Judge Pauley

09 CV 6583

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMER ELECTRONICS ASSOCIATION, INFORMATION TECHNOLOGY INDUSTRY COUNCIL, and ITAC SYSTEMS, INC.,

Plaintiffs,

v.

CITY OF NEW YORK, MICHAEL R. BLOOMBERG, in his official capacity as Mayor of the City of New York, NEW YORK CITY DEPARTMENT OF SANITATION, JOHN J. DOHERTY, in his official capacity as the Commissioner of the Department of Sanitation, and ROBERT LANGE, in his official capacity as Director of Waste Prevention, Reuse and Recycling of the Department of Sanitation,

Defendants.

09 Civ.

COMPLAINT

Plaintiffs Consumer Electronics Association, Information Technology Industry Council, and ITAC Systems, Inc., for their Complaint hereby allege as follows:

INTRODUCTION

1. Plaintiffs are two major trade associations and a company that are damaged by recently enacted City of New York ("City") laws and regulations for managing electronic waste ("E-waste") that are arbitrary, capricious, illegal, and unconstitutional, and impose crushing costs and excessive burdens on Plaintiffs. Plaintiffs agree with Defendant Mayor Bloomberg, who vetoed part of this law, declaring that the law was illegal and unconstitutional (the veto was later overridden). Plaintiffs now seek preliminary and permanent injunctive relief and damages from the illegal E-waste program, which exceeds the authority of the City of New York to regulate interstate commerce. Although the E-waste Program purports to regulate in the City of New York only, the E-waste Program in fact has an extraterritorial reach that controls manufacturers'

conduct beyond the boundaries of City and imposes liability for electronic goods sold long ago by other manufacturers. A preliminary injunction is critical to bar a July 31, 2009 deadline that mandates Plaintiffs' member companies to, among other things, submit plans to directly collect and recycle E-waste from every City resident, at each company's sole cost and expense, regardless of the connection of the company to the old equipment or its current owner. Plaintiffs also ask that the City be ordered to conduct adequate environmental reviews for a program of this scope, as required under state and City laws, which were effectively ignored by the City in its haste to enact a new program for electronic waste.

2. Plaintiffs constitute the consumer electronics industry, which is committed to and has great experience recycling electronic products in jurisdictions world-wide and has worked successfully with many governmental entities to craft sustainable and effective E-waste programs. Many of the industry's leading companies have well-publicized, nationwide "take-back" programs in place whereby members of the public can return used electronics products to manufacturers to ensure proper management, recycling and reuse.

3. Information technology ("IT") and consumer electronics manufacturers also participate in 19 mandatory take-back programs in states throughout the United States. In addition, Plaintiffs are meeting mandatory take-back requirements throughout the European Union and in Japan. Upon information and belief, however, New York City is the first municipality to impose a mandatory E-waste law. While each of the other state programs imposes some burdens on manufacturers, none remotely approaches the draconian level of burdens that New York City's E-waste program imposes on Plaintiffs. Working in some cases directly and in other instances through the trade associations, Plaintiffs attempted over the last

several years to work with the City to develop a reasonable and effective recycling program, but their suggestions were rejected and efforts at dialogue and negotiation rebuffed.

4. The New York City E-waste program (hereinafter, the "E-waste Program") that is the subject of this lawsuit is comprised of (i) two laws enacted by the City Council in 2008 (Local Laws 13 and 21, collectively the "E-waste Law"); (ii) rules finalized on April 15, 2009, by the Department of Sanitation ("E-waste Rules") to implement the E-waste Law; and (iii) E-waste plan submission materials issued on or about the same time as the E-waste Rules directing Plaintiffs and hundreds of companies to file by July 31 detailed plans and commitments to implement the E-waste Law and its regulations. The E-waste Program imposes mandates worldwide on any person involved in the manufacture, assembly, branding, licensing, or sale of a vast array of electronic goods sold at any time in the City or sold at other locations and brought into the City by current or past owners, excluding only a modest number of retail outlets. These persons are all labeled "manufacturers" under the E-waste Program.

5. The E-waste Program requires that these manufacturers build an unprecedented waste management infrastructure and deploy personnel and resources to directly collect electronic waste from any resident in the City for free, including directly retrieving from residences old televisions, computers, monitors, printers, and many other electronic devices greater than 15 pounds. For electronic items 15 pounds or less, the manufacturers are individually responsible for establishing drop-off points for the equipment, or establishing a program for the packaging and mail-back of the electronic equipment solely at the manufacturer's expense. If the manufacturer wants to rely solely on the drop-off option for these "smaller" items, it must provide at least 59 drop-off locations across the City.

6. The E-waste Program imposes joint and several, retroactive liability on the Plaintiffs and hundreds of other businesses around the globe whose electronic equipment ends up in New York City. By July 31, Plaintiffs and other manufacturers must certify which companies are responsible for which brands of electronic goods, an impossible task from a legal, logistical and business perspective, because many companies can be "responsible" for the same covered device given the law's excessively broad definition of "manufacturer." In addition, many brands of televisions and other electronic equipment have passed through multiple owners over the last thirty years or more.

7. As the E-waste Program is implemented over the next two years, it will require manufacturers to retrieve the equipment they sold, or, at times, their competitors' equipment, simply upon a phone call or email request from a City resident. By 2011, Plaintiffs and other manufacturers will be required to retrieve "orphan waste" that is of the "type" the manufacture sells or sold, upon the request of a City resident, regardless of origin and regardless of whether the manufacturer makes a new sale or still manufacturers, assembles, licenses, brands or sells that "type" of equipment.

8. The E-waste Program is enforced against manufacturers through an array of fees, fines, penalties, and mandatory performance standards. By 2012, each manufacturer must retrieve a volume of electronic waste in the City equal to 25% of the volume (by weight) it sells in the City. The requirement grows to 65% by 2018, and has no rational relationship to the life span of electronic goods or the impossibility of calculating manufacturer quotas due to the fact that few of the covered manufacturers have the ability to calculate their "sales," if any, to New York City residents. These targets are completely arbitrary in that they mistakenly assume a manufacturer has the ability and legal authority to require equipment owners to relinquish

ownership of their equipment. Yet, a manufacturer that fails to meet a performance standard will be subject to a $50,000 penalty for each percentage point that the manufacturer falls below the standard.

9. A manufacturer that fails to retrieve or accept for return a piece of covered electronic equipment is subject to a $2,000 penalty for each piece of equipment. Thus, a product that a manufacturer sold years ago at some fraction of this amount could result in a $2,000 penalty being imposed years later. Astonishingly, this penalty even extends to situations where a manufacturer fails to retrieve or accept orphan waste, which it never manufactured, owned, sold, or controlled, let alone profited from by putting it into commerce. A manufacturer that fails to submit a required E-waste plan on July 31 or annual reports thereafter is subject to a penalty of $1,000/day.

10. The retrieval requirements imposed on Plaintiffs extend beyond City residents and include all City businesses, non-profits, and government agencies. For these office locations, manufacturers must provide services to collect and/or accept electronic waste that "must be at least reasonably accessible." Manufacturers are barred from charging any fees for this work, with the sole exception of for-profit companies with over fifty employees.

11. The E-waste Program's burdens are being suffered now by Plaintiffs and will come to a head on July 31, 2009, when Plaintiffs and other manufacturers must submit and certify "E-waste plans" to somehow implement the mandates. Among many other requirements set forth in the City's forms for the E-waste plans, the manufacturers must identify the specific contractors, personnel, and methods they will use to begin retrieving electronic goods across the City. They must also identify details regarding service provider contracts (including start and

end dates), the fate and destination of the collected goods, and how their recycling will comply with all City, state, and federal laws.

12. The E-waste Program is not environmentally responsible, as the City could have and would have discovered had it complied with New York State and City laws by conducting an appropriate environmental impact review. The Department of Sanitation ("Department") effectively wrote itself out of the program when it adopted the E-waste Rules, placing all collection, management and recycling/reuse burdens solely on manufacturers. Despite its extensive existing infrastructure and workforce, and its traditional role with respect to the collection of waste in the City, the Department literally has no further obligation to even facilitate the collection of these used products. Instead, retrieving more than 3,000 electronic devices per day will require hundreds of new trucks on City streets, increasing traffic congestion and exacerbating air and noise pollution and releasing additional carbon-dioxide emissions (which is totally at odds the goals of the Mayor's congestion pricing proposal. *See* http://www.nyc.gov/html/planyc2030/html/plan/transportation_congestion-pricing.shtml (last visited July 23, 2009). In contrast, residents and businesses currently bring electronics to voluntary recycling collection centers, or place them curb-side for pick up by Department of Sanitation. This practice is now prohibited under the new program.

13. Plaintiffs and other manufacturers estimate that their damages from the City's illegal E-waste Program will exceed $200 million per year. The costs of the direct collection requirement of the City's E-waste Program are projected to be, on a per pound basis, 10 times more expensive than the total cost of collection and recycling of other e-waste programs in California and Maine. This is because the burden of the E-waste Program rests entirely on the shoulders of manufacturers, and requires them to implement direct collection methods at

residences. The City has enacted an E-waste regulatory scheme that departs dramatically from programs embraced by other state governments by imposing a direct collection obligation on manufacturers. Even in the states where manufacturers are required to take on the primary role in managing E-waste, they are granted sufficient flexibility in how they implement the program, so as to avoid the extraordinarily excessive burdens that the City's E-waste Program imposes on interstate commerce. No other take-back program anywhere in the world has ever mandated the approach currently taken by the City. Indeed, the City itself, with an unparalleled and extensive waste collection infrastructure already in place, stated publicly last year on the Department of Sanitation's website that for the City to operate this type of program would be cost prohibitive: "Due to high labor and transportation costs, it is cost prohibitive to collect [electronic equipment] directly from homes." *See* DSNY Website, http://home2.nyc.gov/html/nycwasteless/html/recycling/electronicsfaq.shtml (last visited July 17, 2008). (As explained below, by July 28, 2008, this language was removed from the Department's website shortly after a City official was told of its existence.)

14. The E-waste Program discriminates against out-of-state manufacturers that lack facilities in the City to accommodate the collection process. The program is therefore *per se* illegal under the dormant Commerce Clause. The City's E-waste Program also violates the dormant Commerce Clause because the burdens imposed by the program on interstate commerce far outweigh the local benefits to City residents, by, among many others things, mandating that manufacturers collect used electronics directly from residents' homes at a cost to be borne solely by manufacturers and eventually passed along to consumers everywhere in the form of higher product prices. Thus, consumers everywhere will end up subsidizing the unprecedented costs of New York City's program.

15. Similarly, the City's targeted and excessive regulation of only manufacturers of certain electronic equipment while excluding from any regulation manufacturers of other types of electronic equipment and "bulky" wastes (such as appliances) that contain the same materials that the City claims can harm the public health and welfare, violates Plaintiffs' right to equal protection under the Fourteenth Amendment. Defendants' imposition of joint and several and retroactive liability on manufacturers also violates manufacturers' constitutional rights under the Due Process, Takings, and Contracts Clauses of the United States Constitution. Under 42 U.S.C. § 1983, in addition to being entitled to injunctive relief against the City's E-waste Program, Plaintiffs are entitled to damages and an award of attorneys' fees as a result of these constitutional violations.

16. Defendants also violated state law because the E-waste Rules are arbitrary and capricious and were formulated and adopted without any rational basis. Defendants' far reaching regulation of manufacturers' conduct beyond the jurisdictional boundaries of New York City exceeds the City's police power authority. Lastly, Defendants failed to adequately consider and address the potential environmental impacts of the E-waste Program, and specifically the mandates set forth in the E-waste Rules and the E-waste plan forms, in violation of the State Environmental Quality Review Act ("SEQRA") and the City's counterpart environmental review law, the City Environmental Quality Review ("CEQR").

JURISDICTION AND VENUE

17. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343 (section 1983 jurisdiction) and 28 U.S.C. § 2201 (declaratory judgment). This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367. Jurisdiction also lies pursuant to 28 U.S.C. § 1332 (diversity jurisdiction) because there is complete diversity between the parties and damages exceed $75,000.00.

18. For purposes of the declaratory relief sought in this Complaint, an actual case or controversy exists between Plaintiffs and Defendants as a result of New York City's enactment of Local Laws 13 and 21, and the Department of Sanitation's promulgation of rules pursuant thereto, and implementation thereof. Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. § 2201 and related preliminary and permanent injunctive relief pursuant to Fed. R. Civ. P. 65, including a temporary restraining order.

19. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

PARTIES

20. Plaintiff Consumer Electronics Association ("CEA") is a leading trade association comprised of over 2,200 companies within the United States' consumer technology industry. CEA members lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, IT, multimedia, and accessory products, as well as related services that are sold through consumer channels. Members range from multi-national corporations to small, specialty niche companies. CEA is actively involved, on behalf of its members, with electronics equipment take-back programs around the country. CEA is organized under the laws of the Commonwealth of Virginia.

21. Plaintiff Information Technology Industry Council ("ITI") is a 93-year-old trade association comprised of 42 companies. Its members consist of leading manufacturers and suppliers of computers, telecommunications, business equipment, software, and IT services. ITI has established an Environmental Leadership Council which represents almost 70 of the principal manufacturers of IT equipment, wireless, and consumer electronics devices, and other electronics and high-tech equipment. These companies are leaders in innovation and sustainability and are at the forefront of voluntary product stewardship efforts. ITI represents its

membership across the country and internationally with respect to used electronics equipment take-back programs. ITI is organized under the laws of the State of Delaware.

22. CEA and ITI have standing to bring their claims because their respective members would otherwise have standing to sue in their own right, the interests CEA and ITI seek to protect are germane to CEA's and ITI's purpose, and neither the claims asserted nor the relief requested requires the participation of individual members in this lawsuit.

23. Plaintiff ITAC Systems, Inc. ("ITAC") is a small electronics manufacturing company based in Garland, Texas. ITAC designs, manufactures, and markets MOUSE-TRAK high-performance computer input devices used in manufacturing process control, transaction processing, and medical systems, as well as computer graphics, engineering, and government markets. ITAC is incorporated under the laws of the State of Texas.

24. Defendant City of New York is a municipality organized and existing under the laws of the State of New York. At all times relevant hereto, Defendant City, acting through the New York City Council, the Office of the Mayor and the Department of Sanitation, was and is responsible for enacting and adopting the E-waste Law, and promulgating E-waste Rules thereunder, and enforcing these laws, rules, and the E-waste Program challenged in this case.

25. Defendant New York City Department of Sanitation ("Department" or "DSNY") is an administrative agency of the City, established under Chapter 31 of the New York City Charter. Defendant DSNY was and is responsible for implementing the E-waste Law, promulgating and implementing the E-waste Rules, creating the E-waste Plan forms, and implementing and enforcing the E-waste Program as a whole.

26. Defendant Michael R. Bloomberg ("Bloomberg"), being sued in his official capacity, is the Mayor and chief executive officer of the City of New York under Section 3 of the

New York City Charter. At all times relevant hereto, Defendant Bloomberg, acting as Mayor and through his oversight of and general authority over the DSNY, was and is responsible for implementing and enforcing the E-waste Law, the E-waste Rules, and the E-waste Program.

27. Defendant John J. Doherty ("Doherty"), being sued in his official capacity, is the Commissioner of DSNY. At all times relevant hereto, Defendant Doherty was and is responsible for implementing and enforcing the E-waste Law, and formulating, adopting, implementing, and/or enforcing the E-waste Rules and E-waste Program, which is being challenged in this case.

28. Defendant Robert Lange ("Lange"), being sued in his official capacity, is the Director of Waste Prevention, Reuse and Recycling of the DSNY. At all times relevant hereto, Defendant Lange was and is responsible for implementing and enforcing the E-waste Law, and formulating, adopting, implementing, and/or enforcing the E-waste Rules and E-waste Program, which is being challenged in this case.

FACTS

I. General Background

29. In 2006, Defendant DSNY, after a two-year process, issued a comprehensive Solid Waste Management Plan ("2006 SWMP") pursuant to Article 27 of the New York State Environmental Conservation Law ("ECL"). The 2006 SWMP established the structure of New York City's solid waste management for the next 20 years—2006 through 2025. As part of that effort, DSNY undertook a comprehensive environmental assessment of potential environmental impacts in relation to the plan pursuant to SEQRA and CEQR.

30. However, upon information and belief, neither the 2006 SWMP, nor the SEQRA/CEQR environmental assessment conducted for the 2006 SWMP, nor DSNY's findings based on that assessment, discussed or assessed any potential environmental impacts associated

with the requirements of the then-future E-waste Law, E-waste Rules, or E-waste Program at issue in this case.

31. To the contrary, the 2006 SWMP materials merely addressed DSNY's then existing program implemented by DSNY to deal with used electronics products and made a vague reference to a possible future City Council initiative.

32. As explained below, when the City Council enacted the E-waste Law it concluded – without any substantive analysis – that the law, which did not include a "direct collection" mandate, would not cause any adverse environmental impacts. When DSNY subsequently exercised its discretion to promulgate rules to implement the E-waste Law, it did include a direct collection mandate, effectively forcing hundreds of additional trucks onto the streets of New York City. Thus, the Department was independently obligated to assess the program's potential environmental impacts due to the direct collection requirement pursuant to both SEQRA and CEQR. It failed to do so.

II. NYC E-waste Program

A. Defendant Bloomberg Warns of Illegality of E-waste Law and Vetoes Portion of Law

33. In April and May of 2008, the New York City Council passed a two-part electronic waste recycling law, Intro 728 (which became Local Law 13) and Intro 729 (which became Local Law 21). Initially proposed and passed by the City Council as a single bill in February 2008, the City Council broke the law into two components after Defendant Bloomberg threatened to veto and not enforce a law that he believed was illegal.

34. At that time, Defendant Bloomberg stated unequivocally that the proposed law was "**totally illegal**" and openly opined that the "**law violates a whole bunch of federal laws on interstate commerce.**" *See* Ray Rivera, *Mayor Calls Electronics Recycling Bill Illegal*, N.Y.

TIMES, available at http://cityroom.blogs.nytimes.com/2008/02/15/mayor-says-hell-ignore-veto-on-electronic-recycling/?hp (emphasis added) (last visited July 23, 2009).

35. Defendant Bloomberg further explained:

> **The trouble with this law that the City Council passed is that you hold the manufacturers responsible for the public to recycle and the manufacturers can't do that.** They don't sell directly to the public in many cases, they sell to wholesalers, and the wholesalers, you're not holding them responsible, but also it's the individual's responsibility.

Id. (emphasis added).

36. Defendant City of New York, through its City Council, completely ignored Mayor Bloomberg's admonitions, and simply broke the original bill into two components (*i.e.*, Local Laws 13 and 21), leaving all the substantive components largely unchanged. Defendant Bloomberg signed Local Law 13 into effect and vetoed Local Law 21 (the portion that established mandatory performance standards for volumes of recycling and penalties), but the veto was overridden by the City Council.

B. Major Provisions of the E-waste Law

37. The E-waste Law imposes upon only "manufacturers" the obligation to collect, handle, and recycle or reuse "covered electronic equipment" ("CEE"). The law prohibits residents from disposing of CEE as solid waste beginning on July 1, 2010. However, the burdens on manufacturers are immediate.

38. The law's retroactive reach begins with its definition of "manufacturer":

> a person who: 1. assembles or substantially assembles, or has assembled or substantially assembled, covered electronic equipment for sale in the city; 2. manufactures or has manufactured covered electronic equipment under its own brand name or under any other brand name for sale in the city; 3. sells or has sold, under its own brand name, covered electronic equipment produced by another person for sale in the city; 4. owns a brand name that it licenses or has licensed to another person for use on covered electronic equipment sold in the city; 5. imports or has imported covered

> electronic equipment for sale in the city; or 6. manufactures or has manufactured covered electronic equipment for sale in the city without affixing a brand name.

Chapter 4-A of Title 16 of the Administrative Code of the City of New York ("Code") § 16-421(g).

39. The law defines CEE that must be collected from households as "any computer central processing unit; cathode ray tube; cathode ray tube device; keyboard; electronic mouse or similar pointing device; television; printer; computer monitor, including but not limited to a liquid crystal display and plasma screens, or similar video display device that includes a screen that is greater than four inches measured diagonally and one or more circuit boards; a laptop or other portable computer; or a portable digital music player that has memory capability and is battery powered." Code §16-421(d). Accordingly, CEE likely includes millions of pieces of electronic equipment that are found in a large majority of New York City homes, offices, and other buildings.

40. The City Council curiously excluded from the definition of CEE a variety of products such as microwaves, ovens and other household appliances even though these types of products contain the same materials that the City Council professed to be concerned about when it adopted the law. Code § 16-421(d).

41. The E-waste Law requires a manufacturer to submit an electronic waste management plan ("E-waste Plan") to the Department which, as discussed below, under the recently promulgated regulations, directs manufacturers to commit in detail to all facets of work needed to meet the E-waste Program. The E-waste Law authorizes the imposition of a penalty of $1,000/day for each day that a manufacturer fails to submit an E-waste Plan. Code § 16-427(d)(1).

42. Although the E-waste Law does not specify the required methods to be used to collect, handle, and recycle or reuse CEE, it provides that "methods shall be **convenient** for residents of the city." Code § 16-423(d) (emphasis added).

43. The E-waste Law prohibits, regardless of the circumstances, a manufacturer from imposing any fee or charge whatsoever on a person or entity to collect, handle, and recycle or reuse CEE, with the sole exception of for-profit businesses having more than 50 employees. Code § 16-423(c).

44. A manufacturer must collect and accept its own CEE brand products, regardless of whether the owner/generator of the obsolete product is purchasing another product in exchange, and regardless of the circumstances under which the product was originally sold. A manufacturer must accept any CEE product on a one-to-one basis with the resident's purchase of the same type of CEE, regardless of the brand name or origin. Thus, a manufacturer of only small televisions will be required, at the time it sells one of those televisions, to collect, manage, and recycle or reuse in accordance with the E-waste Program any size and any brand television offered by a resident at the manufacturer's sole cost and expense. (Plaintiff ITI raised this issue in comments it submitted on the DSNY's E-waste Rules when they were first proposed, but no relief or clarification was provided in the final rules.) This obligation extends to "orphan waste," where the original manufacturer is known but no longer in business, or where the original manufacturer cannot be identified or no longer exists. Code § 16-422(c).

45. Beginning July 1, 2011, a manufacturer must retrieve on demand from a City resident all CEE of the same type sold by the manufacturer, including orphan waste, without a purchase event. Thus, as the law is drafted, if a manufacturer ever assembled, manufactured, or imported a type of CEE that happened to be sold in the City, it will have the obligation to collect

that same type of CEE even though it no longer assembles, manufactures, or imports the CEE. Significantly, wholesalers, distributors, and/or retailers that actually held title to these now orphan products and, in almost every instance, actually transported the products into New York City for subsequent sale to consumers, will have no responsibility whatsoever for "orphan waste" under the City's E-waste Program. Code § 16-422(d).

46. Under the E-waste Law, a manufacturer is subject to a penalty of $2,000 for each piece of CEE or orphan waste not accepted pursuant to its E-waste Plan. Code § 16-427(d)(4).

47. Although the Department is not responsible financially or otherwise for collecting the CEE and orphan waste under the law, the City Council authorized the Department to apply the amount of CEE and orphan waste collected by manufacturers towards achieving the Department's recycling goals. Code § 16-430.

48. The E-waste Law also requires the manufacturer to "attain the performance standards" under the E-waste Law. The performance standards require a manufacturer to "collect" annually a minimum percentage of its average annual sales of CEE, by weight. By July 1, 2012, a manufacturer is required to collect 25% of its average annual sales, by weight, in the City; by July 1, 2015, the standard is raised to 45%; and by July 1, 2018, a manufacturer is required to collect 65% of its average annual sales, by weight, in the City. Code § 16-424.

49. The performance standards do not take into account that manufacturers do not have any ability to compel a resident's participation in a manufacturer's plan or otherwise control how or when a person in the City discards CEE. Nevertheless, the E-waste Law imposes severe penalties upon a manufacturer that does not meet the required performance standards. A manufacturer will be subject to a $50,000 penalty for each percentage point that the manufacturer falls below the performance standard. Code § 16-427(d)(5).

C. The Sanitation Department Ignored Concerns Regarding the E-waste Law's Potential Burdens in its Rule-Making

50. The Plaintiffs and other stakeholders worked diligently and in good faith with the City following the passage of the E-waste Law to encourage the implementation of a workable program, and in particular to address the law's mandate for a recycling scheme that would be "convenient" for City residents.

51. During the intervening period between the enactment of the E-waste Law and the issuance of proposed implementing regulations by the Department, representatives of Plaintiffs CEA and ITI reached out on numerous occasions to City and Department officials to express their concerns over the law's unprecedented breadth and scope. This included in-person meetings, as well as numerous phone calls and email exchanges.

52. During a phone call that occurred on July 21, 2008, Plaintiff ITI pointed out to a City official the City's acknowledgement of the untenable costs for collecting electronic equipment directly from residences, citing the following text on the Department's website:

> WHY DOESN'T NEW YORK CITY COLLECT ELECTRONIC EQUIPMENT FROM OUR HOMES? WHY DOESN'T THE CITY HOLD MORE ELECTRONICS RECYCLING EVENTS AND WHY AREN'T THESE EVENTS CLOSER TO MY HOME?
>
> Electronics comprise only .64% (or 1.24% when including appliances) of New York City's residential waste stream (See What's in NYC's Waste?). **Due to high labor and transportation costs, it is cost prohibitive to collect these items directly from homes.** The DSNY Bureau of Waste Prevention, Reuse and Recycling tries to hold electronics events at convenient locations throughout the City. **However, it is very difficult to find venues for these events that provide enough space and are easily accessible for everyone.** Additionally, there are various other donation or recycling outlets available for electronics, including many manufacturer and retailers take-back programs, community group collections, and charitable organization donation programs.

See http://home2.nyc.gov/html/nycwasteless/html/recycling/electronicsfaq.shtml (visited July 17, 2008) (emphasis added).

53. During the call, Plaintiff ITI emailed a link to this website page to the City official.

54. By July 28, 2008 (within a week of the July 21, 2008 conversation), this language had been removed from DSNY's website page. *See* http://home2.nyc.gov/html/nycwasteless/html/recycling/electronicsfaq.shtml (last visited July 28, 2008).

55. DSNY drew these conclusions regarding the prohibitive costs of collecting electronics from City residents despite its extensive infrastructure, operational expertise, and resources. DSNY has been in existence for over 125 years and touts itself as "the world's largest [sanitation department], collecting over 12,000 tons of residential and institutional refuse and recyclables a day." DSNY Website, http://www.nyc.gov/html/dsny/html/about/about.shtml (last visited July 23, 2009). DSNY has approximately 10,000 employees, nearly 8,000 of which are uniformed sanitation workers and supervisors. DSNY serves the City out of 59 Districts, using approximately 5,700 vehicles.

56. DSNY is among the largest and most experienced waste collection and management organizations in the world, yet the City now seeks to impose obligations on Plaintiffs with respect to CEE that the DSNY publicly conceded were cost-prohibitive and impractical.

D. The Department of Sanitation Issues Proposed E-Waste Law Regulations

57. On or about September 16, 2008, the Department published proposed rules to implement the E-waste Law. Among other things, the proposed rules defined "convenient

collection" to require manufacturers to directly collect from residents any CEE that exceeded 10 pounds in weight.

58. At a public hearing held on the proposed rules, Carmen Cognetta, then-counsel to the Sanitation Committee of the New York City Council, testified to certain concerns the City Council had with respect to the Department's proposed regulations:

> And we have a couple of concerns. One of them deals with the convenience standard. As you know, in the law it says the return has to be convenient. We went back and forth on this. In the law, we actually had residential pick-up. It was in the law at one point, and they took that out for convenience.... I think the section is going to require a little more thought and more conversation, perhaps, between the manufacturers and the City and perhaps the Council.

59. Unfortunately, despite CEA, ITI, and manufacturers' best efforts to engage City and Department officials in a meaningful dialogue on a workable approach, that "conversation" never occurred.

60. Many stakeholders, including CEA, ITI, ITAC, Retail Industry Leaders Association, Consumers Electronics Retailers Coalition, American Electronics Association and 3M, submitted written comments on the proposed rules.

61. CEA and ITI raised numerous technical problems with the rules, but both stressed the concerns their members had with the E-waste Program as a whole, and in particular, the insurmountable costs and logistical nightmare that would result from the proposed mandate to collect CEE from residences.

62. Plaintiff ITAC Systems informed the Department that because of its small size—7 employees, $1.5 million in annual sales, 10,000 to 12,000 units sold per year—the Department should consider an exemption for "very small domestic manufacturers" from the E-waste Program's requirements. No such exemption was included in the final rules.