

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 27 of
the Environmental Conservation Law (ECL) of the State
of New York,

ORDER

-by-

DEC CASE NO.
CO 4-20160609-06

UPSTAR USA GROUP,

Respondent.

This administrative enforcement proceeding addresses allegations of the staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Upstar USA Group, a manufacturer of covered electronic equipment,¹ violated ECL 27-2617(1) and (3) by failing to submit an annual report with respect to its sale of covered electronic equipment for the 2015 reporting period and failing to submit the annual reporting fee for 2015. DEC staff alleged that respondent, which is registered with the Department as a manufacturer of televisions and computer peripherals, failed to submit the report and fee to the Department on or before the due date of April 1, 2016.

On August 24, 2016, an adjudicatory hearing was convened before Michael S. Caruso, Administrative Law Judge (ALJ) of the Department's Office of Hearings and Mediation Services. ALJ Caruso prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear for the adjudicatory hearing scheduled in the matter on August 24, 2016 (see Hearing Report at 4 [Finding of Fact No. 11]). As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Hearing Report at 5). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Furthermore, at the hearing on August 24, 2016, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report at 4-5). Accordingly, staff is entitled to a judgment based on record evidence.

ECL 27-2617(1) requires manufacturers that offer covered electronic equipment for sale in New York State to submit an annual report to the Department by March 1 of each year. The annual report is to be accompanied by an annual reporting fee of three thousand dollars (\$3,000)

¹ "Covered electronic equipment" is defined to mean "a computer; computer peripheral; small electronic equipment; small-scale server; cathode ray tube; or television" (ECL 27-2601[5]).

(see ECL 27-2617[3]). In 2016, pursuant to ECL 27-2617(2) the Department required manufacturer's annual reports to be filed electronically and extended the deadline for the 2015 report and fee to April 1, 2016 (see Hearing Report, at 3 [Finding of Fact No. 4]. The record demonstrates that respondent was required to, but did not, file an annual report and annual reporting fee of \$3,000 on or before April 1, 2016 (see ECL 27-2617[1] and [3]; Hearing Report, at 3 [Findings of Fact Nos. 3-8], 4-5). At the hearing, Department staff moved to amend its pleadings to correct statutory references and conform the pleadings to the proof, and the ALJ granted staff's motions.

ECL 71-2729(1)(c)(i) provides for a civil penalty of up to one thousand (\$1,000) for each day the report or fee is not submitted. Department staff seeks a civil penalty in the amount of five thousand dollars (\$5,000).²

The Department relies upon the timely filing of the annual reports to implement the Electronic Equipment Recycling and Reuse Act (ECL article 27 title 26) (see Affidavit of Mark Moroukian, June 13, 2016, ¶12). The civil penalty of five thousand dollars (\$5,000) that Department staff requests is authorized. Furthermore, the annual report, which respondent failed to file, is instrumental to Department staff performing its statutory duties and obligations, and, accordingly, the penalty is appropriate.

In addition to the payment of the civil penalty, I direct that respondent submit to the Department the annual report for the 2015 reporting period that was due by April 1, 2016, within fifteen (15) days of service of this order upon respondent, together with the three thousand dollar (\$3,000) annual fee.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Upstar USA Group waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent Upstar USA Group violated ECL 27-2617(1) and (3) by failing to file an annual report and submit payment of the \$3,000 annual reporting fee on or before April 1, 2016.
- III. Within fifteen (15) days of the service of this order upon respondent Upstar USA Group:
 - A. Respondent shall submit to the Department a complete annual report for the 2015 reporting period, together with the \$3,000 annual reporting fee; and

² ECL 71-2729(1)(c)(i) provides that any manufacturer that "fails to submit any report, registration, fee, or surcharge to the department as required by title twenty-six of article twenty-seven of this chapter shall be liable for a civil penalty not to exceed one thousand dollars for each day such report, registration, fee, or surcharge is not submitted[.]"

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 27 of
the Environmental Conservation Law (ECL) of the State
of New York,

HEARING REPORT

-by-

DEC CASE NO.
CO 4-20160609-06

UPSTAR USA GROUP,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Upstar USA Group (respondent) with a notice of hearing and complaint, dated June 14, 2016, alleging a violation of ECL 27-2617(1) for failing to submit an annual report for the 2015 reporting period by April 1, 2016 and ECL 27-2617(3) for failing to submit the annual reporting fee of \$3,000 by April 1, 2016.¹ The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL 27-2617(1) and (3); (2) assessing a civil penalty in the amount of five thousand dollars (\$5,000); (3) directing respondent to submit its 2015 annual report; (4) directing respondent to submit the 2015 annual reporting fee; and (4) granting such other relief as the Commissioner shall deem appropriate.

Respondent is a foreign business entity having offices in Ontario, California. Service of the notice of hearing and complaint on respondent was made by serving respondent by certified mail return receipt requested on June 15, 2016 (see Staff Exhibit 5). Respondent received the certified mail on June 20, 2016 (see id.). Respondent failed to file an answer to the complaint, and failed to appear at hearing scheduled for August 24, 2016, as directed in the notice of hearing and accompanying cover letter (see Staff Exhibit 3).

As stated in the notice of hearing, on August 24, 2016, an adjudicatory hearing was convened before me at the Department's Central Office, 625 Broadway, Albany, New York. Department staff was represented by Jennifer Andaloro, Esq., Senior Attorney, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York. No one appeared on behalf of respondent.

¹ Department staff inadvertently referenced ECL 27-2617(2) in the complaint for failing to submit the annual reporting fee. The complaint, however, lists the "Enforceable Provisions of Law" including "ECL 27-2617(3) requires that the annual report submitted by a manufacturer be accompanied by an annual reporting fee of three thousand dollars (\$3,000.00)." As discussed below, staff moved to correct its pleadings prior to calling its witness and the motion was granted.

Department staff indicated that it was prepared to proceed with the hearing, proffering a staff witness. Noting for the record that respondent had failed to answer the complaint and failed to appear for the adjudicatory hearing, Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15. I reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). Department staff indicated it was ready to proceed with the adjudicatory hearing and seek judgment on the merits.

Department staff called one witness, Mark Moroukian, P.E., Supervisor, Product Stewardship and Waste Reduction Section, with the Department's Division of Material Management. In all, six (6) exhibits were received in evidence.

Applicable Statutory Provisions

ECL 27-2617 Reporting Requirements

“1. Beginning March first, two thousand twelve, for the period of April first, two thousand eleven through December thirty-first, two thousand eleven and each calendar year thereafter, a manufacturer that offers covered electronic equipment for sale in this state shall submit a report to the department on a form prescribed by the department²

“2. The department may require annual reports to be filed electronically.

“3. The report shall be accompanied by an annual reporting fee of three thousand dollars, and any recycling surcharge due pursuant to section 27-2603 of this title.”³

Findings of Fact

The following facts are found based upon the preponderance of evidence presented at the hearing, see 6 NYCRR 622.11(c):

1. Respondent Upstar USA Group (respondent), having offices at 1885 S. Vineyard Avenue #1, Ontario, California, manufactures televisions and computer peripheral equipment. See

² ECL 27-2617(1)(a-j) list in great detail what must be provided in the annual report including sales data reported by weight of the manufacturer's covered electronic equipment sold in the state for the previous three calendar years, the quantity by weight of electronic waste collected for recycling or reuse in the state, and the amount of any recycling surcharge owed.

³ The Electronic Equipment Recycling and Reuse Act (ECL article 27 title 26) was passed in 2010 to address the rapidly growing need for proper management of the electronic waste (e-waste) stream. E-waste contains hazardous constituents such as lead, cadmium, mercury and other hazardous constituents. The law established a statewide recycling and reuse program for e-waste using a product stewardship model that requires manufacturers of covered electronic equipment (CEE) to collect, reuse and recycle their own CEE. The program provides consumers the opportunity to recycle their e-waste free of charge, thus diverting e-waste and its hazardous constituents from disposal in landfills. See Sponsor's Mem, 2010 A.B. 11308.

Testimony of Mark Moroukian; Staff Exhibit 1.

2. Respondent is a foreign company that sells covered electronic equipment in the State of New York. See Testimony of Mark Moroukian; Staff Exhibits 1 and 5.
3. Respondent submitted a Registration Form for Manufacturers of Covered Electronic Equipment to the Department dated June 23, 2015. The Department assigned respondent Registration # 01107. See Testimony of Mark Moroukian; Staff Exhibit 1.
4. Manufacturers of covered electronic equipment are required to submit annual reports and annual reporting fees on or before March 1 of each year. In 2016, pursuant to ECL 27-2617(2) the Department required manufacturer's annual reports to be filed electronically and extended the deadline to April 1, 2016. In addition, the manufacturers are required to sign and mail a certification along with the fee form and payment of the annual reporting fee to the Department. See Testimony of Mark Moroukian; Staff Exhibit 2.
5. On April 12, 2016, the Department issued a Notice of Violation to respondent for failing to submit an Annual Report for Manufacturers of Covered Electronic Equipment and the manufacturer annual reporting fee for the 2015 calendar year. See Testimony of Mark Moroukian; Staff Exhibit 2.
6. Mark Moroukian is a licensed engineer and is the supervisor of the Product Stewardship and Waste Reduction Section, with the Department's Division of Materials Management. The Product Stewardship and Waste Reduction Section administers and implements the Electronic Equipment Recycling and Reuse Act (ECL article 27 title 26). Mr. Moroukian is authorized to maintain, revise, access, examine and search the Department's database. See Testimony of Mark Moroukian; Staff Exhibit 4.
7. On June 13, 2016, Mark Moroukian searched the Department's registered covered electronic equipment manufacturer annual report and annual reporting fee records. See Testimony of Mark Moroukian; Staff Exhibit 4.
8. As a result of his search, Mark Moroukian confirmed that respondent had not filed an annual report or annual reporting fee for the 2015 calendar year. See Testimony of Mark Moroukian; Staff Exhibit 4.
9. Each year the Department collects the information submitted in the manufacturers' annual reports and uses that data to determine the state's recycling or reuse goals and each manufacturers' acceptance standards (how much electronic waste each manufacturer must collect for recycling or reuse) for the current calendar year.⁴ See Testimony of

⁴ For example, the 2015 data (along with the data for 2013 and 2014) is used to determine each manufacturer's acceptance standards for 2016. Each year Department staff must determine the overall recycling or reuse goal (based on the data provided by the manufacturers) and then advise each manufacturer how much covered electronic equipment that manufacturer must accept for recycling or reuse. The manufacturer's acceptance standard is determined by multiplying the state recycling or reuse goal by the manufacturer's market share of e-waste (the

Mark Moroukian; Staff Exhibit 4.

10. Respondent was served personally, on June 20, 2016, pursuant to 6 NYCRR 622.3(a)(3) with a notice of hearing and complaint dated June 14, 2016, alleging a violation of ECL 27-2617(1) and (2), together with a cover letter, statement of readiness and supporting affidavit, for failure to submit an annual report and annual reporting fee on or before April 1, 2016.⁵ See Staff Exhibits 3, 4, and 5; see also Hearing Record.
11. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on August 24, 2016, as directed in the notice of hearing. See Hearing Record.

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint. See 6 NYCRR 622.4(a). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing." 6 NYCRR 622.15(a). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing." 6 NYCRR 622.8(c); see also 6 NYCRR 622.15(a) ("A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and waiver of respondent's right to a hearing").

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order. See 6 NYCRR 622.15(b)(1)-(3).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them." Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 (citations omitted). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim." Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3.

In this case, Department staff's proof presents a prima facie case demonstrating that respondent failed to submit an annual report and annual reporting fee for the 2015 calendar year on or before April 1, 2016.

manufacturer's total weight of covered electronic equipment sold to persons in New York State during the preceding three years [as reported by the manufacturer] divided by the total weight of all manufacturers covered electronic equipment sold to persons in the state during the preceding three years [as reported by the manufacturers]). See ECL 27-2603(3) and (4).

⁵ As discussed below, staff pleaded and proved failure to file the annual reporting fee (ECL 27-2617[3]) but inadvertently referenced ECL 27-2617(2) in the complaint.

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on August 24, 2016, as directed in the notice of hearing. Department staff provided its proposed order at the August 24, 2016 hearing. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to submit an annual report and annual reporting fee on or before April 1, 2016 in violation of ECL 27-2617(1) and (3). The Department is entitled to judgment upon the facts proven. At the August 24, 2016 hearing and before calling its witness, Department staff moved orally to amend the notice of hearing and complaint to correct the reference to violation of ECL 27-1617 to ECL 27-2617 in the notice of hearing; and correct the references to ECL 27-2617(2) in paragraphs 14 and 17 of the complaint to ECL 27-2617(3). Prior to the close of hearing, Department staff moved orally to conform the pleadings to the proof. Pursuant to 6 NYCRR 622.10(b)(1)(i), I granted Department staff's motions to amend the pleadings and conform the pleadings to the proof, as there is no prejudice to respondent in correcting the statutory reference for the violations alleged.⁶

Department staff's proposed order seeks a civil penalty of five thousand dollars (\$5,000). Staff discussed the importance of annual reporting to the statutory scheme. If manufacturers fail to report in a timely fashion, Department staff cannot determine the state's recycling or reuse goals and cannot provide the manufacturers with their respective collection standards for the current year. Timely filed manufacturers' annual reports are vital to Department staff performing its statutory duties.

ECL 71-2729(1)(c)(i) provides that any manufacturer that "fails to submit any report, registration, fee, or surcharge to the department as required by title twenty-six of article twenty-seven of this chapter shall be liable for a civil penalty not to exceed one thousand dollars for each day such report, registration, fee, or surcharge is not submitted[.]" Respondent's annual report and annual reporting fee for calendar year 2015 were due on or before April 1, 2016. Applying the maximum penalty allowed by law, \$1,000 per day of violation, to the period between the April 1, 2016 filing deadline and the date of staff's notice of hearing and complaint, June 14, 2016 or 74 days results in a maximum penalty of \$74,000.⁷

Staff's requested penalty is a fraction of the maximum penalty. In addition, Department staff applied OGC-8, Solid Waste Enforcement Policy (updated December 9, 2015) to determine the violation was minor regarding potential for harm or actual damage, but staff noted the importance of the annual reports to the regulatory scheme. Based on those factors, staff arrived

⁶ I note that Department staff pleaded the violations of ECL 27-2617(1) and ECL 27-2617(3) as separate factual allegations, but staff treats the violations as a single violation for the purpose of calculating a maximum penalty and the requested penalty.

⁷ Department staff calculated a maximum penalty of \$75,000 for the same period. Staff's calculation includes April 1, 2016, the day the annual report and fee were due. Again, staff's calculation is for a single violation rather than the two violations proven.

at the \$5,000 requested penalty, which falls within the recommended penalty amounts found in the Penalty Range Guide attached to OGC-8. The requested civil penalty is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for default, holding respondent Upstar USA Group in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent Upstar USA Group violated ECL 27-2617(1) and (3) by failing to file an annual report and submit payment of the \$3,000 annual reporting fee on or before April 1, 2016;
3. Directing respondent Upstar USA Group to submit to the Department, within fifteen (15) days of service of the Commissioner's order, a complete annual report for the 2015 reporting year, together with the \$3,000 annual reporting fee;
4. Directing respondent Upstar USA Group to pay a civil penalty in the amount of five thousand dollars (\$5,000) within fifteen (15) days of service of the Commissioner's order; and
5. Directing such other relief as he may deem appropriate.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
September 1, 2016

EXHIBIT CHART – E-WASTE EXPEDITED PROCEEDINGS

Matter of Upstar USA Group
 DEC Case No. CO 4-20160609-06
 August 24, 2016 – Central Office
 Edrol File No. 030201101823

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|---|-------|---------|------------------|---|
| 1 | Registration Form for Manufacturers of Covered Electronic Equipment submitted by Upstar USA Group, dated June 23, 2015. | ✓ | ✓ | Department Staff | |
| 2 | Cover Letter from Mark M. Moroukian, P.E. to respondent, with Notice of Violation, both dated April 12, 2016. | ✓ | ✓ | Department Staff | |
| 3 | Cover Letter from Jennifer Andaloro, Esq. to respondent, Notice of Hearing, Complaint, and Statement of Readiness; all dated June 14, 2016. | ✓ | ✓ | Department Staff | |
| 4 | Affidavit of Mark Moroukian, sworn to June 13, 2016. | ✓ | ✓ | Department Staff | The affidavit was served on respondent with Exhibit 3 |

| Exhibit No. | Description | ID'd? | Rec'd ? | Offered By | Notes |
|-------------|--|-------|------------|------------------|-------|
| 5 | Request To Send form, dated June 14, 2016; Tracking and Inquiry, dated August 24, 2016; USPS Tracking, dated August 24, 2016; USPS delivery confirmation, dated July 26, 2016; Affidavit of Service of Elissa Armater, sworn to August 4, 2016; and Supplemental Affidavit of Service of Elissa Armater, sworn to August 25, 2016. | ✓ | ✓ | Department Staff | |
| 6 | Penalty Calculation for Failure to Submit Annual Report & Annual Report Fee | ✓ | ✓ | Department Staff | |