

United States v. Energy Solutions, Inc., et al.

Plaintiff's Opening Statement
April 24, 2017



THE UNITED STATES
DEPARTMENT *of* JUSTICE

Defendants Compete for Waste Generated in the Relevant States



EnergySolutions Perceives WCS as a Threat



ENERGYSOLUTIONS



WCS spends 20 years
and \$700M to enter

2012

2014

2015

Mar. 2014

ES tries
to buy
WCS

Sept. 2014

ES renews
efforts to
buy WCS

Mar. 2015

ES files federal
antitrust claim
against WCS

Nov. 2015

Purchase
Agreement
\$367M

Jan. 2014

WCS opens
Exempt Cell for
LLRW disposal

Jan. 2015

WCS refuses
to sell to ES

Defendants See Each Other as Their Main Rival

March 2014

Developments in Competition WCS Impact to Date



“Resin Class B/C market price erosion of \$25M/yr; price was initially over \$5,500/ft³

Previously believed WCS could not compete with disposal prices of Large Components, but they are charging less than their in compact rates for out of compact Large Components”

Defendants See Each Other as Their Main Rival

March 2015

Review of 2015 Business Plan - Revenue



“ES is attacking on every front, Texas legislation, Commission, South Carolina, and market place. . . . It is believed that ES is rolling the prices back to 2008 levels.”

Defendants See Each Other as Their Main Rival

August 29, 2014

From: jlwillia [REDACTED]
Sent: Friday, August 29, 2014 10:35 PM
To: kwrobu [REDACTED]
Cc: aazad [REDACTED]; broge [REDACTED]; ww [REDACTED]
Subject: Strategy/Options



“The team met this week in SLC to **review our strategy and options in competing with WCS**. The purpose of the meeting was to spell out our options to **level the playing field with WCS** from the sales team perspective and the behind the scenes approach with the NRC, TCEQ, Texas regulators, etc.”

Defendants See Each Other as Their Main Rival

March 13, 2015

WASTE CONTROL SPECIALISTS, LLC

Plaintiff,

V.

ENERGYSOLUTIONS, LLC,

Defendant.

Civil Action No. 7:15-cv-00034



EnergySolutions' downblending
"serves as **WCS's only
competition** in the market for
disposal of Class B and C waste."

Defendants See Each Other as Their Main Rival

June 24, 2015

From: AAZAD [REDACTED]
Sent: Wednesday, June 24, 2015 7:05 PM
To: jlwilla [REDACTED]; mrpi [REDACTED]
Subject: ERS UPDATE



“We needed to change pricing approach in order to compete with WCS continued price spiral downward.”

Customers See ES and WCS as Their Main Options



Nuclear Utilities



Processor



Decommissioning
Contractor

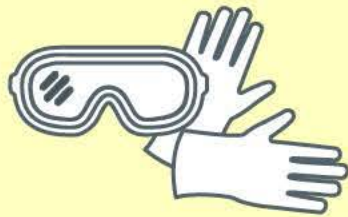


Different Actions Create Different Waste

Low-Level Radioactive Waste

Operational:

Generated by the day-to-day operations of a nuclear power plant

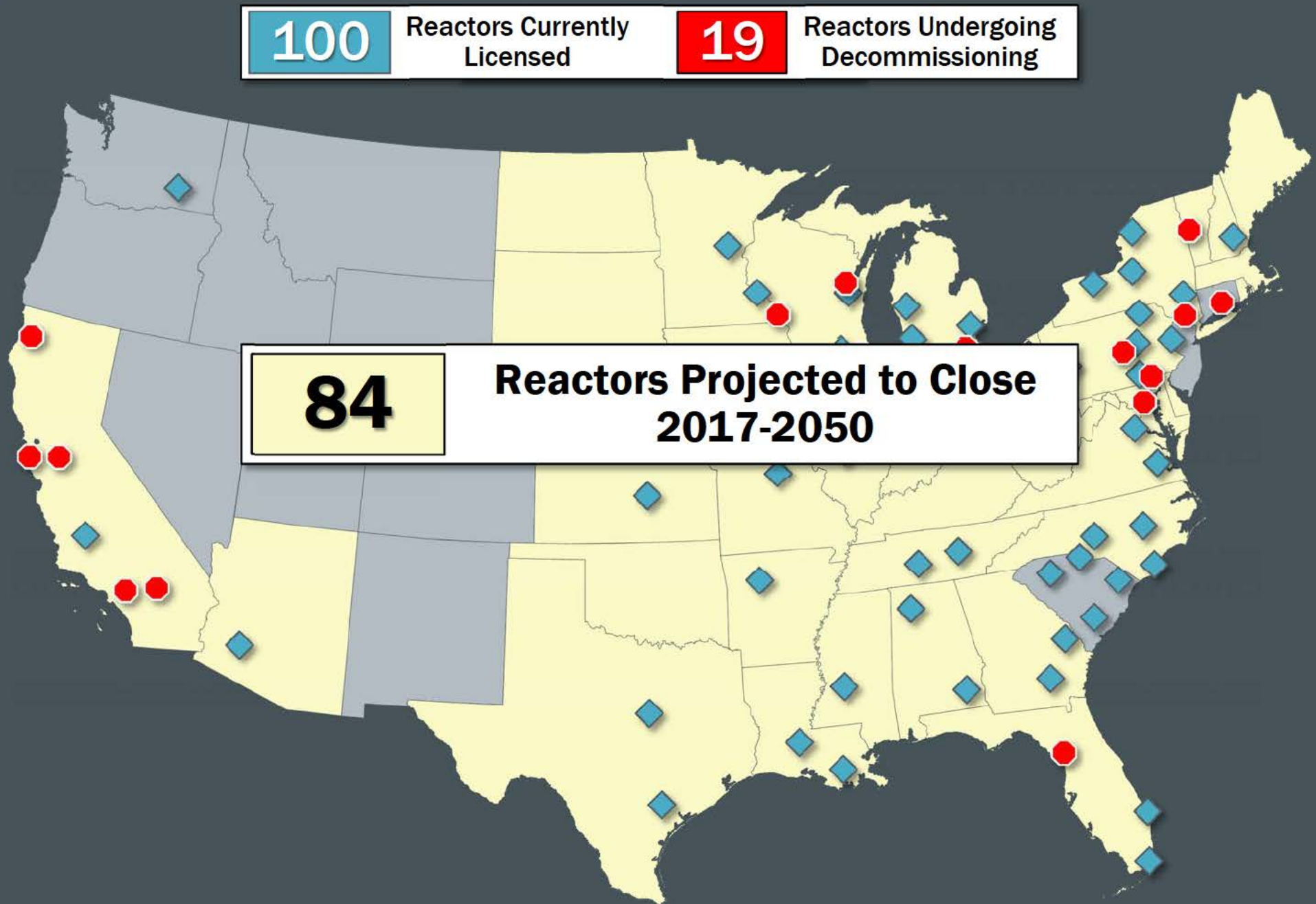


Decommissioning:

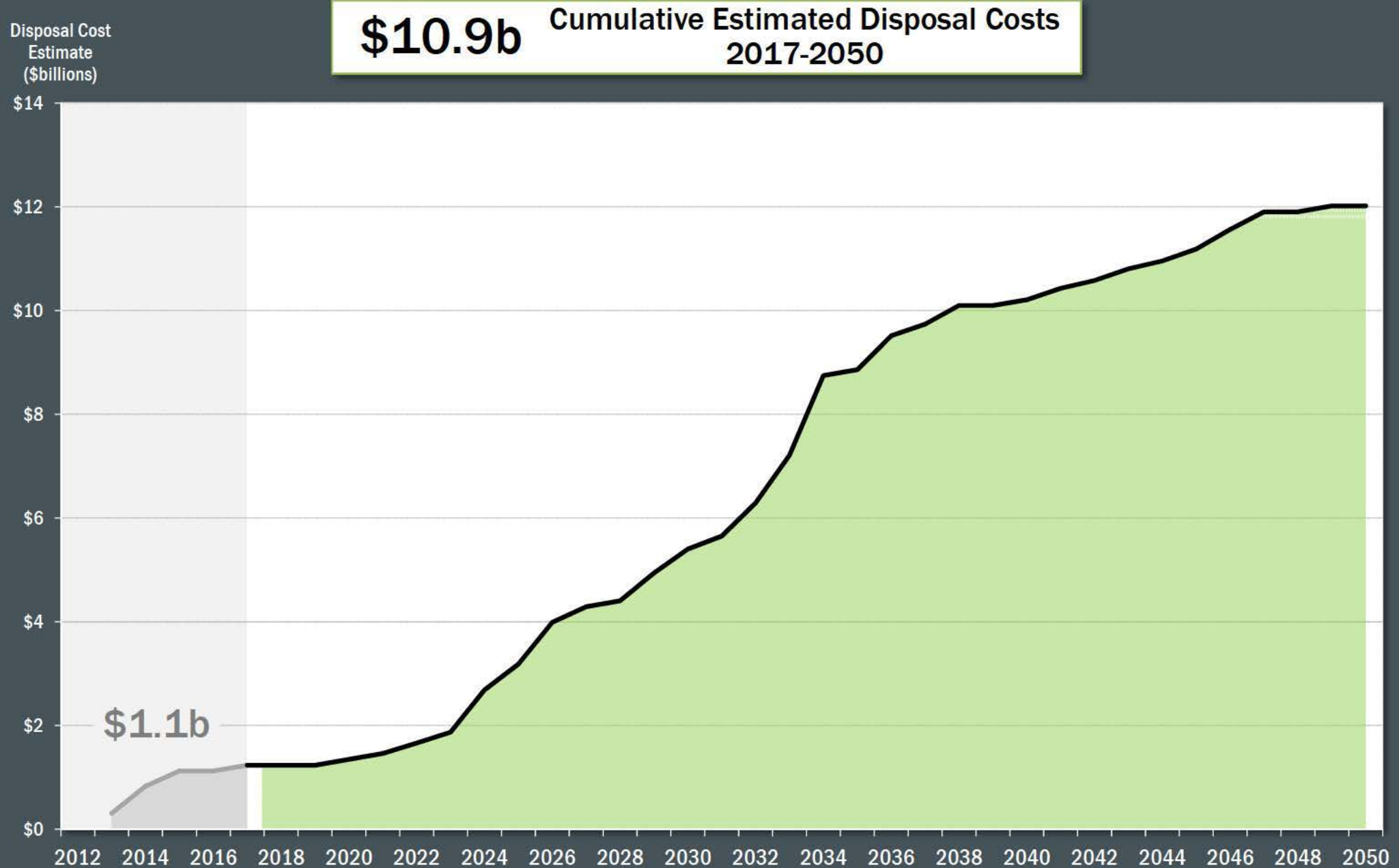
Generated when a nuclear reactor is shut down and the site returned to normal use



Significant Growth in Decommissioning Projects



Significant Growth in Decommissioning Projects



Waste Is Classified by Radioactivity Level

Low-Level Radioactive Waste

Lower Activity

Class A

Greater volume,
lower risk



Higher Activity

Class B/C

Smaller volume,
greater risk



Processing



Four Relevant Product Markets

Low-Level Radioactive Waste

Lower Activity Operational

Dry active waste (protective gear and rags)
Some filters and resins



Higher Activity Operational

Nuclear power plant machine parts and equipment
Water purification filters and resins



Lower Activity Decommissioning

Soil and construction debris



Higher Activity Decommissioning

Nuclear power plant machine parts
and equipment



Four Relevant Product Markets

Low-Level Radioactive Waste

Lower Activity
Operational



Higher Activity
Operational



Lower Activity
Decommissioning



Higher Activity
Decommissioning



Fringe Players

U.S. Ecology

- Hazardous waste landfill, not a licensed LLRW disposal facility
- Not a player in 3 out of 4 Relevant Markets
- Fringe player in Lower Activity Decommissioning market



Tennessee Bulk Survey for Release Program (BSFR)

- Participating solid waste landfills in Tennessee
- Not a player in 2 out of 4 Relevant Markets
- Not cost effective in Lower Activity Decommissioning market
- Fringe player in Lower Activity Operational market



Customer Storage Is Not a Reasonable Alternative

Storage merely delays disposal . . .

Customers still must
dispose later

Disposal costs
likely to increase

Facilities are costly to build
and maintain

Increases risks and liabilities

Regulations may change

Accidents and natural disasters

Worker exposure

Community opposition



. . . so customers effectively pay for disposal twice

New Entry Will Not Replace WCS

January 20, 2014

The New York Times

Texas Company, Alone in U.S., Cashes In on Nuclear Waste



“Standing at the lip of what might be America’s most valuable hole in the ground, **Rodney A. Baltzer** cataloged the features that he said would isolate the radioactive waste to be buried here for thousands of years.

* * *

Mr. Baltzer said **10 attempts had been made, with a total expenditure of \$1 billion.**

‘There’s an incredibly high barrier to entry,’ he said.”

Defendants Cannot Rebut the Government's Case

Defendants' efficiencies claims are unsupported . . .

NOT quantified

NOT verified

NOT merger-specific

NOT within the challenged markets

NOT likely to be passed on to consumers

NOT SUFFICIENT

. . . and contradicted by Defendants' own statements

Defendants Cannot Rebut the Government's Case

“Failing firm” is an affirmative defense . . .

“a ‘lesser of two evils’ approach”

United States v. General Dynamics Corp., 415 U.S. 486, 507 (1974)

“probably the weakest ground of all for justifying a merger”

Kaiser Alum. & Chem. Corp. v. FTC, 652 F.2d 1324, 1339 (7th Cir. 1981)

“the Hail-Mary pass of presumptively doomed mergers”

ProMedica Health System, Inc. v. FTC, 749 F.3d 559, 572 (6th Cir. 2014)

. . . and Defendants cannot meet their burden of proof

Defendants Cannot Rebut the Government's Case

WCS's "failing firm" defense is a litigation strategy . . .

NOT LIKELY TO EXIT ABSENT THE MERGER

NOT in imminent danger of failing

NOT unable to meet its financial obligations

NOT engaged in good-faith efforts to find an alternate buyer

NOT behaving like a failing firm in the ordinary course

. . . not a business reality

Preserve the Competition We Have

“If **anticompetitive effects** of a merger are probable in ‘**any**’ significant market, the merger is **proscribed**.”

Brown Shoe Co. v. United States, 370 U.S. 294, 337 (1962)