

COPY

FILED
U.S. DISTRICT COURT
NORTHERN DIST. OF TX.
FT. WORTH DIVISION

UNITED STATES DISTRICT COURT JUL 29 P 4:06
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION NANCY DOHERTY, CLERK.

UNITED STATES OF AMERICA and
STATE OF TEXAS,

Plaintiffs,

v.

ALLIED WASTE INDUSTRIES, INC.

Defendant.

BY: _____
DEPUTY
Civil Action
No.: 497-CV 564 E

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

On July 14, 1997, the United States filed a civil antitrust Complaint alleging that the proposed acquisition by Allied Waste Industries, Inc. ("Allied") of the Crow Landfill in Tarrant County, Texas from USA Waste Industries, Inc. ("USA Waste") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. An Amended Complaint was filed on July 29, 1997. The Complaint alleges that Allied and USA Waste are two of only four competitors in the

greater Tarrant County area that operate commercial landfills for the disposal of municipal solid waste ("MSW") generated in Tarrant County. If the acquisition were consummated, there would be only three operators competing to dispose of MSW generated in Tarrant County, and that loss of competition would likely result in consumers paying higher prices for waste disposal and hauling and receiving fewer or lesser quality services. MSW disposal is a service which involves the receiving of waste at landfills from haulers which have collected paper, food, construction material and other solid wastes from homes, businesses and industries, and transported that waste to a landfill. The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) a permanent injunction preventing Allied from acquiring the Crow Landfill from USA Waste.

When the Complaint was filed, the United States also filed a proposed settlement that would permit Allied to complete its acquisition of USA Waste's Crow Landfill, but require certain divestitures of Airspace Assets and other terms that will preserve competition in the relevant market. This settlement consists of a Stipulation and Order and a proposed Final Judgment.

The proposed Final Judgment requires Allied to sell the right to dispose of waste at the Crow Landfill being acquired by Allied from USA Waste, and at Allied's Turkey Creek Landfill in Johnson County. In particular, Allied is ordered to (1) divest up

to a total of 880,000 cubic yards of disposal space, measured at the gate house, at the Crow Landfill over a five year period or the life of the Crow Landfill, whichever is longer; and (2) divest up to a total of 560,000 cubic yards of disposal space at the Turkey Creek Landfill over a ten year period (together, "Airspace Assets"). The Airspace Assets may be divided and sold to separate purchasers. In any single year, the purchaser(s) of the Airspace Assets may not dispose of more than the Maximum Annual Disposal amounts specified in the Final Judgment, which is 275,000 cubic yards at Crow and 125,000 cubic yards at Turkey Creek.

Allied is also required to supply, in a timely manner, any Independent Hauler with a letter assuring the municipality that the hauler can dispose of that municipality's waste in Allied's Crow or Turkey Creek Landfills. Allied has agreed to nondiscrimination terms. It will accept waste from haulers not affiliated with Allied under conditions no less favorable than those provided to Allied's vehicles. Further, if Allied obtains a permit within ten years to expand the Crow Landfill or to develop a new landfill adjacent to the Crow Landfill, it agrees to sell 20% of the expanded capacity to the existing Airspace Assets purchaser(s) at the rates and terms specified in the original Airspace Assets purchase agreement. If the purchaser does not buy the assets, Allied will offer it for sale in the same manner it sold the original Airspace Assets.

The amounts of disposal space to be divested are minimums and are based on cubic yards measured at the gate. If the actual remaining capacity at the Crow Landfill is greater than 4.4 million cubic yards, Allied must offer for sale 20% of the additional capacity at the Crow Landfill and 10% of the additional capacity at the Turkey Creek Landfill at the rates and terms specified in the original Airspace Assets purchase agreement(s). Allied will not re-purchase any portion of the assets without approval from the Department of Justice after consultation with Texas.

The plaintiffs and defendant have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate the 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 Defendant and the Proposed Transaction

Allied is among the ten largest solid waste hauling and disposal companies in the nation, and serves municipal, commercial, industrial and residential customers in 22 states. USA Waste is the third largest in the nation, and serves the same type of customers in 32 states. In 1996, Allied had total revenues of over \$806 million and USA Waste had total revenues of over \$1 billion.

On March 7, 1997, Allied agreed to acquire the Crow Landfill and other assets from USA Waste. This transaction, which would take place in the highly concentrated MSW disposal market at commercial landfills in the greater Tarrant County area, precipitated the government's suit.

B. Product and Geographic Markets

The requirements imposed by Texas law and regulations limit the means by which MSW can be properly disposed. Landfills that are open to the general public, or "commercial landfills," generally accept MSW from anyone or anywhere. Disposal of MSW at these commercial landfills is a line of commerce and a relevant product market. Landfills that accept MSW from only certain areas, such as Arlington, Grand Prairie, and the City of Fort Worth landfills, or "captive landfills," are not viewed by most haulers of MSW to be substitutes for commercial landfills which includes Tarrant County, northern Johnson County, and southern Denton County. One of the captive landfills, the City of Fort Worth landfill, primarily accepts waste hauled to it from private individuals rather than commercial haulers.

The cost of transporting MSW to a landfill site can be a substantial component of the cost of disposal. Total disposal costs may account for as much as 50 percent of the actual amount charged by a hauler for its collection services, hence limiting the areas where MSW can be economically transported and disposed of by haulers. The geographic location of landfills and associated transportation costs create localized markets for the

disposal of MSW.

Due to the high costs of transporting MSW, and the substantial travel time to other landfills based on distance or congested roadways, haulers of MSW generated in Tarrant County are limited to those commercial landfills located in the greater Tarrant County area, which includes Tarrant County, northern Johnson County, and southern Denton County. The four operators of commercial landfills in the relevant geographic market to which haulers of MSW generated in Tarrant County turn to dispose of MSW are USA Waste, which owns the Crow Landfill; Allied, which owns the Turkey Creek Landfill; WMI, which owns both the Westside Landfill and DFW Landfill; and the City of Farmers Branch, which owns the Camelot Landfill.

C. Harm to Competition as a Consequence of the Acquisition

The Complaint alleges that the transaction would have the following effects, among others: that competition generally in providing disposal at commercial landfills to haulers of MSW generated in Tarrant County would be lessened substantially; that actual and potential competition between Allied and USA Waste in providing disposal at commercial landfills to haulers of MSW generated in Tarrant County will be eliminated; and that competition for the hauling of MSW generated in Tarrant County may be substantially lessened.

Should Allied acquire the Crow Landfill, there will be only three landfill operators in the relevant market. The elimination of one of such a small number of significant competitors will

significantly increase the likelihood that consumers will face higher prices and poor quality service for the disposal of MSW generated in Tarrant County.

Allied and USA Waste compete with each other and with other companies to provide MSW disposal services in the greater Tarrant County area. That competition has resulted in lower waste disposal prices to haulers, which in turn has permitted those haulers to compete more effectively for business in Tarrant County. The elimination of competition resulting from the proposed acquisition of the Crow Landfill by Allied will likely result in price increases for the disposal of MSW generated in Tarrant County.

Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), which is defined and explained in Appendix A, the post-acquisition HHI, based on the amount of waste from Tarrant County disposed of in 1996 at the five landfills in the relevant geographic market, would exceed 3500, with an increase in the HHI of over 400. This number is likely understated because the capacity limitations on the Camelot Landfill limit its ability to provide a competitive constraint. Thus, an acquisition by Allied of the Crow Landfill would substantially increase concentration in the market.

Obtaining regulatory approval for either a new landfill or the expansion of an existing landfill in the greater Tarrant County area is a costly and time consuming process that can take several years. Entry by a new landfill or through the expansion

of an existing one would not be timely, likely or sufficient to prevent harm to competition.

Allied is also engaged in the collection and hauling of waste in the relevant geographic market. Allied and WMI are the dominant haulers in the relevant geographic market and account for roughly 80% of the hauling by private firms in Tarrant County. Post-acquisition, Allied would have an increased incentive to raise disposal prices to rival haulers in Tarrant County, to create a substantial barrier for entry to new haulers, or selectively to raise prices to punish or impede independent haulers who attempt to compete with it in Tarrant County.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The provisions of the proposed Final Judgment are designed to eliminate the anticompetitive effects of the acquisition of the Crow Landfill by Allied from USA Waste.

The proposed Final Judgment requires the Airspace Assets to be divested within one hundred twenty (120) days from the filing of the complaint, or within five (5) days after notice of the entry of the Final Judgment. The Airspace Assets will be divested to a purchaser, or purchasers, who demonstrate to the sole satisfaction of the United States (after consultation with the State of Texas) that the assets will be used as part of an ongoing business engaged in solid waste disposal. If Allied fails to sell the Airspace Assets, a trustee will be appointed. The

Final Judgment provides that Allied will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish divestiture. If the trustee has not accomplished the divestiture within six months of its appointment, 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 Complaint has been tailored to insure that it will protect consumers of hauling services and MSW disposal services at commercial landfills from the higher prices and poorer quality service that might otherwise result from the acquisition.

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 defendant.

V.

PROCEDURES AVAILABLE FOR MODIFICATION
OF THE PROPOSED FINAL JUDGMENT

The United States and defendant have consented that a 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 of a Final Judgment upon the Court's determination that the proposed Final Judgment is in the public interest. The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 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 Department of Justice, which remains free to withdraw its consent to the proposed 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 defendant Allied. The United States could have brought suit and sought preliminary and permanent injunctions against Allied's acquisition. The United States is satisfied, however, that the divestiture of the described assets and the other terms specified in Part I and in the proposed Final Judgment will encourage viable MSW disposal competitors in the greater Tarrant County area. The United States is satisfied that the proposed relief will prevent the acquisition from having anticompetitive effects in this market. The divestiture of Airspace Assets Space and the other proposed terms will restore the market to a structure that existed prior to the acquisition and will preserve the existence

of independent hauling competitors in the area.

VII.

STANDARD OF REVIEW UNDER THE APPA
FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider--

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia Circuit recently 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, 56 F.3d 1448 (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. ¶ 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

¹ 119 Cong. Rec. 24598 (1973). See, United States v. Gillette Co., 406 F.Supp. 713, 715 (D.Mass.1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See, H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

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.^{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.' (citations omitted)."^{3/}

United States v. Bechtel , 648 F.2d at 666 (citations omitted) (emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d at 565.

⁴ 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., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985).

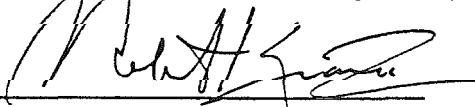
VIII.

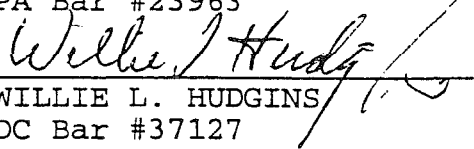
DETERMINATIVE DOCUMENTS

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.

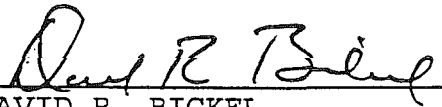
Respectfully submitted,

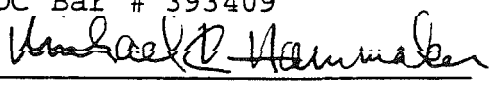
FOR PLAINTIFF UNITED STATES OF AMERICA:


J. ROBERT KRAMER II
PA Bar #23963


WILLIE L. HUDGINS
DC Bar #37127

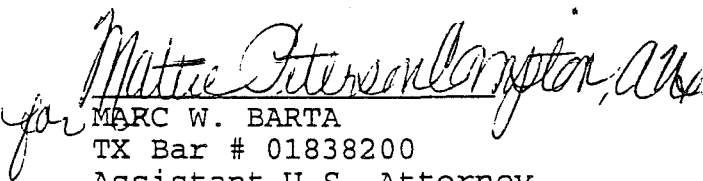
Attorneys
U.S. Department of Justice
Antitrust Division


DAVID R. BICKEL
DC Bar # 393409


MICHAEL K. HAMMAKER
DC Bar # 233684

Attorneys
U.S. Department of Justice
Antitrust Division
1401 H St., N.W.,
Suite 3000
Washington, D.C. 20530
202-307-0924
202-307-6283 (Facsimile)

PAUL E. COGGINS
UNITED STATES ATTORNEY


for MARC W. BARTA
TX Bar # 01838200
Assistant U.S. Attorney
Northern District of Texas
801 Cherry Street,
Ste. 1700
Fort Worth, TX 76102-6897
817-978-3291
817-978-6351 (Facsimile)

Dated: July 29, 1997

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the attorneys for USA Waste Services, Inc., the attorneys for Allied Waste Industries, Inc, and the Office of the Attorney General of the State of Texas, by placing a copy in the U.S. Mail, directed to each of the above-named parties at the a addresses given below, this 24th day of July, 1997.

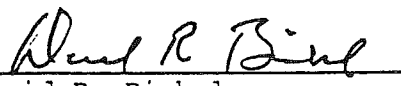
USA Waste Services, Inc.
c/o James R. Weiss
Preston, Gates
Suite 500
1735 New York Ave., NW
Washington, DC 20006

USA Waste Services, Inc.
c/o James D. McCarthy
Hughes & Luce
1717 Main Street
Suite 2800
Dallas, TX 75201

Allied Waste Industries, Inc.
c/o Tom D. Smith
Jones, Day, Reavis & Pogue
Metropolitan Square
1450 G Street, NW
Washington, DC 20005-2088

Allied Waste Industries, Inc.
c/o Thomas R. Jackson
Jones, Day, Reavis & Pogue
2300 Trammel Crow Center
2001 Ross Avenue
Dallas, TX 75202-2598

State of Texas:
Amy Krasner
Assistant Attorney General
Antitrust Section
Office of the Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548


David R. Bickel
Attorney
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W.
Suite 3000
Washington, D.C. 20530
(202) 307-0924
(202) 307-6283 (Facsimile)