UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA; STATE OF OHIO; STATE OF ARIZONA; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF FLORIDA; COMMONWEALTH OF KENTUCKY; STATE OF MARYLAND; STATE OF MICHIGAN; STATE OF NEW YORK; COMMONWEALTH OF PENNSYLVANIA; STATE OF TEXAS; STATE OF WASHINGTON; and STATE OF WISCONSIN, Plaintiffs, v. USA WASTE SERVICES, INC.; DOME MERGER SUBSIDIARY; and WASTE MANAGEMENT, INC., Defendants.	)	Civil No. 1:98 CV 1616 Judge Ann Aldrich Filed:

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF
ENTRY OF THE PROPOSED MODIFIED FINAL JUDGMENT

I. Introduction

A. The Procedural Background

On July 16, 1998, the United States, and the states of Ohio, Arizona, California, Colorado, Florida, Maryland, Michigan, New York, Texas, Washington and Wisconsin, and the commonwealths of Kentucky and Pennsylvania filed a civil antitrust complaint, which alleged that USA Waste Services, Inc.'s ("USA Waste's") acquisition of Waste Management, Inc. would

violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleged that in 19 geographic areas around the country, the defendants were two of the most significant competitors in commercial waste collection, or disposal of municipal solid waste (*i.e.,* operation of landfills, transfer stations and incinerators), or both services, and that the elimination of competition as a result of the merger could lead to higher prices or reduced services for purchasers of waste collection or disposal services.

At the same time the Complaint was filed, the parties submitted a proposed Final Judgment that would require the defendants to divest assets sufficient to preserve the competition that otherwise would be lost in each of the markets in which an antitrust violation had been alleged. The parties also filed -- and the Court (per Chief Judge Matia) entered -- a Hold Separate Stipulation and Order, allowing the defendants to complete their merger transaction, provided that they keep the assets required to be divested separate from their own business operations and adhere to the terms of the proposed Final Judgment pending the United States's compliance with the notice and comment provisions of the Antitrust Penalties and Procedures Act, 15 U.S.C. §§16(b)-(h) (the "APPA").[1]

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[1]Nothing in the Hold Separate Order, however, prevents the defendants from promptly selling the assets required to be divested to an acceptable purchaser, and in this instance, the defendants chose to do so prior to APPA compliance. In a series of transactions beginning in September 1998 and ending in February 1999, the defendants divested all of the assets available for sale under the decree (except the Baltimore disposal assets) to Republic Services, Inc. ("Republic") for approximately $500 million. In October 1998, the defendants sold the Baltimore disposal assets to Browning-Ferris Industries, Inc. ("BFI") for roughly $60 million over a ten-year time period.

The United States, after consultation with the relevant states, concluded that Republic and BFI were both acceptable purchasers under the terms of the proposed Judgment. The defendants informed the Court of the pending sales of these assets before consummation. (*See* Letter from James R. Weiss, counsel for defendants USA Waste and Waste Management, to Honorable Ann Aldrich, United States District Judge, dated October 30, 1998.)

B. The Pending Motion to Enter the Proposed Modified Final Judgment

Today, the United States has filed a Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act, certifying that it has notified the public of the terms of the proposed settlement and fully responded to the public comments that were received. The parties also have submitted, and moved the Court to enter, a slightly modified version of the Final Judgment that was originally proposed. A copy of the proposed Modified Final Judgment is attached hereto as Exhibit A.

The modification affects only a single waste transfer station in a single market, New York City, NY.[2] As originally conceived, the proposed Final Judgment contained a contingent divestiture, requiring the defendants to sell the Brooklyn (or "Scott Avenue") Transfer Station, a 1,000 ton/day waste disposal facility located in Brooklyn, NY, *if* the proposed Nekboh Transfer Station, previously sold by the defendants, has not been licensed or permitted within a year after entry of the proposed Final Judgment. *See* Final Judgment, §§ II(C)(2)(i) and IV(B). The Modified Final Judgment would eliminate the contingent divestiture of the Scott Avenue Transfer Station (*i.e.,* remove §§ II(C)(2)(i) and IV(B) from the decree) and substitute instead an immediate divestiture of either of two other New York transfer stations, Gesuale (500 ton/day) or Vacarro (400 ton/day).[3]

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[2]To put the proposed modification in perspective, the proposed Final Judgment orders the defendants to divest ownership rights in twelve waste transfer stations (including four in New York City) and disposal rights in as many as five other transfer stations. In addition, the defendants were ordered to divest disposal or ownership rights in as many as 18 different landfills.

[3]The defendants' commitment to sell either the Gesuale or Vacarro transfer stations and the government's agreement to join the defendants in moving for the entry of the proposed Modified Final Judgment, were key elements of a consent decree, filed in December 1998 in

C. Reasons Why Entry of the Proposed Modification Would be in the Public Interest

As explained below, the United States strongly believes that entry of the proposed Modified Final Judgment would be in the public interest. The major reasons for including this transfer station in the proposed decree are no longer valid. Divestiture of the Scott Avenue Transfer Station is not necessary to ensure the defendants' continued cooperation in licensing the Nekboh site since the purchaser of the Nekboh permit application has the financial resources and economic incentive to pursue on its own licensing of that transfer station. Further, divestiture of the Scott Avenue Transfer Station is not necessary to promote competition in the disposal of the New York City's commercial waste because that transfer station is incapable of effectively competing for such waste, having entered into a long term contract to dispose of the city's residential waste.

Finally, the United States agreed to join the defendants in a motion to eliminate the Scott Avenue Transfer Station from the pending Final Judgment in response to the defendants' twin

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federal district court in Brooklyn, NY, and entered in May 1999 in settlement of an antitrust suit brought by the United States, the State of New York, and others against the defendants' acquisition of a major New York City waste industry rival, Eastern Environmental Services, Inc. *See* Final Judgment in *United States, States of New York and Florida, and Commonwealth of Pennsylvania v. Waste Management, Inc., Eastern Environmental Services, Inc., et. al,* Civil No. 98-7168 (E.D.N.Y., entered May 25, 1999) (the "*Waste/Eastern*" case), attached hereto as Exhibit B. The federal district court in Brooklyn (J. Block), following public notice, comment, and government response, entered the *Waste/Eastern* Final Judgment on May 25, 1999, concluding that an exchange of the contingent divestiture of the Scott Avenue Transfer Station in Brooklyn, NY, for an immediate divestiture of one of the two smaller New York transfer stations would be *"in the public interest." See* the *Waste/Eastern* Judgment, §§ II(D)(2)(c), IV(A)(2), IV(L), and XIII, Ex. B at 5, 7-8, 12 and 22 (emphasis supplied).

Although this Court must decide for itself whether the Modified Final Judgment submitted for entry in this case would be in the public interest, the judgment of the federal district court in Brooklyn, NY with respect to competitive issues concerning New York City waste transfer stations has some bearing on that issue.

commitments to divest either of two smaller, but more capable waste disposal facilities in New York City (Gesuale or Vacarro), *and* two large New York City waste transfer stations subsequently acquired by the defendants from Eastern Environmental Services, Inc. (PJ's and Atlantic Waste).

In our view, each of these reasons provides an independent basis for concluding that entry of the proposed Modified Final Judgment would be in the public interest, and taken together, they appear dispositive of that issue. (The State of New York, the only state plaintiff whose interests are directly affected by the proposed modification, has authorized us to state that it concurs in the motion to enter the proposed Modified Final Judgment and believes the modification to be in the public interest.)[4]

II. Statement of the Case

A. The Complaint, Proposed Final Judgment and Competitive Impact Statement

Although the Complaint in this case alleges that the defendants' combination would eliminate competition in a number of waste collection and disposal markets around the country, the critical issues here relate to competition in the disposal of New York City waste. In that market, the Complaint alleged, defendant USA Waste's acquisition of defendant Waste Management's transfer stations in Brooklyn and Bronx, NY, would substantially lessen competition in the disposal of the city's commercial waste.[5] The Final Judgment sought to

[4]The other twelve government plaintiffs also concur and urge the Court to enter the proposed Modified Final Judgment.

[5]"Commercial waste" is municipal solid waste generated by commercial establishments such as restaurants or department stores, private office and apartment buildings. "Residential waste," on the other hand, is municipal solid waste produced by single family households and state and municipal agencies. In New York, commercial waste must be collected and disposed of

remedy this problem by requiring the defendants to divest Waste Management's only waste disposal asset in the Bronx -- the SPM Transfer Station [Final Judgment, §§ II (C)(2)(i)((1) and IV] -- and to divest USA Waste's only disposal assets in Brooklyn, the All City Transfer Station [*id.,* § II(C)(2)(i)(3) and IV] and an application for a permit to construct and operate a waste transfer station at 2 North 5th Street, a site known as the proposed Nekboh Transfer Station [*id.,* § II (C)(2)(i)(2) and IV(B)]. The proposed Judgment further provided that if the divested Nekboh site was not permitted within one year after entry of the Final Judgment, then the defendants must sell a fourth waste transfer station in New York, the Brooklyn (or "Scott Avenue") Transfer Station, located at 485 Scott Avenue [*id.,* § II (C)(2)(i)(4) and IV].

The defendants' divestiture of the proposed Scott Avenue Transfer Station was seen as a way both to ensure the defendants' continued cooperation and assistance in permitting the proposed Nekboh Transfer Station and to promote competition in disposal of New York City's commercial waste if, for some reason, that transfer station was not permitted and built within the prescribed time period.

In August 1998, however, the defendants agreed to divest the Nekboh permit to Republic, one of the nation's largest waste collection and disposal firms, which has over $2 billion in total assets. And in early September 1998, the City of New York awarded the Scott Avenue Transfer Station a three to five-year contract for the disposal of the city's residential waste. With the bulk of the facility's available capacity committed under a long-term municipal contract for disposal of residential waste, if the defendants were to divest the Scott Avenue Transfer Station, the new

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by private firms. Residential waste is collected and disposed of by the city, which, until recently, maintained its own network of disposal facilities. New York, however, has recently begun contracting with private firms for disposal of the city's residential waste since the city landfill must be closed by 2001.

owner could not compete effectively in the processing and disposal of New York City's private commercial waste, the relevant market the government alleged would be adversely affected by the defendants' combination.

B. The Defendants' Acquisition of Eastern Environmental Services, Inc. and the Parties' Resolution of the Competitive Issues Concerning the New York City Waste Disposal Market

In early fall 1998, the defendants[6] agreed to acquire Eastern Environmental Services, Inc. ("Eastern"), a major competitive rival in the disposal of New York City's residential and commercial waste. This agreement precipitated another government antitrust suit, filed in federal district court in Brooklyn, NY, in which the United States and the State of New York alleged that the transaction, if consummated, would substantially reduce competition in waste disposal services in New York.[7] The parties agreed to settle the Waste/Eastern case in late December 1998 and, inter alia, to resolve *all* of the outstanding issues relating to the defendants' acquisitions of competitors in the New York market.

The defendants agreed to divest the two New York waste transfer stations that they would acquire from Eastern, PJ's and Atlantic Waste Disposal. *Waste/Eastern* Final Judgment, §§ II(D)(2)(a) and (b), IV(A)(1), Ex. B at 5, 7-8. They also agreed to divest either of two smaller waste transfer stations, Gesuale or Vacarro, both located in New York, NY.[8] *Id.* §§ II(D)(2)(c) and IV(A)(2). Because the United States and the State of New York concluded that

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[6]After the defendants USA Waste Services, Waste Management and Dome Merger Subsidiary merged, they named the new firm "Waste Management, Inc."

[7]The complaint also alleged the merger would create competitive problems in collection and disposal markets in Pennsylvania and Florida, and those states were co-plaintiffs in that lawsuit.

[8]The defendants later opted to divest the Vacarro Transfer Station.

circumstances had changed and that an immediate divestiture of a transfer station with capacity for disposal of commercial waste was competitively better than a contingent divestiture of Scott Avenue Transfer Station, which ha no longer had such capacity, they agreed to move for entry of a Modified Final Judgment that would eliminate the requirement that the defendants divest the Scott Avenue Transfer Station if the Nekboh site is not permitted within the prescribed one-year time period. *Id.* § IV(L), Ex. B at 12.

In essence, the United States and the State of New York agreed to a swap, trading a future divestiture of the capacity-constrained Scott Avenue Transfer Station for an immediate divestiture of either one of two small New York transfer stations, both with capacity available for processing commercial waste, *and* the two waste transfer stations, PJ's and Atlantic Waste, that the defendants had agreed to acquire from Eastern.

The parties filed the proposed *Waste/Eastern* Judgment on December 31, 1998. Following public notice and response to public comments,[9] the federal district court in Brooklyn entered the Final Judgment in the Waste/Eastern case on May 25, 1999, after concluding that that decree, including the provision requiring the United States and the State of New York to join the defendants in a joint motion to modify the Final Judgment in this case, would be "in the public interest." *Waste/Eastern* Final Judgment, § XIII, Ex. B at 22.

[9]In accordance with the APPA, the United States published notice of the Waste/Eastern Judgment in *The New York Times* and *The Washington Post*, newspapers of general circulation in New York, NY and Washington, DC. The United States also published a copy of the complaint, proposed judgment, and competitive impact statement in the *Federal Register* on February 26, 1999 (64 Fed. Reg. 9527), and published its responses to the public comments on the Waste/Eastern decree on June 11, 1999 (64 Fed. Reg. 31638).

III. Argument

A. Entry of the Modified Final Judgment Would Be In the Public Interest.

At this stage of the proceedings, after the United States has certified its compliance with the public notice and response to comment requirements of the APPA, the Court must determine whether entry of the proposed Modified Final Judgment "is in the public interest." 15 U.S.C. § 16(e). As noted in our Competitive Impact Statement, 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."[10] 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). And "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.' (citations omitted)."[11]

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[10] 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 government's 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.

[11] *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.,*

B. The Public Comments on the Proposed Final Judgment Were Unpersuasive.

"[T]his is not a case wherein objectors speak with one voice," *United States v. Nat'l. Broadcasting Co.*, 449 F. Supp. 1127, 1144 (C.D. Cal. 1978) (distinguishing *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975), where the court confronted "unified opposition" to a proposed consent decree). Rather, in this case, the 13 public comments submitted on the proposed Final Judgment expressed a wide variety of views, which the United States carefully considered and addressed, but which ultimately failed to persuade the United States to withdraw its consent to entry of the proposed Judgment. (*See* Certificate of Compliance, Ex. 3-15.)

In its responses to the public comments, the United States carefully explained why requiring the defendants to make more extensive divestitures (*id.,* Ex. 7-9, 12-15) or imposing more onerous restrictions on the defendants' business operations post-merger (*id.,* Ex. 1, 10) were unwarranted under the circumstances.[12] In our view, the proposed Final Judgment, without these additional requirements, falls well "within the range of acceptability" and the broad "reaches of the public interest." *United States v. AT&T*, 552 F. Supp. at 150.

C. Removing the Contingent Divestiture of the Scott Avenue Transfer Station From the Proposed Judgment Would Be in the Public Interest.

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406 F. Supp. 713, 716 (D. Mass. 1975); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

[12]The only comments related to the contingent divestiture of the Scott Avenue transfer Station were from individuals who favored converting the proposed site for the Nekboh transfer Station into an open space or a public park (*see* Certificate of Compliance, Ex. 4-6), comments which do not implicate the proposed modification.

This case, however, is somewhat atypical because the Modified Final Judgment that the parties now urge the Court to enter differs somewhat from the Final Judgment that they originally proposed.[13] The United States strongly believes that the difference -- removal of the Scott Avenue Transfer Station from the modified decree -- is a minor change that would make the Modified Final Judgment more effective and procompetitive than the earlier decree the parties proposed.

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[13]There is no requirement that the government must republish the settlement or resolicit public comment simply because it proposes that the Court enter a modified version of the final judgment originally proposed. The reported cases interpreting the APPA strongly suggest that republication is unnecessary. In *United States v. Nat'l. Broadcasting Co.*, 449 F. Supp. 1127 (C.D. Cal. 1978), *modified*, 1993-2 Trade Cas. (CCH) ¶ 70,418 (C.D. Cal. 1993), the government amended a proposed consent decree after comments were received, then submitted the amended proposed judgment for approval by the court. The court said that "the requirements of the APPA concerning publication and consideration of public comments have been satisfied" (*id.* at 1129), and subsequently approved the decree. *Id.* at 1145. *See also Massachusetts Sch. of Law v. United States*, 118 F.3d 776, 778 (D.C. Cir. 1997) (relating the district court's decision to enter a consent judgment after several modifications had been made following the end of the public comment period). In *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 225 (D.D.C. 1982) ("*AT&T*"), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), Judge Greene approved a proposed consent decree after the comment period had expired, also on the condition that the decree be amended to add a new section. In none of the cases did the court require republication of the amended proposed consent decree before entry. Rather, by eventually entering the consent judgments, the court in each case implicitly concluded that the requirements of the APPA were satisfied by the initial publication, comment, and response. *See, e.g., Nat'l. Broadcasting Co.*, 449 F. Supp. at 1129.

In any event, to the extent notice and opportunity to comment is necessary, it was provided when the United States complied with the APPA before entry of the Final Judgment in the *Waste/Eastern* case. The competitive impact statement filed in that case discussed the substitution of the Gesuale and Vacarro transfer stations for the Scott Avenue Transfer Station. 64 Fed. Reg. 9538. The Judgment in that case was published in *The New York Times*, prior to its entry, and thus provided ample notice and opportunity to comment to those persons affected most directly by the waste disposal relief in the New York City market. *See* the Certificate of Compliance in the *Waste/Eastern* case, 64 Fed. Reg. 31638, 31639 (July 11, 1999).

First, the defendants' divestiture of the Scott Avenue Transfer Station is not necessary to ensure that the Nekboh Transfer Station is permitted. As noted above, the defendants subsequently sold the permit application for the Nekboh site to Republic, now the nation's third largest waste collection and disposal firm. With over $2 billion in annual revenues, Republic certainly possesses the management skill, financial wherewithal and economic incentive to pursue on its own a permit for the proposed Nekboh Transfer Station. In addition, the proposed Modified Final Judgment requires the defendants to cooperate and enjoins them from interfering in any way with Republic's efforts to obtain a permit for the Nekboh site. Modified Final Judgment, §§ IV(H) and VIII(B) and (C), Ex. A at 20, 28. Thus, forcing a divestiture of the Scott Avenue Transfer Station would not advance the timing on the permitting and opening of the Nekboh site.

Moreover, a divestiture of the defendants' Scott Avenue Transfer Station would not promote competition in the disposal of New York City's private commercial waste because as a consequence of a long-term municipal contract, virtually all of that transfer station's capacity is committed to processing the city's residential waste.

In short, the compromise the parties reached in the *Waste/Eastern* case -- returning the Scott Avenue Transfer Station for three transfer stations that would resolve the competitive problems created by the defendants' series of acquisitions of rivals in the New York City market for disposal of commercial waste -- not only avoided an expensive and resource-intensive trial on the merits in that case, but also obtained immediate relief, not merely a contingent remedy, that would be more effective than that contained in the proposed Final Judgment in this case. In these

circumstances, the United States strongly believes that entry of the proposed Modified Final Judgment in this case is squarely in the public interest.

IV. Conclusion

For the foregoing reasons, and for the reasons set forth in the United States's Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act, the United States respectfully requests that this Court enter the proposed Modified Final Judgment.

Dated: September 13, 1999.

Respectfully submitted,

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