

Case No. VEE-0054

November 3, 1999

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: Amana Appliances

Date of Filing: February 19, 1999

Case Number: VEE-0054

This Decision and Order considers an Application for Exception filed by Amana Appliances (Amana), seeking exception relief from the provisions of 10 C.F.R. Part 430, Energy Conservation Program for Consumer Products: Energy Conservation Standards for Refrigerators, Refrigerator-Freezers and Freezers (Refrigerator Efficiency Standards). In its exception request, Amana asserts that the firm would suffer a competitive disadvantage and undue hardship if required to adhere to the Refrigerator Efficiency Standards of Part 430, effective July 1, 2001, 10 C.F.R. § 430.32. If Amana's Application for Exception were granted, Amana would receive a 10 percent increase in maximum energy consumption allowable under Part 430, effective July 1, 2001 until January 1, 2010, with respect to all of the firm's classes of refrigerators and refrigerator-freezers (refrigerator products). As set forth in this Decision and Order, we have concluded that Amana's Application for Exception should be denied.

I. Background

A. Refrigerator Efficiency Standards

The Refrigerator Efficiency Standards, 10 C.F.R. Part 430, were published as a final rule by Department of Energy (DOE) on April 28, 1997, 62 Fed. Reg. 23102, 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 that DOE review and revise energy conservation standards applicable to refrigerator products, promulgated by the agency in 1989, 54 Fed. Reg. 47916 (November 17, 1989). EPCA, § 325(b)(3)(B), 42 U.S.C. § 6295(b)(3)(B). The new Refrigerator Efficiency Standards were designed to reduce energy use in classes of refrigerator products by up to 30 percent relative to the prior standards, and thereby reduce consumer costs as well

as emissions of air pollutants associated with electricity production.⁽¹⁾ The Refrigerator Efficiency Standards are mandated to become effective July 1, 2001.

The delay in the effective date of the Refrigerator Efficiency Standards was based upon DOE's recognition of two factors impacting the refrigerator industry: first, there will be considerable costs associated with the product redesign necessary to meet the new efficiency standards and, second, the manufacture and import of HCFC-141b, the blowing agent currently used to produce insulation in refrigerators, will be banned effective January 1, 2003, as a stratospheric ozone-depleting chemical under regulations of the Environmental Protection Agency (EPA), 40 C.F.R. §§ 82.4(l) and (m). In the latter regard, DOE noted that an alternative hydrofluorocarbon blowing agent being tested, HFC-245fa, is able to produce insulating foams with a thermal efficiency comparable to HCFC-141b and that AlliedSignal, Inc. (AlliedSignal), the exclusive domestic licensee and thus sole intended supplier of HFC-245fa, was taking steps necessary to bring HFC-245fa into production prior to the phaseout of HCFC-141b. The agency stated that "[b]ased on the results of recent toxicology tests, and the statements of AlliedSignal, the EPA and others, DOE has concluded that it is likely that the chosen substitute for HCFC-141b will be HFC-245fa, or another blowing agent with comparable characteristics, and that such a substitute will be available for use in the manufacture of refrigerators prior to the 2003 phase out date for the production of HCFC-141b." 62 Fed. Reg. at 23108. DOE stated further that "[b]ecause of the comparability of HFC-245fa to HCFC-141b, the Department believes that only minor changes in refrigerator design, not a complete redesign, will be required to convert to the new blowing agent." *Id.*

However, in proceeding to adopt the Refrigerator Efficiency Standards, the DOE recognized that some uncertainty yet existed about the suitability and commercial availability of HFC-245fa, and therefore provided as follows:

[I]t is still possible that subsequent tests will identify unacceptable risks associated with the use of this product [HFC-245fa] or that its commercial availability will be delayed beyond 2003. Under such conditions, DOE may grant manufacturers exception relief. Section 504 of the Department of Energy Organization Act authorizes DOE to make adjustments of any rule or order issued under the Energy Policy and Conservation Act, consistent with the other purposes of the Act, if necessary to prevent special hardship,

inequity, or unfair distribution of burdens. 42 U.S.C. § 7194(a).

....

Compliance with the terms of this rule could constitute special hardship for the refrigerator manufacturing industry in the unexpected event that it is shown that HFC-245fa or a comparable product would not be available as a timely replacement for HCFC-141b and the unavailability of HFC-245fa or comparable products prior to the imposition of the ban on the further production of HCFC-141b would substantially increase the expected manufacturer costs associated with complying with this revised standard. In such circumstances, appropriate transition relief, as may be needed to address the special hardship, would be considered.

62 Fed. Reg. at 23108-09.

B. The Present Proceeding

(1) Application for Exception

Amana manufactures a complete line of refrigerator products. In its Application for Exception, Amana seeks exception relief from the Refrigerator Efficiency Standards based upon its claim that contrary to DOE's supposition, HFC-245fa will not be commercially available prior to the imposition of the ban on HCFC-141b. Amana states that other than HFC-245fa, there is no alternative blowing agent which yields insulating foam with a thermal efficiency comparable to HCFC-141b. Thus, Amana asserts that the firm would be required to undertake a major redesign of its product line first to meet the July 1, 2001, effective date of the Refrigerator Efficiency Standards, and then again in order to adhere to the January 1, 2003, phaseout date of HCFC-141b. Amana asserts that DOE specifically provided for exception relief under these circumstances in the final rulemaking preamble, recognizing the onerous financial burden of a double "retooling" in the event HFC-245fa were not available as a "drop in" replacement in time to meet the phaseout of HCFC-141b.

In addition, Amana contends that the unavailability of a comparable replacement for HCFC-141b will place the firm at a serious competitive disadvantage. Amana states that there are a limited number of competitors in the refrigerator industry, including General Electric Appliances (GE), Whirlpool Corp. (Whirlpool), Maytag Corp. (Maytag), White Consolidated Industries, Inc. (Frigidaire) and SubZero. Amana asserts that all of its refrigerator products are manufactured within the United States (U.S.); however, GE and Whirlpool not only have domestic plants but also have plants in Mexico (GE and Whirlpool) and Canada (GE). Amana maintains that because the EPA regulations only ban the use of HCFC-141b in the U.S. after January 1, 2003, GE and Whirlpool have a significant competitive advantage since they will be able to manufacture refrigerator products using HCFC-141b outside of the U.S. and export them into the U.S. until the year 2010.(2) Since this option is not available to Amana, the firm states that it would be required to utilize a less efficient blowing agent combined with increased cabinet insulation thickness in order to meet the Refrigerator Efficiency Standards. According to Amana, the corresponding loss of refrigerator storage capacity would detrimentally impact its competitive position since "internal volume is a significant market driver.(3) Therefore, Amana argues that exception relief is warranted in order to avoid the cumulative burden of a second major refrigerator redesign within an 18-month period (July 1, 2001 to January 1, 2003) due to the commercial unavailability of HFC-245fa, and also to avoid the adverse competitive impact upon the firm as a result of the so-called "Mexico/Canada advantage" enjoyed by competitors GE and Whirlpool.

Amana states that it has identified an alternative insulation foam blowing agent, cyclopentane, as a viable alternative to HCFC-141b, but states that there is a 10% energy loss as a result of the lower thermal efficiency of cyclopentane(4), even taking into account any increases gained from higher efficiency compressors, and evaporator and condenser motors. Thus Amana requests in its Application for Exception that the firm be granted a 10% increase in allowable energy consumption for all classes of its refrigerator products. In further support of the 10% relief figure, Amana asserts that in the Proposed Rulemaking leading to the Refrigerator Efficiency Standards, DOE initially considered adopting a two-tier phase in of the revised standards, that would have established a 10% less stringent efficiency requirement for refrigerator products that do not use HCFCs as blowing agents in their foam insulation. *See* Notice of Proposed Rulemaking, 60 Fed. Reg. 37388 (July 20, 1995).(5) Amana thus requests exception relief which would authorize an increase of 10% in allowable energy consumption for its refrigerator products from the effective date of the Refrigerator Efficiency Standards until January 1, 2010, the ostensible expiration date of the Mexico/Canada advantage.

(2) Comments and Supplement

Following the receipt of Amana's Application, we solicited and received comments from eleven interested parties(6) regarding the bases for Amana's exception request. In their submissions, the commenters raised several issues bearing on Amana's claims. The principal issues raised by the commenters are summarized below:

Timeliness. Several commenters stated that Amana's exception request is premature because: 1) contract negotiations with the potential supplier of HFC-245fa, AlliedSignal, are yet ongoing and it is too early to predict the probable outcome; and 2) DOE conditioned possible exception relief on the event that HFC-245fa or reasonable alternative were unavailable as of January 1, 2003, the phaseout date of HCFC-141b, and not as of July 1, 2001, the effective date of the Refrigerator Efficiency Standards.

Equitable Standing. Certain commenters asserted that the entire industry is facing this possibility of having to "retool" its product line twice within an 18-month period, first in order to meet the Refrigerator Efficiency Standards and again as required by the EPA phaseout of HCFC-141b, and that possibility was not overlooked by the agency in adopting the final rules. These commenters therefore asserted that Amana has not shown that the firm will be subjected to any special hardship, inequity, or unfair distribution

of burdens, but is merely attempting to circumvent the uncertainty inherent in these business decisions facing the entire industry.

Mexico/Canada Advantage. With regard to the Mexico/Canada advantage described in Amana's Application, commenters opined that: 1) it is highly speculative to infer that GE and Whirlpool will scale back their domestic operations in favor of increasing imports from Mexico and Canada; 2) the EPA is well aware of this "loophole" in its regulations for refrigerator imports and will likely choose to close it; and 3) in any event, granting Amana exception relief would not alleviate this concern but only further disadvantage Amana's remaining competitors. Moreover, it was suggested that the Mexico/Canada advantage is only marginally relevant to the present exception proceeding since it is a by-product of EPA regulations, and not a hardship, inequity or burden caused by the DOE Refrigerator Efficiency Standards.

Scope of Relief. Several commenters asserted that the level of exception relief requested by Amana is overbroad both in amount and duration. In advancing the 10% relief figure, Amana cites DOE's Part 430 proposed rulemaking where the agency initially considered adopting two-tier standards, with a 10% relaxation of the otherwise applicable standards for refrigerator products free of HCFCs. *See* note 5, *supra*. However, it has been urged that the 10% differential cited by DOE in 1995 is now outdated and significantly overstated based upon existing technological advancements. In addition, commenters considered Amana to be overreaching in its request for relief until the year 2010, apparently based upon the ostensible duration of the Mexico/Canada advantage. As noted above, the Mexico/Canada advantage is arguably speculative, and Amana has ignored the likely development of alternatives in the event HFC-245fa proves to be unavailable.

In a letter dated March 25, 1999, we directed that Amana file a response to the principal issues raised in the comments of the interested parties. Amana initially requested, and we approved, an extension of time to file its response, in view of the yet inconclusive nature of HFC-245fa contract negotiations with AlliedSignal, then being conducted on behalf of the refrigerator industry by its trade association, the Association of Home Appliance Manufacturers (AHAM). Amana ultimately filed a Supplement to Application for Exception (Supplement), on July 12, 1999.

In its Supplement, Amana reasserts its claim that the exception relief requested by the firm should be approved, despite the issues raised in the comments of interested parties. Amana maintains its position that "HFC-245fa (or a comparable product) will *not* be available as a timely replacement for HCFC-141b before it is phased out on January 1, 2003." Supplement at 2 (emphasis in original). According to Amana, "AlliedSignal *still* has not made a firm, unequivocal commitment to proceed with commercial production of HFC-245fa" and "AlliedSignal's latest optimistic schedule for achieving commercial production before the January 1, 2003 phaseout of HCFC-141b -- which assumes that agreement will be reached with the refrigerator manufacturing industry by July 31, 1999 -- is demonstrably unrealistic." *Id.* In the latter regard, Amana states that the industry-wide negotiations, conducted by AHAM with AlliedSignal, were terminated on May 18, 1999. While AlliedSignal has proceeded to conduct negotiations with individual manufacturers, Amana asserts that the firm "reached an impasse in its own direct negotiations with AlliedSignal to assure an uninterrupted supply of HFC-245fa after HCFC-141b is phased out." *Id.* Amana therefore argues that the exception relief requested by the firm, using cyclopentane as an alternative blowing agent, is justified since Amana "cannot responsibly rely on the speculative and elusive availability of HFC-245fa." Supplement at 2-3.(7)

Moreover, Amana claims that the schedule that AlliedSignal has now presented for constructing a HFC-245fa production facility is doubtful, representing "a dramatically compressed version" of a much longer schedule that AlliedSignal had originally presented to DOE during the rulemaking which considers the revised standards. According to Amana, "[i]t is extremely aggressive and optimistic, and has absolutely no margin for error or delay in any of the design, construction, startup or permitting processes that must necessarily precede commercialization of a new chemical." Supplement at 5; *see* Affidavit of Bart Schuchert, Supplement Exhibit 2. Thus, Amana also argues that its Application for Exception is also timely based upon its conclusion that HFC-245fa cannot be fully commercialized prior to the HCFC-141b phaseout, due to time constraints confronting AlliedSignal.

Finally, Amana argues that the "Mexico/Canada advantage" cannot be ignored since it is integrally related to the EPA phaseout of HCFC-141b, which figured prominently in DOE's process of adopting the Refrigerator Efficiency Standards. Amana maintains on this basis that exception relief until the year 2010 is warranted, since "[t]he playing field will not be level until January 1, 2010, when HCFC-141b is finally phased out in Canada and Mexico." Supplement at 11.

(3) Supplemental Comments and Response

In view of Amana's claims regarding the unavailability of HFC-245fa, and the centrality of this issue to the proceeding, we solicited supplemental comments from AlliedSignal specifying any additional information the firm was able to provide concerning its plans to construct a plant for producing the insulation foam blowing agent, HFC-245fa. Letter of July 22, 1999, to Brian C. Strauss, Marketing Manager, AlliedSignal, from Fred L. Brown, Deputy Assistant Director, OHA.(8) Pursuant to our request, AlliedSignal provided supplemental comments on August 20, 1999, reaffirming the firm's prior assertions that it "fully expects to make HFC-245fa commercially available prior to the HCFC-141b phase-out date of January 1, 2003." AlliedSignal Supplemental Comments at 1. AlliedSignal included with its submission a news release dated June 21, 1999, announcing the firm's intention to expand its existing production facility at Geismar, Louisiana for the production of HFC-245fa. The firm further states that it is prepared to support customers with semi-commercial HFC-245fa before the middle of 2002, and has formulated a feasible timetable to bring HFC-245fa into commercial production based upon its experience in the industry. Finally, AlliedSignal maintains that the firm has negotiated in good faith with Amana and other members of the refrigerator industry to supply HFC-245fa, and the firm's "proposed terms are neither onerous, unprecedented nor commercially unreasonable." *Id.* at 8.(9)

In the interim prior to AlliedSignal's filing of supplemental comments, GE requested leave to also file supplemental comments, which we approved. GE filed its supplemental comments on August 13, 1999, in which the firm elaborates its position that Amana has failed to meet the requisite conditions for exception relief, and that the approval of such relief for Amana would be injurious to other members of the refrigerator industry that have already initiated steps to comply with the Refrigerator Efficiency Standards.

Further, with regard to the alleged Mexico/Canada advantage, GE maintains that “[a]ny U.S. production transferred to Mexico or Canada for re- export to the U.S. will comply with the U.S. EPA HCFC-141b phase-out schedule . . . [and] GE is working with its Mexican partners to convert their production facilities [] from HCFC-141b foam for any GE product imported into the U.S.” GE Supplemental Comments at 12.

Nonetheless, in view of the “Mexico/Canada advantage” issue raised by Amana, we solicited comments from the EPA regarding any intended or probable regulatory action by the agency on the use of HCFC-141b in products and the importation of those products. In a letter dated August 31, 1999, the EPA stated that “because section 610 of the [Clean Air] Act explicitly exempted the use of HCFCs in thermal insulating foam, we cannot ban the import of appliances using foam blown with HCFC-141b under that section.” Letter of August 31, 1999, from Sue Stendenbach, Chief, and Jeff Cohen, Chief, Stratospheric Protection Division, EPA. However, the EPA noted that:

Section 612 of the Act directs EPA to review substitutes for ozone- depleting substances as part of the Significant New Alternatives Program (SNAP). In particular, it directs EPA to prohibit the use of substitutes that pose risks to either human health or the environment when other substitutes exist that pose lower overall risk. . . . Currently, several substitutes for HCFC-141b are listed as acceptable, and in light of newly available foam-blowing alternatives that pose less risk to health and the environment, we are considering restrictions on the use of HCFC-141b in refrigerators, freezers, and other types of foam, which could also extend to restricting import of such products made using foam blown with HCFC-141b.

Id.(10)

Finally, on October 1, 1999, Amana filed a Response to Supplemental Comments (Supplemental Response), addressing the supplemental filings of AlliedSignal and GE, as well as the EPA comments. In its Supplemental Response, Amana argues that despite AlliedSignal’s representations, there still is no assurance that HFC-245fa will ever be commercially available. Amana contends that regardless of its stated intentions, “AlliedSignal does *not* make a definite statement that a plant will actually be built or expanded, let alone where, or when, or under what permitting or construction schedule.” Supplemental Response at 5 (emphasis in original). Thus Amana reasserts its claim that the firm is entitled to exception relief based upon the unavailability of HFC-245fa or other viable substitute for HCFC-141b.

II. Analysis

We have carefully considered the Application for Exception filed by Amana, the numerous comments of interested parties and Amana’s response to those comments. On the basis of the record before us and the standards governing the approval of exception relief in this case, we have concluded that Amana’s Application for Exception must be denied. For the reasons set forth below, we find that Amana has failed to establish the conditions for exception relief stated in the rulemaking preamble of the Refrigerator Efficiency Standards. Nor has Amana otherwise shown that the firm will suffer a serious hardship, inequity or unfair distribution of burdens, as a result of its compliance with the revised standards.

A. Claim for Exception Relief Under the Regulatory Preamble

In the revised Part 430 rulemaking, the agency was clear in stating the conditions necessary for the approval of exception relief from the Revised Refrigerator Standards, based upon the unavailability of HFC-245fa. Amana correctly observes in its exception application that the agency decided to adopt the Refrigerator Efficiency Standards effective July 1, 2001, although HCFC-141b will be phased out beginning January 2003, “founded on the best current information about substitutes for HCFC-141b, i.e. that HFC-245fa will receive the necessary regulatory approvals, and that Allied Signal will make it available in sufficient quantities for all manufacturers to use prior to 2003.” 62 Fed. Reg. at 23108. DOE recognized, however, the industry predicament if HFC-245fa were not available: “Compliance with the terms of this rule could constitute special hardship for the refrigerator manufacturing industry in the unexpected event that it is shown that HFC-245fa or a comparable product would not be available as a timely replacement for HCFC-141b and the unavailability of HFC-245fa or comparable products prior to the imposition of the ban on the further production of HCFC-141b would substantially increase the expected manufacturer costs associated with complying with this revised standard. In such circumstances, appropriate transition relief, as may be needed to address the special hardship, would be considered.” *Id.* at 23109. Prior decisions of this office as well as the courts clearly place the burden upon the applicant to establish the basis for its claim for exception relief from DOE regulatory provisions. *See, e.g., Whirlpool Corp.*, 14 DOE ¶ 81,023 (1986) (seeking exception relief from former Part 430 refrigerator testing regulations); *White Consolidated, Inc.*, 13 DOE ¶ 81,045 (1985); *Exxon Corp. v. Department of Energy*, 802 F.2d 1400, 1407-08 (Temp. Emer. Ct. App. 1986) (“great deference” accorded to agency in applying standards for exception relief); *City of Long Beach v. Department of Energy*, 754 F.2d 379, 386 (Temp. Emer. Ct. App. 1985).

On the basis of standard set forth above and the record before us, we cannot approve exception relief since Amana has failed to carry its burden to show that HFC-245fa will not be available as a timely replacement for HCFC-141b. While Amana raises factors in support of its highly subjective belief that HFC-245fa will be unavailable, Amana simply has not convinced us that AlliedSignal cannot feasibly bring HFC-245fa into commercial production in time to meet the phaseout of HCFC-141b, or that AlliedSignal is being disingenuous in stating its intention to do so.

During the course of this proceeding, Amana stated alternative grounds for its claim that HFC-245fa will not be available. Initially in its Application for Exception, Amana argues essentially that HFC-245fa would be functionally unavailable, pointing to the circumstantial risk that “HFC-245fa would be produced in a single manufacturing facility (Allied Signal), and there is no back up chemical” and therefore “[i]t is unlikely that the members of AHAM will sign up and agree to the business commitments or terms and conditions that Allied Signal has presented to the AHAM members.” Amana Application for Exception at 3. Subsequently, in

the Supplement to its exception application. Amana argues that due to time constraints on AlliedSignal “HFC-245fa cannot be fully commercialized prior to the January 1, 2003 phaseout of HCFC-141b.” Supplement at 5. Finally, in its Supplemental Response, Amana claims that we must assume that HFC-245fa will be unavailable because AlliedSignal has not made “a definitive statement that a plant will actually be built.” Supplemental Response at 5. We are unpersuaded by any of these contentions.

First, the fact that AlliedSignal would at the outset be the sole domestic supplier of HFC-245fa for the industry, as the exclusive licensee of the product, was recognized by DOE. *See* 62 Fed. Reg. at 23107. Although there may be risk associated with this circumstance, it is a risk shared by the industry and does not entitle Amana to exception relief. Although Amana was correct in its prediction that the contract negotiations performed by AHAM would prove to be unsuccessful, it is apparent that AlliedSignal has continued to carry on negotiations with individual industry members. In its Supplemental Comments, AlliedSignal states that “[w]hile the industry-wide effort was unfortunately unsuccessful, AlliedSignal came away from the process confident in the fact that there was sufficient interest among certain appliance manufacturers to turn to individual negotiations.” AlliedSignal Supplemental Comments at 7. Indeed, in a recent AlliedSignal press release of September 13, 1999, a principal AlliedSignal representative announced: “We have received commitments from various customers to purchase HFC-245fa upon the phaseout of HCFC-141b, and the marketplace has responded with resounding support for this product.(11)

Next, we find speculative Amana’s assertion that AlliedSignal cannot feasibly bring HFC-245fa into commercial production within the time necessary to meet the phaseout of HCFC-141b. While AlliedSignal concedes that the firm is substantially behind the timetable presented to DOE in 1997 during the rulemaking, AlliedSignal explains that its forecast at that time was based upon its assumption that commercial production of HFC-245fa would be needed to meet the July 1, 2001 effective date of the revised standards, rather than the later January 1, 2003 phaseout date of HCFC-141b. AlliedSignal Supplemental Comments at 4-5.(12) AlliedSignal is now adamant, however, that its present production schedule that is being presented to potential customers, including Amana, is realistic and workable. According to AlliedSignal, the firm “is committed to putting all the necessary resources into our HFC-245fa plant construction and working consistently throughout the construction period to complete the HFC-245fa plant on time.” *Id.* at 6. AlliedSignal further submits that the firm is prepared to support customers with semi-commercial amounts of HFC-245fa before the middle of 2002, recognizing that some manufacturers will likely want quantities of the product for testing and conversion planning with an eye toward the HCFC-141b phaseout. *Id.* at 3.(13)

Notwithstanding, Amana maintains finally that we should attach little weight to AlliedSignal’s repeated assertion that the firm “fully expect[s] to make HFC-245fa commercially available prior to the HCFC-141b phase-out date of January 1, 2003.” *Id.* at 1. According to Amana, this statement does not constitute “a firm, unequivocal commitment to proceed” or a “definitive statement that a plant will actually be built or expanded.” Supplemental Response at 5. Moreover, Amana argues that despite AlliedSignal’s negotiations with potential customers, “none of those offers and discussions have any meaning [since] no one can assure Amana that it will be able to purchase commercial quantities of HFC-245fa before the 2003 phaseout of HCFC- 141b.” Supplemental Response at 6.

We do not share Amana’s pessimistic assessment. Viewed objectively, we believe that AlliedSignal’s continuing contract negotiations are firm indications of the firm’s commitment to bring HFC-245fa into commercial production. Amana has presented nothing that would lead us to conclude that AlliedSignal is not negotiating in good faith. Instead, the record shows that AlliedSignal has continued to move forward in accordance with its stated intention. AlliedSignal’s September 13, 1999, press release announced significant steps in the process leading to commercial production, including final site selection and EPA product approval. We are sympathetic that Amana does not feel “assured” of AlliedSignal’s commitment and recognize that all uncertainty has not been removed. However, Amana’s discomfiture does not constitute a basis for exception relief. In this regard, Amana is in no worse position than any other member of the refrigerator industry.

On the basis of the foregoing, we conclude that Amana has failed to show that HFC-245fa will not be commercially available in time to meet the phaseout of HCFC-141b, due to be banned effective January 1, 2003, under EPA regulations. Consequently, we must deny Amana’s request for exception relief under the conditions specified in the rulemaking preamble to the Refrigerator Efficiency Standards, 62 Fed. Reg. at 23109. We now turn to whether Amana has presented any other basis upon which exception relief might be approved.

B. Collateral Claims for Exception Relief

We find that other matters that Amana has propounded in support of its claim for exception relief are essentially invalidated by our determination above. For instance, Amana argues on grounds of hardship and inequity that exception relief is appropriate to avoid the cumulative financial burden of a double “retooling” of its product line that will be required, first to meet the July 1, 2001, effective date of the Refrigerator Efficiency Standards, and then again to meet the phaseout of HCFC-141b. However, this argument is premised upon Amana’s claim that HFC-245fa will not be available as a “drop in” replacement for HCFC-141b in time to meet the phaseout date. Since Amana has not convinced us that HFC-245fa will not be available, we do not accept the inevitability of a costly double “retooling” envisioned by Amana.

Similarly, because Amana has failed to establish that no blowing agent with an insulating efficiency comparable to HCFC-141b will be commercially available as of January 1, 2003, we must discount Amana’s corollary claim that the firm will suffer an unfair distribution of burdens as a result of the so-called “Mexico/Canada advantage” enjoyed by competitors, GE and Whirlpool. In the absence of more conclusive evidence that HFC-245fa will not be available, this purported competitive advantage is merely theoretical.(14)

Finally, however, we must address Amana’s contention that, even assuming HFC-245fa will be commercially available, the product is effectively unavailable to Amana since it has been unable secure a reasonable supply agreement with AlliedSignal.

Amana submits that there "is no reasonable prospect" that Amana will be able to negotiate a supply contract with AlliedSignal due to what Amana characterizes as "commercially unreasonable terms" imposed by AlliedSignal. Supplement at 4. AlliedSignal in turn has responded that its "proposed terms are neither onerous, unprecedented, or commercially unreasonable" and that "AlliedSignal continues to hope to structure an HFC-245fa contractual agreement with Amana." AlliedSignal Supplemental Comments at 8, 9.

We emphasize that it is neither our inclination or province to decide which business entity is correct with regard to the reasonableness of the proposed contract terms. That contrasting viewpoints exist is typical of firms involved in such negotiations having conflicting business interests and we do not intend to insert the DOE into the delicate negotiation process as some sort of arbiter of fair contract terms.

We do not believe that that Amana and AlliedSignal will not ultimately be able to reach an agreement. Our best indication is that a cognizable possibility remains that Amana will be able to reach an agreement with AlliedSignal. AlliedSignal represents in its most recent press release that it has received commitments from various customers, although no formal announcement has been made. Certainly to the extent that AlliedSignal is able to secure HFC-245fa supply contracts with other manufacturers, it objectively weakens Amana's position that the terms proposed by AlliedSignal are patently prohibitive. In any event, until all opportunities have been exhausted, consideration of Amana's exception request on the basis of contractual supply unavailability is not appropriate.

III. Conclusion

Accordingly, we have concluded that Amana's Application for Exception must be denied. As discussed in this decision, we have determined that Amana has failed to show that the firm is entitled to exception relief from the Refrigerator Efficiency Standards, effective July 1, 2001, based upon the future unavailability of the insulation foam blowing agent HFC-245fa, under the conditions described in the rulemaking preamble, 10 C.F.R. Part 430, 62 Fed. Reg. 23102, 23108-09 (April 28, 1997). Nor do we find that Amana has established any alternative grounds for exception relief, *i.e.* that the firm will otherwise suffer a serious hardship, gross inequity or unfair distribution as a result of its compliance with the Refrigerator Efficiency Standards. While we will deny Amana's Application for Exception at this juncture, Amana may file a renewed Application for Exception at a later date in the event material findings of fact underlying this decision prove to be incorrect on the basis of future developments. Amana may also renew its claim for exception relief on the basis of other evolving circumstances that may cause the firm to suffer a serious hardship, gross inequity or unfair distribution of burdens as a result of its compliance with the Refrigerator Efficiency Standards.

It Is Therefore Ordered That:

(1) The Application filed by Amana Appliances on February 19, 1999, is hereby denied. Amana may file a renewed Application for Exception at a later date in the event material findings of fact underlying this decision prove to be incorrect on the basis of future developments, or on the basis of other circumstances that may cause the firm to suffer a serious hardship, gross inequity or unfair distribution of burdens as a result of its compliance with the requirements of 10 C.F.R. Part 430.

(2) Any person aggrieved or adversely affected by the denial of exception relief in this Decision and Order may file an appeal to the Federal Energy Regulatory Commission, in accordance with the procedural regulations of that agency.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 3, 1999

(1) For each of eighteen classes of refrigerator products, the Refrigerator Efficiency Standards establish energy efficiency equations which limit energy usage. These equations are expressed in kilowatt-hours per year (kWh/yr). For example, the consumption equation for the class of "Refrigerator-Freezers -- automatic defrost with top-mounted freezer without through-the-door ice service" is a maximum of "9.80AV+276.0," where AV is the "adjusted volume" of the particular unit. "Adjusted volume" in turn is defined as 1.63 times the freezer volume plus the fresh food volume.

(2) The EPA regulations were adopted pursuant to treaty obligations under the Montreal Protocol by which the U.S. and other developed nations are obligated to achieve a certain percentage of progress towards the total phaseout of ozone-depleting substances, e.g. hydrochlorofluorocarbons (HCFCs). While the EPA regulations ban the use and import of HCFC-141b effective 2003, products and equipment manufactured using HCFC-141b may be imported if manufactured and placed in inventory before 2010. *See* 40 C.F.R. Part 82.

(3) "Amana maintains that as a general rule of thumb, volume is worth \$50 per cubic foot per unit at retail and thus a loss from 22.1 cu. ft. to 20.2 cu. ft. is substantial. Amana further points out that the firm does not have the option of increasing external dimensions to increase insulation thickness because kitchen space allotments for refrigerators are by standard design (28", 30" or 36" wide and 62", 66" or 69" high).

(4) Amana considers the cyclopentane, a hydrocarbon, as the better alternative between the most readily available blowing agents, cyclopentane and HFC-134a. Amana states that other blowing agents such as HFC-236ea and HFC-365mfc were evaluated but

have been unsuccessful due to poor thermal performance, chemical compatibility, toxicity, etc; other than HFC-245fa, however, no blowing agent yields insulation with a thermal efficiency comparable to HCFC-141b.

(5)DOE initially proposed amending the energy conservation standards for refrigerator products under a two-tier system. The proposed standards were similarly designed to reduce product energy use by up to 30 percent relative to current standards (Tier 1). However, for products manufactured without HCFC (hydrochlorofluorocarbon) blowing agents, there was a second-tier standard applicable for six years designed generally to reduce energy use by up to 23 percent (Tier 2). The two-tier phase in proposed, allowing for a 10 percent relaxation of the otherwise applicable standards for HCFC-free products, took into account the burden of DOE's new efficiency standards and the presumed energy penalty of replacements for HCFC-141b, due to be banned. Joint comments solicited from industry representatives, which were developed in 1994 and reflected information on blowing agents available at the time, stated that: "all non-chlorinated substitutes available to replace HCFC-141b are expected to be a minimum 10% less energy efficient." Joint Comments, No. 49 at 12; *see* 60 Fed. Reg. at 37396.

(6)These interested parties include: 1) American Council for an Energy-Efficient Economy, 2) AlliedSignal, 3) California Energy Commission, 4) Dupont Fluoroproducts, 5) GE, 6) Maytag, 7) Natural Resources Defense Council, 8) Oregon Office of Energy, 9) W.C. Wood Company, 10) Whirlpool, and 11) Frigidaire.

(7)In the Affidavit of David F. Brown, Amana Purchasing Manager, Amana describes the firm's unsuccessful efforts to reach an agreement with AlliedSignal for a guaranteed supply of HFC-245fa in time to meet the HCFC-141b phaseout date. Supplement Exhibit 1. According to the Brown Affidavit, Amana could not accept AlliedSignal's contract proposal which included exclusive, long-term "take or pay" commitments and unreasonable pricing terms.

(8)In its initial comments filed in the proceeding on March 16, 1999, AlliedSignal stated in pertinent part: "AlliedSignal is working diligently to commercialize HFC-245fa prior to the 01/01/2003 HCFC-141b phase out. At this point in time, AlliedSignal fully expects that HFC-245fa will be commercially available prior to said phase out date." AlliedSignal Comments at 2.

(9)On August 26, 1999, Amana filed a motion to strike the supplemental comments filed by AlliedSignal since AlliedSignal claimed confidential treatment with respect to portions of its submission, as proprietary business information. According to Amana, its inability to examine the confidential portions of AlliedSignal's submission violated its procedural right "to respond to all third person submissions." 10 C.F.R. § 1003.25(a)(1). We determined, however, that the motion to strike should be denied, finding that AlliedSignal was allowed to request confidential treatment under section 1003.9(f) of the procedural regulations, and that this allowance did not obliterate the guarantee set forth in section 1003.25(a)(1) that Amana shall be provided "an opportunity" to respond to all comments filed by interested parties. Moreover, we found that despite the confidential redactions, Amana was not prevented from responding to the essential points advanced by AlliedSignal. Letter of September 7, 1999, from Fred L. Brown, Deputy Assistant Director, OHA, to Mitchell H. Bernstein and Janet L. Woodka, counsel for Amana.

(10)In a subsequent letter dated September 8, 1999, the EPA clarified that "EPA does not currently have regulations that would prohibit the importation of appliances containing foam blown with HCFC-141b." The agency reemphasized, however, that "[a]s a policy matter, we are concerned about the future importation of products manufactured with a substance that will be illegal to produce in the United States [and w]e are currently reviewing Title VI of the Clean Air Act to determine what authority we may have to address this concern." Letter of September 8, 1999, from Jeff Cohen, Chief, Stratospheric Protection Division, EPA.

(11)"This quoted statement of Guy Broadbent, AlliedSignal Director of Specialty Products, appears in a September 13, 1999 press release "AlliedSignal Receives US EPA Approval and Identifies Production Site for HFC-245fa."

(12)AlliedSignal's explanation is confirmed in the regulatory preamble where the agency stated in assessing the timing matter that "[a]s of February 1997, AlliedSignal expected appliance manufacturers to begin converting to HFC-245fa as early as 1999 and to complete their conversion before the end of 2000." 62 Fed. Reg. at 23107.

(13)AlliedSignal states that the firm will be able to produce sufficient quantities of HFC-245fa for customer "ramp-up" purposes at the firm's Buffalo Research Laboratory pilot plant. AlliedSignal Supplemental Comments at 3.

(14)Thus we need not reach the conjectural issue of whether EPA has the legal authority to close the HCFC-141b imported product "loophole" existing in the present regulations, and if in fact the EPA shall move to do so in view its January 1, 2003, domestic ban of the blowing agent. We note in passing, however, our impression based upon EPA correspondence submitted in the proceeding that its not the practice of EPA to allow such a regulatory interstice to persist and the agency will likely explore all available means to rectify it.