

DOCKETED

| | |
|-------------------------|------------------------------|
| Docket Number: | 16-ENFORCE-03 |
| Project Title: | Settlement Agreements |
| TN #: | 221518 |
| Document Title: | Swagway Settlement Agreement |
| Description: | N/A |
| Filer: | Amanda Harris |
| Organization: | California Energy Commission |
| Submitter Role: | Commission Staff |
| Submission Date: | 10/16/2017 1:52:05 PM |
| Docketed Date: | 10/16/2017 |

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (Agreement) is entered into between the California Energy Commission (Commission), with its principal office at 1516 Ninth Street, Sacramento, California 95814, and Swagway LLC, an Indiana limited liability company (Swagway), with a place of business at 3431 William Richardson Drive, Suite F, South Bend, Indiana 46628, collectively referred to as the Parties.

I. RECITALS

(1) The Commission's Appliance Efficiency Regulations at California Code of Regulations, Title 20, Article 4, sections 1601-1609 (Appliance Efficiency Regulations),¹ set forth the requirements to sell or offer for sale regulated appliances in California. The pertinent requirements include:

- Testing: The appliance is tested as required in 1603, using the applicable test method set forth in section 1604.
- Efficiency: The appliance meets the required efficiency standards set forth in sections 1605.2 or 1605.3.
- Marking: The appliance is correctly marked and labeled as required under section 1607.
- Certification: The appliance is certified to the Commission and appears in the Commission's most recent Appliance Efficiency Database (Database) as required under section 1606.

(2) The Commission's enforcement authority includes the removal of non-complying appliances from the Database, as set forth in section 1608, and the issuance of administrative civil penalties under section 1609.

(3) Swagway sells several models of personal e-mobility devices that it sells or offers for sale in California, either directly or through retailers or distributors.

(4) Swagway personal e-mobility devices contain small battery charging systems (SBCS) that are subject to the testing, efficiency, marking, and certification requirements for this appliance class as described in paragraph I(1) above.

(5) From June 2015 to January 2017, Swagway sold or offered for sale through retailers or distributors personal e-mobility devices in California, that were not listed in the Database as required in section 1606, did not meet the SBCS efficiency standards set forth in section 1605.3(w)(2) when tested by the Commission's outside laboratory using the appropriate test method as described in section 1604(w), and were not marked as required in section 1607(d)(10).

(6) Based on the above recitals, the Commission, through adjudication, could impose penalties for each violation alleged, obtain injunctive relief to prohibit Swagway from continuing to sell or offer for

¹ All references are to California Code of Regulations, Title 20, Article 4, unless otherwise specified.

sale, non-compliant SBCS in California, and take any other enforcement action as allowed by law.

(7) Section 1609(b)(3) and California Public Resources Code section 25402.11(a)(2) identify the following factors the Commission shall consider when determining the amount of an administrative civil penalty:

- The nature and seriousness of the violation.
- The persistence of the violation, meaning a responsible person's history of past violations of the Appliance Efficiency Regulations over the previous seven years.
- The number of violations arising from the course of conduct that is subject of the enforcement proceeding.
- The length of time over which the violation occurred.
- The willfulness of the persons responsible for the violation.
- The harm to consumers and to the state that resulted from the amount of energy wasted due to the violation.
- The number of persons responsible for the violation.
- The efforts of the persons responsible for the violation to correct the violation prior to initiation of an enforcement action by the Energy Commission.
- The cooperation, by the persons responsible for the violation, with the Energy Commission during its investigation.
- The assets, liabilities, and net worth of the persons responsible for the violation. This information will be considered to reduce the administrative civil penalty amount, should a responsible person or persons elect to provide asset, liability, and net worth documentation to the Executive Director to demonstrate that a reduction in a penalty amount is necessary to avoid an undue burden.

(8) Penalties must be set at levels sufficient to deter violations. In developing this Agreement the Commission considered the facts of the case and applied the above factors to determine an appropriate settlement. Further, in this case Swagway cooperated with the Commission in the investigation by ensuring compliant designing of their products; testing, certifying, and marking the units; notifying retailers and, to the best of its ability, removing the non-compliant units from the California market; and by providing to the Commission sales data of non-compliant units. The efforts by Swagway saved the Commission time and resources in investigating the violations and minimized the impacts on energy consumption and the environment in California, from the non-compliant units.

(9) Swagway is willing to enter into this Agreement solely for the purpose of settlement and resolution of this matter with the Commission. The Commission accepts this Agreement in termination of this matter. Accordingly, the Parties agree to resolve this matter completely by means of this Agreement, without the need for adjudication.

II. TERMS AND RELEASE

In consideration of the Recitals listed above which are incorporated into this section by reference, and the mutual agreements set forth below, the Commission and Swagway agree as follows:

(1) This Agreement covers the following Swagway appliances: Swagtron T1, T3, T5, T6, Swagger Scooter, Swagger PRO Scooter, Swagboard, Voyager Longboard, SwagCycle E-Bike, and SwagRoller Unicycle models. These appliances have been designed to comply with the applicable energy efficiency standards prescribed by section 1605.3, have been certified to the Database as required by section 1606, and marked as required by section 1607(d)(10), and are now legal for sale in the California market.

(2) For selling or offering for sale in California, personal e-mobility devices identified in paragraph I(5), whose model numbers are identified in paragraph II(1) containing SBCS that the Commission maintains did not meet the energy efficiency standards prescribed by section 1605.3, were not certified to the Database as required by section 1606, and were not marked per section 1607(d)(10), and, in consideration of the factors listed in paragraph I(7) and I(8) above, Swagway shall pay as an administrative civil penalty the total sum of one hundred twenty thousand seven hundred five dollars (\$120,705.00). Payment shall be made by check payable to the California Energy Commission, in 3 monthly payments of \$40,235.00 each, as shown below:

| Payment Number | Due Date | Amount |
|-----------------------|-------------------|---------------|
| 1 | October 16, 2017 | \$40,235.00 |
| 2 | November 15, 2017 | \$40,235.00 |
| 3 | December 15, 2017 | \$40,235.00 |

Payment shall be made by the applicable due date and sent with the corresponding remittance statement to the following address:

California Energy Commission
Accounting Office, MS-2
1516 Ninth Street
Sacramento, California 95814-5512

Effect of untimely payment: If any payment is more than 15 days late, the entire remaining balance becomes immediately due and payable. In addition, if the Commission takes action to enforce this Agreement, Swagway shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.

It is agreed that if Swagway, including its subsidiary or parent company, at any time becomes insolvent, or makes an assignment for the benefit of creditors or similar action adversely involving Swagway, its subsidiary, or parent company, or a proceeding or petition under any bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt, or receivership law or statute is filed by or against Swagway, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of Swagway's, its subsidiary, or parent company's

properties, or if any deposit account or other property of Swagway, its subsidiary, or parent company be attempted to be obtained or held by writ of execution, garnishment, attachment, condemnation, levy, forfeiture or other legal process, or Swagway, its subsidiary, or parent company takes any action to authorize any of the foregoing, the entire remaining balance becomes immediately due and payable without notice or demand.

(3) Swagway also agrees to take each of the following actions for any and all SBCS it will sell or offer for sale in California:

- a. Test all basic models, utilizing the applicable test method, to ensure conformance with the Appliance Efficiency Regulations.
- b. Certify all basic models in the Database and ensure listings are kept current and up to date.
- c. Use a new model number for the T1 model described in II(1) for future designs.
- d. Add the required battery charger mark to the unit, cover page of the instructions, and exterior product package.

(4) This Agreement shall apply to and be binding upon Swagway and its principals, officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations, and upon the Commission and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.

(5) In consideration of the payment specified above, the Commission hereby releases Swagway and its principals, directors, officers, agents, employees, shareholders, subsidiaries, predecessors and successors from any and all claims for violations of section 1608 (efficiency, marking, certification), relating to the appliances identified in paragraph I(5), whose model numbers are identified in paragraph II(1).

(6) This Agreement constitutes the entire agreement and understanding between the Commission and Swagway concerning the claims and settlement in this Agreement, and this Agreement fully supersedes and replaces any and all prior negotiations and agreement of any kind or nature, whether written or oral, between the Commission and Swagway concerning these claims.

(7) No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, shall be valid or enforceable unless it is in writing and signed by all Parties to this Agreement.

(8) Swagway further agrees that if the subject matter of this Agreement comes before the Commission in an administrative adjudication, neither any member of the Commission, nor the Executive Director, shall be disqualified because of prior consideration of this Agreement.(9) Each Party to this Agreement has reviewed the Agreement independently, has had the opportunity to consult counsel, is fully informed of the terms and effect of this Agreement, and has not relied in any way on any inducement, representation, or advice of any other Party in deciding to enter into this Agreement.

(10) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice of law rules. Any litigation arising out of or related to this Agreement shall be filed in the Superior Court of California, County of Sacramento.

(11) Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect.

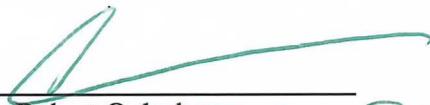
(12) The failure of any Party to enforce any provision of this Agreement shall not be construed as a waiver of any such provision, nor prevent such Party thereafter from enforcing such provision or any other provision of this Agreement.

(13) This Agreement is deemed to have been drafted equally by the Parties; it will not be interpreted for or against either Party on the ground that said Party drafted it.

(14) This Agreement is effective upon signature by a representative of Swagway with authority to bind the company, and approval by an authorized agent of the Commission or, if required, the Commission at a publically noticed meeting through an order or resolution. The Parties agree that fax or scanned signatures and multiple signature pages are acceptable for purposes of executing this Agreement.

California Energy Commission

Swagway LLC

By: 

Name: Robert Oglesby

Title: Executive Director

Date:

10.12.17

By: **Lydia M. Lim** Digitally signed by Lydia M. Lim
Date: 2017.10.03 11:05:29 -07'00'

Name: LYDIA M. LIM

Title: GENERAL COUNSEL

Date: October 3, 2017