UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
- NORFOLK DIVISION -

UNITED STATES OF AMERICA, Plaintiff, v. WASTE INDUSTRIES USA, INC., Defendant.	Civil No.: 2:05CV468 Filed: August 8, 2005 Judge: Friedman

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("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

Defendant Waste Industries USA, Inc. ("Waste Industries") purchased from Allied Waste Industries, Inc. ("Allied"), effective August 1, 2003, certain waste-hauling assets located in the independent cities of Norfolk, Chesapeake, Virginia Beach, Portsmouth, Suffolk, and Franklin, Virginia and the county of Southampton, Virginia (hereinafter the "Southside"). The United States filed a civil antitrust Complaint on August 8, 2005, seeking a declaration that Waste Industries' purchase from Allied violated Section 7 of the Clayton Act and requesting equitable relief. The Complaint alleges that the transaction substantially lessened competition for small container commercial waste collection services in the Southside. This loss of competition has

denied Southside customers the benefits of competition – lower prices and better service.

At the same time the Complaint was filed, the United States also filed a proposed Final Judgment, which is designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Waste Industries is required within ninety (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 business operation, specified waste-hauling assets. In addition to the divestiture, the proposed Final Judgment also requires Waste Industries to comply with certain conditions regarding its customer contracts in the Southside.

The United States and Waste Industries 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 Acquisition

On August 1, 2003, Waste Industries acquired Allied's hauling assets in the Southside. The transaction has lessened competition in the Southside small container commercial waste collection services market. Waste Industries, with revenues in 2004 of approximately $291 million, is engaged in providing waste collection and disposal services throughout the southeastern United States. Allied, with revenues in 2004 of approximately $5.4 billion, is the nation's second-largest waste collection and disposal company.

B. Southside Small Container Commercial Waste Collection Services Market

Municipal solid waste ("MSW") is solid, putrescible waste generated by households and commercial establishments. Waste collection firms, or haulers, contract to collect MSW from residential and commercial customers and 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 the waste. Small container commercial waste collection is one component of MSW collection, which also includes residential and other waste collection.

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 generally use specialized equipment to store, collect, and transport waste from these accounts to approved disposal sites. This equipment (*i.e.*, one- to ten-cubic-yard containers for waste storage, and front-end load vehicles commonly used for collection and transportation) is uniquely well suited for providing 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, these firms use different waste storage equipment (*e.g.*, garbage cans or semi-stationary roll-off containers) and different vehicles (*e.g.*, rear-load, side-load, or roll-off 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 generally not used on small

container commercial waste collection routes. The Complaint alleges that, in the event of a small but significant increase in price for small container commercial waste collection services, customers would not switch to any other alternative and that, therefore, the provision of small container commercial waste collection services constitutes a line of commerce, or relevant service, for purposes of analyzing the effects of the transaction.

The Complaint alleges that the provision of small container commercial waste collection service takes place in compact, highly localized geographic markets. It is expensive to ship waste long distances in waste collection 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. Distance may significantly limit a remote 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. Based on these circumstances, the Complaint alleges that the Southside constitutes a section of the country, or relevant geographic market, for the purpose of assessing the competitive effects of Waste Industries' purchase of Allied's Southside hauling assets in the provision of small container commercial waste collection services.

There are significant entry barriers in small container commercial waste collection services. A new entrant in small container commercial waste collection services must achieve a

minimum efficient scale and operating efficiencies comparable to those of existing firms to provide a significant competitive constraint on the prices charged by market incumbents. In order to obtain comparable operating efficiencies, a new firm must achieve route density similar to existing firms. Because most customers have their waste collected once or twice a week, a new entrant generally requires several hundred customers in close proximity to construct an efficient route. However, the common use of price discrimination and long-term contracts by existing commercial waste collection firms can leave too few customers available to the entrant in a sufficiently confined geographic area to create an efficient route. The incumbent firm can selectively and temporarily charge an extraordinarily low price to specified customers targeted by new entrants. Long-term contracts often run for three to five years and may automatically renew or contain large liquidated damage provisions for contract termination. Such terms make it more costly or difficult for a customer to switch to a new hauler and obtain lower prices for its collection service. Because of these factors, a new entrant may find it difficult to compete by offering its services at price levels comparable to the incumbents' pre-entry prices. Such difficulties may cause an increase in the cost and time required to form an efficient route, thereby limiting a new entrant's ability to build an efficient route and reducing the likelihood that the entrant will ultimately be successful.

The need for route density, the use of long-term contracts with restrictive terms, and the ability of existing firms to price discriminate raise significant barriers to entry by new firms, which will likely be forced to compete at lower than pre-entry price levels.

C. Anticompetitive Effects of the Transaction

Waste Industries' acquisition of Allied's hauling assets reduced from four to three the

number of significant firms that compete in the collection of small container commercial waste in the Southside. Waste Industries now controls about 43% of the Southside small container commercial waste hauling market. The total Southside market generates annual revenues of approximately $25 million. Two firms, Waste Industries and Waste Management, Inc., control about 82% of the market.

The Complaint alleges that Waste Industries' acquisition of Allied's hauling assets in the Southside has removed a significant competitor in small container commercial waste collection services. The resulting increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents has denied Southside customers the benefits of competition – lower prices and better service.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is designed to return the Southside small container commercial waste collection services market to its pre-acquisition competitive state while recognizing changes to other haulers since the acquisition. At the time of the acquisition, there were four significant competitors in the Southside market. Allied and Waste Management, Inc. dominated the market with substantial market shares. Waste Industries and another local hauler were small but significant players. Thus, post-acquisition, there is one less competitor in a market with two dominant participants and one small participant whose operations have expanded slightly since the acquisition.

The divestiture and contract relief provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing a new, independent, and

economically viable competitor or by strengthening an existing, in-market hauler, and by also reducing the barriers to entry created by the contracts currently used by Waste Industries.

A. Divestiture

The proposed Final Judgment requires Waste Industries, within ninety (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 specified small container commercial waste collection assets in the Southside. Under the proposed Final Judgment, Waste Industries is required to divest the specified assets to a new, independent, and economically viable competitor or to an existing, independent, and economically viable small hauler. The proposed Final Judgment requires divestiture of certain small container commercial waste collection customers that produce annual revenues of $780,000. A divestiture of this size will reduce Waste Industries' market share to approximately Allied's July 2003 premerger market share. The divested customers come from two existing Waste Industries routes, one in Virginia Beach and the other in Norfolk. These two areas account for the majority of Waste Industries' Southside small container commercial waste revenues. Waste Industries will retain certain customers on the designated routes, including customers that would be difficult to divest because, for example, the customer is serviced as part of a national account or the customer has multiple locations that are serviced on Waste Industries routes not subject to divestiture.

The 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 as a viable, ongoing business that can compete effectively in the Southside. Waste Industries must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

Under the proposed Final Judgment, Waste Industries will be required to preserve and maintain the divested assets and to operate the assets in the ordinary course of business, including reasonable efforts to maintain and increase sales and revenues. To ensure that Waste Industries takes no action to jeopardize the divested assets, in the event revenues generated by the divested customers decline by 5% or more, the proposed Final Judgment will require that Waste Industries divest additional customers to replace the lost revenues.

In the event that Waste Industries does not accomplish the divestiture within the period prescribed by the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Waste Industries will pay all costs and expenses of the trustee. The trustee's compensation 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 Court and the United States as appropriate, setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States as appropriate, will make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

While the proposed Final Judgment prohibits Waste Industries from reacquiring all or substantially all of the small container commercial waste customers to be divested, it encourages ongoing Southside competition by permitting Waste Industries to continue to compete for the hauling business of any individual customer to be divested. Waste Industries' conduct in this

regard must be consistent with a commercially reasonable sales agreement negotiated with the acquirer of the divested assets.

B. Contract Relief

Because the divestiture alone will not fully eliminate the anticompetitive effects of the acquisition, the proposed Final Judgment also requires contract relief. The Final Judgment obligates Waste Industries, for a period of five (5) years from August 8, 2005, to offer all new customers and all existing customers who initiate negotiations, a contract with at least the following conditions ("the Standard Contract"): (1) no initial term longer than two years; (2) no renewal term longer than one year; (3) no requirement that the customer give Waste Industries notice of termination more than thirty days prior to the end of any initial term or renewal term; (4) no requirement that the customer pay liquidated damages more than three times its average monthly charge during the first year the customer has had service with Waste Industries; and (5) no requirement that the customer pay liquidated damages more than two times its average monthly charge after the first year the customer has had service with Waste Industries. Waste Industries will be required to send a letter to its current customers advising them of the new contract terms and that Waste Industries may not enforce more restrictive terms even if the customer does not enter into a new contract. The proposed Final Judgment provides that, as to Waste Industries' current customers, only the customer can initiate negotiations to replace its existing contract. Waste Industries shall offer in writing the Standard Contract to all new customers and any existing customers who choose to initiate contract negotiations. Waste Industries and these customers are then free to negotiate modifications to the Standard Contract terms, provided that the modifications are made in the presence of the customer, in writing, and

initialed by the customer. The proposed Final Judgment shall not prevent the enforcement by either the defendant or customer of any such negotiated modification.

This contract relief is significant because it lowers barriers to entry by giving new and existing customers greater leverage in contract negotiations with Waste Industries and allowing existing customers to consider competitive alternatives by providing for the termination of existing contracts through the payment of reasonable liquidated damages. Implementation of the proposed contract relief will make it easier for customers to switch haulers and should enable the purchaser of the divested assets and other competitors to gain customers if Waste Industries raises prices. The combined divestiture and contract relief sought in the Southside will ensure that consumers of small container commercial waste collection services will continue to receive the benefits of competition.

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 Waste Industries.

V.

PROCEDURES AVAILABLE FOR MODIFICATION
OF THE PROPOSED FINAL JUDGMENT

The United States and Waste Industries 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 (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the United States, 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:

Maribeth Petrizzi
Chief, Litigation II Section, Antitrust Division
U.S. Department of Justice
1401 H Street, NW, Suite 3000
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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 Waste Industries. The United States could have continued the litigation and requested that the Southside transaction be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act. The United States is satisfied, however, that the divestiture of assets and the contract relief described in the proposed Final Judgment will preserve competition for small container commercial waste collection services in the Southside.

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." 15 U.S.C. § 16(e)(1). In making that determination, the Court shall 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, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (2) the impact of entry of such judgment upon competition in the relevant market or markets, 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)(1). As the United States 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).

"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." 15 U.S.C. § 16(e)(2). Thus, in conducting this inquiry, "[t]he 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." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).[1] Rather:

> [a]bsent 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-Am. 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

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[1] *See United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed by the Department of Justice 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. Rep. No. 93-1463, 93rd Cong., 2d Sess. 8-9 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6535, 6538.

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) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Courts have held that

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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[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.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater

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[2] *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

remedy).

Moreover, the Court's role under the APPA 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. Because the "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.

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: August 8, 2005

Respectfully submitted,

_____/s/_____
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CERTIFICATE OF SERVICE

I, Leslie D. Peritz, hereby certify that on August 8, 2005, I caused a copy of the foregoing Competitive Impact Statement to be served upon Waste Industries USA, Inc. by mailing the document first-class, postage prepaid, to the duly authorized legal representative of the defendant, as follows:

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