Case No. VEH-0015

January 31, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Evidentiary Hearing

Name of Petitioner: Sub-Zero Freezer Co.

Date of Filing: December 1, 2000

Case Number: VEH-0015

Sub-Zero Freezer Co. (Sub-Zero) filed a motion for evidentiary hearing with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The motion relates to Sub-Zero's appeal (Case No. VEA-0015) of our November 3 decision, in which we granted Viking Range Corporation (Viking) a six-month exception from the 2001 energy appliance efficiency standards for built-in refrigerators. Viking Range Corporation, 28 DOE ¶ 81,002 (2000). As discussed below, we have concluded that the motion should be granted in part.

I. Background

The refrigerator efficiency standards become effective on July 1, 2001. See 10 C.F.R. Part 430. In June 2000, Viking Range requested that OHA grant it a 12-month extension to comply with the standards. In our November 3 decision, we granted Viking a six- month extension. Three Viking competitors appealed the decision: Sub-Zero, GE Appliances (GE), and Whirlpool Corporation (Whirlpool).

In the November 3 decision, we explained our conclusion that the application of the July 1, 2001 effective date to Viking would create an unfair distribution of burdens. With respect to the underlying facts, we found that (i) Viking historically outsourced the manufacture of its built-in refrigerators; (ii) as of 1999, four firms manufactured built-in refrigerators: Sub-Zero, GE's supplier - Kolpak, Whirlpool, and Amana Appliances (Amana); (iii) in the fall of 1999, Whirlpool announced that it would no longer supply Viking; (iv) because Sub-Zero and Kolpak similarly would not supply Viking, Amana was Viking's only outsourcing choice; (v) Viking purchased refrigerators from Amana for several months, until Amana decided to stop selling built-in refrigerators and leave the market; (vi) Viking then purchased Amana's built-in refrigeration manufacturing operation; and (vii) Amana's lack of progress on meeting the standards precludes Viking from achieving compliance by the July 1, 2001 effective date. We further found that, in the absence of exception relief, Viking would not be able to sell built-in refrigerators for six months, which would jeopardize its share of the built-in refrigerator market and have a collateral impact on its sales of other appliances. Finally, we found that the grant of exception relief would have minimal impact on national energy conservation objectives.

In response to the parties' appeals, we are now considering a modification of the November 3 decision to address the appellants' concerns that the relief would give Viking a competitive advantage. Specifically, we are considering a limitation that would prevent Viking from using the relief to increase its market share. We have proposed to achieve that result by limiting the number of units that may be produced during the period of exception relief, and we have requested the parties' views on such a limitation. Letters dated December 8, 2000 & January 12, 2001 from Thomas L. Wieker, Deputy Director, Office of Hearings and Appeals, to the parties. Accordingly, we will take account of this proposed modification in our analysis of Sub-Zero's motion for evidentiary hearing.

The items on which Sub-Zero requests an evidentiary hearing relate to its contentions that Viking's acquisition of the Amana manufacturing operation was a discretionary business decision and that an exception is unnecessary and unfair to competitors. Sub- Zero identifies five specific factual issues: (i) whether, when Viking purchased Amana, Viking had outsourcing options, (ii) whether having a built-in refrigerator that will meet the July 1, 2001 deadline is a vital part of Viking's business strategy, (iii) whether the burden of not selling built-in refrigerators for six months is significant, (iv) whether Viking knew of Amana's lack of progress necessary to meet the July 1, 2001 deadline, and (v) whether a six-month extension of the deadline will give Viking a significant competitive advantage. As explained below, we will permit an evidentiary hearing on the first, third, and fifth issues.

II. Applicable Standard

The DOE procedural regulations govern the processing of this appeal. 10 C.F.R. Part 1003. "Subpart C - Appeals" provides that requests for hearings are governed by Subpart F. 10 C.F.R. § 1003.35(c) (referring to Subpart F). The purpose of an evidentiary

hearing is to receive testimony on "material factual issues that remain in dispute." 10 C.F.R. § 1003.62(e).

III. Analysis

As an initial matter, we note that Sub-Zero's motion requests the opportunity to present its own witnesses and to require Viking to present witnesses. It is unclear to what extent Sub-Zero wishes to present witnesses. Under the regulations, Viking has the obligation to support its request for exception relief. If Viking fails to do so, it is not entitled to relief; Sub-Zero's contention that Viking has failed to do so is a legal argument which we will consider in connection with the underlying appeal. As explained below, however, we will permit Sub-Zero to present evidence on three of the five issues it identified. Sub-Zero should advise us, by February 9, 2001, whether it will present evidence on the three issues and, if so, Sub-Zero should provide a description of the evidence. If Sub-Zero elects to present testimony on a given issue, we will give the other parties the option to present evidence on that issue.

Sub-Zero's first issue is whether Viking had an alternative to its purchase of the Amana operation, i.e., whether Viking could have continued to outsource the manufacture of built-in refrigerators. As explained above, in our November 3 decision, we found that such outsourcing was not possible. Sub-Zero disagrees with that finding.

The record indicates that the identified manufacturers of built-in refrigerators - Sub-Zero, Kolpak, and Whirlpool - all refused to supply Viking.(1) Thus, the only disputed issue is whether other sources existed. Sub-Zero maintains that the answer is "yes."

We will grant Sub-Zero's request to present evidence that identifies other sources of built-in refrigerators. If Sub-Zero has documents concerning such other sources that it intends to rely on, Sub-Zero shall supply them prior to the hearing.

Sub-Zero's second issue is whether having a built-in refrigerator that would meet the July 1, 2001 deadline was a "vital" part of Viking's business strategy. Sub-Zero maintains that the answer to this question is "no."

Whether having built-in refrigerators that would meet the July 1, 2001 deadline is "vital" to Viking's business strategy is not material. The record indicates that in 1993, Viking announced its intention to source built-in refrigerators and had ensuing sourcing discussions with all three appellants. Whirlpool has not disputed that its 1995 negotiations with Viking led to Whirpool's manufacture of refrigerators for Viking. Thus, as Sub-Zero itself argues, the sale of such refrigerators has been part of Viking's business strategy. All parties would probably agree that the sale of such refrigerators is not "vital" in the sense that the sale is not necessary to Viking's business survival. Indeed, Viking has not requested an exception based on "serious hardship." Accordingly, we do not believe that an evidentiary hearing on this issue would produce material evidence.

Sub-Zero's third issue is whether the burden of not selling built- in refrigerators for a six-month period is significant. In our November 3 decision, we found that the inability to sell built-in refrigerators would jeopardize Viking's share of the built-in refrigerator market and have a collateral negative impact on its sale of other appliances. Sub-Zero disagrees.

We will permit the presentation of witnesses who believe that not selling built-in refrigerators for six months would have only a minimal impact on Viking. We believe that it is a generally accepted proposition that a firm's six-month suspension of sales of an existing product jeopardizes the firm's market share of that product. If so, we question whether Viking's argument about a collateral negative impact on its sales of other appliances is important. Nonetheless, we will permit an evidentiary hearing on both of these issues.

Sub-Zero's fourth issue is whether Viking knew of Amana's lack of progress in meeting the July 1, 2001 deadline when it purchased the Amana manufacturing operation. Sub-Zero argues that Viking knew, or should have known, of such lack of progress, and got the benefit of a reduced purchase price.

Whether Viking knew, or should have known, of Amana's lack of progress or whether Viking got the benefit of a reduced purchase price, is not material to whether Viking's purchase of Amana's operation was a discretionary business decision. If Viking's alternative to its purchase of Amana's operation was the discontinuation of its sale of built-in refrigerators, Viking's purchase of the Amana operation was not a "discretionary" decision that would preclude the grant of relief. As stated above, we are interested in hearing evidence at an evidentiary hearing on the existence of Viking's outsourcing options. Accordingly, we do not believe that any testimony concerning the negotiation of the Amana purchase is relevant and, therefore, will not grant an evidentiary hearing on that subject.

Sub-Zero's fifth issue is whether a six-month extension will give Viking a substantial competitive advantage. In our November 3 decision, we found that any such advantage was speculative. We found that Viking was incurring design and retooling costs and would continue to do so during the period of relief. Thus, we expected that Viking would attempt to pass through those costs in its sale of noncompliant refrigerators during the period of relief.(2) Sub-Zero disagrees.

We question the logic of arguments advanced in support of the asserted cost advantage. The first argument is that Viking was able to devote resources to product development, thereby gaining an advantage, while other firms were devoting resources to compliance. Assuming arguendo that that statement is accurate, it follows that Viking must now devote resources to compliance while other firms can devote resources to product development. The second argument is that Viking will not pass through its design and retooling cost during the relief period. Firms pass through costs unless precluded by market conditions or a desire to increase market share. The exception relief will not change market conditions, which will apply to all the manufacturers of built-in refrigerators. As we have advised the parties, we are giving serious consideration to limiting the exception relief to preclude the use of relief to increase market share.

As just indicated, we doubt that the relief - particularly as we propose to modify it - would confer a competitive advantage on Viking. Nonetheless, we will allow Sub-Zero to present the testimony of its company officials and outside experts at a hearing on this issue, if Sub-Zero wishes.

It Is Therefore Ordered That:

(1) The Motion for Evidentiary Hearing filed by Sub-Zero Freezer Co., on December 1, 2000, Case No. VEH-0017, be and hereby is granted in part as set forth in Paragraphs 2 and 3 below.

(2) Sub-Zero's request for an evidentiary hearing on the first, third, and fifth issues described in this Decision and Order is granted. Sub-Zero's request for an evidentiary hearing on the second and fourth issues is denied.

(3) Sub-Zero should advise us, no later than February 8, 2001, whether it wishes to avail itself of the opportunity for an evidentiary hearing on the identified issues. If Sub-Zero elects to proceed with an evidentiary hearing on any of the three identified issues, GE, Whirlpool, and Viking will be permitted, but not required, to submit evidence on the issue.

(4) This is an interlocutory Order of the Department of Energy and subject to appeal only upon the issuance of a final Decision and Order in Case No. VEA-0015.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 31, 2001

(1)Sub-Zero has not contested Viking's assertion that Sub-Zero refused to supply it; GE has not contested Viking's assertion that Kolpak refused to supply it; and Whirlpool has not contested Viking's assertion that Whirlpool refused to supply it. Indeed, the record contains a copy of Whirlpool's September 8, 1999 letter, terminating the Whirlpool/Viking supply relationship that existed from 1997 to 1999.

(2)We further concluded that even if there was some advantage, the advantage was outweighed by the lack of competition and consumer choice that would occur if relief were denied.