UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. ALLIED WASTE INDUSTRIES, INC. and REPUBLIC SERVICES, INC., Defendants.	File No.: 1:00CV01469 JUDGE: Ricardo M. Urbina DECK TYPE: Antitrust Filed: 8/15/00

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

The United States filed a civil antitrust Complaint on June 21, 2000, seeking to enjoin an exchange of certain waste-hauling and disposal assets by Allied Waste Industries, Inc. ("Allied") and Republic Services, Inc. ("Republic"). Allied and Republic had entered into purchase agreements pursuant to which the companies would exchange assets in a number of market areas in the United States. The Complaint alleges that the likely effects of these asset exchanges would be to substantially lessen competition for waste collection and disposal services in several markets in violation of Section 7 of the Clayton Act. This loss of competition would result in consumers paying higher prices and receiving fewer services for the collection and disposal of waste.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order and proposed Final Judgment which are designed to eliminate the anticompetitive effects of the acquisitions. Under the proposed Final Judgment, which is explained more fully below, the defendants are required within 120 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 viable business operations, certain waste-hauling and disposal assets. Under the terms of the Hold Separate Stipulation and Order, the defendants are required to take certain steps to ensure that the assets to be divested will be preserved and held separate from the defendants' other assets and businesses. In addition to these asset divestitures, the proposed Final Judgment also requires the defendants to comply with certain conditions in their customer contracts in several identified areas.

The United States and the defendants 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 Defendants and the Proposed Transactions

Allied, with revenues in 1999 of approximately $6 billion, is the nation's second largest waste collection and disposal company, operating throughout the United States. Republic, with 1998 revenues of approximately $1.8 billion, is the nation's third largest waste collection and disposal company. On July 28 and October 7, 1999, Allied and Republic entered into separate asset purchase agreements in which they agreed to exchange certain waste-hauling and disposal assets. The

proposed transactions, identified below, would lessen competition substantially in waste collection and/or disposal services: (1) Allied's acquisition of hauling assets in Albany, New York; (2) Allied's acquisition of hauling assets in Augusta, Georgia; (3) Allied's acquisition of hauling assets in Memphis, Nashville and Clarksville, Tennessee; (4) Allied's acquisition of disposal assets in New York, New York; (5) Allied's acquisition of hauling assets in Norfolk, Virginia; (6) Allied's acquisition of hauling assets in Okaloosa, Escambia and Santa Rosa counties, Florida ("Gulf Coast, Florida"); (7) Republic's acquisition of disposal assets in Anderson, Indiana; (8) Republic's acquisition of hauling assets in Columbus, Ohio; (9) Republic's acquisition of hauling assets in Lakeland, Florida; (10) Republic's acquisition of hauling assets in Louisville, Kentucky and Sellersburg, Indiana; (11) Republic's acquisition of hauling and disposal assets in Macon, Georgia; and (12) Republic's acquisition of hauling assets in Monmouth, Burlington and Camden counties, New Jersey. These acquisitions are the subject of the Complaint and proposed Final Judgment filed by the United States on June 21, 2000.

B. The Competitive Effects of the Transactions

Waste collection firms, or "haulers," contract to collect municipal solid waste ("MSW") from residential and commercial customers; they 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 waste. Allied and Superior compete in operating waste collection routes and waste disposal facilities.

1. *The Effects of the Transactions on Competition in Small Container Commercial Waste Collection Service*

a. Small Container Commercial 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 -- one to ten cubic yard containers for waste storage and front-end loader vehicles commonly used for collection and transportation -- is uniquely well suited for the provision of 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 rarely used on small container commercial waste collection routes. Thus, the Complaint alleges that 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 acquisitions.

The Complaint alleges that the provision of small container commercial waste collection services takes place in compact, highly localized geographic markets. It is expensive to ship waste

long distances in either collection or disposal 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 distant 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.

Applying this analysis, the Complaint alleges that the areas of Albany, New York; Augusta, Georgia; Burlington and Camden counties, New Jersey; Clarksville, Tennessee; Columbus, Ohio; Gulf Coast, Florida; Lakeland, Florida; Louisville, Kentucky and Sellersburg, Indiana; Macon, Georgia; Memphis, Tennessee; Monmouth County, New Jersey; Nashville, Tennessee; and Norfolk, Virginia constitute sections of the country, or relevant geographic markets, for the purpose of assessing the competitive effects of a combination of Allied and Republic in the provision of small container commercial waste collection services.

There are significant entry barriers into small container commercial waste collection. An efficient route usually handles 80 or more containers/customers each day. As most customers have collections once or twice a week, a new entrant must have several hundred customers in close proximity to construct an efficient route. However, the common use of long-term self-renewing "evergreen" 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. These

contracts often run for several years and frequently have high liquidated damage terms which make it costly to a customer who wishes to change its collection service without giving proper notice. When giving proper notice, the customer must often inform the firm in writing 60 days before the contract renews. This time period allows the incumbent firm an opportunity to react to a prospective entrant's solicitation to that customer. The incumbent firm can inquire why the customer wishes to change its service, and if a prospective entrant has offered a lower price, the incumbent can lower its price to retain the customer. This can result in price discrimination; i.e., an incumbent firm can selectively (and temporarily) charge unbeatably low prices to some customers targeted by entrants, a tactic that would strongly inhibit a would-be entrant from competing for such accounts, which, if won, may be unprofitable to serve, and would limit its ability to build an efficient route. Because of these factors, a new entrant may find it difficult to compete by offering its services at pre-entry price levels comparable to the incumbent.

The need for route density, the use of long-term evergreen 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. Such barriers in the market for commercial small container waste collection have allowed incumbent firms to raise prices successfully.

b. Anticompetitive Effects in Small Container Collection Service Markets

(1) Memphis and Nashville Areas

In the Memphis and Nashville, Tennessee market areas, Allied is the acquiring party. Total market revenues for commercial small container waste collection are over $25 million in Memphis and about $31 million in Nashville. Currently, Allied already has a substantial share of the commercial

small container collection market in both Memphis and Nashville. In Memphis, the proposed acquisition would reduce from four to three the number of significant firms that compete in small container commercial waste collection service, and in Nashville, it would reduce the number of significant competitors from three to two. After the acquisition, Allied would control roughly 69% of the commercial waste collection market in Memphis, and over 50% of the market in Nashville. In both cities, after the acquisition, two firms would control over 90% of the market.

(2) Lakeland, Macon, Augusta, Norfolk, Columbus, Gulf Coast, and Louisville/Sellersburg Areas

In Lakeland, Florida and Macon, Georgia, the acquisition would reduce from two to one the number of significant firms that compete in the collection of small container commercial waste. After the acquisition, Allied would control about 98% of the market in Lakeland, and Republic would control over 85% of the small container commercial market in Macon. In each market, the annual revenues derived from commercial waste collection are about $5 million.

In Augusta, Georgia and Norfolk, Virginia, the acquisition would reduce from three to two the number of significant firms that compete in the collection of small container commercial waste. After the acquisition, Allied would control over 40% of the market in Augusta, and over 55% of the market in Norfolk. The annual revenues from commercial waste collection are about $8 million in Augusta and about $28 million in Norfolk.

In the Columbus, Ohio; Gulf Coast, Florida; and Louisville, Kentucky/Sellersburg, Indiana areas, the acquisition would reduce from four to three the number of significant firms that compete in the collection of small container commercial waste. After the acquisition, Republic would control over 50%, and two firms over 80%, of the small container commercial waste hauling market in

Columbus, which has annual revenues of about $29 million. In Gulf Coast, Florida, after the acquisition, Allied would control over 50%, and two firms more than 90%, of the commercial market, which has annual revenues of about $10 million. In Louisville/Sellersburg, Republic would control over 50%, and two firms would control about 90%, of the market after the acquisition, in a market which has annual revenues exceeding $22 million.

(3) Clarksville, Albany and New Jersey Areas

The acquisition would reduce the number of significant competitors in small container commercial waste collection service from five to four in Clarksville, Tennessee; four to three in Albany, New York and Monmouth County, New Jersey; and from three to two in Burlington and Camden counties, New Jersey. In Clarksville, Tennessee, Allied would control over 40%, and two firms over 65%, of the market, which has annual revenues of about $5 million. In Albany, Allied would control over 35%, and two firms over 80%, of the market, which has annual revenues of about $17 million. In Monmouth County, New Jersey, Republic would control about 40%, and three firms over 75% of the market, which has annual revenues of about $18 million. In Burlington and Camden counties, New Jersey, Republic would control about 31%, and two firms over 80%, of the market, which has annual revenues exceeding $24 million.

The Complaint alleges that a combination of Allied and Republic in these markets would likely lead to an increase in prices charged to consumers of small container commercial waste collection services. The acquisitions would diminish competition by enabling the few remaining competitors to engage more easily, frequently, and effectively in coordinated pricing interaction that harms consumers. New entry into these markets would be difficult, time-consuming, and is unlikely to be sufficient to constrain any post-merger price increase.

2. *The Effects of the Transactions on Competition in Roll-Off Waste Collection Service*

a. Roll-Off Waste Collection Service

Roll-off waste collection service is the collection of large volumes and/or bulkier items of waste from sources such as construction sites or industrial plants. Because of its characteristics (e.g. construction debris) and volume, roll-off waste is deposited by the customer/generator into a disposal container (usually 20 to 40 cubic yards in size) which is larger than those routinely used in small container commercial collection (usually one to 10 cubic yards in size). When filled, the roll-off container is picked up by roll-off trucks, which are specifically designed for roll-off waste collection, and driven to a nearby disposal site, where the container's contents are disposed.

Unlike most small container commercial service vehicles, which routinely employ compaction systems on the truck to increase storage capacity and can empty numerous small containers located on a scheduled route before being driven to a disposal site, roll-off vehicles have no compaction system on board and are designed to carry only one large container at a time to a disposal site. As a result, roll-off waste collection is often performed on an "on call" basis, rather than as part of any route, and pricing is primarily influenced by the distance between the customer's location, the hauler's location, and the disposal site.

The differences in size, type, and volumes of roll-off waste and in the equipment used to collect it distinguish roll-off waste collection from all other waste collection services. These differences mean that roll-off waste collection firms can profitably increase their charges for roll-off waste collection services without losing significant sales or revenues to firms engaged in the provision of other types of waste collection services. Thus, the Complaint alleges that the provision of roll-off waste collection service is a line of commerce, or relevant service, for purposes of analyzing the

effects of the acquisitions.

Roll-off waste collection services are generally provided in localized areas because a roll-off truck cannot be efficiently or profitably driven significantly longer distances than those driven by a competitor to collect and dispose of the waste. It is economically impractical for a roll-off waste collection firm to serve metropolitan areas from a distant base. Roll-off waste haulers, therefore, generally establish garages and related facilities within each major local area served.

The Complaint alleges that the Macon, Georgia area is a section of the country, or relevant geographic market, for purposes of analyzing the effects of the acquisitions in the provision of roll-off waste collection service. In this area, local roll-off waste collection firms can profitably increase charges to local customers without losing significant sales to more distant competitors.

A barrier to entry with roll-off waste collection is the nature of the contracts with customers used by some market participants. They are often long-term evergreen contracts which renew automatically unless canceled during a short window, with liquidated damages clauses. These contracts restrict the ability of a new or an existing firm to compete for customers. Entry into roll-off waste collection is also difficult where the major competitors in roll-off collection control the local disposal facilities because new entrants will be at a disadvantage in obtaining access to competitive disposal sites.

b. Anticompetitive Effects in the Macon, GA Area for Roll-Off Collection Service

In the Macon, Georgia area, the acquisition by Republic would combine the two largest firms that compete in roll-off waste collection service. After the acquisition, Republic would control over 60% of the roll-off hauling market, which has annual revenues of about $8 million. In addition, Republic already controls the most accessible landfill in the area. Its acquisition of Allied's transfer station would likely put its roll-off collection competitors at an even greater competitive disadvantage because it would have the ability to raise prices selectively to its roll-off collection competitors at two of the area's best disposal facilities.

The Complaint alleges that a combination of Allied and Republic would likely lead to an increase in prices charged to roll-off waste collection customers in the Macon, Georgia area. The acquisition would diminish competition by the loss of competition between the two largest firms engaging in roll-off waste collection service. Because of the limited disposal options and use of long-term evergreen contracts with a large number of customers, new entry in the area would be difficult and unlikely to be sufficient to constrain any post-merger price increase.

3. The Effects of the Transactions on Competition in the Disposal of Municipal Solid Waste

a. Municipal Solid Waste

Municipal solid waste (MSW) is solid putrescible waste generated by households and commercial establishments. A number of federal, state and local safety, environmental, zoning and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing and disposal of MSW. MSW can be sent for disposal only to a transfer station, sanitary landfill, or incinerator permitted to accept MSW. Anyone who attempts to dispose of MSW in a facility that has

not been approved for disposal of such waste risks severe civil and criminal penalties. In many cases, landfills or incinerators may not be located close to where the waste is generated. In such instances, the waste is brought to a nearby transfer station by collection trucks where it is compacted and combined with other waste and transported to the more distant disposal site.

There are no good substitutes for MSW disposal. Firms that compete in the disposal of MSW can profitably increase their charges to haulers of MSW without losing significant sales to any other firms. Thus, for purposes of antitrust analysis, the disposal of MSW constitutes a line of commerce, or relevant service, for purposes of analyzing the acquisitions.

The disposal of MSW generally occurs in localized markets. The Complaint alleges that the Anderson, Indiana and New York City, New York (defined as the Borough of Brooklyn in the Complaint) areas each constitute sections of the country, or relevant geographic markets, for purposes of assessing the competitive effects of the transaction. Virtually all of the MSW generated in each of these areas is disposed of in local transfer stations. Firms that compete in the disposal of MSW generated in the Anderson or New York City areas can profitably increase their charges for MSW disposal without losing significant sales to more distant disposal sites.

There are significant barriers to entry in MSW disposal. Obtaining a permit to construct a new disposal facility or expand an existing one is a costly and time consuming process, which typically takes many years to conclude. Local public opposition often makes it more difficult and costly, and increases the time and uncertainty of successfully permitting a facility. In the Anderson, Indiana and New York City, New York areas, entry by any new MSW disposal facility would be an extremely costly and time-consuming process, and unlikely to prevent market incumbents from significantly raising prices for the disposal of MSW following the acquisition.

b. Anticompetitive Effects in Anderson, Indiana and New York City, New York areas for Disposal of Municipal Solid Waste

In the Anderson, Indiana area, almost all of the MSW generated is disposed of in one of three transfer stations. These three transfer stations are currently owned by Allied, Republic and another competitor. The proposed acquisition would reduce from three to two the number of significant competitors for the disposal of MSW. After the acquisition, Republic would own two of the three transfer stations, which together would control in excess of 65 percent of the MSW disposal market, which has annual revenues in excess of $3 million.

In the New York City area, the acquisition would reduce from five to four the number of significant firms competing to dispose of MSW. After the acquisition, Allied would control roughly 30 percent--and two firms about 66 percent--of the New York City area MSW disposal market, which has annual revenues of about $40 million.

The Complaint alleges that a combination of Allied and Republic in Anderson, Indiana and New York City, New York would likely lead to an increase in prices for disposal of MSW. The acquisitions would diminish competition in MSW disposal by eliminating actual and potential competition between Allied and Republic in disposal of MSW in these areas and enabling the remaining firms to engage more easily in coordinated pricing. New entry into these markets would be difficult, time consuming and unlikely to be sufficient to constrain any post merger price increases.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Small Container Commercial and Roll-Off Waste Collection Service

The divestiture and contract provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in small container commercial waste collection services in the market areas identified in the Complaint by establishing a new, independent and economically viable competitor in each of those markets and/or reducing the barriers to entry and expansion that the evergreen contracts currently in use raise. The proposed Final Judgment requires defendants, within 120 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 or businesses, small container commercial waste collection assets (*e.g.*, routes, trucks, containers, and customer lists) in the market areas of Augusta, GA; Columbus, OH; Gulf Coast, FL; Lakeland, FL; Louisville, KY/Sellersburg, IN; Macon, GA; Memphis, TN; Nashville, TN; and Norfolk, VA. On or before December 1, 2000, the proposed Final Judgment also requires the defendants to alter the contracts each uses with its existing and new small container solid waste commercial customers in the market areas of Albany, NY; Augusta, GA; Clarksville, TN; Columbus, OH; Gulf Coast, FL; Lakeland, FL; Louisville, KY/Sellersburg, IN; Macon, GA; Norfolk, VA; Burlington and Camden counties, NJ; and Monmouth County, NJ. On or before that same date, defendant Republic is required to alter the contracts it uses with roll-off customers in the five counties in the Macon, Georgia area. The assets to be divested must be divested in such a way as to satisfy the United States that the operations can and will be operated by the purchaser or purchasers as a viable, ongoing business or businesses that can compete effectively in each relevant market. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

In the event that defendants do not accomplish the divestitures within the above-described period, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that the defendant affected 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 its efforts to accomplish divestitures. At the end of six months, if the divestiture has not been accomplished, 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.

1. Memphis and Nashville Areas

The divestiture provisions of the proposed Final Judgment will fully eliminate the anticompetitive effects of the acquisition in small container commercial waste collection services in the Memphis and Nashville, Tennessee areas by divesting all of the assets being acquired to a new, independent and economically viable competitor in each of those markets. The relief sought in the Memphis and Nashville areas will maintain the pre-acquisition structure of each market with no increase in concentration and thereby ensure that consumers of small container commercial waste collection services will continue to receive the benefits of competition -- lower prices and better service.

2. *Lakeland, Macon, Augusta, Gulf Coast, Norfolk, Columbus, and Louisville/Sellersburg Areas*

In these market areas, the Department of Justice determined that competition would be best maintained by obtaining a combination of divestiture and contract relief. The Department's experience after many years of investigating this industry is that contract relief is significant because it lowers entry barriers and is effective at enabling smaller competitors to grow and new competitors to enter. The divestiture relief requires certain small container commercial routes to be divested in each market. In Macon, Georgia, the transfer station is also being divested as attendant to the small container routes and to facilitate disposal of the waste by the purchaser of the divested routes.

In each case the divestiture that has been agreed to is of a size that will create a substantial competitor capable of competing immediately in the market. The divestitures are augmented by decree provisions that obligate the acquiring company to alter all of its contracts with its commercial small container customers to provide terms that are less restrictive in terms of the length of the contracts, the renewal provisions, and the liquidated damages for a customer who wishes to change its service. This contract relief will make it easier for customers to consider competitive alternatives, easier for existing small firms to compete and expand in the future, and will make it more difficult for incumbent firms to price discriminate successfully. The contract provisions also make it easier for new firms to enter a market and raise the prospect that the markets will become less concentrated and more competitive than they were pre-acquisition. In Macon, Georgia, similar contract relief is also required for roll-off waste collection. This relief will make it easier for smaller firms to compete for customers under contract with incumbent collection firms.

a. Norfolk, Columbus and Louisville/Sellersburg Areas

In these market areas (Norfolk, VA; Columbus, OH; and Louisville, KY/Sellersburg, IN), the market shares of the acquiring firm before the acquisition were not as great as in Memphis and Nashville, or there were more market participants. The divestitures required in each market enable a new competitor to restore the competition that otherwise would have been lost. The purchasers of the assets to be divested in each market will have routes producing over two million dollars in annual sales and at least a 10% market share from those assets.

In Louisville and Columbus, where Republic is the acquiring company, there are two other significant competitors, one large and one small, and several disposal options. With Republic implementing the contract relief specified in the proposed Final Judgment, the purchaser of the divested assets, and other competitors, should be able to gain customers more easily if Republic seeks to raise prices in these markets. In Norfolk, where Allied is the acquiring company, there is only one other significant competitor, but the divestiture creates a substantial competitor and represents over 70% of the open commercial work being acquired from Republic (in addition to certain municipal work). One reason why the Norfolk market has few significant competitors is because the major disposal option in the area has a high volume threshold for a meaningful discount. Only the defendants and the other large competitor have been able to qualify for this discount. The amount of assets required to be divested will make it easer for the purchasing firm to apply for this or a similar disposal discount. The proposed Final Judgment provides that Allied will divest additional customers with acceptable waste if necessary for the purchaser to qualify for this discount. Contract relief should make it easier for the divested firm and other competitors to maintain efficient routes and gain new customers should Allied raise prices.

b. Augusta and Gulf Coast Areas

In these two markets (Augusta, GA and Gulf Coast, FL), the market is small, the acquired firm is significantly smaller than the acquiring firm, and there is another significant competitor. Divestitures with contract relief are desirable in these markets as they will both create a new competitor and help it and other competitors to compete in the market.

In Augusta, where Allied is acquiring assets from Republic, disposal is provided by municipally owned facilities. With the divestiture and contract relief, the existing competitors will be better able to compete because it will be easier for them to expand and gain new customers.

In the Gulf Coast, where Allied is also the acquiring company, disposal is provided by municipally owned facilities. There is also a public company that competes in the market which is constrained in its ability to compete by restrictive long-term contracts used by the defendants.. The contract relief provisions in the proposed Final Judgment should help it -- and the owner of the divested assets -- to compete by making it easier for customers to change collection companies.

c. *Lakeland and Macon Areas*

In these two areas (Lakeland, FL and Macon, GA), the acquisitions result in market shares greater that those in Memphis and Nashville, but other factors make the partial divestiture obtained and contract relief a better remedy than full divestiture. In both markets, the purchaser of the divested assets will become a significant competitor with over 20% of the open commercial work in the market.

In the Lakeland area, most of the cities are franchised. Haulers in nearby counties and the cities indicated that the merger was unlikely to effect prices for these franchises because haulers in adjacent counties could compete for that work. Administrators of Polk County expect the County

will be franchising the remaining areas in the county. Under franchising, the municipality or other franchising authority solicits bids for all of the commercial work in an area so that setting up a route is not difficult and a newcomer can compete with an incumbent company in the bidding process. The divestiture involved requires Republic to divest two of the three routes being acquired from Allied that currently do non-franchised work. The purchaser of the divested assets will have over 20% of the open market and the contract relief should make it easier for it to expand or for firms in neighboring counties to enter if prices are raised by Republic. The major disposal site in the county is controlled by the county, so that no firm has a disposal advantage.

In the Macon, Georgia area, Republic is being required to divest a transfer station and two of the four small container commercial routes being acquired from Allied. Republic and Allied control the two best disposal options in the market. Divesting the transfer station will assist competition by providing a disposal option not controlled by the major competitor. Republic agreed to provide contract relief in Macon for roll-off service as well as commercial service. Small firms often enter an area by starting to provide roll-off service. These firms are in a position to enter the commercial market. By making it easier for roll-off companies to succeed and providing a good disposal option, contract relief should make it easier for the divested firm to expand or new entrants to create an efficient small container route if Republic raises prices.

3. Albany; Clarksville; and the New Jersey Areas

In Albany, New York; Clarksville, Tennessee; and the two New Jersey areas (Burlington/ Camden counties and Monmouth County) the market share after the transaction created a competitive problem but not one which was as substantial as the market areas above. In all of these markets, the post-acquisition market concentration or change in concentration from the acquisition was lower than

the other market areas. In each market, except Clarksville (which has the lowest market concentration), one of the two merging firms had less than a 10% market share. There was more than one other firm as big or bigger than the acquired firm and/or there were a number of other significant competitors in the surrounding area. In these market areas, the acquiring party is required to modify its contracts with customers to make them less restrictive, which will have the effect of lowering entry barriers and making it easier for competing firms to expand if attempts to increase prices occur.

In the Albany market, after the merger, Allied will be only the second largest firm. There is a third firm about the same size as Republic along with a number of small competitors. Disposal is primarily municipally owned. In the Clarksville market, the post-acquisition levels of concentration are lower than in the other markets above, and in addition to the presence of a large competitor, there are three additional competitors about the same size as the acquired firm. As with Albany, disposal is primarily municipally owned. In the Burlington/Camden market the post-acquisition change in concentration is lower than in the other markets described above and the acquired firm has a low (approximately a 6%) market share. In the Monmouth area, the post-acquisition market concentration is lower than the other markets and there are at least two firms with market shares bigger than the acquired firm.

B. Disposal of Municipal Solid Waste in Anderson, Indiana, and New York City Areas

The divestiture provisions of the proposed Final Judgment will fully eliminate the anticompetitive effects of the acquisition in disposal services in the Anderson, Indiana and New York City, New York (defined as the Borough of Brooklyn in the Complaint) areas. The proposed Final Judgment requires divestiture of all the disposal assets being acquired to a new independent and economically viable competitor in each of those markets. The relief sought will maintain the pre-

acquisition structure of each market with no increase in concentration and thereby ensure that users of disposal services in these areas will continue to receive the benefits of competition -- lower prices and better services.

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 the defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants 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 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 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 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:

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 defendants Allied and Republic. The United States could have continued the litigation and sought preliminary and permanent injunctions against Allied's acquisition of the Republic assets and Republic's acquisition of the Allied assets. 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, roll-off waste collection services, and MSW disposal in the relevant markets identified by the United States.

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." 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 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).

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,

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[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

> 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).

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 at 1448. 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 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]

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.

[2] *United States v. Bechtel Corp.*, 648 F.2d at 666 (citations omitted) (emphasis added); *see also, 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 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

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.'"[3]

Moreover, the court's role under the Tunney Act 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. Since "[t]he 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.*

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[3] *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982) (citations omitted), *quoting United States v. Gillette Co., supra,* 406 F. Supp. at 716 *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983); *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.

Dated: August __ , 2000

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon Allied Waste Industries, Inc. and Republic Services, Inc. by placing a copy of this Competitive Impact Statement in the U.S. mail, postage prepaid directed to each of the above-named parties at the addresses given below, this 15th day of August, 2000.

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