

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUN 22 2000 44

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLIED WASTE INDUSTRIES, INC. and  
SUPERIOR SERVICES, INC.,

Defendants.

File No.: 1:00 CV 01067

JUDGE: Ricardo M. Urbina

DECK TYPE: Antitrust

Filed: June 22, 2000

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

The United States filed a civil antitrust Complaint on May 12, 2000, seeking to enjoin the acquisition of certain waste hauling and disposal assets by Allied Waste Industries, Inc. ("Allied") and Superior Services, Inc. ("Superior"). Allied and Superior had entered into purchase agreements pursuant to which Superior would acquire hauling assets from Allied in Milwaukee, Wisconsin; Allied would acquire hauling assets from Superior in Mansfield, Ohio; and Superior would acquire Allied's County Environmental Landfill in Leeper, Pennsylvania. The Complaint alleges that the likely effects of these acquisitions would be to substantially lessen competition for waste collection and disposal services in violation of Section 7 of the Clayton Act. This loss of competition would

result in consumers paying higher prices and receiving fewer services for the collection and disposal of waste.

At the same time the Complaint was filed, the United States also filed a proposed Final Judgment and a Hold Separate Stipulation and Order that were designed to eliminate the anticompetitive effects of the acquisitions. Under the proposed Final Judgment, which is explained more fully below, the defendants are required within 90 days after the filing of the Hold Separate Stipulation and Order, or five (5) days after notice of the entry of the Final Judgment by the Court, to divest, as viable business operations, certain waste hauling assets and related transfer stations in the Milwaukee and Mansfield areas. The proposed Final Judgment also requires Superior to abandon its proposed acquisition of Allied's landfill in Leeper. Under the terms of the Hold Separate Stipulation and Order, the defendants are required to take certain steps to ensure that the assets to be divested will be preserved and held separate from the defendants' other assets and businesses.

The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

## II.

### DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

#### A. *The Defendants and the Proposed Transactions*

Allied, with revenues in 1999 of approximately \$6 billion, is the nation's second largest waste hauling and disposal company, operating throughout the United States. Superior, with 1999 revenues of approximately \$319.7 million, is a multi-state waste collection and disposal company.

On August 4, 1999, Allied and Superior entered into nine separate agreements in which they agreed to exchange certain waste hauling and disposal assets. Three of those nine agreements involve acquisitions of waste hauling and disposal assets in the Milwaukee, Mansfield, and Leeper areas. These acquisitions are the subject of the Complaint and proposed Final Judgment filed by the United States on May 12, 2000.

*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. Allied and Superior compete in operating waste collection routes and waste disposal facilities.

*1. The Effects of the Transaction on Competition in the Markets for Small Container Commercial Waste Collection Services.*

Small container commercial waste collection service 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, plus front-end and rear-end loader vehicles for collection and transportation -- is uniquely well suited for the provision of small container commercial waste collection service. Providers of other types of waste collection services (e.g.,

residential and roll-off services) are not good substitutes for small container 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., side-load trucks), which, for a variety of reasons, cannot be conveniently or efficiently used to store, collect or transport waste generated by commercial accounts, and hence, are rarely used on small container commercial waste collection routes. For purposes of antitrust analysis, the provision of small container commercial waste collection services constitutes a line of commerce, or relevant service, for analyzing the effects of the acquisitions.

The Complaint alleges that the provision of small container 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, small container 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 Complaint alleges that the Milwaukee and Mansfield areas constitute sections of the country, or relevant geographic markets, for the purpose of assessing the competitive effects of a combination of Allied and Superior in the provision of small container

commercial waste collection services. The Milwaukee area includes the City of Milwaukee, Milwaukee County and the eastern half east of route 83 of Waukesha County, Wisconsin. The Mansfield area includes the City of Mansfield, and Richland and Ashland counties, Ohio.

In the Milwaukee area, Superior's acquisition of Allied's assets would reduce from three to two the number of significant firms competing in small container commercial waste collection service. After the acquisition, Superior would control approximately 40%, and two firms would control over 80%, of total market revenue, which is about \$22 million annually. The acquisition would increase the Herfindahl-Hirschmann Index ("HHI"),<sup>1</sup> a measure of market concentration, by about 700 points to about 4700 in the Milwaukee area.

In the Mansfield area, Allied's acquisition of Superior's assets would reduce from two to one the number of significant firms that compete in small container commercial waste collection service. After the acquisition, Allied would control over 80% of the market. The acquisition would increase the HHI by over 3000 points to about 7300 in the Mansfield area, where total revenues exceed \$3.5 million annually.

New entry into these markets would be difficult, time consuming, and is unlikely to be sufficient to constrain any post-merger price increase. Many customers of commercial waste

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<sup>1</sup>The Herfindahl-Hirschmann Index ("HHI") is a measure of market concentration calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2600 (30 squared (900) plus 30 squared (900) plus 20 squared (400) plus 20 squared (400) = 2600). The HHI, which takes into account the relative size and distribution of the firms in a market, ranges from virtually zero to 10,000. The index approaches zero when a market is occupied by a large number of firms of relatively equal size. The index increases as the number of firms in the market decreases and as the disparity in size between the leading firms and the remaining firms increases.

collection firms have entered into long-term 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 unprofitable to serve. Taken together, the prevalence of long-term contracts and the ability of market incumbents to price discriminate 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 Complaint alleges that a combination of Allied and Superior in Milwaukee and Mansfield would likely lead to an increase in prices charged to consumers of small container commercial waste collection services. The two acquisitions would diminish competition by enabling the few remaining competitors to engage more easily, frequently, and effectively in coordinated pricing interaction that harms consumers.

2. *The Effects of the Transaction on Competition in the Leeper Area 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 be sent for disposal only 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. The disposal of MSW therefore constitutes a line of commerce, or relevant service, for the purposes of analyzing the acquisition.

Disposal of MSW generally tends to occur in localized markets. Disposal costs are a significant component of waste collection services, often comprising 40% 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) 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, the Leeper area is a relevant geographic market for disposal of MSW. The Leeper area includes the City of Leeper, and Clarion, Elk, Forest, and Jefferson counties, Pennsylvania.

In the Leeper area, Superior's acquisition of Allied's County Environmental Landfill would reduce from two to one the number of significant firms competing in the disposal of MSW, resulting in a monopoly. In 1998, approximately 66,000 tons of MSW were generated from this market. In that same year, these two landfills disposed of about 97% of that MSW. Based on quantity disposed, the post-merger HHIs for disposal of MSW would be about 9500, with an increase of approximately 4500 points.

Obtaining a permit to construct or expand an existing disposal site is an expensive and time consuming task. Local public opposition often makes it more difficult and costly and increases the uncertainty of successfully permitting a facility. Significant new entry in the Leeper area is unlikely to prevent the exercise of market power after the acquisition.

The elimination of one of only two significant competitors, such as would occur as a result of the proposed transaction in the Leeper area, virtually ensures that consumers in this market will face higher prices for the disposal of MSW or the collection of small container commercial waste.

### III.

#### EXPLANATION OF THE PROPOSED FINAL JUDGMENT

##### *A. Divestitures in the Milwaukee and Mansfield Areas*

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in small containerized commercial waste collection services in the Milwaukee and Mansfield areas by establishing a new, independent and economically viable competitor in each of those markets. The proposed Final Judgment requires defendants, within 90 days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later to divest, as a viable ongoing business or businesses, small container commercial waste collection assets (*e.g.*, routes, trucks, containers, and customer lists) relating to the Milwaukee and Mansfield markets, as well as a transfer station in each market. The transfer stations must be divested because they are likely to make the buyer of the waste collection assets a more effective competitor.

These assets must be divested in such a way as to satisfy the United States that the operations can and will be operated by the purchaser or purchasers as a viable, ongoing business that can

compete effectively in each relevant market. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

In the event that defendants do not accomplish the divestitures within the above-described period, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that the defendant affected 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 divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth its efforts to accomplish divestitures. At the end of six months, if the divestiture has 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.

The relief sought in the Milwaukee and Mansfield areas will maintain the pre-acquisition structure of each market and thereby ensure that consumers of small container commercial waste collection services will continue to receive the benefits of competition -- lower prices and better service.

*B. Ban on Acquisition of County Environmental Landfill*

The proposed Final Judgment also requires Superior to abandon its purchase agreement with Allied, dated August 4, 1999, to acquire the County Environmental Landfill ("County Landfill") in Leeper, Pennsylvania. Superior is banned from acquiring the landfill for the ten-year term of the Final Judgment unless a new landfill opens in the Leeper area. If a new landfill opens, Superior may

propose to acquire County Landfill, but it must give the Antitrust Division advance notice of any such plan.

Typically, the United States does not require parties who have abandoned an acquisition to enter into a Final Judgment preventing them from engaging in the same or a similar transaction in the future. In this case, however, such a provision was necessary because the acquisition of County Landfill, standing alone, probably would not be large enough to trigger the reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a. Absent such a provision, Superior could subsequently acquire the landfill without the United States knowing about the acquisition until well after it had taken place.

As noted above, the proposed Final Judgment does not completely bar Superior from acquiring County Landfill, but, rather, it permits Superior to propose such an acquisition in the event that another landfill opens in the Leeper area. The United States does not believe entry is likely within the next two years or that foreseeable entry would be sufficient to counteract the anticompetitive effects of Superior's acquisition of County Landfill. The proposed Final Judgment has a term of ten years, however, and it is possible that entry during that period would sufficiently alter the market conditions so as to render competitively harmless an acquisition of County Landfill by Superior. Hence, the proposed Final Judgment requires Superior to provide the Antitrust Division with notice before consummating an acquisition of County Landfill. This will give the Antitrust Division time to evaluate the proposed transaction and take action to block the deal if the situation so warrants.

#### 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 the defendants.

#### V.

##### PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants 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 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 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 Final 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, N.W., 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 Final 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 Allied and Superior. The United States could have continued the litigation and sought preliminary and permanent injunctions against Allied's acquisition of the Superior assets, and Superior's acquisition of the Allied assets. The United States is satisfied, however, that the divestiture of hauling assets and the abandonment of the County Landfill acquisition will preserve competition for small containerized commercial waste collection services in the Milwaukee and Mansfield areas, as well as competition for the disposal of MSW in the Leeper area.

## VII.

### STANDARD OF REVIEW UNDER THE APPA FOR THE 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 has 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 Corp.*, 56 F.3d 1448, 1458-62 (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."<sup>2</sup> 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 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

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*

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<sup>2</sup>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.

*interest.*” More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.<sup>3</sup>

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 would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest.’”<sup>4</sup>

Moreover, the court’s role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to “construct [its] own hypothetical case and then evaluate the decree against that case,” *Microsoft*, 56 F.3d at 1459. Since “[t]he court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bring a case in the first place,” it follows that the court “is only authorized to review the decree itself,” and not to

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<sup>3</sup> *United States v. Bechtel Corp.*, 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 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

<sup>4</sup>*United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982) (citations omitted), quoting *United States v. Gillette Co.*, *supra*, 406 F. Supp. at 716 *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

“effectively redraft the complaint” to inquire into other matters that the United States might have but did not pursue. *Id.*

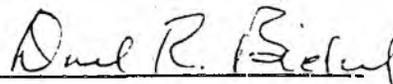
VIII.

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: June 22, 2000

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon Allied Waste Industries, Inc. and Superior Services, Inc. by placing a copy of this Competitive Impact Statement in the U.S. mail, postage prepaid directed to each of the above-named parties at the addresses given below, this 27 day of June, 2000.

*Counsel for Defendant Allied Waste Industries, Inc.*

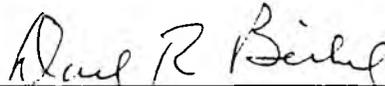
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