

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

WASTE MANAGEMENT, INC.,
INDUSTRIAL DISPOSAL SERVICE
COMPANY, INC.,
RICHARD R. CLARK and
ANDREW A. CLARK,

Defendants.

Civil Action No. SA88CP0911

Filed: 9/1/88

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 proceeding.

I

Nature and Purpose of the Proceeding

Contemporaneously with this pleading, the United States filed a civil antitrust Complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25, alleging that the proposed

acquisition of the stock of Industrial Disposal Service Company, Inc. ("IDS") by Waste Management, Inc. ("WMI") would constitute a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that the effect of the acquisition may be substantially to lessen competition in commercial containerized waste hauling services in Bexar County, Texas. The Complaint seeks, among other relief, an injunction preventing defendants from, in any manner, combining their businesses.

Simultaneously with the filing of this Competitive Impact Statement, the United States and defendants have filed a stipulation by which they consented to the entry of a proposed Final Judgment designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, as explained more fully below, defendant WMI would be required, within six months, to sell Waste Management of San Antonio ("WMSA"), its waste hauling division operated from facilities in Bexar County, along with all of WMI's rights in one landfill permit application. If it were not to do so, a trustee appointed by the Court would be empowered for an additional six months to sell WMSA and the landfill permit application. If the trustee is unable to do so, the Court is empowered to prolong the trustee period or to order rescission of WMI's purchase of IDS's stock.

The United States and defendants 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 of the proposed Final Judgment.

II

Events Giving Rise To The Alleged Violation

WMI is the world's largest company engaged in the solid waste hauling and disposal business, with operations in 45 states and several foreign countries. It had total revenues of over \$2 billion from solid waste hauling and disposal in 1986, and had approximately \$5 million in revenues from Bexar County, Texas in 1987. IDS is the largest company offering such services in Bexar County, Texas. IDS had total revenues of over \$17.5 million in its 1987 fiscal year.

On January 6, 1988, WMI, IDS and the owners of IDS, Richard R. and Andrew A. Clark ("the Clarks") entered into a letter of intent under which they agreed that WMI would purchase all the voting common stock of IDS. In effect, the businesses of IDS would be merged with those of WMSA, including their commercial containerized waste hauling businesses. Solid waste hauling services, including commercial containerized waste hauling services, are described in greater detail below.

A. The Solid Waste Hauling Industry

Solid waste hauling is the collection of paper, food, construction material and other solid wastes from homes,

businesses and industries, and transporting that waste to a landfill or other disposal site. These services may be provided by private haulers directly to residential, commercial and industrial customers, or indirectly through municipal contracts and franchises. The most common method of solid waste disposal is burial in a sanitary landfill. Landfills may be owned and operated by a municipality or county, but many are owned and operated by private waste hauling firms.

Service to commercial customers accounts for more hauling revenues than service to any other type of customer in Bexar County. Commercial customers include restaurants, large apartment complexes, retail and wholesale stores, office buildings and industrial parks. These customers typically generate far more waste than residential customers, and generally place their trash in metal containers of various volumes (one to ten cubic yards) provided by their hauling firm. Commercial customers are served primarily by front-load vehicles that lift the containers over the front of the truck by means of a hydraulic hoist and empty them into the storage section of the vehicle, where it is compacted. Automated sideloaders can also be used to service some commercial customers, but these trucks cannot physically handle any container larger than four cubic yards. The trucks used to service commercial customers can drive directly up to a container and hoist the container in a manner similar to a

forklift hoisting a pallet; the containers do not need to be manually rolled into position by a truck crew. Containers are not interchangeable among truck types. Service to these customers is called "commercial containerized hauling service."

Solid waste hauling firms also provide service to residential and industrial (or "roll-off") customers. Residential customers are households and small apartments that generate small amounts of waste, normally disposed of at curbside in plastic bags or trash cans. Rear and manual side-load vehicles generally serve these customers (and business establishments that generate relatively small quantities of solid waste, similar in amount to that generated by residential customers). They use a one or two person crew which manually loads the waste into the rear or side of the vehicle. Industrial or roll-off customers include factories and construction sites; these customers generate the largest amount of waste, which is often non-compactible, such as concrete or building debris. These customers deposit their waste in very large containers (30-40 cubic yards) that are loaded onto a roll-off truck and transported individually to the disposal site where they are emptied before being returned to the customer's premises.

B. Commercial Containerized Hauling Services

Front load trucks, automated side-load trucks, and containers up to 10 cubic yards are used to provide commercial

containerized hauling service. This service is called "commercial" service because nearly all customers are commercial establishments.

There is no reasonable substitute to which a significant number of customers would turn in response to a small but significant and nontransitory price increase in commercial containerized hauling services. Residential-type hand service is not a good substitute because, except at very small volumes, it is too impractical and costly for commercial customers to bag and carry their trash to the curb for hand pickup, nor does hand pickup provide equivalent cleanliness and freedom from scavengers. Roll-off service is not a good substitute because, except at very large volumes, it is much more costly than commercial containerized service. The Complaint alleges that commercial containerized hauling services in Bexar County, Texas constitutes a line of commerce and a relevant market (hereinafter "Bexar County commercial containerized market") for antitrust purposes.

Entry into the commercial containerized market cannot be relied upon to discipline collusion or supracompetitive pricing in that market. Collusion in the trash hauling industry has been recurring and has persisted for long periods in a number of markets, undeterred by new entry.

A new entrant cannot constrain immediately the prices of larger incumbents. Before it can do so, the new firm's costs must be in line with larger incumbent firms. This will not

occur until the entrant achieves minimum efficient scale and achieves operating efficiencies comparable to incumbent firms. To achieve comparable operating efficiency, a new entrant must first obtain comparable route density, which typically takes a substantial period of time. By the use of pricing and long-term contracting practices, incumbent firms can and do make it difficult for new entrants to win customers from incumbents.

Further, even if a new entrant endures and grows to a point near minimum efficient scale, incumbent firms often purchase such companies as they are about to achieve minimum efficient scale, removing the entrant as a competitive threat. This practice has been followed consistently in the San Antonio area.

Finally, new entrants require assured disposal at prices that will not significantly disadvantage them compared with their hauling competitors. This is because disposal costs account for approximately 20 percent of revenues for commercial containerized hauling service. Currently, each of the incumbent firms has substantial volume discounts at the open landfills in Bexar County that would not be available to a new entrant, at least until after it reaches minimum efficient scale and can generate volumes as large as the incumbents. This cost disadvantage inhibits the ability of a new entrant to grow to the size that would permit it to make use of such discounts. Consequently, a new entrant in hauling may also

need to acquire a landfill to compete successfully in the long run in the Bexar County solid waste hauling markets. Currently, only BFI and the City own landfills in Bexar County.

IDS and WMI are the only firms capable of opening new landfills in Bexar County within the next two to three years, because they own or control the only pending landfill permit applications there. Opening a new landfill is time-consuming and expensive due to government regulations, scarcity of suitable landfill sites, and public opposition. In Bexar County, a firm beginning the landfill permit application process can expect to spend at least three years and hundreds of thousands of dollars to perfect the application, with no assurance of success. Consequently, a lack of access to disposal at prices comparable to incumbent hauling firms is a substantial barrier to entry into hauling markets.

IDS and WMI are direct competitors in the Bexar County commercial containerized market and are the first and third largest firms in that market. The market is highly concentrated and would become substantially more concentrated as a result of the proposed acquisition of IDS by WMI. Based on 1987 revenue data, IDS and WMI have, respectively, about 48 percent and 16 percent of the Bexar County commercial containerized market. The acquisition would create a dominant firm with a market share of about 64 percent and would increase

the Herfindahl-Hirschmann Index ("HHI"), 1/ a measure of market concentration, by 1536, to more than 5000.

Based on the foregoing and other facts, the Complaint alleges that the effect of the proposed acquisition may be substantially to lessen competition in the Bexar County commercial containerized market in violation of Section 7 of the Clayton Act.

III

Explanation of the Proposed Final Judgment

The provisions of the proposed Final Judgment are designed to eliminate the anticompetitive effects of the acquisition in the Bexar County commercial containerized hauling market by establishing a new, independent and economically viable competitor in that market. The proposed Final Judgment requires WMI and IDS, within six months of its filing, to divest the solid waste hauling and disposal assets of WMSA,

1/ The Herfindahl-Hirschman Index is a measure of market concentration calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20 and 20 percent, the HHI is 2600 (30 squared + 30 squared + 20 squared + 20 squared = 2600). The HHI, which takes into account the relative size and distribution of the firms in a market, ranges from virtually zero to 10,000. The index approaches zero when a market is occupied by a large number of firms of relatively equal size. The index increases as the number of firms in the market decreases and as the disparity in size between the leading firms and the remaining firms increases.

with some exceptions described below. If WMI and IDS cannot accomplish these divestitures within the above period, the Final Judgment provides that, upon application by the United States as plaintiff, the Court will appoint a trustee to effect divestiture.

As defined in the proposed Final Judgment, "WMSA" means Waste Management of San Antonio, a division of an indirect wholly-owned WMI subsidiary that currently provides solid waste hauling and disposal services in the San Antonio, Texas area. WMSA does not include WMI's Comal County landfill, or its two pending applications for landfills in Bexar or Guadalupe Counties.

The proposed Final Judgment not only relates to the commercial containerized hauling assets of WMSA, but also to all other hauling assets and to certain disposal assets. WMSA also offers residential and roll-off hauling services; it owns an operating Type 1 landfill in Comal County, a permit application for a Type 1 landfill in Bexar County ("Rosillo Creek") and has an option to purchase a third Type 1 landfill site located on both sides of the border of Bexar and Guadalupe Counties ("Buffalo Valley") for which an application is pending. IDS owns the only other landfill permit applications

in Bexar County--a site near the current City landfill ("Covel Gardens") and a permit application that has been denied because of land-use problems, but is still in litigation ("Converse").

The United States concluded that inclusion in the divestiture of residential and roll-off hauling assets was crucial to assuring that the divestiture produced a viable and effective competitor in the affected market. As a result, the proposed Final Judgment obligates WMI and IDS to divest the residential and roll-off hauling assets of WMSA. It also requires divestiture of all WMI's rights in the application for a permit for a Type 1 landfill at the Buffalo Valley site (the "Buffalo Valley Assets"). The proposed Final Judgment states a preference that the same purchaser buy both WMSA and the Buffalo Valley Assets.

The proposed Final Judgment also obligates WMI and IDS to guarantee that WMSA may dispose of unlimited amounts of waste at a landfill in Bexar County at a price not to exceed \$2.00 per cubic yard for a period of three and one-half years (which price may be increased pursuant to an agreed escalation formula after January 1, 1990) and to reimburse WMSA for any higher costs it incurs. The obligation to guarantee this disposal rate terminates, however, if WMSA acquires an operating landfill. The Final Judgment further obligates defendants to take no actions, directly or indirectly, to oppose any landfill permit applications divested pursuant to the Final Judgment.

WMI and IDS are allowed six months following the filing of the proposed Final Judgment to accomplish divestiture of WMSA and the Buffalo Valley Assets to a company or companies that will operate the divested assets as an independent, viable competitor. If WMI and IDS have not accomplished the required divestiture within that period, the Court shall, on application of the plaintiff, appoint a trustee to accomplish the divestiture.

The proposed Final Judgment provides that WMSA and the Buffalo Valley Assets must be divested in such a way as to satisfy plaintiff that these operations can and will be operated by the purchaser or purchasers as viable, ongoing businesses that can compete effectively in the relevant markets. Similarly, if the divestiture is accomplished by the trustee, WMSA and the Buffalo Valley Assets must be divested in such a way as to satisfy plaintiff that the businesses can and will be operated as a viable, independent competitor by the purchaser or purchasers. WMI and IDS must take all reasonable steps necessary to accomplish the divestiture and shall cooperate with bona fide prospective purchasers and, if one is appointed, the trustee.

If a trustee is appointed, the proposed Final Judgment provides that the WMI and IDS 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 appointment becomes effective, the trustee will file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish divestiture. At the end of six months, if he has not accomplished the divestiture, the trustee and the parties will make recommendations to the Court and the Court shall thereafter enter such orders as it shall deem appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment, or terminating the trust and rescinding the sale of IDS to WMI, returning WMSA and the Buffalo Valley Assets to WMI and returning IDS to its prior owners.

By the terms of a Hold Separate Stipulation and Order, which was filed simultaneously with the proposed Final Judgment, defendants must take certain steps to ensure that, until the required divestiture has been accomplished, WMI and IDS will be held separate and apart from defendants' other assets and businesses. WMI and IDS must, until the required divestiture is accomplished, preserve and maintain WMSA as a saleable and economically viable ongoing business.

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 defendants.

V.

Procedure Available for Modification
of the Proposed Final Judgment

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Antitrust Procedures and Penalties Act, provided that the United States has not withdrawn its consent. The Act conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The Act 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 the comments, determine whether it should withdraw its consent, and respond

to the comments. 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:

Mark C. Schechter
Chief, Transportation, Energy
and Agriculture Section
Antitrust Division
United States Department of Justice
Room 9104 Judiciary Center Building
555 4th Street, N.W.
Washington, D.C. 20001

VI.

Alternatives To The Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, also requiring the divestiture of WMI's operating Type 1 landfill in Comal County, Texas, and/or more than one pending landfill permit application, but decided against it. The Comal County landfill is located outside the relevant disposal market defined by the United States. A hauler would need to travel 20-30 miles further to dump at the Comal site than to open landfills in Bexar County. The United States also considered requiring divestiture of two pending landfill permit applications, either a second application outright, or as a back-up in the event Buffalo Valley fails to gain approval. Since WMI currently operates no landfill in Bexar County, however, the United States decided

that divesting a second application would reduce WMI's chances of gaining its first landfill (which would reduce the current concentration in the disposal market) without significantly increasing WMSA's viability. The United States concluded that the divestiture of the application for the Type 1 landfill at the Buffalo Valley site, plus the guaranteed 3 1/2-year disposal rate, which is less than either the City or BFI gate rate, is an adequate method for assuring that WMSA's disposal costs will permit it to compete effectively.

Litigation is, of course, always an alternative to a consent decree in a Section 7 case. The United States could have filed suit and sought preliminary and permanent injunctions against the acquisition of IDS by WMI. The United States is satisfied, however, that the divestiture of WMSA and the Buffalo Valley landfill site application, and the 3 1/2-year disposal rate guarantee, will establish a viable competitor in the Bexar County commercial containerized hauling market and prevent the acquisition from having anticompetitive effects in that market. The divestiture will restore the market to the structure that existed prior to the acquisition, and will preserve the existence in it of three significant competitors.

VII

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: _____

Respectfully submitted,

Roger W. Fones

Nancy H. McMillen

Attorneys
U.S. Department of Justice
Antitrust Division
Room 9804
555 Fourth Street, N.W.
Washington, D.C. 20001
(202)724-6386