UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **STATE OF CALIFORNIA,** **STATE OF INDIANA,** **COMMONWEALTH OF KENTUCKY,** **STATE OF MICHIGAN,** **STATE OF NORTH CAROLINA,** **STATE OF OHIO,** **COMMONWEALTH OF PENNSYLVANIA,** **and** **STATE OF TEXAS,** ***Plaintiffs*,** **v.** **REPUBLIC SERVICES, INC., and** **ALLIED WASTE INDUSTRIES, INC.,** ***Defendants*.**	**CASE NO.: 1:08-cv-02076 (RWR)** **JUDGE: Richard W. Roberts** **DECK TYPE: Antitrust** **DATE STAMP:**

RESPONSE OF PLAINTIFF UNITED STATES TO THE
MOTION BY CCWI FOR LEAVE TO APPEAR AS AMICUS CURIAE

The United States respectfully submits this response to the Motion of Center For A Competitive Waste Industry's ("CCWI") For Leave To Participate As Amicus Curiae ("Motion") in this Tunney Act (the "Act") proceeding. Under the Act, 15 U.S.C. § 16(b)-(h), the Court must determine whether entry of the proposed Final Judgment is in the public interest. As Congress anticipated, courts typically make this determination on the basis of the information, including public comments, that the Act requires the United States to file with the Court. In this case, the CCWI submitted an extensive public comment, to which the United States has already responded. Both CCWI's comment and the United States' response have been filed with the Court. In the Motion, CCWI repeats arguments already presented in its public comment, and asserts the United

States should have alleged additional claims in the Complaint and/or obtained different remedies than those in the proposed Final Judgment. While the decision to permit participation of an amicus curiae lies solely within the Court's discretion, the United States respectfully submits that participation by CCWI is unlikely to be helpful to the Court because its submission is superfluous and makes allegations irrelevant to the Court's Tunney Act review.

I. BACKGROUND

A. The Tunney Act. The Court must find that the proposed Final Judgment is in the public interest before entering the Final Judgment. 15 U.S.C. § 16(e). The Act, which governs the Court's public interest determination, sets forth a public comment process requiring that the United States (1) publish notices in newspapers and the *Federal Register*; (2) file and publish a Competitive Impact Statement describing, among other things, the antitrust violation and the proposed decree; and (3) file with the Court and publish in the *Federal Register* any public comments received and the United States's response to those comments. *Id.* § 16(b)-(d). The public comment process gives the Court, as well as the United States, the benefit of views of interested nonparties prior to making its public interest determination.

The Act enumerates factors the Court must consider in making its public interest determination. *Id.* § 16(e)(1). The Court may make its determination based on the information provided by the Complaint, proposed Final Judgment, Competitive Impact Statement, public comments, and the government's response to comments. If the Court concludes that the information is insufficient, the Act provides a wide array of tools for obtaining more. *Id.* § 16(f). However, the Act explicitly allows the court to enter the Final Judgment without conducting an evidentiary hearing; *see id.* § 16(e)(2) ("Nothing in this section shall be construed to require the

court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.").

B. Proceedings to date. On December 3, 2008, the United States and eight Plaintiff States[1] filed a Complaint alleging that the merger of Republic Services, Inc. ("Republic") and Allied Waste, Inc. ("Allied") violated Section 7 of the Clayton Act, 15 U.S.C. § 18. At the same time, the United States and Plaintiff States filed a proposed Final Judgment, to which the defendants had consented, requiring Republic to divest nine landfills, 10 transfer stations and 87 small container hauling routes (and ancillary assets) in 15 separate geographic markets to remedy the competitive harms alleged in the Complaint. *See* 15 U.S.C. § 16(b)-(h). Also on December 3, 2008, the United States filed its Competitive Impact Statement, *see id.* § 16(b), analyzing the violation alleged in the Complaint and the remedies in the proposed Final Judgment. Pursuant to 15 U.S.C. § 16(b), the proposed Final Judgment and Competitive Impact Statement were published in the *Federal Register* on December 16, 2008. See *United States v. Republic Services, Inc. et al*, 73 Fed. Reg. 76,383 (2008). Pursuant to 15 U.S.C. § 16(c), a summary of the terms of the proposed Final Judgment and Competitive Impact Statement were published in *The Washington Post*, a newspaper of general circulation in the District of Columbia, for seven days beginning on December 31, 2008, and ending on January 6, 2009. The United States received five comments from the public, including a detailed comment from CCWI. The United States filed a full and complete Response to Public Comments on May 14, 2009. The public comments and Response to Public Comments were then published in the *Federal Register* on June 16, 2009.

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[1] The Plaintiff States comprise the States of California, Indiana, Michigan, North Carolina, Ohio, Texas and the Commonwealths of Kentucky and Pennsylvania.

Having satisfied all the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h), the United States and Plaintiff States filed their Motion for Entry of the Proposed Final Judgment on July 16, 2009 (Docket No.16).[2] *See* Certificate of Compliance (Docket No. 16).

C. The CCWI Motion. On August 25, 2009, CCWI filed the instant Motion seeking leave to participate as amicus curiae.

II. ARGUMENT

This is a statutory proceeding to determine whether it would be in the public interest for the Court to enter the proposed Final Judgment. 15 U.S.C. § 16(e). The Act requires the United States to provide the Court with substantial information relevant to the Court's determination, including the views and analyses of interested third parties. *Id.* § 16(b), (d). This information is ordinarily sufficient to support a court's determination. CCWI seeks to provide the Court with duplicative and extraneous information that it already submitted to the Court through the public comment process. Therefore, participation by CCWI as an amicus is unlikely to aid the Court in making its public interest determination.

A. The Court Should Base Its Public Interest Determination On The Mandatory Tunney Act Materials Unless They Inadequately Inform The Court's Public Interest Determination

The parties to the underlying antitrust dispute have resolved their differences, and the Court therefore does not face the typical judicial task of resolving contested disputes of fact, law,

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[2] The parties also filed two joint status reports describing the implementation of the divestitures required by the proposed Final Judgment (Docket Nos. 10, 18). As of September 1, 2009, Republic completed the sale of all of the divestiture assets in all 15 market areas.

and remedy.[3] Rather, the Act requires that the government provide the Court with substantial information relevant to its public interest determination, including the Complaint, the proposed decree, the Competitive Impact Statement, any comments submitted to the government by interested third parties, and the government's response to those comments. 15 U.S.C. § 16(b), (d). Congress contemplated that these materials would often suffice.[4] Congress reiterated its understanding in the 2004 Amendments to the Act by providing in 15 U.S.C. § 16(e)(2) that "Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene."

The Act provides a wide array of optional tools which the Court may employ to gather additional information, 15 U.S.C. § 16(f), but the Court should employ these tools only when it is necessary to do so. To do otherwise would conflict with the principle that "the trial judge will adduce the necessary information through the least . . . complicated and least time-consuming means possible . . . ." S. Rep. No. 93-298 at 6 (1973) (Senate Report). Ordinarily, courts do not

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[3] The Court's task is to determine only whether to perform the "judicial act," *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932), of entering the decree proposed by the parties as the Court's decree. In carrying out that task, the Court must be mindful of the congressional purpose to preserve the role of the consent decree in effective antitrust enforcement, *see* S. Rep. No. 93-298 at 5 (1973) ("Senate Report") ("the consent decree is of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere"); 119 Cong. Rec. 24,600 (1973) (Statement of Sen. Gurney) (Tunney Act "is designed to enhance the value and effectiveness of the consent decree as a tool of public policy"), a purpose which would be threatened by transforming the Court's public interest determination into a process resembling a trial.

[4] Senate Report at 6 ("[w]here the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized"); *see also United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) ("Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone").

find it necessary to employ these additional tools in Act proceedings. Thus, for example, Judge Greene, considering the entry of a decree that would massively restructure the entire telecommunications industry, "concluded that none of the issues before [the Court] require[d] an evidentiary hearing. That being so, there [was] obviously no need, nor indeed any occasion, for the presentation by a third party of its own witnesses or for the cross-examination of adverse witnesses." *United States v. AT&T*, 552 F. Supp. 131, 219 (D.D.C. 1982), *aff'd mem. sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983). *See also United States v. Microsoft Corp.*, 2002 WL 319366 at *3 (D.D.C. Feb. 28, 2002) (prohibiting amicus from submitting information that repeats public comments).

B. CCWI Fails To Show How Its Participation Would Be Helpful To The Court

An amicus curiae participates only for the "benefit of the court." *United States v. Microsoft Corp.*, 2002 WL 319366 at *2 (D.D.C Feb. 28, 2002). Accordingly, it is "solely within the discretion of the Court to determine the fact, extent and manner of participation by the amicus." *Id. (*citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062 1064 (7th Cir. 1997) (Posner, J., in chambers) ("judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.")). Here, CCWI fails to explain why the record before the Court is insufficient or how CCWI's participation would cure any alleged insufficiency. Rather, the Motion presents duplicative and/or irrelevant arguments.

1. CCWI's Arguments Are Duplicative of Its Public Comment

In the Motion, CCWI asserts that the United States should have (1) prohibited the sale of divestiture landfills to Waste Connections, Inc., or any other member of an alleged waste

"oligopoly;" and (2) required Republic to sell airspace rights to independent haulers, instead of compelling the outright divestiture of landfills in the relevant markets. Both of these arguments were raised in CCWI's public comment and fully addressed by the United States in its response. *See* CCWI comment at 8-12; Response of United States to Public Comments at 10-15. Indeed, the Motion notes that "CCWI presented extensive arguments to the DOJ" in its public comment. Motion at 12. The Motion does *not* indicate what CCWI's proposed participation would bring to this proceeding that cannot already be found in its previous public comment.

As Judge Kollar-Kotelly said of a similar motion, the "request in this regard seems somewhat redundant in light of the lengthy comment it submitted to the Department of Justice in response to the proposed consent decree . . . . Because the Court is authorized to consider [the] comments submitted to the Department of Justice, 15 U.S.C. § 16(f)(4), and because the Court has already received and will review copies of [the] comments, . . . the Court considers any additional participation by [the commentor] to be largely superfluous." *United States v. Microsoft Corp.*, 2002 WL 319436, at *3 (D.D.C. Feb. 28, 2002). Moreover, with respect to other amicus movants in the *Microsoft* case, Judge Kollar-Kotally established "strict parameters" that precluded amicus from "repeat[ing] arguments and assertions detailed in that entity's [public] comments." *United States v. Microsoft Corp.*, 2002 WL 319366 at *3 (D.D.C. Feb. 28, 2002). The Court imposed this restriction so it would be not be burdened with material that was not only "duplicative" but most importantly,"unlikely to be of great assistance to the Court." *Id.*

2. CCWI's Arguments Are Irrelevant and Unhelpful To The Court

CCWI's main contention, as cited above, is that United States and the Plaintiff States should have obtained different remedies than those provided in the proposed Final Judgment. *See*

Motion at 1 (CCWI seeks to assist the Court "in fashioning appropriate and necessary remedies"). This reveals CCWI's serious misunderstanding of the scope of the public interest determination under the Tunney Act. The Tunney Act does not permit a court to impose a remedy that it thinks is "preferable" to the one in the proposed Final Judgment. *United States v. Abitibi-Consolidated, Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008) (citing *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 15-16 (D.D.C. 2007)). Instead, the "relevant inquiry is whether there is a factual foundation for the government's decision such that its conclusions regarding the proposed settlement are reasonable." *Id.*; *see also United States v. AT&T, Inc.*, 541 F. Supp. 2d 2, 6-7 (D.D.C. 2008) (same); *Enova*, 107 F. Supp. 2d at 17 (court may not reject a remedy simply because it may not be, in the court's view, the "best" remedy available).[5] CCWI's claim that the divestiture of landfill airspace rights is preferable to landfill divestiture is irrelevant to the Court's public determination. Therefore, submission of additional arguments from CCWI about its preferred remedies is unlikely to be helpful to the Court.

3. CCWI Alleges Competitive Injury Outside the Scope of the Complaint

CCWI also asserts that proposed Final Judgment fails to address the likelihood that the merger will facilitate tacit collusion *outside* of the 15 relevant geographic markets identified in the Complaint. While it is unclear whether CCWI is alleging that the merger will facilitate collusion at a national level in some undefined market, or in local disposal markets that were not alleged in the Complaint, what is clear is that CCWI is complaining about alleged competitive harms outside

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[5] *See also United States v. InBev, N.V.*, No. 08-1965, Mem. Order (D.D.C. Aug. 11, 2009) (Docket No. 41) (The government's predictions as to the effect of the proposed remedies are given deference, and are reviewed primarily for whether they have a factual basis and are reasonable) (citing *SBC Commc'ns*, 489 F. Supp. 2d 15-16; *United States v. Microsoft Corp.*, 56 F.3d 1448, 1460 (D.C. Cir. 1995)) (internal quotations omitted).

the scope of the Complaint filed by the United States and the Plaintiff States. It is well-settled law that in a Tunney Act proceeding, a district court may not second guess the prosecutorial decisions of the United States to assert or not assert claims in its Complaint; "rather, the court is to compare the complaint filed by the United States with the proposed consent decree and determine whether the proposed decree clearly and effectively addresses the anticompetitive harms initially identified." *United States v. Thomson Corp.*, 949 F. Supp. 907, 913 (D.D.C. 1996); *accord Microsoft*, 56 F.3d at 1459 (D.C. Cir. 1995) (in APPA proceeding, "district court is not empowered to review the actions or behavior of the Department of Justice; the court is only authorized to review the decree itself"); *United States v. BNS Inc.*, 858 F.2d 456, 462-63 (9th Cir. 1988) ("the APPA does not authorize a district court to base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint"). "[A] district court is not permitted to 'reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made.'" *SBC Commc'ns, Inc.*, 489 F. Supp. 2d at 14 (quoting *Microsoft*, 56 F.3d at 1459) (emphasis in original). *See also Enova*, 107 F. Supp. 2d at 18 (merger's potential impact on a natural gas market was beyond the allegations of the complaint and therefore outside the scope of the Court's review in public interest determination).

Moreover, CCWI's contention that the 2004 Amendments to the Tunney Act overruled precedent in this court and require a more extensive review of the United States' exercise of its prosecutorial judgment directly conflicts with this Court's holding in *SBC Communications*, *supra*. In *SBC Communications*, this Court held that "a close reading of the law demonstrates that the 2004 amendments effected minimal changes, and that this Court's scope of review remains

sharply proscribed by precedent and the nature of [APPA] proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11. This Court continued that because "review [under the 2004 amendments] is focused on the 'judgment,' it again appears that the Court cannot go beyond the scope of the complaint." *Id.*

The 2004 amendments to the APPA, as interpreted and applied by this Court in *SBC Communications* (and more recently in *Abitibi*, *AT&T* and *InBev*) require the Court to evaluate the effect of the "judgment upon competition" in the 15 relevant markets alleged in the Complaint. 15 U.S.C. § 16(e)(1)(b). Because the Court may not consider any alleged anticompetive harm outside the scope of the Complaint in its public interest determination, CCWI's proposal to submit unsubstantiated allegations regarding the risk of tacit collusion in unidentified and undefined markets is unlikely to be helpful to the Court.

III. CONCLUSION

The decision to permit CCWI to participate as an amicus curiae is solely within the Court's discretion. The United States respectfully suggests that any further participation by CCWI is unlikely to be helpful to the Court as its submission is merely duplicative of material already before the Court and/or irrelevant to this Tunney Act proceeding.

Respectfully Submitted,

Dated: September 8, 2009

/s/

Lowell R. Stern (D.C. Bar #440487)
Stephen A. Harris
Litigation II Section, Antitrust Division
United States Department of Justice
450 5th Street, N.W., Suite 8700
Washington, DC 20530
(202) 514-3676
(202) 307-5802 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2009, I sent by electronic mail a copy of the foregoing Response of Plaintiff United States to Motion of Center For A Competitive Waste Industry for Leave To Participate as Amicus Curiae in this matter to:

Counsel for the Center For A Competitive Waste Industry
David A. Balto, Esq.
Attorney at Law
1350 I Street, NW - Suite 850
Washington, DC 20005
Email: david.balto@yahoo.com

________/s/________________

Lowell R. Stern