air conditioning equipment, the 13 SEER revised standard represents a 30 percent improvement in energy efficiency. As noted above, the Air Conditioner Standards were issued in final form on January 22, 2001.

However, on May 23, 2002, the DOE published another rulemaking in which it sought to withdraw and amend the 13 SEER established for air conditioners under the Air Conditioner Standards. Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards, 67 Fed. Reg. 36368 (2002) (Amended Rule). The Amended Rule proposed to increase the 1992 minimum energy efficiency levels by 20 percent and establish 12 SEER and 7.4 HSPF for most central air conditioners and central air conditioning heat pumps.1/ In addition, the Amended Rule gave special recognition to small duct, high velocity (SDHV) systems, which the rule defined as follows:

> *Small duct, high velocity system* means a heating and cooling product that contains a blower and indoor coil combination that:
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> (1) Is designed for, and produces, at least 1.2 inches of external static pressure when operated at the certified air volume rate of 220-350 CFM per rated ton of cooling; and
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> (2) When applied in the field, uses high velocity room outlets generally greater than 1000 fpm which have less than 6.0 square inches of free area.

Amended Rule, 10 C.F.R. § 430.2, 67 Fed. Reg. at 36406. In response to comments received from manufacturers and trade associations, the DOE agreed that it was

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1/ In the Amended Rule, the DOE stated its intention to withdraw the 13 SEER standard because it: (1) was promulgated without consulting with the Attorney General on potential anti-competitive effects, (2) contained a material defect in the statement of basis and purpose required by the Administrative Procedure Act, (3) contained an effective date in conflict with the Congressional Review Act, and (4) was based upon an erroneous conclusion that the 13 SEER standard was economically justified under the EPCA. 67 Fed. Reg. at 36368-69.

unlikely that SDHV systems would be able to meet the 12 SEER minimum requirement the agency proposed to establish for conventional air conditioners, and that SDHV systems would therefore require special consideration. The DOE concluded, in pertinent part:

> Although DOE has concluded that SDHV systems warrant their own product class, it has yet to determine an appropriate minimum efficiency standard for them. Therefore, this final rule provides that the NAECA-prescribed minimum standards covering all product types (e.g. 10 SEER/6.8 HSPF for split system air conditioners) will remain applicable to SDHV systems. DOE intends to conduct a separate rulemaking for SDHV systems to establish appropriate minimum efficiency standards for this class of product.

Amended Rule, 67 Fed. Reg. at 36398.

However, a separate rulemaking for SDHV systems was never completed. In late 2002, the Natural Resources Defense Council, consumer groups and attorneys general from 10 states brought suit in federal court challenging the DOE's attempt to substitute the 12 SEER standard under the Amended Rule for the 13 SEER standard the agency had previously adopted in the Air Conditioner Standards. On January 13, 2004, the U.S. Appeals Court for the Second Circuit in New York ruled in favor of the complainants, finding that the May 23, 2002, final rules promulgated by DOE withdrawing the standards it published as a final rule on January 22, 2001, and replacing them with less stringent standards, were not a valid exercise of DOE's authority under the EPCA. *National Resources Defense Council, et al. v. Abraham,* 355 F.3d 179 (2nd Cir. 2004). By invalidating the Amended Rule, the court's ruling effectively reinstated the Air Conditioner Standards and the 13 SEER rule, effective January 23, 2006, for most central air conditioners including SDHV systems.1/

B. Application for Exception

Persons subject to the various product efficiency standards of Part 430 may apply to the DOE Office of Hearings and Appeals (OHA) for exception relief. *See Amana Appliances,* 27 DOE ¶ 81,006 (1999); *Midtown Development, L.L.C.,* 27 DOE ¶ 81,013 (2000); *Diversified Refrigeration, Inc.*, 28 DOE ¶ 81,005 (2001). In this regard, section 504 of the Department of Energy Organization Act authorizes OHA to make adjustments of any rule or order issued under the EPCA, consistent with the other

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2/ On April 2, 2004, the DOE announced that it would not challenge the court's ruling but would enforce the 13 SEER standard for residential central air conditioners. *See* Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards, 69 Fed. Reg. 50997, 50998 (August 17, 2004).

purposes of the Act, if necessary to prevent special hardship, inequity, or unfair distribution of burdens. 42 U.S.C. § 7194(a). *See generally* 10 C.F.R. Part 1003, Subpart B (OHA Procedural Regulations).

On September 28, 2005, ESP filed an Application for Exception claiming that the firm would suffer a gross inequity, serious hardship and unfair distribution of burdens in the absence of exception relief from the 13 SEER rule. ESP is a manufacturer of air conditioning equipment sold under the brand name "Hi-Velocity Systems." ESP is headquartered in Alberta, Canada and markets its Hi-Velocity product line through 58 wholesalers and distributors located in Canada and the United States. ESP's Hi-Velocity Systems are marketed in four basis models, the HV-50, HV-70, HV-100, and HV-140, ranging from 1.5 ton to 5 ton cooling capacities.

According to ESP's Application for Exception, its High-Velocity Systems are SDHV products "uniquely created to be installed through walls, floors, and ceilings with the potential of the fan coil unit being located in space constrained locations such as attics and closets." ESP Application for Exception at 2. Thus, ESP argued that the firm is entitled to receive the same exception relief granted to its principal competitors in the SDHV market, SpacePak and Unico, Inc. (Unico). *See SpacePak/Unico, Inc.*, 29 DOE ¶ 81,002 (2004) (*SpacePak/Unico*). In that case, we granted SpacePak and Unico exception relief from the revised 13 SEER rule effective January 23, 2006, permitting those firms to produce and market SDHV systems having a SEER rating of not less than 11.0, and an HSPF rating ot 6.8, until such time as the agency establishes a separate standard for SDHV systems. ESP argued in its Application for Exception that the firm would be placed at an unfair competitive disadvantage relative to SpacePak and Unico if ESP were not granted the equivalent level of exception relief. ESP Application for Exception at 2-3.

On October 24, 2005, Unico filed comments opposing ESP's Application for Exception. While Unico generally supports the approval of exception relief for SDHV air conditioners, as granted in *SpacePak/Unico*, the firm argued that "there is no evidence that ESP's products provide the benefits or satisifies the rationale in the previous Exceptions granted in the past to Unico, Inc., and SpacePak for their SDHV air conditioning products and systems." Unico Comments at 1. Unico asserted that ESP has provided "no data or proof of performance efficiency" with regard to its Hi-Velocity line of products and therefore maintained that exception relief should be denied "until such time as ESP has submitted proof that its products meet the requirements for testing and rating of SDHV products." Unico Comments at 2, 3.1/ In response to

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3/ Several suppliers and customers of Hi-Velocity Systems products filed comments expressing support for ESP's exception request. An interested party, the American

Unico's comments, ESP filed a supplement to its Application for Exception on November 18, 2005. ESP November 18 Submission. In this submission, ESP sets forth test data and supporting documentation regarding the structural design and performance efficiency of the firm's Hi-Velocity Systems line of products.

In our Decision and Order issued on December 20, 2005, we determined based upon our holding in *SpacePak/Unico* that ESP should be granted exception relief from the 13 SEER rule for its Hi-Velocity Systems line of products that fall within the DOE regulatory definition of "*Small duct, high velocity system,*" 10 C.F.R. § 430.2. *See ESP,* 29 DOE at 82,548-49, *quoting SpacePak/Unico*, 29 DOE at 82,507. As in *SpacePak/Unico*, the primary basis for our granting exception relief is the agency's finding in the Amended Rule that SDHV systems meeting that definition will be unable to meet the 13 SEER standard due to energy inefficiencies inherent in their design and application. While we considered Unico's contention that ESP's products do not qualify for exception relief on this basis,1/ we determined that ESP had provided sufficient information in its November 18 Submission to show that its Hi-Velocity Systems meet the DOE regulatory definition of "*Small duct, high velocity system,"* 10 C.F.R. § 430.2. *ESP*, 29 DOE at 82,549. ESP specifically assured in its November 18 Submission that its Hi-Velocity products satisfy the specific terms of the regulatory definition, stating that they have "an operating condition of 1.5 in. static, 250 CFM/Ton cooling, a 2 in. outlet with an area of 3.14 sq. in., and an outlet velocity of 1470 FPM." ESP November 18 Submission at 1 (footnotes omitted); *see* 10 C.F.R. § 430.2. Accordingly, we granted exception relief to ESP conditioned upon ESP's representation that its High-Velocity line of products are SDHV systems as defined by DOE. *See* 29 DOE at 82,549 (ordering ¶ (2)).

C. Unico Appeal

Unico filed its Appeal of the *ESP* decision on January 19, 2006, and has supplemented its Appeal with submissions filed on February 16, 2006, and on April 18, 2006 (February 16 Submission and April 18 Submission, respectively). 10 C.F.R. § 1003.36.

Council for an Energy-Efficient Economy (ACEEE), filed comments on October 7, 2005, conditionally supporting the request. Quoting the DOE regulatory definition of "*Small duct, high velocity systems,"* ACEEE stated that it "will not oppose the waiver request for the 'Hi-Velocity Systems, Small Duct, High Velocity System' for units/systems that comply with the DOE specification." ACEEE Comments at 1.

4/ In its comments, Unico pointed to data presented on ESP's website indicating that "ESP's air handlers, when matched to a typical condensing unit, will have the same and, in many cases, *greater* capacity and efficiency than the system consisting of the same condensing unit used by ESP." Unico Comments at 1 (emphasis in original). Unico asserts that these claims are inconsistent with standard testing results for SDHV products.

In its initial submission, Unico argues that the approval of exception relief for ESP was arbitrary and capricious "because ESP has not provided any independent, verifiable testing data or evidence suggesting that its Hi-Velocity products provide any energy efficiency benefits warranting an exception from the 13 SEER efficiency standard." Unico Appeal at 1. Unico contends that "[a]bsent such information, it is unknown whether ESP's small duct, high velocity ('SDHV') products offer increased energy-saving benefits over traditional air conditioner systems; therefore, ESP cannot demonstrate serious hardship, gross inequity, or unfair distribution of burdens by complying with the applicable energy efficiency standards." *Id.* In its initial Appeal submission, Unico apparently accepts the premise that ESP's products are SDHV systems, within the DOE regulatory definition, but maintains nonetheless that "simply because ESP's High-Velocity products qualify as a "*Small duct, high velocity system*" they do not necessarily provide inherent energy efficiencies that are not quantifiable by means of the Department of Energy's testing protocol." *Id.* at 3.

In its supplemental submissions, however, Unico somewhat modified its position on appeal. In its February 16 Submission, Unico states in pertinent part:

> [W]e believe that any company that manufactures Small-Duct High-Velocity equipment, as defined by the Department of Energy, should receive a product exception similar to the one granted to Unico and SpacePak. . . . In ESP's case, we have serious reservations about whether its product meets the SDHV definition and ESP has done nothing to prove that it does meet that definition. We contend that their products do not meet the strict test for Small-Duct High-Velocity (SDHV) equipment while meeting the minimum efficiency required for said equipment. . . . [T]he DOE should require that ESP submit such independent data for its current products – if it complies and if the data support that the products meet the SDHV definition, then we will have no further complaint.

Unico February 16 Submission at 1.

Finally, in its April 18 Submission, Unico reasserts its position that "ESP's products do not meet the product category standards established by the DOE and should therefore not have been granted the exception that SpacePak and Unico received." April 18 Submission at 1. In this instance, however, Unico submits that it has evidence that ESP's High-Velocity products do not meet the regulatory definition of "*Small duct, high velocity system.*" Unico states that it performed a test of ESP's High-Velocity Systems models HV-50 and HV-70 "to determine if the airflow and blower static pressure comply with the rules for small-duct high-velocity equipment at the rated airflow." *Id.*, Attachment at 2. According to Unico, its test results show that "[n]either of these units meets the requirements for SDHV equipment at the rated

airflow nor will the equipment meet the minimum energy efficiency." *Id.* Thus, Unico reasserts its position that ESP must provide independent test data to verify its entitlement to exception relief.1/

ESP has responded to Unico's Appeal in two submissions, filed on February 21, 2006, and on May 17, 2006 (February 21 Submission and May 17 Submission, respectively). In its February 21 Submission, ESP concedes that the product test data previously submitted to OHA is "dated" but maintains that "the data is still applicable as it stands today." ESP February 21 Submission at 1. ESP therefore continues to argue that the firm is entitled to exception relief equivalent to that granted to SpacePak and Unico since ESP "has proven that they do manufacture a true 'small duct high velocity' (SDHV) system." *Id.*

In its May 17 Submission, ESP responds to the test data submitted by Unico in the April 18 Submission, that Unico submitted to support its claim that ESP's High-Velocity Systems products do not meet the DOE definition of "*Small duct, high velocity system.*" In its May 17 Submission, ESP asserts that it "utilizes independent testing facilities in the USA, Canada and Europe to verify our in-house test results [and, a]t this time we have contracts with two different facilities for testing and verification of existing and new products." ESP May 17 Submission at 1. ESP claims that it has provided sufficient test data to support the granting of exception relief and strongly objects to any reliance being placed upon the test data supplied by its competitor, Unico. Nonetheless, ESP states that "[i]f requested, ESP will supply further testing material to the DOE with the understanding all test data is confidential and strictly for the use of the DOE." *Id.*

II. Analysis

Having considered this matter, we have concluded that ESP should be required to submit current, independent test data to verify that the firm's High-Velocity Systems line of products meet the DOE regulatory definition of "*Small duct, high velocity system,*" 10 C.F.R. § 430.2. As stated in the *SpacePak/Unico* and *ESP* decisions, the granting of exception relief is strictly premised upon a finding that the air conditioning products meeting that regulatory definition cannot feasibly achieve the new 13 SEER efficiency standard. We now find, however, that sufficient doubt has been cast upon the representations made by ESP to warrant requiring the firm to submit additional evidence to verify its entitlement to exception relief.

In the *ESP* decision, we observed that ESP had made questionable claims regarding the performance of its High-Velocity Systems products on the firm's website. *See ESP*,

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5/ On May 17, 2006, OHA convened a conference upon the request of Unico, 10 C.F.R. § 1003.61, to receive oral presentation by Unico in support of its Appeal.

29 DOE at 82,549, note 5. However, we accepted ESP's assertion that the firm's High-Velocity products are SDHV systems, as defined by DOE, based on test results previously submitted to DOE. *See id.* ESP now concedes, however, that this test data is "dated." ESP February 21 Submission at 1.

Added to this concern, Unico has submitted test data showing that ESP's High-Velocity Systems do not meet the static pressure/air flow requirements specified by the DOE definition of "*Small duct, high velocity system,*" 10 C.F.R. § 430.2.1/ Unico April 18 Submission. This testing was apparently performed by Unico itself and we certainly recognize that, as ESP's competitor, Unico has incentives to minimize the effectiveness of the ESP products. We therefore do not place undue reliance on the test data provided by Unico in connection with its Appeal. Nonetheless, the information provided by Unico certainly supports our determination that ESP should be required to provide current, independent test data. We note, in that regard, that ESP has expressed its willingness to provide such test data, if required.

Accordingly, we will direct ESP to provide, by not later than July 28, 2006, current test data with regard to its High-Velocity Systems line of products, to verify that the firm's High-Velocity Systems products meet the design and performance efficiencies specified in the DOE regulatory definition of "*Small duct, high velocity system,*" 10 C.F.R. § 430.2. The results submitted must be derived from testing performed by an independent, recognized testing facility. Failure to provide such test data may result in the immediate rescission of the exception relief granted to ESP in the *ESP* decision.

It Is Therefore Ordered That:

(1) The Appeal filed by Unico, Inc., on January 19, 2006, of the Decision and Order issued in *Energy Savings Products, Ltd.*, 29 DOE ¶ 81,015 (2005) (*ESP*), is hereby granted as set forth in paragraph (2) below.

(2) By not later than July 28, 2006, Energy Savings Products, Ltd., must submit current test data with regard to its High-Velocity Systems line of products, to verify that the firm's claim that its High-Velocity Systems products meet the design and performance requirements specified in the DOE regulatory definition of "*Small duct, high velocity system,*" 10 C.F.R. § 430.2. The testing of ESP's High-Velocity Systems products must be performed and verified by an independent, recognized testing facility.

6/ DOE defines a "*small duct, high velocity system*" as a heating and cooling product that contains a blower and indoor coil combination that: (1) is designed for, and produces, at least 1.2 inches of static pressure when operated at the certified air volume rate of 220-350 CFM per rated ton of cooling; and (2) when applied in the field, uses high velocity room outlets generally greater than 1000 fmp which have less than 6.0 square inches of free area.

The test results described in this paragraph must be submitted to the DOE Office and Hearings and Appeals, and to the DOE Office of Energy Efficiency and Renewable Energy at the following addresses:

Fred L. Brown, Assistant Director
Office of Hearings and Appeals
U. S. Department of Energy
HG-20/L'Enfant Plaza Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585-1615

David E. Rodgers, Program Manager
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Energy Efficiency and Renewable Energy
Department of Energy, EE-2J
1000 Independence Ave., SW
Washington, DC 20585-0121

Failure to provide the test data described in this paragraph may result in the immediate rescission of the exception relief granted to ESP in *Energy Savings Products, Ltd.*, 29 DOE ¶ 81,015 (2005).

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 30, 2006