

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	File No. 1:00 CV 2311
)	
REPUBLIC SERVICES, INC. and)	JUDGE: Ricardo M. Urbina
ALLIED WASTE INDUSTRIES, INC.,)	
)	DECK TYPE: Antitrust
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

The United States filed a civil antitrust Complaint on September 27, 2000, seeking to enjoin the acquisition of certain waste hauling assets by Republic Services, Inc. ("Republic") from Allied Waste Industries, Inc. ("Allied"). Republic and Allied had entered into agreements pursuant to which Republic would acquire waste hauling assets from Allied in the Akron/Canton, Ohio area. The Complaint alleges that the likely effects of these acquisitions would be to substantially lessen competition for waste collection services in the Akron/Canton area in violation of Section 7 of the Clayton Act, 15 U.S.C. Section 18, resulting in consumers paying higher prices and receiving fewer services for the collection of waste.

At the time the Complaint was filed, the United States also filed a proposed Final Judgment and a Hold Separate Stipulation and Order that would permit Republic to complete its acquisition of the Allied assets, provided divestitures of certain waste collection assets are accomplished in such a way as to preserve competition in the market. Under the proposed Final Judgment, which is explained more fully below, Republic is required within 120 days after September 27, 2000, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest as viable, ongoing business operations certain waste hauling assets in the Akron/Canton area. Under the terms of the Hold Separate Stipulation and Order, Republic is required to take certain steps to ensure that the assets to be divested will be preserved and held separate from Republic's other assets and businesses until the divestiture is accomplished. Republic has appointed, subject to the United States' approval, an individual to manage the assets to be divested and ensure the defendants' compliance with the requirements of the proposed Final Judgment and Hold Separate Order.

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 Transaction*

Republic, with revenues of approximately \$1.8 billion in its 1998 fiscal year, is engaged in providing waste collection and disposal services throughout the United States. 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. Pursuant to a Put/Call Agreement dated December 6, 1999 and a Letter Agreement dated August 1, 2000, Republic will acquire from Allied certain waste-hauling and disposal assets in the Akron/Canton area. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on September 27, 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. In the Akron/Canton area, Republic and Allied compete in operating small container waste collection routes and waste disposal facilities.

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 trucks 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 trucks (*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 acquisition.

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 Akron/Canton, Ohio area constitutes a section of the country, or relevant geographic market, for the purpose of assessing the competitive effects of a combination of Republic and Allied in the provision of small container commercial waste collection services. The Akron/Canton area includes the Cities of Akron and Canton, Ohio; and Summit, Stark and Portage counties, Ohio. In the Akron/Canton area, Republic's acquisition of Allied's assets would reduce from four to three the number of major firms competing in small

container commercial waste collection service. After the acquisition, Republic would control approximately 35% of the total market revenue, which exceeds \$25 million annually.

New entry into this market would be difficult and time consuming and is unlikely to be sufficient to constrain any post-merger price increase. Many customers of commercial waste 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 the 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 Republic and Allied in Akron/Canton would likely lead to an increase in prices charged to consumers of small container 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.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in small container commercial waste collection services in the Akron/Canton area by establishing a new, independent and economically viable competitor in the markets. The proposed Final Judgment requires Republic, within 120 days after September 27, 2000, 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 its small container commercial waste collection assets (*e.g.*, routes, trucks, containers, and customer lists) relating to the Akron/Canton market to a purchaser acceptable to the United States in its sole discretion.

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 the relevant market. Republic must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that Republic does not accomplish the divestiture 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 Republic 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 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 the divestiture. 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 Akron/Canton area will maintain the pre-acquisition structure of the 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.

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 sixty 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 Republic and Allied. The United States could have continued the litigation and sought preliminary and permanent injunctions against Republic's acquisition of the Allied assets. The United States is satisfied, however, that the divestiture of hauling assets will

preserve competition for small container commercial waste collection services in the Akron/Canton area. To this end, the United States is convinced that the proposed relief, once implemented by the Court, will prevent Republic's acquisition of the Allied assets from having adverse competitive effects.

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). 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.”¹ 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 interest.*” More elaborate requirements might undermine the effectiveness

¹119 Cong. Rec. 24,598 (1973). *see also United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). 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, *see* 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.Rep. 93-1463*, at 8-9(1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

of antitrust enforcement by consent decree.²

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.’”³

Moreover, the Court’s role under the Tunney Act is limited to reviewing the remedy in relation 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. Because “[t]he court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bringing a case in the first place,” it follows that the court “is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States might have but did not pursue. *Id.* at 1459-60.

² *Bechtel Corp.*, 648 F.2d at 666 (citations omitted and emphasis added); see *BNS, Inc.*, 858 F.2d at 463; *United States v. National Broad.Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *s 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).

³*United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982) (citations omitted) quoting *Gillette Co.*, 406 F. Supp. at 716; *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

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: October 23 , 2000

Respectfully submitted,

_____/s/_____
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