

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,)	
STATE OF NEW YORK,)	
COMMONWEALTH OF PENNSYLVANIA, and)	Civil No.: 98 CV 7168 (FB)(MDG)
STATE OF FLORIDA,)	
Plaintiffs,)	
)	
v.)	Filed: February 2, 1999
)	
WASTE MANAGEMENT, INC.,)	
OCHO ACQUISITION CORP., and)	
EASTERN ENVIRONMENTAL SERVICES, INC.,)	
)	
Defendants.)	

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On November 17, 1998, the United States, and the states of New York and Florida, and the Commonwealth of Pennsylvania ("the governments") filed a civil antitrust suit alleging that the proposed acquisition by Waste Management, Inc. of Eastern Environmental Services, Inc. ("Eastern") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Amended Complaint, filed on December 2, 1998, alleges that in nine markets in the eastern United States, Waste Management and Eastern are the two of the most significant competitors in commercial

waste collection, or disposal of municipal solid waste (“MSW”) (*i.e.*, operation of landfills, transfer stations and incinerators), or both services.

The Amended Complaint alleges that a combination of Waste Management and Eastern would substantially lessen competition for the massive \$6 billion contract to dispose of residential waste collected by the New York City Department of Sanitation following the closure of the city’s Fresh Kills Landfill in late 2001. The Amended Complaint alleges that the combination would also substantially reduce competition in disposal of municipal solid waste in four other highly concentrated markets -- Pittsburgh (Allegheny County), Allentown/Bethlehem, and Chambersburg/Carlisle, Pennsylvania, and New York, New York (commercial waste) -- and that it would substantially lessen competition in commercial waste collection services in four highly concentrated, relevant geographic markets: Scranton and Carlisle/Chambersburg, Pennsylvania; and the Miami/Ft. Lauderdale and suburban Tampa (Hillsborough County), Florida areas.

According to the Amended Complaint, the loss of competition would likely result in consumers paying higher prices and receiving fewer or lesser quality services for the collection and disposal of waste. The prayer for relief in the Amended Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act and (2) a permanent injunction that would prevent Waste Management from acquiring control of or otherwise combining its assets with Eastern.

On December 31, 1998, the governments filed a proposed settlement that would permit Waste Management to complete its acquisition of Eastern, but require the defendants to divest certain waste collection and disposal assets in such a way as to preserve competition in the affected markets. This settlement consists of a Hold Separate Stipulation and Order, a proposed Final Judgment, and correspondence that outlines a methodology for selecting which commercial waste collection routes should be divested in the Miami area and sets forth the standard by which the governments determined whether routes that serve a given geographic area should be divested under the Judgment (Appendix B).^{1/}

The proposed Final Judgment orders Waste Management and Eastern to divest commercial waste collection routes in each of the relevant areas in which the Complaint alleges the merger would substantially reduce competition in commercial waste collection services. In

¹ Defendants are required to divest front end loader (FEL) commercial waste collection routes that serve certain geographic areas specified in the Judgment. Because some FEL commercial routes may serve more than one area, the governments agreed that in determining whether a defendant's routes that serve a given area are subject to divestiture under the Judgment the following standard would apply: if a defendant's FEL route obtained 10% or more of its commercial revenues from a geographic area set forth in the Judgment [§§ II(E)(1)-(5)] in the route's most recent year of operation, defendants must divest that FEL commercial route. Applying this principle in the Franklin/Adams/Cumberland area of Pennsylvania, for instance, would require defendants to divest any Eastern FEL commercial route from which 10 percent or more of its revenues derive from customers located in the Franklin, Adams or Cumberland County, PA area. Under this standard, a route which serves an area but has a *de minimis* amount of revenue would be excluded.

Defendants have specifically noted the total number of FEL commercial routes they believe must be divested under the Judgment. At this time, the governments, however, have not verified defendants' representations.

addition, the Judgment orders Waste Management and Eastern to divest landfills, transfer stations, or disposal rights in such facilities in each of the relevant markets in which the merger would substantially reduce competition in disposal of municipal solid waste. (A summary of the commercial waste collection and waste disposal assets that defendants must divest pursuant to the Judgment appears below in Appendix A.) Waste Management and Eastern must complete their divestitures of the rights to Eastern's RFP proposal by January 18, 1999², and complete their divestitures of the other waste collection and disposal assets within 120 days after December 31, 1998, or five days after entry of the Final Judgment, whichever is later.

The Hold Separate Stipulation and Order ("Hold Separate Order") and the proposed Final Judgment ensure that until the divestitures mandated by the Judgment are accomplished, the currently operating waste collection and disposal assets that are to be divested will be maintained and operated as saleable, economically viable, ongoing concerns, with competitively sensitive business information and decision-making divorced from that of the combined company. Subject to the United States' approval, Waste Management will appoint a person to manage the operations to be divested and ensure defendants' compliance with the requirements of the proposed Judgment and Hold Separate Order.

The parties have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Judgment would terminate this action, except

² The rights to Eastern's RFP proposal were divested to Republic Services, Inc. in a transaction that closed on January 18, 1999.

that the Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE VIOLATIONS ALLEGED IN THE COMPLAINT

A. The Defendants and the Proposed Transaction

Waste Management is the largest waste collection and disposal firm in the United States. Based in Houston, Texas, it provides waste collection and disposal services throughout the country. In 1998, Waste Management's total operating revenues exceeded \$12 billion.

Eastern, based in Mt. Laurel, New Jersey, is a large regional waste collection and disposal firm, with operations concentrated in New York, New Jersey, Pennsylvania, Delaware and Florida, often in direct competition with Waste Management. In 1997, Eastern reported total operating revenues of over \$90 million.

In August 1998, Waste Management announced an agreement to acquire Eastern in a stock transaction worth nearly \$1.2 billion. This transaction, which would combine two major competitors and substantially increase concentration in a number of already highly concentrated, difficult-to-enter waste disposal and collection markets, precipitated the governments' suit.

B. The Competitive Effects of the Transaction

Waste collection firms, or “haulers,” contract to collect municipal solid waste (“MSW”) from residential and commercial customers; they transport the waste to private and public disposal facilities (*e.g.*, transfer stations, incinerators and landfills), which, for a fee, process and legally dispose of waste. Waste Management and Eastern compete in operating waste collection routes and waste disposal facilities.

1. The Effects of the Transaction on Competition in the Markets for Commercial Waste Collection.

Commercial waste collection is the collection of MSW from commercial businesses such as office and apartment buildings and retail establishments (*e.g.*, stores and restaurants) for shipment to, and disposal at, an approved disposal facility. Because of the type and volume of waste generated by commercial accounts and the frequency of service required, haulers organize commercial accounts into special routes, and use specialized equipment to store, collect and transport waste from these accounts to approved disposal sites. This equipment -- one to ten cubic yard containers for waste storage, and front-end loader vehicles for collection and transportation -- is uniquely well suited to commercial waste collection service. Providers of other types of waste collection services (*e.g.*, residential and roll-off services) are not good substitutes for commercial waste collection firms. In their waste collection efforts, other firms use different waste storage equipment (*e.g.*, garbage cans or semi-stationary roll-off containers) and different vehicles (*e.g.*, rear- or side-load trucks), which, for a variety of reasons, cannot be conveniently or efficiently used to store, collect or transport waste generated by most commercial accounts, and hence, are infrequently used on commercial waste collection routes.

For purposes of antitrust analysis, commercial waste collection constitutes a line of commerce, or relevant service, for analyzing the effects of the merger.

The Amended Complaint alleges that provision of commercial waste collection services takes place in compact, highly localized geographic markets. It is expensive to ship waste long distances in either collection or disposal operations. To minimize transportation costs and maximize the scale, density, and efficiency of their waste collection operations, commercial waste collection firms concentrate their customers and collection routes in small areas. Firms with operations concentrated in a distant area cannot easily compete against firms whose routes and customers are locally based. Sheer distance may significantly limit a distant firm's ability to provide commercial waste collection service as frequently or conveniently as that offered by local firms with nearby routes. Also, local commercial waste collection firms have significant cost advantages over other firms, and can profitably increase their charges to local commercial customers without losing significant sales to firms outside the area.

Applying that analysis, the Amended Complaint alleges that four areas -- Scranton and the Chambersburg/Carlisle area (Franklin/Adams/Cumberland counties), Pennsylvania, and Miami/Ft. Lauderdale and suburban Tampa (Hillsborough County), Florida areas -- constitute sections of the country, or relevant geographic markets, for the purpose of assessing the competitive effects of a combination of Waste Management and Eastern in the provision of commercial waste collection services. In each of these markets, Waste Management and Eastern are two of the largest competitors, and the combined firm would command from 50 to 75 percent

or more of total market revenues. These five commercial waste collection markets generate from \$7 million to well over \$150 million in annual revenues.

Significant new entry into these markets would be difficult, time consuming, and is unlikely to occur soon. Many customers of commercial waste collection firms have entered into “evergreen” contracts, tying them to a market incumbent for indefinitely long periods of time. In competing for uncommitted customers, market incumbents can price discriminate, *i.e.*, selectively (and temporarily) charge unbeatably low prices to customers targeted by entrants, a tactic that would strongly discourage a would-be competitor from competing for such accounts, which, if won, may be very unprofitable to serve. The existence of long term contracts and price discrimination substantially increases any would-be new entrant’s costs and time necessary for it to build its customer base and obtain efficient scale and route density to become an effective competitor in the market.

The Amended Complaint alleges that a combination of Waste Management and Eastern would likely lead to an increase in prices charged to consumers of commercial waste collection services. The acquisition would diminish competition by enabling the few remaining competitors to engage more easily, frequently, and effectively in coordinated pricing interaction that harms consumers. This is especially troublesome in markets where entry has not proved an effective deterrent to the exercise of market power.

2. *The Effect of the Transaction on Competition for the Disposal of New York City's Residential Waste After the Closing of Fresh Kills Landfill*

A combination of Waste Management and Eastern would have some of its most immediate, far-reaching and severe effects on competition for the New York City Department of Sanitation's 20-30 year, multi-billion dollar contracts for disposal of the city's residential waste following the state-mandated December 2001 closing of Fresh Kills Landfill, the only landfill that handles the disposal of the city's residential waste. In a lengthy competitive process known as the "RFP," between June 1997 and October 1998, the New York City Department of Sanitation solicited and evaluated proposals from a number of vendors for the disposal of the city's waste, and it recently concluded that Waste Management and Eastern are two of only three firms that remain in contention for contracts under this major procurement.

The RFP, once the contracts are awarded and the proposals implemented, would create a new infrastructure for processing and disposal of New York City's residential waste. The winning contractors would purchase and operate a fleet of barges that would collect up to 9,000 tons of residential waste each day from city-owned transfer stations, and deliver it to one or more new, privately-owned and operated enclosed marine barge unloading facilities ("EBUFs"). The EBUFs would process the residential waste and ship it by rail, truck or ocean-going barge primarily to massive distant landfills for final disposal far from New York.

New York City currently anticipates paying private contractors more than \$200 million annually, over a 20-30 year time period, to construct, operate and manage the waste processing and disposal facilities outlined in its RFP. With total estimated payments of well over \$6 billion

over the length of the contracts, the RFP would be the single largest municipal procurement in the history of New York City.

A combination of Waste Management and Eastern would significantly reduce from three to two the city's competitive options for the disposal of its residential waste, and likely result in an increase (or a refusal to negotiate further reductions) in the finalists' charges for disposal of the city's residential waste. As it stands now, Eastern is a competitive alternative for a third or more of any final RFP award. With the elimination of Eastern, the market incumbents, Waste Management and Browning-Ferris Industries, Inc., would no longer compete as aggressively since they would no longer have to worry about losing business to Eastern.

3. *The Effects of the Transaction on Competition in Other Markets for Disposal of Municipal Solid Waste.*

A number of federal, state and local safety, environmental, zoning and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing and disposal of MSW. MSW can only be sent for disposal to a transfer station, sanitary landfill, or incinerator permitted to accept MSW. Anyone who attempts to dispose of MSW in a facility that has not been approved for disposal of such waste risks severe civil and criminal penalties. Firms that compete in the disposal of MSW can profitably increase their charges to haulers for disposal of MSW without losing significant sales to other firms. For these reasons, there are no good substitutes for disposal of MSW.

Disposal of MSW tends to occur in highly localized markets.^{3/} Disposal costs are a significant component of waste collection services, often comprising 40 percent or more of overall operating costs. It is expensive to transport waste significant distances for disposal. Consequently, waste collection firms strongly prefer to send waste to local disposal sites. Sending a vehicle to dump waste at a remote landfill increases both the actual and opportunity costs of a hauler's collection service. Natural and man-made obstacles (*e.g.*, mountains and traffic congestion), sheer distance and relative isolation from population centers (and collection operations) all substantially limit the ability of a remote disposal site to compete for MSW from closer, more accessible sites. Thus, waste collection firms will pay a premium to dispose of waste at more convenient and accessible sites. Operators of such disposal facilities can -- and do -- price discriminate, *i.e.*, charge higher prices to customers who have fewer local options for waste disposal.

For these reasons, the Complaint alleges that, for purposes of antitrust analysis, five areas -- New York City, NY; Pittsburgh (Allegheny County), Allentown/Bethlehem, and Carlisle/Chambersburg, PA -- are relevant geographic markets for disposal of municipal solid waste. In each of these markets, Waste Management and Eastern are two of only a few

³ Though disposal of municipal solid waste is primarily a local activity, in some densely populated urban areas there are few, if any, local landfills or incinerators available for final disposal of waste. In these areas, transfer stations are the principal disposal option. A transfer station collects, processes and temporarily stores waste for later bulk shipment by truck, rail or barge to a more distant disposal site, typically a sanitary landfill, for final disposal. In such markets, local transfer stations compete for municipal solid waste for processing and temporary storage, and sanitary landfills may compete in a broader regional market for permanent disposal of area waste. The Complaint in this case alleges that in one relevant area -- New York, NY -- transfer stations are the principal method for disposal of MSW.

significant competitors. Their combination would command from over 50 to well over 90 percent of disposal capacity for municipal solid waste, in markets that generate annual disposal revenues of from \$10 million to over \$100 million annually.

Entry into the disposal of municipal solid waste is difficult. Government permitting laws and regulations make obtaining a permit to construct or expand a disposal site an expensive and time-consuming task. Significant new entry into these markets is unlikely to occur in any reasonable period of time, and is not likely to prevent exercise of market power after the acquisition.

In each listed market, Waste Management's acquisition of Eastern would remove a significant competitor in disposal of municipal solid waste. With the elimination of Eastern, market incumbents will no longer compete as aggressively since they will not have to worry about losing business to Eastern. The resulting substantial increase in concentration, loss of competition, and absence of reasonable prospect of significant new entry or expansion by market incumbents likely ensure that consumers will pay substantially higher prices for disposal of MSW, collection of commercial waste, or both, following the acquisition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief described in the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in commercial waste collection and in disposal of MSW from the

relevant markets by establishing new, independent and economically viable competitors in each affected market.

A. *The Proposed Divestitures*

First, the proposed Final Judgment requires Waste Management and Eastern to sell by January 18th the rights to Eastern's RFP Proposal to Republic Services, Inc. or any other purchaser acceptable to both the United States and the State of New York.^{4/} That divestiture must be made promptly so as to not delay the New York Department of Sanitation's plans to quickly conduct and complete its final negotiations for contracts to dispose of the city's residential waste before the city must close its only landfill in 2001.^{5/}

The proposed Final Judgment also requires Waste Management and Eastern, within 120 days after the December 31, 1998 filing of the Hold Separate Stipulation and Order, or five days after notice of the entry of this Final Judgment by the Court, whichever is later, to sell certain commercial waste collection assets ("Relevant Hauling Assets") and disposal assets ("Relevant Disposal Assets") as viable, ongoing businesses to a purchaser or purchasers acceptable to the United States, in its sole discretion, after consultation with the relevant state, or in the case of

⁴ As noted above, defendants sold the rights to Eastern's RFP proposal to Republic Services, Inc. on January 18, 1999.

⁵ On December 30, 1998, the governments agreed that Donald Chappel be substituted for Robert Donna as interim trustee for the rights to Eastern's RFP proposal and defendants agreed to restrict Waste Management's access to highly confidential information contained in the rights to Eastern's RFP proposal prior to the proposal's divestiture by Waste Management or by a trustee appointed pursuant to the terms of the Judgment.

certain New York City transfer stations, to a purchaser or purchasers acceptable to *both* the United States and the State of New York.⁶ The collection assets to be divested include front-end loader commercial waste collection routes, trucks and customer lists. The disposal assets to be divested include landfills, transfer stations, disposal rights in such facilities, and certain other assets (*e.g.*, leasehold and renewal rights in the particular landfill or transfer station, garages and offices, trucks and vehicles, scales, permits, and intangible assets such as landfill or transfer station-related customer lists and contracts).

Finally, the proposed Judgment [§ IV(L)] provides that the United States and the State of New York will join a Waste Management motion to modify the pending consent decree in *United States v. USA Waste Services, Inc.*, No. 98 CV 1616 (N.D. Ohio, filed July 16, 1998), to eliminate a contingent divestiture of Waste Management's Brooklyn Transfer Station. In its place, this proposed Judgment would substitute an immediate divestiture of either Waste Management's Gesuale or Vacarro transfer station [§§ II(D)(2)(c) and IV(A)(2)]. A day after the filing of the proposed decree in that case, counsel for defendants informed the United States, New York and the other governments that *defendants* had mistakenly agreed to a contingent divestiture of the Brooklyn Transfer Station, when they had actually meant to agree to a contingent divestiture of the Gesuale Transfer Station, located at 38-50 Review Avenue, Queens,

⁶ The governments interpret Section VI of the proposed Final Judgment as meaning that any request for information involving the rights to Eastern's RFP proposal or Vacarro or Gesuale transfer stations must be a joint request from New York and the Antitrust Division. Since a request continues until such time as it is answered, it can effectively be withdrawn by either New York or the Antitrust Division withdrawing the request -- under the decree, such action would mean that there was no ongoing "joint" request for additional information.

NY. In addition, defendants contended that they needed to retain the Scott Avenue Transfer Station in order to provide disposal services under a New York City residential waste contract, which they expected to receive, and that in any event, there was no assurance under the proposed Judgment that after defendants receive the residential waste contract, the Scott Avenue Transfer Station, if divested, would have any capacity remaining for disposal of commercial waste.

The United States and the State of New York agreed to join a motion to revise the proposed decree in the Ohio case, substituting a divestiture of either Vacarro or Gesuale, only if Waste Management agreed to divest both the New York City transfer stations it would gain by acquiring Eastern -- divestitures which defendants have agreed to make [*see* Judgment, §§ II(D)(2)(a) and (b) and IV(A)(1)].

B. Trusteeship Provisions

If Waste Management and Eastern cannot accomplish the divestitures within the prescribed time, the Final Judgment provides that, upon application of the United States (or in the case of certain New York City transfer stations, application by *both* the United States and the State of New York), the Court will appoint a trustee to complete the divestiture of each relevant disposal asset or relevant hauling asset not sold. The proposed Final Judgment generally provides that the assets must be divested in such a way as to satisfy the United States, in its sole discretion, after consultation with the relevant state, that the assets can and will be used by the purchaser as part of a viable, ongoing business or businesses engaged in waste collection or disposal that can compete effectively in the relevant area. Defendants must take all reasonable

steps necessary to accomplish the divestitures, and shall cooperate with bona fide prospective purchasers and, if one is appointed, with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestitures. At the end of six months, if the divestitures have not been accomplished, the trustee and the parties will make recommendations to the Court which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendant.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants Waste Management and Eastern. The United States could have continued the litigation to seek preliminary and permanent injunctions against Waste Management's acquisition of Eastern. The United States is satisfied, however, that defendants' divestiture of the assets described in the Judgment will establish, preserve and ensure viable competitors in each of the relevant markets identified by the governments. To this end, the United States is convinced that the proposed relief, once implemented by the Court, will prevent Waste Management's acquisition of Eastern from having adverse competitive effects.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court *may* consider--

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."⁷ Rather,

absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 CCH Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

⁷ 119 Cong. Rec. 24598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass.1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See H.R. 93-1463*, 93rd Cong. 2d Sess. 8-9, *reprinted in* (1974) U.S. Code Cong. & Ad. News 6535, 6538.

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that

the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.^{8/}

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court

⁸ *United States v. Bechtel*, 648 F.2d at 666 (citations omitted)(emphasis added); *see United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. *See also United States v. American Cyanamid Co.*, 719 F.2d at 565.

would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)."^{9/}

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: February 1, 1999.

Respectfully submitted,

_____/s/_____
Anthony E. Harris (AH 5876)

U.S. Department of Justice
Antitrust Division, Litigation II Section
1401 H Street, NW, Suite 3000
Washington, DC 20530
(202) 307-6583

⁹ United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) *quoting United States v. Gillette Co.*, *supra*, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985).

APPENDIX A
Summary of Waste Disposal and Collection Assets That
Must Be Divested Under the Proposed Final Judgment

I. The Rights to Eastern's RFP Proposal

The proposed Final Judgment (§§ II (C), IV and V) requires Waste Management and Eastern to divest to Republic Services, Inc. (or any other purchaser acceptable to the United States and the State of New York) the rights to Eastern's proposal to accept residential waste at a marine transfer terminal from the New York City Department of Sanitation. The rights to Eastern's RFP proposal include not only the rights to Eastern's original proposal, but also any amendments, revisions, or modifications to that proposal and any intangible assets relating to the proposal (*e.g.*, any engineering, technical, or construction designs, plans or specifications, permit or land use applications, and any options, commitments or agreements of any type for the design, construction, permitting, lease or sale of any land, building or equipment, or to receive, transport store or dispose of waste).

The purchaser of the Rights to Eastern's RFP Proposal, in additional, may obtain such technical assistance on that proposal as the purchaser reasonably may require from Eastern for a period of one hundred fifty days (150) after the purchase of the rights; and at purchaser's option, airspace disposal rights for up to a twenty-year time period at Eastern's Waverly, VA landfill, pursuant to which defendants will sell rights to dispose of up to 4,000 tons of average daily waste pursuant to any contract award under the New York City RFP. The optional airspace agreement must be entered into on the terms and conditions specified in the Waste Disposal Agreement, dated December 29, 1998, between Atlantic Waste Disposal, Inc. and Republic Services, Inc.

II. Waste Disposal Assets

The proposed Final Judgment (§§ II (D) and (E), IV and V) requires Waste Management and Eastern to divest certain “relevant disposal assets.” In general, this means, with respect to each landfill or transfer station, all tangible assets, including all fee and leasehold and renewal rights in the listed landfill or transfer station; the garage and related facilities; offices; and landfill- or transfer station-related assets including capital equipment, trucks and other vehicles, scales, power supply equipment, interests, permits, and supplies; and all intangible assets of the listed landfill or transfer station, including customer lists, contracts, and accounts, or options to purchase any adjoining property. The list of disposal facilities that must be divested includes properties in the following locations, under the listed terms and conditions:

A. Landfills

3. Allegheny County, Pennsylvania

Eastern’s Kelly Run Sanitation Landfill, located at State Route 51 South, Elizabeth, Pennsylvania 15037, and known as the Kelly Run Landfill (and includes the waste disposal agreement between Chambers Development Company, Inc. and William H. Martin, Inc. and Eastern Environmental Services, Inc. and Kelly Run Sanitation, Inc., dated 1997);

2. Bethlehem/Allentown, Pennsylvania

Eastern's Eastern Waste of Bethlehem Landfill, located at 2335 Applebutter Road, Bethlehem, Pennsylvania 18015, and known as the Bethlehem Landfill; and

3. Chambersburg-Carlisle, Pennsylvania

Eastern's R&A Bender Landfill located at 3747 White Church Road, Chambersburg, Pennsylvania 17201(also known as the Bender Landfill).

B. Transfer Stations

New York, New York

1. Eastern's PJ's Transfer Station located at 222 Morgan Avenue, Brooklyn, New York 11237 (also known as the Morgan Avenue Transfer Station);
2. Eastern's Atlantic Waste Transfer Station located at 110-120 50th Street, Brooklyn, New York 11232 (also known as the Atlantic Transfer Station); and
3. Waste Management's Vacarro Transfer Station, located at 577 Court Street, Brooklyn, NY 11231 (also known as the Court Street Transfer Station); and Waste Management's Gesuale Transfer Station, located at 38-50 Review Avenue, Queens, NY 11101

(also known as the Review Avenue Transfer Station), only one of which must be sold pursuant to the terms of Sections IV or V of this Final Judgment.

II. Commercial Waste Collection Assets

The Final Judgment also orders Waste Management and Eastern to divest certain commercial waste collection assets. Those assets primarily include routes, capital equipment trucks and other vehicles, containers, interests, permits, supplies, customer lists, contracts, and accounts used to service customers along the routes in the following locations:

A. Scranton, Pennsylvania

Waste Management's front-end loader truck ("FEL") commercial routes servicing Luzerne and Lackawanna County, Pennsylvania;

B. Franklin/Adams/Cumberland Counties, Pennsylvania

Eastern's FEL commercial routes servicing Franklin, Adams and Cumberland Counties, Pennsylvania;

C. Broward County, Florida

Eastern's FEL commercial routes servicing Broward County, Florida;

D. Dade County, Florida

Eastern's FEL commercial routes servicing portions of Dade County, Florida; and

E. Hillsborough County, Florida

Eastern's Kimmins Recycling Corporation FEL commercial routes servicing the unincorporated (and grandfathered incorporated) areas of Hillsborough County, Florida solid waste service area, more specifically defined in RFP#C-277-96, Hillsborough County Board of County Commissioners documents 96-2393, as modified by 97-1913.

APPENDIX B

Correspondence Between Counsel for Waste Management, Inc. and Eastern Environmental Services, Inc. and Counsel for the United States

(Methodology for Determining Which FEL Commercial
Routes Must be Divested Under the Judgment)