

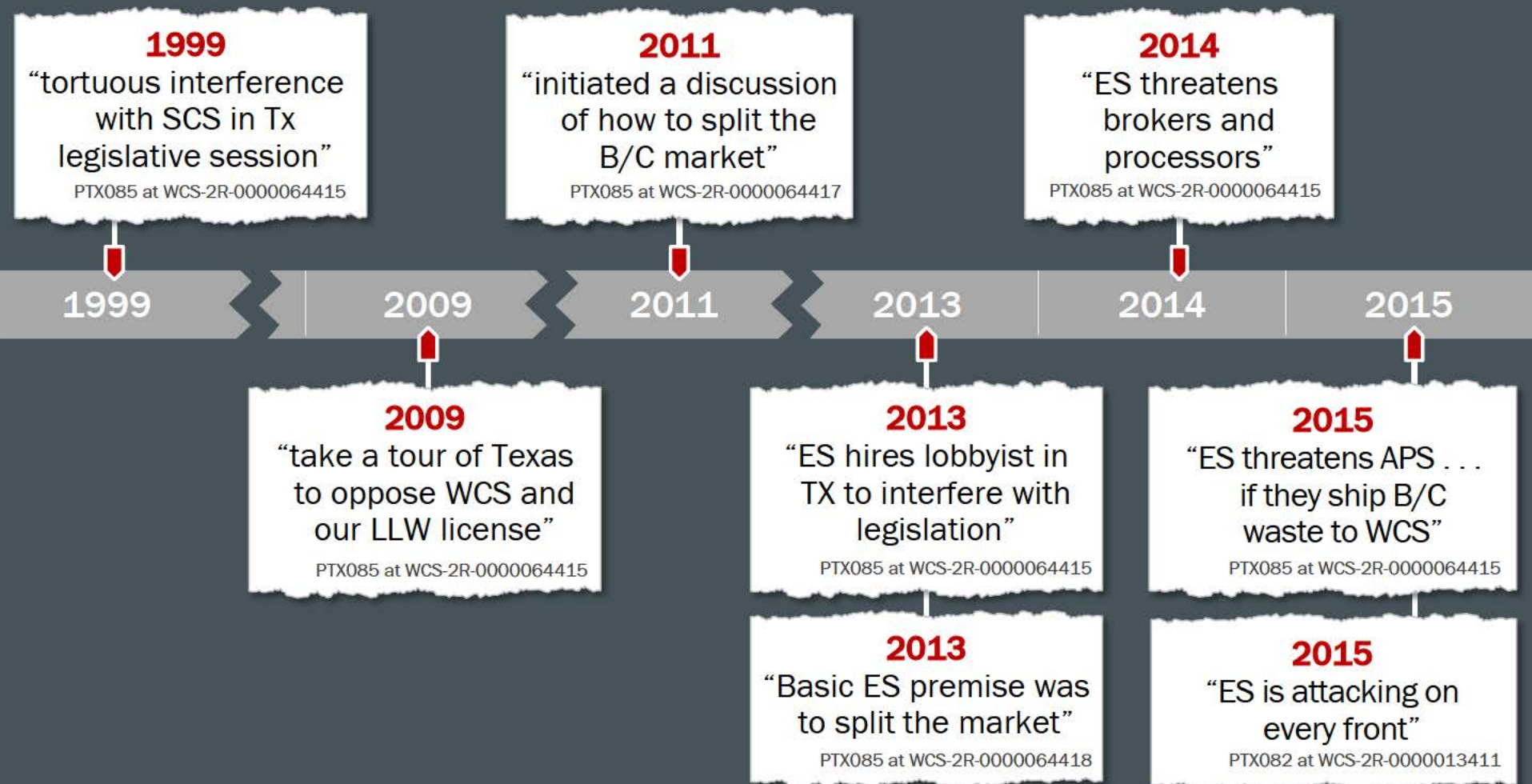
United States v. EnergySolutions, Inc., et al.

Plaintiff's Closing Argument
May 5, 2017



===== THE UNITED STATES =====
DEPARTMENT *of* JUSTICE

EnergySolutions Has Been Attacking WCS Since 1999



EnergySolutions Has Been Attacking WCS Since 1999



Rod
Baltzer
WCS

Q. And the items in your e-mail describe a range of instances in which **EnergySolutions tried to sabotage WCS's business**, don't they?

A. So this document was actually prepared. There was litigation, settlement discussions going on, and this document was prepared with that in mind, and listed out **what we deemed to be bad behavior**, I guess, on the part of EnergySolutions.

* * *

Q. So stepping back, this e-mail shows that EnergySolutions has been **trying to undermine WCS's business since 1999?**

A. **That was the purpose** of putting this together, settlement purposes for this litigation.

If You Can't Beat Them, Buy Them

Mar. 2014

"these guys are scary
– just give them
the \$275"

PTX101 at ESI-0005126

Dec. 2014

"20 years of history of
butting heads with ES"

PTX062 at ESI-0000412

Aug. 2015

"they have no interest
in selling to us"

PTX435 at ESI-0004502

2014

2015

Sep. 2014

"we need to do something
to push them to engage
with us"

PTX438 at ESI-0005239

Jan. 2015

"It appears WCS [deal] is
officially dead . . . at least
for the time being"

PTX434 at ESI-0004500

Oct. 2015

"we reached a deal with
Valhi to buy Wcs today
for \$270mm cash"

PTX330 at ESI-0005398

Nov. 2015

Purchase Agreement
\$367 Million

PTO Ex. 1 ¶ 14

Competition Is Messy



**Dr. John
Mayo**

U.S. Expert

- Q. Earlier this week we heard testimony that **EnergySolutions approached WCS a number of times about a potential acquisition** with the first coming in 2014. What is your assessment of EnergySolutions' motivations behind these approaches?
- A. I just identified a variety of ways in which this rivalry broke out. The fact of the matter is, **competition is both messy and really hard**. It's hard for the participants that are engaged in competition. Firms that are in competition don't really like the idea of being in competition. **It is good for consumers, but it is hard for firms.** . . .

And what you see on this slide is a manifestation that **EnergySolutions looked pretty quickly at an alternative that wasn't so hard**. It wasn't so messy.

Section 7 of the Clayton Act prohibits a merger “where in **any** line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition **may be substantially to lessen competition**, or to tend to create a monopoly.”

15 U.S.C. § 18

The Relevant Geographic Market Is Not Contested



“Congress used the words ‘may be substantially to lessen competition’ to indicate that its concern was with **probabilities, not certainties**, rendering Section 7’s definition of antitrust liability relatively expansive.”

Fed. Trade Comm’n v. Penn State Hershey Med. Ctr., 838 F.3d 327, 337 (3d Cir. 2016)

“[A] merger which produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it **must be enjoined** in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”

United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963)

Factors to consider in defining a relevant market include: “industry or public recognition of the [product market] as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”

Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962);
accord Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 199 (3d Cir. 1992)

Lower and Higher Activity Are Separate Markets



**Assef
Azadeh**

EnergySolutions

Disposal Options and Overlaps by Disposal Site Operator (all \$/ft³)

Proprietary and Confidential

ENERGYSOLUTIONS

Lower Activity Higher Activity

ES	BSFR	BWF	ES LC		ERS & Filters			
WCS	Exempt \$17			A Routine \$110 LC @ \$180	A Shielded \$237	B/C \$3000 (ES rate @ WCS ~\$8K-\$11K)	B/C IR \$7000 +	HLW Proposed
USE	20.2002 \$5							

EnergySolutions' Own Executive Defines Higher Activity Market Like Dr. Mayo



**John
Christian**

EnergySolutions

- Q. Okay. So what does EnergySolutions do with waste that is classified as Class B/C?
- A. Well, we classify it as Class waste B/C. We'll send it to WCS or to Barnwell if it's an Atlanta compact customer because those are the only outlets. We do receive high activity materials that had they been classified for direct disposal, they would have been B or C, but if they are **processed and reduce the volume** of that which is B and C, and some of it, for instance, **would go to Class A disposal** and some of it would go to B and C disposal.

Substantial Overlap in Higher Activity Markets



Terry
Dickinson

APS

Q. Is it your testimony, sir, that all B/C waste can be downblended?

A. The **vast majority** of it, B/C waste can be downblended.

well-defined group of LLRW disposal customers and is maintaining that monopoly position

“By eliminating this contract, WCS will prevent EnergySolutions from continuing its current down-blending, which serves as WCS’s only competition in **the market for disposal of Class B and C waste.**”

meet the Class A waste classification and must therefore be disposed of as Class B or C waste. Because of the competitive threat that down-blending poses to WCS’s monopoly, WCS has sought and seeking to stop down-blending altogether. But, to do so, it must (and has) wrongfully attempted to terminate an ongoing, profitable contract for the acceptance of processed Class B and C LLRW from EnergySolutions’ predecessor company, Studsvik, Inc. (“Studsvik”). By eliminating this contract, WCS will prevent EnergySolutions from continuing its current down-blending, which serves as WCS’s only competition in the market for disposal of Class B and C waste.

4. WCS has known about down-blending since at least 2007. And, for years, WCS had engaged in a profitable business relationship with Studsvik, as a joint venture member and

RELEVANT MARKET

I. RELEVANT PRODUCT MARKET FOR CLASS B AND C LLRW DISPOSAL

44. The relevant antitrust market here is a market for the disposal of Class B and C LLRW. Class B and C waste is a delineated form of LLRW according to the NRC and there are specific government regulations prohibiting unlicensed firms from receiving such waste.

45. Facilities only licensed to accept Class A waste may not accept Class B or C LLRW and thus do not restrain price on the disposal of Class B and C waste.

II. RELEVANT GEOGRAPHIC MARKET

46. The relevant geographic market is the group of 26 states from which generators of Class B and C LLRW can send their waste only to Texas due to interstate legal restrictions on LLRW disposal.

“The relevant antitrust market here is a market for **the disposal of Class B and C LLRW.**”

EnergySolutions Uses Same Criteria as Dr. Mayo for Pricing and Products (HAO)

From: jwill [REDACTED]
Sent: Monday, November 30, 2015 8:46 PM
To: kwrot [REDACTED]
Subject: FW: Emailing: Erwin 2015

Sensitivity: Confidential

Erwin analysis attached.

From: Mark Ping
Sent: Monday, November 09, 2015 2:29 PM
To: Jason Williams; Tony Didgeon; Weston White; Assef Azar
Subject: RE: Emailing: Erwin 2015-2016 Report (11-09-2015).pptx
Sensitivity: Confidential

COMPANY CONFIDENTIAL

Jason / Tony / Weston / Assef / Bret,

New Rev 1. (fyi - changed the date in file name).... I only comments / suggests.

New version is attached (added an executive summary slide #1, along with some minor edits).

If I receive no comments or feedback I will consider my

Mark R. Ping | EnergySolutions | Vice President - Business Development

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From: Mark Ping
Sent: Sunday, November 08, 2015 9:25 PM
To: Jason Williams; Tony Didgeon; Weston White; Assef Azar
Subject: Emailing: Erwin 2015-2016 Report (11-08-2015).pptx
Importance: High
Sensitivity: Confidential

COMPANY CONFIDENTIAL

Jason / Tony / Weston / Assef / Bret,

Attached is my action item from the SLC mtg. aka Erwin. Please review and suggest edits. Comments appreciated. Also, sanity check please.

CONFIDENTIAL

“Mid-2015 the competitor dropped >1.0 SOF resin market pricing to the US market forcing attention by both customer and ES.”

“To maintain the >1.0 SOF market share ES had to make pricing approach adjustments.”

“Market intelligence recently obtained – Competitor again lowered pricing by removing the curie surcharges to customers.”

“Resin leakage to competitor do to extreme ‘blue light specials’.”



ESI-0031865

Substantial Overlap in Lower Activity Markets

“Ideal for disposal of nuclear power plant decommissioning waste – **Expect that 80%+ of the D&D waste will qualify**”

Source: PTX159 at WCS-0000202633; see also Trial Tr. (Baltzer) 1195:1-1199:22, 4/28/2017

“WCS can also take **>80% of your decommissioning and operating waste as ‘Exempt’** in our RCRA landfill, which is more protective than the other guy’s landfill, *and at a fraction of the price.*”

Source: PTX164 at WCS-2R-0000193298; Trial Tr. (Baltzer) 1199:23-1201: 2, 4/28/2017

REDACTED

Substantial Overlap in Lower Activity Markets

“Exemption would allow WCS to take 90% of the BWF at Clive”

CONFIDENTIAL

REDACTED

ENERGY

Board of Director's Meeting
May 27, 2014

LP&D Q1 2014 Summary

CONFIDENTIAL

Source: PTX092 at ESI-0668284; see also Trial Tr. (G. Wood) 321:24-323:13, 4/25/17

“Exempt Waste disposal is authorized in TN and TX on an isotope basis”

“TX limits for exempt waste are astronomically beyond any approved exemption by the NRC, or any other Agreement State”

DRAFT INTERNAL ENERGYSOLUTIONS DOCUMENT

ENERGY

Risk Evaluation of
Disposal
DR
27 Aug

Source: PTX005 at ESI-0276350

REDACTED

Substantial Overlap in Lower Activity Markets



Terrance
Dickinson

APS

Q. And do you know how much of your Class A waste meets those requirements?

A. It would be greater than **80 percent** of my Class A waste.

* * *

Q. Have you told WCS that you believe that at least **80 percent** of your Class A LLRW could go in an exempt cell?

A. Yes.

* * *

Q. And at that time did WCS agree with your **80 percent** or more calculation?

A. Yes, they did.

EnergySolutions' Lower Activity Market Definition: Fiction, not Reality



Assef Azadeh

EnergySolutions

Q. And you don't know the name of the WCS person who provided that data to Mr. Rogers, do you?

A. I do not. It came from Bret.

Q. And you don't – **do you know the dose that you provided**, the number that you were provided?

A. The number that was given to me by Bret Rogers?

Q. Correct.

A. Yes, I do.

Q. What was that?

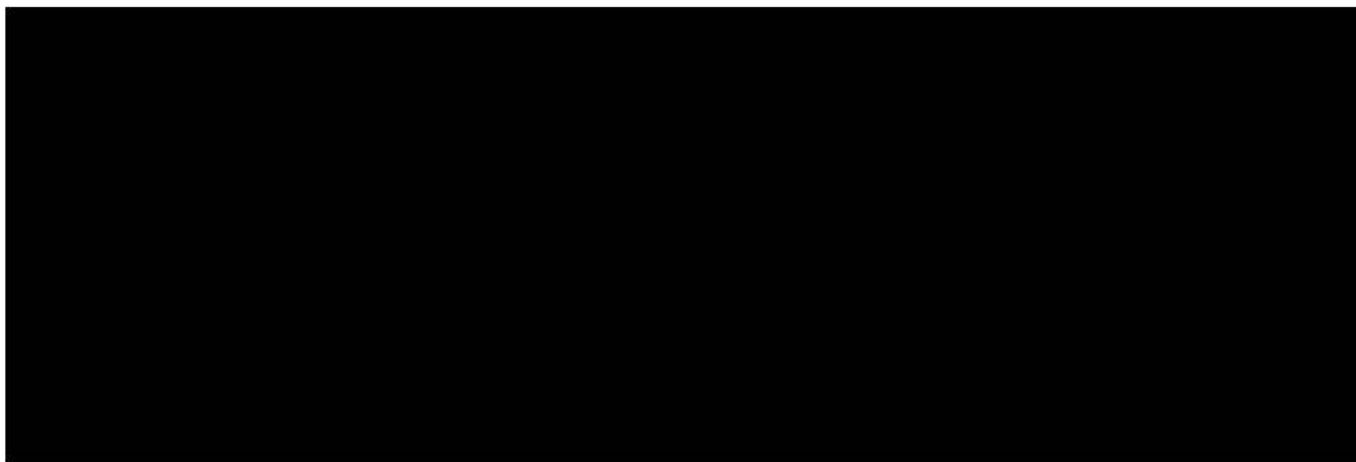
A. **10 millirems per hour.**

Source: Trial Tr. (Azadeh) 167:20-168:4, 4/24/2017



Rod Baltzer

WCS



EnergySolutions' Lower Activity Market Definition: Fiction, not Reality



Assef Azadeh
EnergySolutions

Q. And you didn't learn that this so-called marketing literature **was wrong** until 2016; is that correct?

A. That is correct.

Q. And that was **after the DOJ began its merger investigation**; is that correct?

A. Yes, I believe so.

Source: Trial Tr. (Azadeh) 159:15-20, 4/24/2017

Operational and Decommissioning Are Separate Markets



Dan
Burns
WCS

Q. And decommissioning projects, they generate waste over a **number of years**?

A. Yes, sir.

Q. And they require the disposal of **very large quantities** of waste over that time; is that right?

A. As a – correct. There are large quantities of waste that are generated during the decommissioning process.

* * *

Q. And that's a lot more than you would expect to receive from an operating nuclear reactor on an ongoing basis; right?

A. Yes. **Clearly, decommissioning activities will generate more waste, and also different kinds of waste than are routine as part of an operation of a utility.**

Q. You actually distinguish between decommissioning and operational at WCS?

A. Yes, we do.

Operational and Decommissioning Are Separate Markets



Assef
Azadeh

EnergySolutions

- Q. **[W]aste generated from a nuclear power plant's ordinary operations differs from waste generated by the decommissioning** of a plant; is that correct?
- A. Some of them do, yes.
- Q. And waste generated as a result of the decommissioning of a nuclear power plant generates more large components like steam generators; is that correct?
- A. Yes.
- Q. And the **decommissioning** of a nuclear power plant also **generates a large volume of construction debris and soil**; true?
- A. Yes.
- Q. And construction debris and soil tend to be a lower radioactivity than resins and filters and other types of operational waste; correct?
- A. Yes.

Storage Is Not a Substitute for Disposal



Terrance
Dickinson
APS

- A. . . . The NRC's position is **if you have the ability to dispose of waste, you should dispose it if it's economically feasible**, and that is Palo Verde's practice as well.

* * *

- Q. If EnergySolutions and WCS merge and the cost of increasing B/C waste increases by five percent, would you then store your B/C waste?

- A. No.

Source: Trial Tr. (Dickinson) 63:24-64:19, 70:18-21, 4/24/2017



Carol Peterson
Exelon

- Q. So at this point in time, did Exelon have an option to dispose of any of its radioactive waste instead of – sorry, to store instead of dispose of any of its radioactive waste?

- A. . . . So we do have the option of storing at different times. **Our best option is to dispose of it.** Class A, B and C waste, that is the best option.

Source: Trial Tr. (Peterson) 1424:14-1425:7, 5/01/2017



Brian Wood
TVA

- Q. And what is TVA's position on storing LLRW versus shipping it off-site for disposal?

- A. We would **prefer to ship for disposal** versus storing.

Source: Trial Tr. (Wood) 545:3-545:6, 4/26/2017

Storage: Increased Costs



Dr. John Mayo
U.S. Expert

“You can **pay me now or pay me later**, but you’re going to pay me.”

Source: Trial Tr. (Mayo) 592:18-19, 4/26/2017; see also id. at 592:1-20



Carol Peterson
Exelon

Q. Okay. So when Exelon stores, it essentially means **you have to pay twice** to have the B/C disposed of eventually?

A. Correct, for that particular sample of waste.

Source: Trial Tr. (Peterson) 1441:1-3, 5/01/2017



Brian Wood
TVA

Q. Why is that your preference?

A. It would be for us – for us, the cost, **today’s cost versus tomorrow’s dollar**, so to speak. If I can go ahead and ship for disposal today – if I store, the cost for disposal goes up. We have seen that over the years.

Source: Trial Tr. (B. Wood) 545:7-12, 4/26/2017; see also id. at 545:7-19

Storage: Increased Risks



Terrance
Dickinson
APS

Q. And just so we're clear, what is the difference between disposal and storage?

A. Disposal is when it's introduced to the endpoint, the disposal facility, and we no longer have responsibility for it. . . [W]hen you are in a period of storage, **you don't know what your future costs or liabilities are going to be** exactly, so there's that risk involved as well.

Source: Trial Tr. (Dickinson) 56:22-57:8, 4/24/2017; see also id. at 63:19-70:8



Assef Azadeh
EnergySolutions

Q. And ultimately, a customer's storage of waste **poses a higher risk** than if the waste is disposed, doesn't it?

A. Again, **in my opinion, yes**, but you have to ask the customers . . .

Source: Trial Tr. (Azadeh) 146:2-5, 4/24/2017



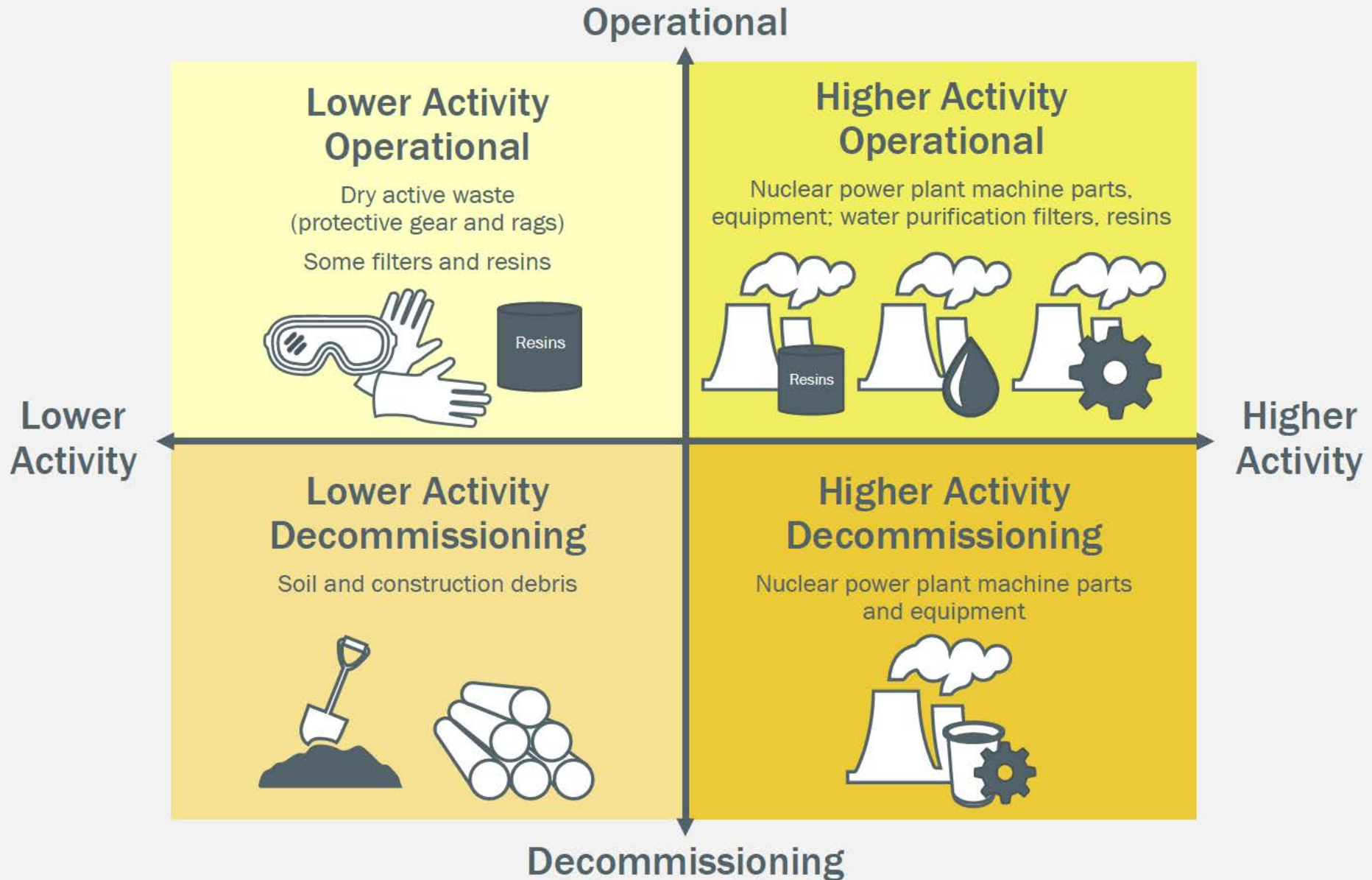
Brian Wood
TVA

Q. So uncertain future costs, Mother Nature[,] administrative paperwork, regulatory scrutiny, container degradation, employee and public exposure, security, public perception, specialized equipment, and overall expense, **are these all reasons why** you want to dispose of waste as soon as you possibly can and not store it?

A. Yes.

Source: Trial Tr. (Wood) 550:9-16, 4/26/2017; see also id. at 545:7-550:8

Two Dimensions of Competition: Four Product Markets



“Congress prescribed a **pragmatic, factual approach** to the definition of the relevant market and not a formal, legalistic one.”

Fed. Trade Comm’n. v. Penn State Hershey Med. Ctr., 838 F.3d 327, 335 (3rd Cir. 2016)
(quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962))

“[A] market cannot be defined with absolute certainty.”

Ansell Inc. v. Schmid Labs., Inc., 757 F. Supp. 467, 476 (D.N.J. 1991),
aff’d, 941 F.2d 1200 (3d Cir. 1991)

“[I]n the end, this [market-definition] dispute had little practical bearing on the market share calculations that flowed from the market definition.”

United States v. Anthem, Inc., No. CV 16-1493 (ABJ), 2017 WL 685563, at *20 (D.D.C. Feb. 21, 2017)

“[T]he district court did not abuse its discretion in enjoining the merger on the basis of the merger’s anticompetitive effects in the Richmond market. . . . [T]his holding provides an **independent basis** for the injunction, even absent a finding of anticompetitive harm in the fourteen-state . . . market.”

United States v. Anthem, Inc., No. 17-5024, 2017 WL 1521578, at *16 (D.C. Cir. Apr. 28, 2017)

The Clayton Act “plainly contemplates that mergers may involve more than one market, yet it bases legality on a separate **market-by-market appraisal**. This is corroborated by the legislative history, and the courts have consistently so held.”

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 972a (4th ed. 2016)

“Without attempting to specify the smallest [resulting] market share which would still be considered to threaten undue concentration, we are clear that **30%** presents that threat.”

United States v. Phila. Nat'l Bank, 347 U.S. 321, 364 (1963)

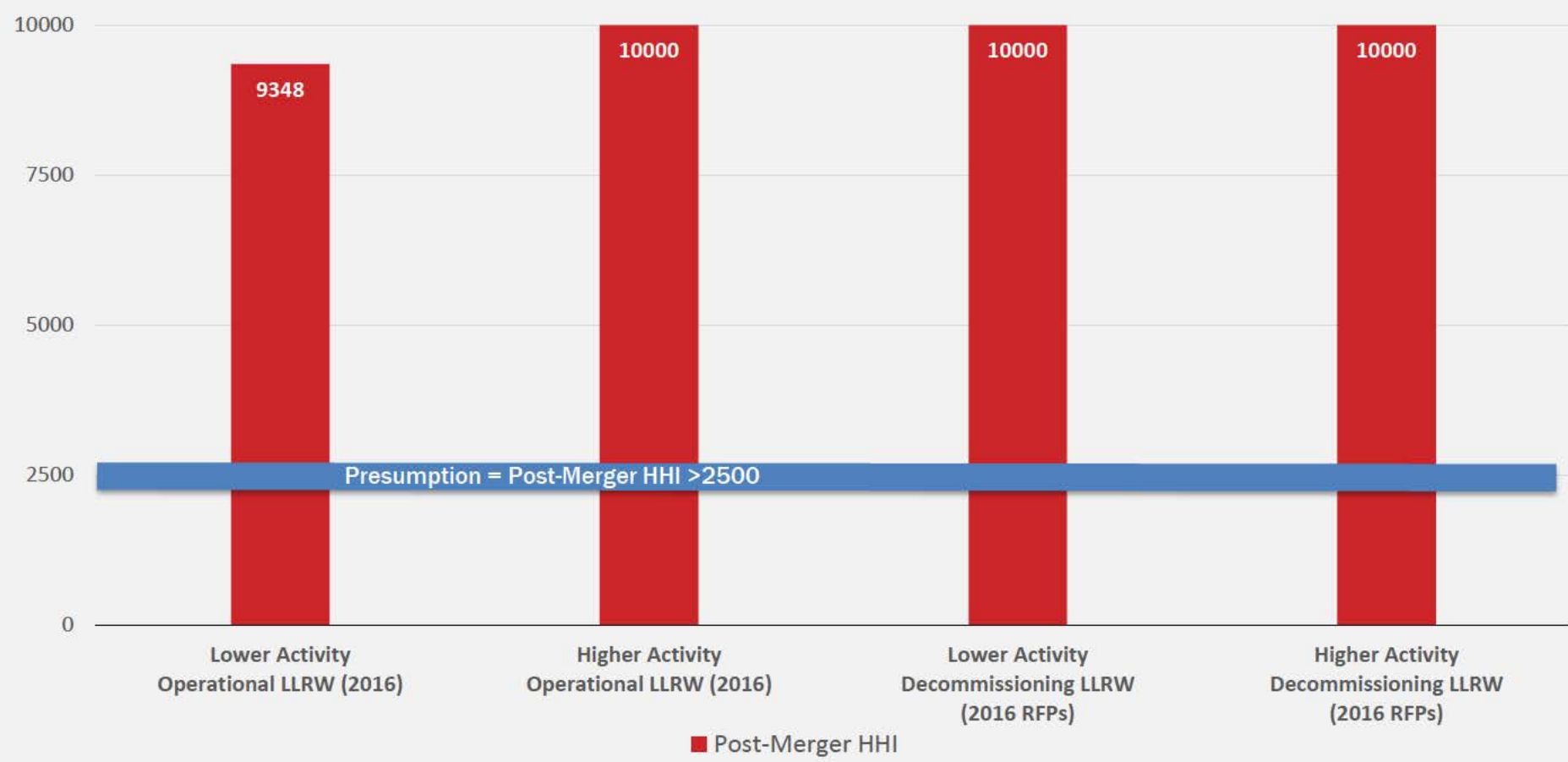
“The Government can establish a **prima facie case** simply by showing a high market concentration based on HHI numbers.”

Fed. Trade Comm'n. v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347 (3rd Cir. 2016)

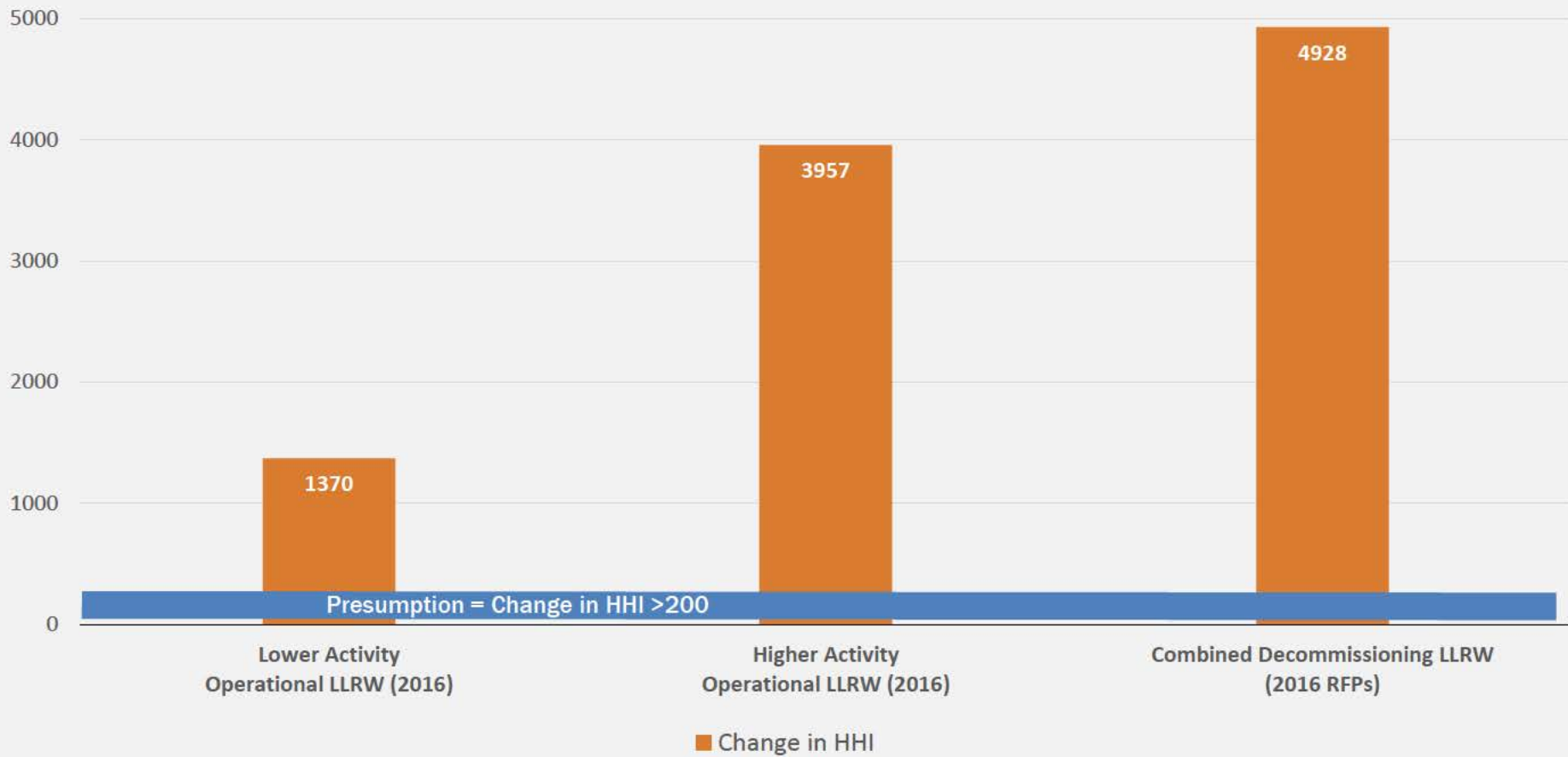
“A post-merger market with a HHI above 2,500 is classified as ‘**highly concentrated**,’ and a merger that increases the HHI by more than 200 points is ‘**presumed to be likely to enhance market power**.’”

Fed. Trade Comm'n. v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347 (3rd Cir. 2016)

All Four Product Markets Exceed the HHI Presumption



All Four Product Markets Exceed the HHI Presumption



Defendants' "Slicing" Doesn't Change Anything



**Dr. John
Mayo**

U.S. Expert

Q. And have you performed any analysis or robustness checks to see whether Dr. Israel's criticism alters any of your conclusions?

A. I did. . . . And in the case of lower activity waste, what he wants to do is slice the market at the upper limit of the exempt cell Waste Acceptance Criteria. . . . And when you do that, it **turns out to not change anything**. . . .

The same is true in the higher activity space. There again, he would prefer to use a slice. . . . Then again, you're left with **exactly the same conclusion** as the slides we just went through.

You have a highly concentrated market and the change in the level of concentration is still well in excess of a level that would create a **presumption of anticompetitive harm**.

“Even excluding the HHIs, the Government’s other evidence independently suffices to establish a *prima facie* case”

Chi. Bridge & Iron Co. N.V. v. Fed. Trade Comm’n, 534 F.3d 410, 433 (5th Cir. 2008)

“[E]vidence indicating the *purpose of the merging parties*, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger.”

Brown Shoe Co. v. United States, 370 U.S. 294, 329 n.48 (1962)

Customers: This Is a Merger to Monopoly



Carol Peterson
Exelon

Q. So if EnergySolutions acquires WCS, Exelon would be left with a **single source** for its waste disposal of low level radioactive waste; is that right?

A. Correct.

Source: Trial Tr. (Peterson) 1441:19-22, 5/01/2017



“WHAT IN THE h#@!! WERE THEY THINKING???? Boy are you guys screwed!! And so are we!!!! Now **EnergySolutions has a monopoly on burial sites**. And we were thinking that we would be able to get away from those guys. Loved WCS, now????????????????”

Source: PTX090 at WCS-2R-0000438448; see also Trial Tr. (Burns) 826:24-827:13, 4/27/2017

Customers: This Is a Merger to Monopoly

[REDACTED]

[REDACTED]

PTA152

Customers View EnergySolutions and WCS as the Two Key Competitors

From: MIKE SHEPARD <Mike.Shep[REDACTED]>
Sent: Thursday, November 19, 2015 11:33 AM
To: Tim Blythe
Subject: Re: (External):WCS Purchase Announcement

Not sure how you feel about this but for me personally... I consider it unfortunate. The industry suffers without competition.

Mike Shepard

On Nov 19, 2015, at 10:41 AM, Tim Blythe <tbly[REDACTED]>

I'm sure some of you may have already received this official. Please feel free to contact me should you

Thanks,

Tim Blythe
Vice President - Business Development
Waste Control Specialists LLC

Three Lincoln Center, 3430 LBJ Freeway, Suite 1700
[REDACTED] E-mail: [tbly\[REDACTED\]](mailto:tbly[REDACTED])



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<WCS Purchase Announcement - ES version.pdf>

<Valhi to Sell WCS.PDF>



“Not sure how you feel about this but for me personally . . . I consider it unfortunate. The industry suffers without competition.”

EnergySolutions Saw WCS as a Competitive Threat

REDACTED

From: Jwilliams
Sent: Friday, August 1, 2008
To: kwrobb
Cc: as23
Subject: Strategy/Options

Ken,
The team met this week in SLC to review our strategy and spell out our options to level the playing field with the NRC, TCEQ, Texas regulators, etc. Attached are risks from the customer's perspective. We will use the sales team so that we have a firm grasp on all points to our key customers. Assef and Bret led several hours from both Casey Hill and John Pott

Jason Williams

“The team met this week in SLC to **review our strategy and options in competing with WCS**. The purposes 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. Attached is a summary of the issues and potential actions”

“1. **WCS issues**

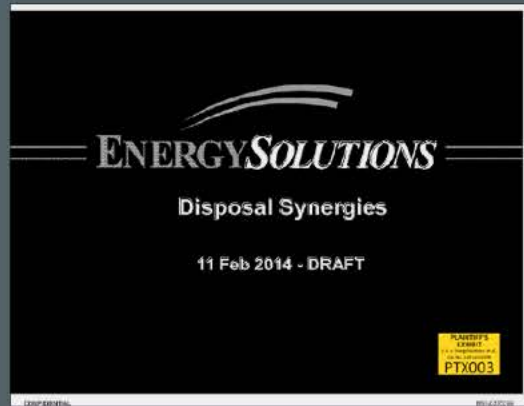
- a. Long term fair pricing for Erwin disposal
- b. Drop in B/C market price
- c. Drop in Large Component prices and penetration
- d. Drop in Class A resin price and no dewatering
- e. Threat in Class A pricing for out of compact
- f. Large impact of exempt waste disposal”

U.S. v. EnergySolutions et al.
Case No. 1:16-cv-01056
PTX006

CONFIDENTIAL

ESI-0668293

2014 Model Shows Post-Merger Price Increases (HAO)



“No increase in 2014, thereafter resin processing and WCS disposal rates were increased 15%, 15%, 5% and 5% for 2015-2018”

Source: PTX003 at ESI-0272104



Assef Azadeh
EnergySolutions

Q. So you expected a combination of the two companies to **not only stop price degradation, but also reverse it**; is that right?

A. For this particular model, yes.

* * *

Q. And the fifth bullet below the chart says, “**Conservative price increases**.” Did I read that correctly?

A. You did.

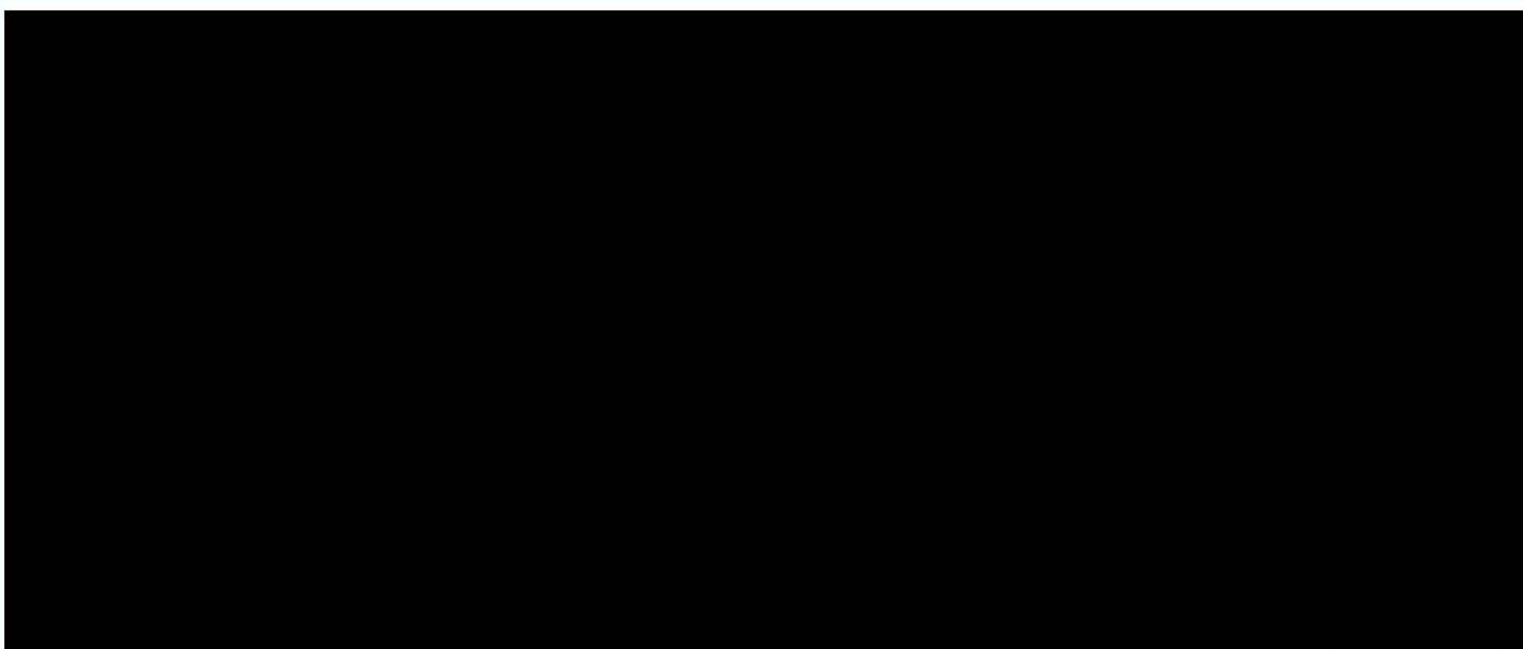
Source: Trial Tr. (Azadeh) 189:22-190:16, 4/24/2017

2015 Model Shows

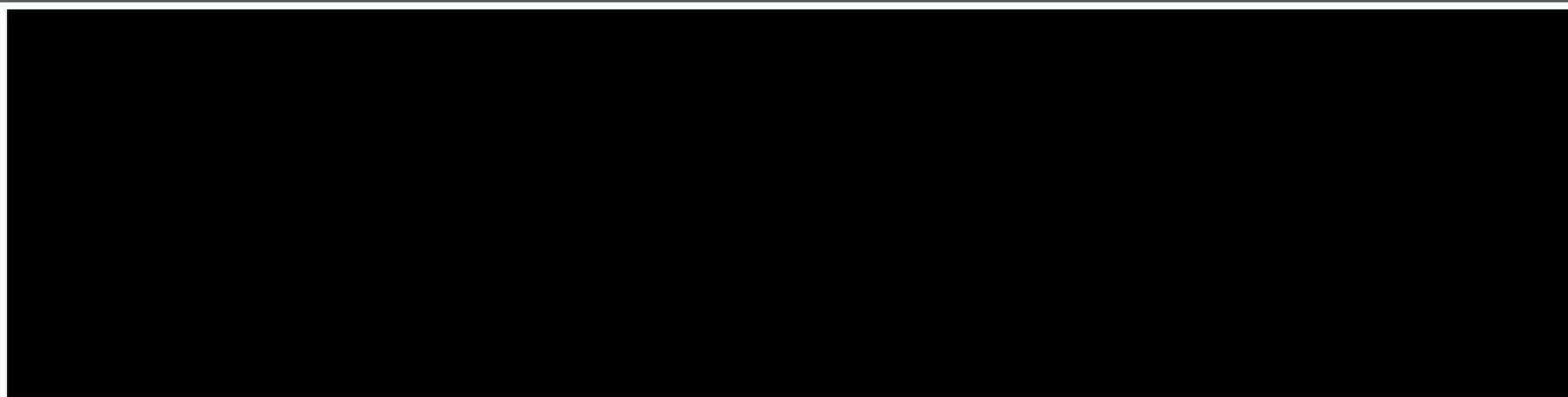


**Bret
Rogers**

EnergySolutions



Source: Trial Tr. (Rogers) 350:9-351:22, 4/25/2017



REDACTED

Defendants Competed for [REDACTED] Business (HAO)

December 25-26, 2014

“[REDACTED] is telling me that the CNO asked him to develop a spreadsheet to **compare both ES and WCS**”

“We will have to **do whatever it takes to win this.**”

Source: PTX192 at ESI-0248016; see also Trial Tr. (Williams) 255:14-258:12, 4/25/2017

January 22, 2015

“How did the [REDACTED] meeting go?”

“For some reason they are **enamored with WCS**. There is one person internally that is calling the shots and he feels that **direct disposal is the best option for B/C waste**. We are trying every trick in the book including **putting them on notice with the LOP contract and dropping the price once again.**”

Source: PTX194 at ESI-0263941; see also PTX185 at ESI-0015078; Trial Tr. (Williams) 243:16-245:17, 264:22-267:1, 4/25/2017

REDACTED

APS Benefited from ES-WCS Competition (HAO)



**Terrance
Dickinson**

APS

Q. Does Palo Verde use **competition between EnergySolutions and WCS** in negotiating B/C disposal pricing?

A. Yes.

* * *

Q. And how many times did you go back and ask for various offers from EnergySolutions and WCS?

A. Throughout that course, the period of time that we just spoke to, it was at least **four to five times where we received written offers** from them.

* * *

Q. . . . And then what was the final price that you agreed to with WCS?

A. . . . It was just around the \$2,000 range. The overall, as comparison of the 16 to \$19 million project that we were talking about, we got the **pricing down to \$6.5 million.**

Q. All right.

A. **\$10 million savings.**

Q. And can you put an approximate percentage on that?

A. Greater than **50 percent.**

EnergySolutions Responded to WCS Pricing Pressure (HAO)

September 2015

“Margins also negatively impacted by lower pricing”

REDACTED



ENERGY *SOLUTIONS*

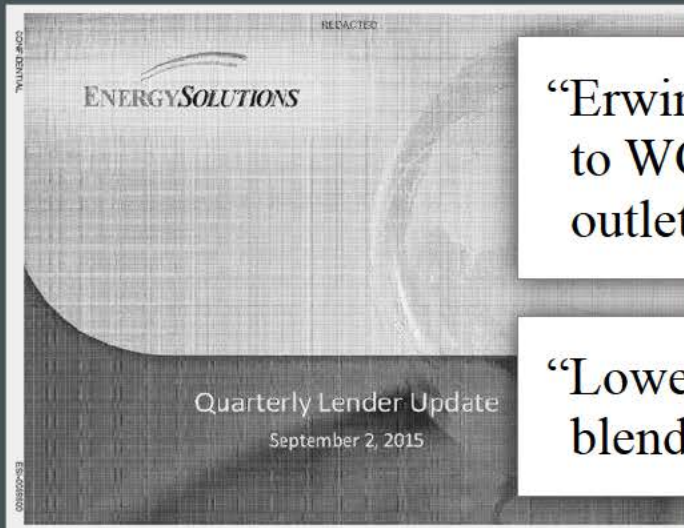
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ESI-009815

Source: PTX104 at ESI-0059807, Trial Tr. (G.Wood) 330:17-331:9, 4/25/2017

“Erwin pricing has decreased by [REDACTED] since purchase due to WCS pricing strategy. Need to resolve disposal outlet to maintain existing margins.”

“Lower pricing with pricing pressure from WCS, excess blendstock processing and storage costs at RMS”



Source: PTX105 at ESI-0059816_2014 vs Q3 Forecast, - 817; see also Trial Tr. (G. Wood) 332:7-335:12, 4/25/2017

EnergySolutions Reduces Prices to Compete with WCS (HAO)

REDACTED

From: Assef Azadeh <AAZ@[REDACTED]>
Sent: Wednesday, April 29, 2015 9:43 PM
To: Mark Ping
Cc: Ed Kolski
Subject: RE: [REDACTED] price difference

“You OK with not increase . . .
WCS is hunting them hard.”

CC: Ed Kolski
Subject: RE: [REDACTED] price difference

Hi

LOP rules and they all should be the same. DO NOT FORGET THE TAX.

Cheers

On Apr 28, 2015, at 12:37 PM, Mark Ping <mping@[REDACTED]> wrote:

Assef/Ed,

The two are supposed to be equivalent. But several SSL contracts did not get CPI increased in 2014 and some still not in 2015 (so Z1 and Z2 are behind). Also the Z1 and Z2 rates include the Utah tax whereas the LOP rate does not. I suggest we edit the Z1 and Z2 rate to say “Z1 reference the LOP Bulk Resin Rate”, and Z2 reference the LOP Containerized Resin Rate” this way the two will always be in sync.

If you agree, I will make the changes to [REDACTED] and [REDACTED] tables now. Then do [REDACTED] and [REDACTED] as well.

ps: I am not sure we should do a Tier 17 CPI increase since we are behind price wise already? Thoughts?

PLAINTIFF'S
EXHIBIT
U.S. v. EnergySolutions et al.
Case No. 1:15-cv-01056
PTX016

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ESI-0299264

Source: PTX016 at ESI-0299264

REDACTED

From: cdnkr [REDACTED]
Sent: Tuesday, June 09, 2015 5:09 PM
To: wwf [REDACTED]
Subject: RE: [REDACTED] Resin Pricing Analysis 6 8 15 v2.xlsx

So, they are getting a hell of a deal! We had to meet the WCS rates so this was a no brainer.

Danay

From: Weston White [REDACTED]
Sent: Tuesday, June 09, 2015 9:53 AM
To: Danny Nichols
Subject: FW: [REDACTED] Resin Pricing Analysis 6 8 15 v2.xlsx

FYI, This is the resin pricing comparison that I put together for [REDACTED]

From: Mark Ping
Sent: Monday, June 08, 2015 11:20 PM
To: Weston White; Ed Kolski; Assef Azadeh

“We had to meet the WCS
rates so this was a no brainer.”

Hi

Below is a comparison...we had to do it. Also in attached xls.

WCS price with Tax is \$2,469/t3

We had to do it (1) to be competitive ALSO increases in [REDACTED] with added transportation and dewatering.

Cheers

		WCS 2014
SOF >6	\$ 1,271,381	\$ 731,766
SOF 1-6	\$ 2,891,222	\$ 2,416,321

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ESI-0537216

Source: PTX018 at ESI-0537216

REDACTED

EnergySolutions Overhauls Pricing to Compete with WCS (HAO)

REDACTED

From: AAZA [REDACTED]
Sent: Wednesday, June 24, 2015 7:05 PM
To: Jwilli [REDACTED] mwp [REDACTED]
Subject: ERS UPDATE

June 24, 2015

Hi,

Jason and Mark, I am trying to clearly communicate

PLEASE read it all the way through at least once

Please let me know if you agree or if we need to

Cheers

“Addressed **maintaining market share/**
competitiveness for [REDACTED] resins through
[REDACTED]

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

PLAINTIFF'S
EXHIBIT
U.S. v. EnergySolutions et al.,
Case No. 1:15-cv-08006
PTX019

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ESI-0303753

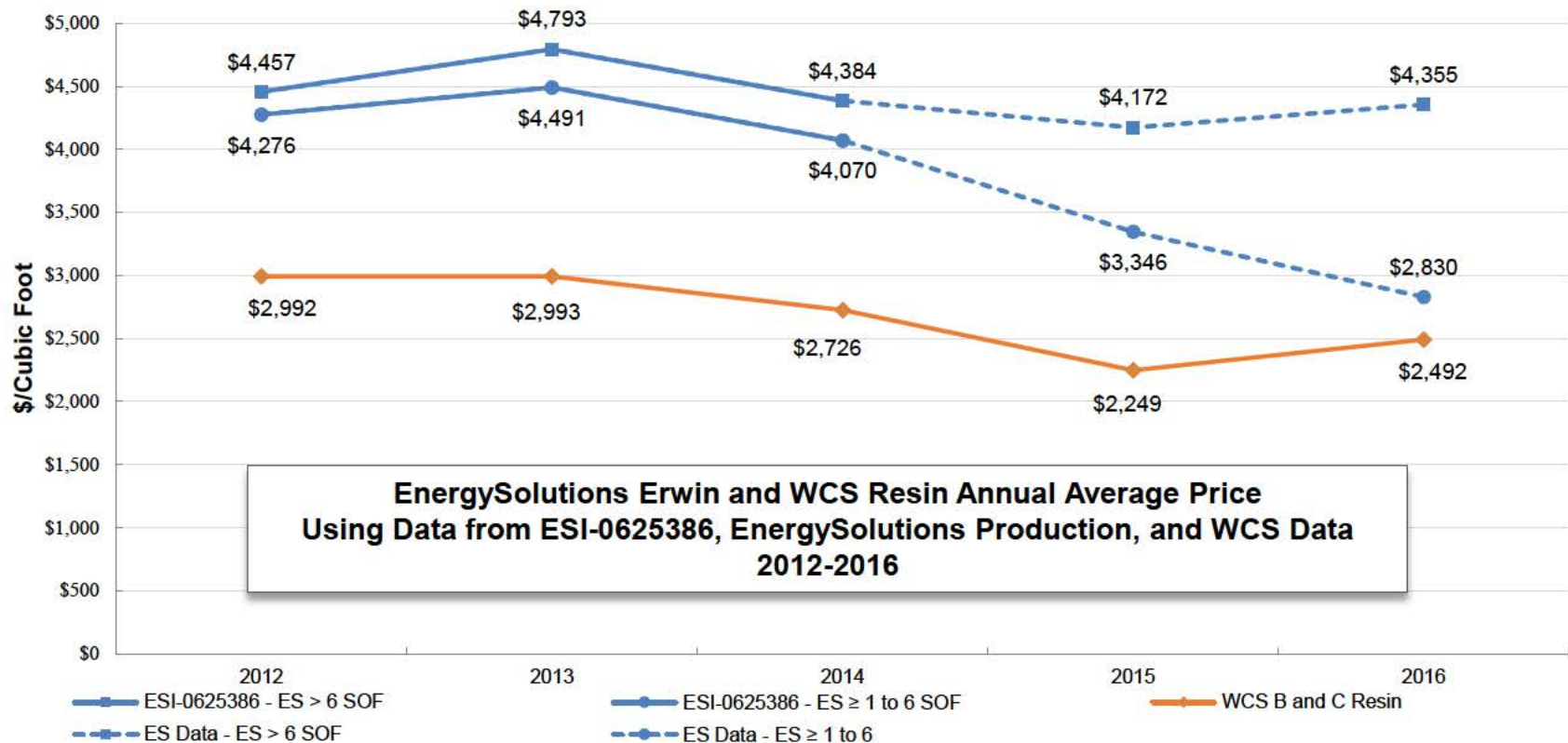
Higher Activity Operational Price Decreases



Dr. John Mayo
U.S. Expert

“And what you see is that the price of resins, dispositioning for resins with sum of fractions 1 through 6 **falls precipitously** both in 2015 and 2016. And so you see that there’s a pronounced competitive effect associated with the **entry of WCS.**”

Source: Trial Tr. (Mayo) 629:20-24, 4/26/2017; see also id. at 628:23-630:17



No Impact from 2015 Branch Technical Position (HAO)



Assef
Azadeh

EnergySolutions

- Q. Did the 2015 branch technical position expand the options available to Energy Solutions for managing low level radioactive waste for its customers?
- A. I've got to get the dates correct because I believe the 2015 position went final, but there was **a version of it that allowed the concentration averaging or the downblending** we spoke of earlier that permitted the activity, but I believe 2015 solidified it in its final form. But the answer is no, because we were still doing that work based on the earlier revisions of the branch technical positions.
- Q. I see. So the Nuclear Regulatory Commission **had already issued some guidance** that permitted these types of methods for managing waste?
- A. **Yes.**
- Q. Did I ask you those questions and did you give me those answers at your deposition?
- A. Yes.

LOP Renegotiation Is an Opportunity for WCS (LAO)



Dan
Burns

WCS

- Q. But you also have an understanding that EnergySolutions' **LOP agreements have periodic renegotiations**; right?
- A. My general understanding is that they were tenure agreements, so they would have terms to them. Yes, sir. My general understanding. I'm not certain though.
- Q. And when a customer is around that renegotiation period, that **represents a window of opportunity for WCS** to potentially win that customer's business, doesn't it?
- A. That certainly is an opportunity for us to make sure that we have communicated our capabilities to these customers, so that they can, you know, understand all of their options. So, **yes, sir, that would be an opportunity** for them to assess their needs and how they want to move forward with disposing of waste.
- Q. In fact, you actually **try to track which customers have LOP agreements** with ES in your business?
- A. My – as we discussed earlier, I've got a couple sales fellows that track the utilities, and, yes, they track them much closer than I do. **Yes, sir.** But I'm generally aware of them.

WCS Threatens EnergySolutions' LOP Contracts (LAO)



Source: PTX092 at ESI-0668284; see also Trial Tr. (G. Wood) 321:24-323:3, 4/25/2017

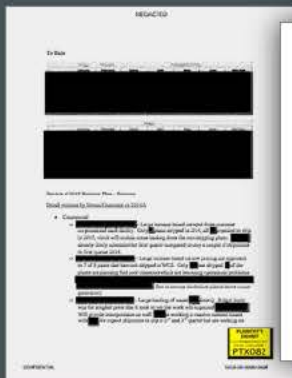
“WCS is offering a volume-tiered pricing approach to processors to compete for Utility waste.
WCS will push to open up **LOP agreements for competition.**”



Source: PTX010 at ESI-0409123, -125; see also Trial Tr. (Azadeh) 157:16-161:11, 4/24/2017

“WCS Exempt Cell option provides high levels of rad acceptance and extremely low prices that **threaten LOP renewal process**”

“Most LOP renewals start in [REDACTED] but we want to renew much sooner before **WCS can develop their LOP approach.**”



Source: PTX082 at WCS-2R-0000013411; see also Trial Tr. (Burns) 807:7-809:20, 4/24/2017, Trial Tr. (Azadeh) 146:21-148:24, 193:13-18, 4/24/2017

“ES is **attacking on every front**, Texas legislation, Commission, South Carolina, and market place. They are challenging customers on interpretations for LOP commitment agreements and beginning negotiation of LOP agreement extensions. . . . It is believed that ES is **rolling the prices back** to 2008 levels.”

WCS Exempt Cell Designed to Compete with ES (LAO)

From: Rod Baltzer
Sent: Friday, December 11, 2015 3:59 PM
To: Bob O'Brien
Cc: Amy Sanford
Subject: FW: Arizona Public Service - GOA for LAW Disposal
Attachments: APS LAW Disposal Ops Summary 11.25.15.docm; Sort-Seg Cast Model-APS with Rental of 6 Sealers.docm

Bob - another GOA. This is for Exempt DAW for [REDACTED] and this one is at [REDACTED] even though it's sort/seg and we don't have to use a third party. This is to improve the profit margins.

Please see attached and let me know if you'd like to discuss it or if it is approved.

Thanks,
Rod

From: Tim Blythe
Sent: Friday, December 11, 2015 3:00 PM
To: Rod Baltzer <rbaltz@wastecontrolspecialists.com>
Subject: RE: Arizona Public Service - GOA for LAW Disposal

Here you go.

Tim Blythe
Waste Control Specialists LLC
[REDACTED]

From: Rod Baltzer
Sent: Friday, December 11, 2015 3:58 PM
To: Tim Blythe
Subject: RE: Arizona Public Service - GOA for LAW Disposal

Resend it to me. Bob's out of the office until the 18th, so it may take a bit to get him through it.
Thanks,
Rod

PRIVILEGED MATERIAL REDACTED

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PLAINTIFF'S
EXHIBIT
U.S. v. EnergySolutions et al.
 Civ. No. 1:16-cv-01056
PTX161

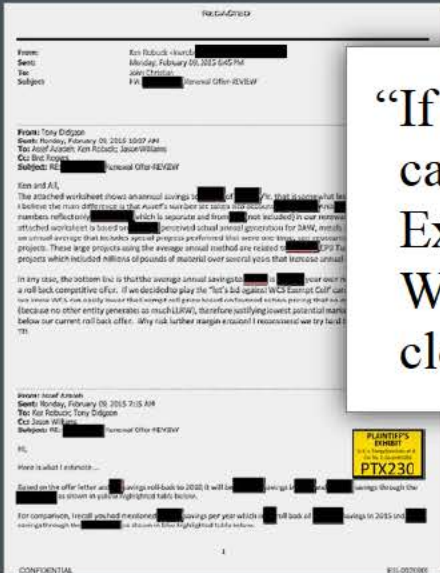
WCS-2R-0000009084

“EnergySolutions is the only competitor”

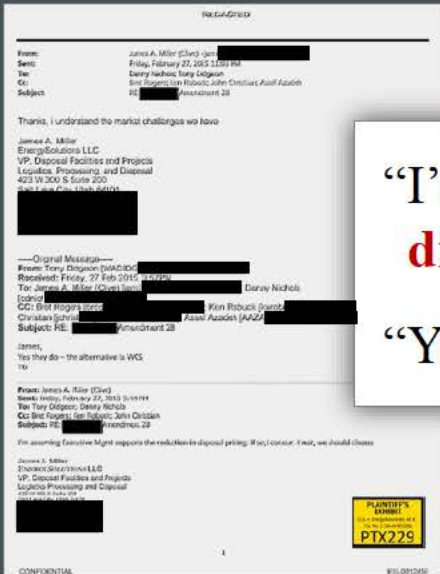
“WCS’s offering is designed to be competitive with the ES option”

Customers Benefit When Defendants Compete (LAO)

“If we decided to play the ‘**let’s bid against WCS Exempt Cell**’ card and go the distance, we know WCS can easily lower the Exempt cell price . . . well below our current roll back offer. Why risk further margin erosion! I recommend we try hard to close the deal now.”



Source: PTX230 at ESI-0029906; see also Trial Tr. (Didgeon) 215:10-217:13, 4/24/2017



“I’m assuming Executive Mgmt supports the **reduction in disposal pricing.**”

“Yes they do – the alternative is WCS”

Source: PTX229 at ESI-0012453; see also Trial Tr. (Didgeon) 217:18-219:10, 4/24/2017

Customers Benefit When Defendants Compete (LAO)



**Terrance
Dickinson**

APS

- Q. How does **WCS's price compare to what you are paying EnergySolutions?**
- A. . . . With the WCS rates, it would be about a 40 to 50 percent reduction in my current disposal cost, which correlates out to approximately **\$800,000 a year in savings** for my company.

Source: Trial Tr. (Dickinson) 52:21-53:4, 4/24/2017

September 11, 2014



“What are your thoughts on counter and split it?”

“Given all the uncertainty in the market with **WCS**. Let's get this one in the books.”

Source: PTX190 at ESI-0204005; see also Trial Tr. (Williams) 241:7-242:25, 4/25/2017

TVA Received Better Terms from Competition (LAO)



Brian Wood

TVA

Q. Then you sent your Class A resin waste to WCS from around April 2013 until the fall of 2015?

A. Yes.

* * *

Q. Then in 2015, **EnergySolutions offered to change pricing back** from per culvert to per cubic foot, and that was **more favorable** to TVA?

A. Yes.

Q. Then in response to that, **WCS gave you free transportation and waived rate increases** across all waste classes?

A. That's correct.

Q. And the free transportation and the, you know, not imposing rate increases, those **represent savings for TVA**?

A. That's correct.

Source: Trial Tr. (B. Wood) 550:23-551:1, 550:5-16, 4/26/2017; see also id. at 543:14-544:13; PTX537; PTX557



Dan Burns

WCS

Q. And WCS actually came back to this customer with a proposal for **better terms**; is that correct?

A. Yes, sir. I can't recall all the specifics of it, but we did go back to them offering not price discounts on the disposal, but we did provide some, I believe, **discounted transportation services** to try to offset the price.

Source: Trial Tr. (Burns) 820:3-8, 4/27/2017

EnergySolutions and WCS Competed to Win [REDACTED]

REDACTED

From: Mike Lehr <lm[REDACTED]>
Sent: Wednesday, February 11, 2015 3:59 PM
To: Assef Azadeh
Subject: RE: [REDACTED]

Do it!
Mike

Sent from my Verizon Wireless 4G LTE PHONE

“[A]ll Class A resins previously sent to Clive are being sent to WCS. . . . We are trying to win the business back.”

Cheers

From: Mike Lehr
Sent: Tuesday, February 10, 2015 9:22 PM
To: Assef Azadeh
Cc: James A. Miller (Clive)
Subject: RE: [REDACTED]

He and I briefly discussed this via email last week.
Mike

From: Assef Azadeh
Sent: Tuesday, February 10, 2015 9:17 PM
To: Mike Lehr
Cc: James A. Miller (Clive)
Subject: Re: [REDACTED]

Thanks Mike. James Miller is also aware of what I am asking for if you need to speak with him.

Cheers

On Feb 10, 2015, at 8:38 PM, Mike Lehr <lm[REDACTED]> wrote:



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ESI-0493208

Source: PTX014 at ESI-0493209

From: Rod Baltzer <rbalt[REDACTED]>
Sent: Monday, June 01, 2015 6:01 PM
To: Elida Sanchez
Subject: RE: Couple of things

I board at 7:30 am and don't land until 11:30 Texas time and then I have an ~4hour layover before I'm seated at 3:00 pm Texas time. I have a TVA cell service at 3:00 pm. You can call on my cell tonight, catch me tomorrow during a layover or during or Wednesday afternoon.

“We want to charge the [REDACTED] to compete with latest offer from ES.”

We have Miguel tomorrow morning at 8:30 but we can chat prior than that if you have time before your flights.

Thanks,

Elida

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WCS-2R-0000195447

Source: PTX557 at WCS-2R-0000195447

REDACTED

Perma-Fix Benefits when Defendants Compete (LAO)



**Louis
Centofanti**

Perma-Fix

Q. So when WCS's exempt cell opened, **you diverted most of the waste that you were sending to Clive to WCS's exempt cell?**

A. Correct.

Q. Why did you do that?

A. And out of BSFR also, that's – yeah.

Q. And why did you do that?

A. The cost and the service.

Q. Can you explain that in more detail?

A. I don't remember the exact numbers, but the – **the cost of the exempt cell was far below the cost of EnergySolutions. And the cost of BSFR was – BSFR was a little cheaper, but it wasn't worth the risk.**

Q. So is it fair to say that when the WCS exempt cell opened, your costs went down dramatically?

A. Yes.

* * *

Q. So you were able to use the **exempt cell to bargain for a lower rate** with EnergySolutions in Clive?

A. Correct.

Defendants Are Each Other's Closest Competitor (LAO)



**Kimberly
Murchison**

Talen Energy

Q. Is there **anywhere else** that this waste could be sent for disposal, other than Clive?

A. **WCS.**

Source: Trial Tr. (Murchison), 1286:7-9, 5/01/2017; see also Trial Tr. (Burns) 818:1-4, 4/27/2017



**Terrance
Dickinson**

APS

Q. Mr. Dickinson, you were asked a number of questions about the LOP and negotiating in good faith. What impact could Energy Solutions' acquisition of WCS have on your LOP negotiations with EnergySolutionsText?

A. Well, the impact would be that two disposal cells, right, we've got **basically two holes in the ground** where this material ultimately resides. If they – if they have both of the holes in the ground, I will have very little negotiating power when I'm reassessing my LOP rates.

Source: Trial Tr. (Dickinson) 131:5-13, 4/24/2017; see also id. at 75:22-76:15

Non-LOP Lower Activity Operational is a Competitive Opportunity for WCS



**Assef
Azadeh**

EnergySolutions



Non-LOP Lower Activity Operational is a Competitive Opportunity for WCS



William Didgeon

EnergySolutions

- Q. The right of first refusal means that if Customer A wants to dispose of something that is not included in their disposal agreement and they get a better price elsewhere, they have to give EnergySolutions the opportunity to meet this price?
- A. Yes, essentially.
- Q. You went and you confirmed that this customer had gotten an alternative price from WCS?
- A. I did, yes, through their supply contact.
- Q. . . . Did Customer A ultimately get the discount they requested?
- A. Yes, they did.
- Q. And this customer had previously used WCS to get a lower price from EnergySolutions; is that correct?
- A. One time before there was an event, yes.

Source: Trial Tr. (Didgeon) 222:4-222:19, 4/24/17



“Also, just notified by [REDACTED] that ES has a first right of refusal price to beat from WCS.”

“If they can do this and get a [REDACTED] discount, it looks like it just became standard practice. This is the second time.”

Source: PTX489 at ESI-0204535

Defendants Compete for Large Components (LAO)



**Bret
Rogers**

EnergySolutions

Q. And some low level radioactive waste fall **outside of the life of plant contract** exclusivity terms; is that right?

A. Yes.

Q. And some low level radioactive waste, like, for instance, **large components**, that's bid outside of the life of plant contract; is that correct?

A. In some cases.

Source: Trial Tr. (Rogers) 373:15-22, 4/25/2017



- “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
- \$8M loss of disposal and project revenue with **WCS winning award** for Point Beach 4 Steam Generators”

Source: PTX091 at ESI-0668257; see also Trial Tr. (G. Wood) 317:20-318:1, 4/25/2017; PTX592 at WCS-2R-00000367

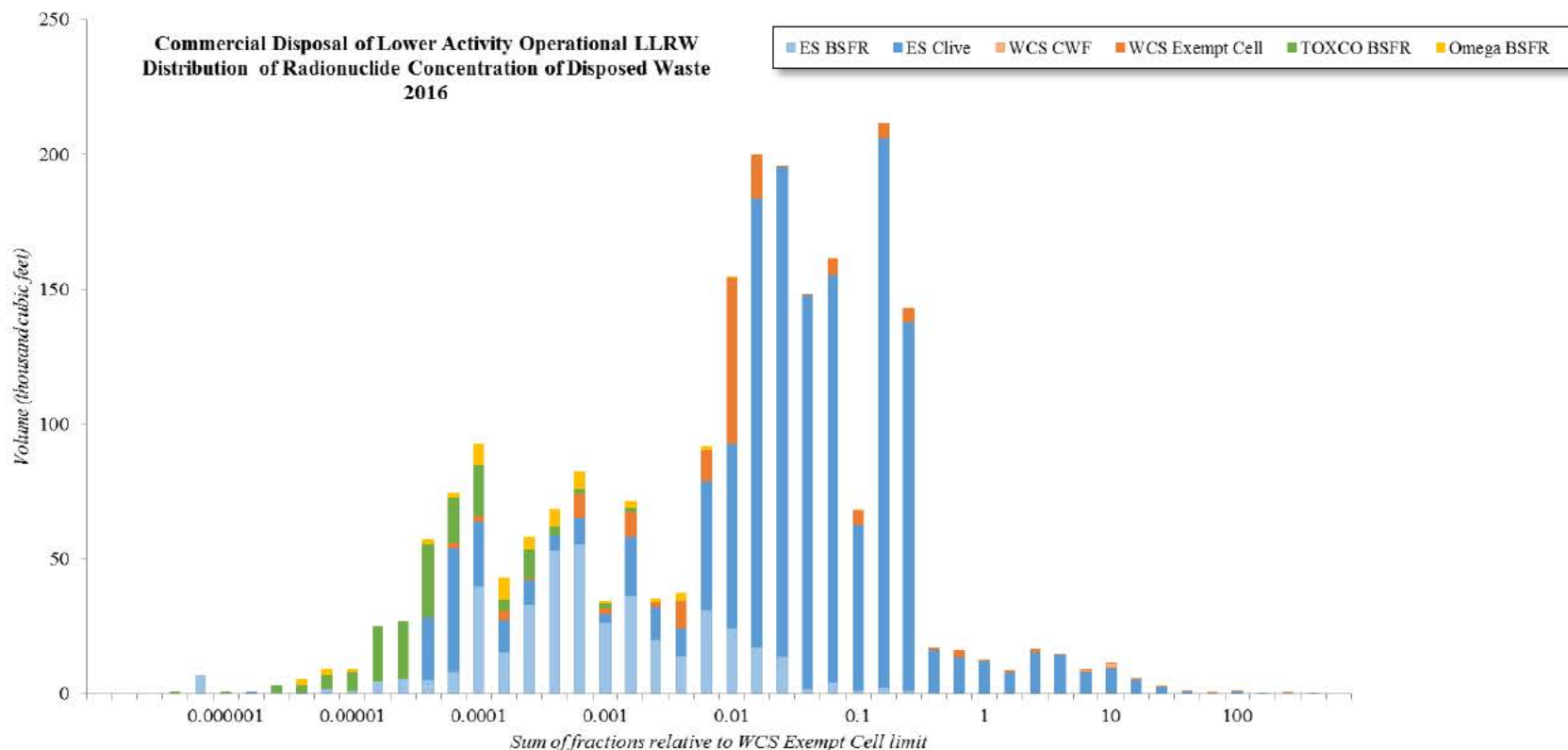
Substantial Competitive Overlap (LAO)



Dr. John Mayo
U.S. Expert

- Q. And Professor Mayo, what are your takeaways from this analysis?
- A. [Y]ou see a bulk of a big – big tall bars there. Lots of volume. And where you see those lots of volume bars at various concentration levels, what you see are blue and tan. It says that EnergySolutions and WCS are disposing of waste with the same radioactive concentration properties, propensities. So it suggests that they're buying for similar waste in that respect.

Source: Trial Tr. (Mayo) 616:20-617:23, 4/26/17



EnergySolutions Predicts Growth in Decommissioning



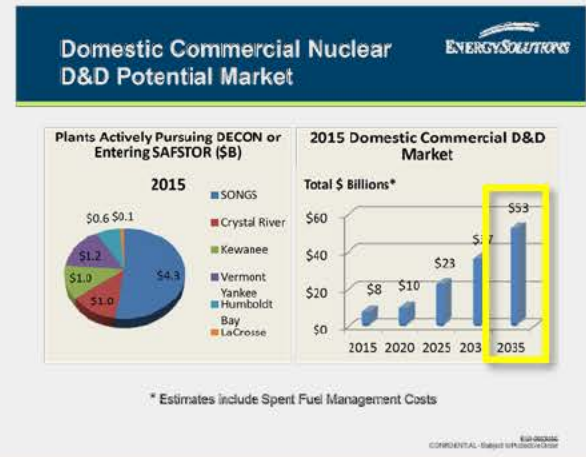
Ken Robuck
EnergySolutions

- Q. And EnergySolutions' **projections** of the size of this market **have actually gone up** since this slide deck was prepared; is that right?
- A. I think they have.

Source: Trial Tr. (Robuck) 862:23-863:1, 4/27/2017

**\$53 Billion Domestic Commercial
D&D Market in 2035**

Source: PTX060 at ESI-0663886; see also Trial Tr. (Robuck) 862:11-863:1, 4/27/2017



Only Two Sites for Decommissioning Waste



Scott
State

NorthStar

- Q. When you were talking about waste disposal as being one of the areas of a decommissioning project that you have to use a subcontractor for, you mentioned that **EnergySolutions and Waste Control Specialists were the two alternatives**. Is there any particular reason why you only mentioned those two firms?
- A. The – yeah. There’s an absolute reason. They’re the only two places that – at the levels of volumes of material that we have to deal with in a reactor or a power plant decommissioning we would be able to use in a cost-effective manner to dispose of the waste. **There isn’t any other option for the volume of material that we need to move and the time frame we need to move it, other than those two sites.**

Substantial Overlap in Lower Activity Decommissioning

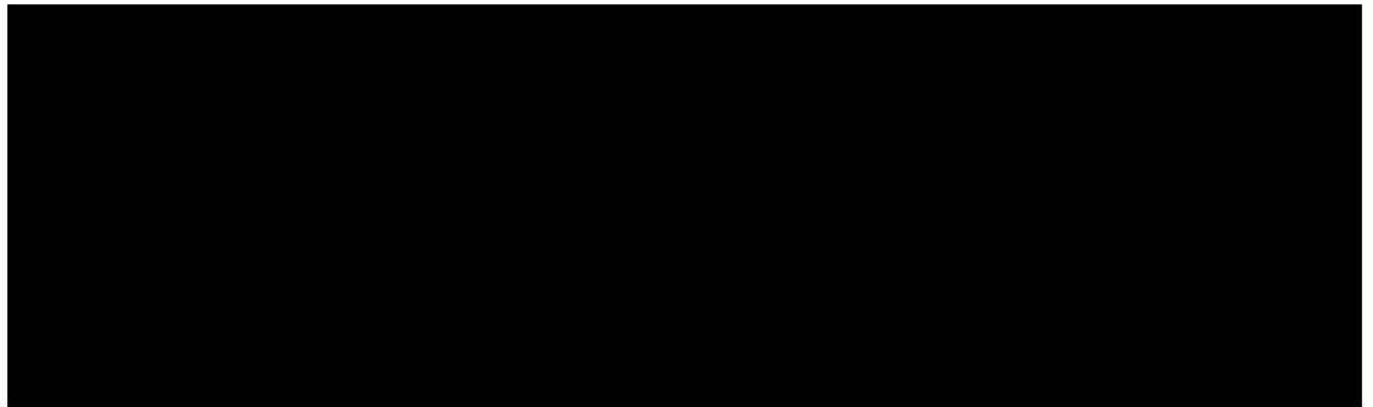
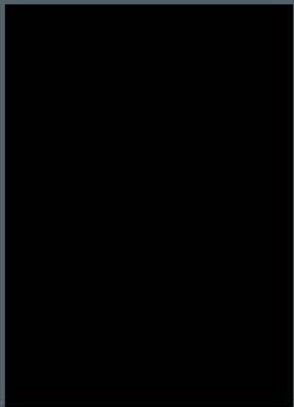


Dan Burns

WCS

- Q. For instance, you anticipate that **90 percent** of the waste that you expect to receive from Vermont Yankee will be dispositioned in the **Exempt Cell**; right?
- A. That is a general statement that we have discussed in our planning documents to NorthStar. However, it's important to understand that WCS does not own that number or the quantities of waste that are generated.
- Q. You've made that representation to NorthStar, haven't you?
- A. **Absolutely.**

Source: Trial Tr. (Burns) 830:10-19, 4/27/2017

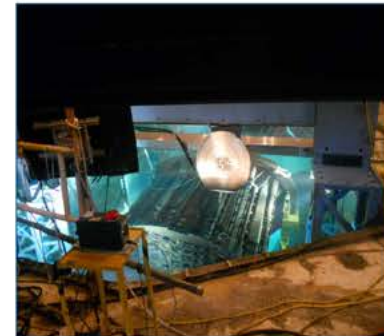


Substantial Overlap in Higher Activity Decommissioning

Reactor Vessel Internals Segmentation



- Mechanical cutting completed in both Reactor Vessels
 - Utilized mechanical cutting to avoid significant secondary waste creation and eliminate the significant radiological concerns experienced in previous D&D projects
 - Lessons learned and experience to provide benefit to future D&D projects
- Most cost effective vessel internal segmentation project to date
 - Optimize cutting and waste loading campaigns to minimize Class B&C waste costs
 - Worked both units in parallel to stay off a critical path and not interfere with spent fuel loading



ESI-0663893
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“Optimize cutting and waste loading campaigns to minimize Class B&C waste costs”

SAFSTOR Is Not a Competitive Constraint on Defendants



Scott State
NorthStar

Q. . . . [I]s it possible in a decommissioning project to store the resulting low level radioactive waste?

* * *

A. **No.** . . . You **could never terminate the license** if you stored the nuclear waste on the site, as – as a practical matter. As a – you know, a secondary matter, the states would – would go crazy if you tried to just create a nuclear waste facility in their state. **They want the material gone.**

Source: Trial Tr. (State) 987:25-988:16, 4/28/2017



Rod Baltzer
WCS

“Particularly local towns, you know, there’s a loss of jobs once that plant closes, and so they don’t want the plants to close. Then you also have others who just don’t like nuclear and **want those removed at any price.**”

Source: Trial Tr. (Baltzer) 1251:10-14, 5/1/2017; see also id. at 1251:7-9



Ken Robuck
EnergySolutions

License Stewardship “Zion Model”

ENERGYSOLUTIONS

- What is the Zion D&D model and why is it good for the industry and EnergySolutions?
- D&D is not a typical Utility core competency
- Transfers risk for D&D – one contracting entity to carry
- SAFESTOR is not a low risk model
- Disposal space is finite
- Regulatory baselines can change (Fukushima)
- Plants continue to need managing – costs money
- Stakeholders don’t like delaying (“mothballing”) the project for future generations
- We have proved accelerated cleanup can be achieved at lower cost
- ES’ D&D Management Model is perfected to provide accelerated D&D

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“SAFESTOR is not a low risk model”

Source: PTX060 at ESI-0663887; see also Trial Tr. (Robuck) 864:6-866:12, 4/27/2017

BSFR: Not a Competitive Constraint on Defendants



**Terrance
Dickinson**

APS

Q. Do you send LLRW to BSFR now?

A. Not currently.

Q. Why not?

A. There's a couple of factors. . . . There's additional **transportation costs** associated with getting that material to Tennessee. . . . In addition, . . . there is a potential to have non-conforming waste returned to you at an **additional cost**. . . . And, . . . There's the **liabilities** associated with that material. It's commingled with other people's waste and then it's placed into a non-licensed disposal facility as the BSFR program.

Q. You mentioned something about it being a small volume. Could you explain that?

A. Yes . . . we determined that it would be less than five percent of our Class A waste stream would be a candidate for the BSFR program. It is a **very small volume**.

Q. If EnergySolutions acquires WCS, do you think that telling EnergySolutions that you are going to send your LLRW to BSFR instead of EnergySolutions would be an effective negotiating strategy?

A. I don't believe it would be very effective based on the small volumes that we just spoke of. **I don't think it's a very big bargaining chip at all.**

BSFR: Not a Competitive Constraint on Defendants



**Louis
Centofanti**

Perma-Fix

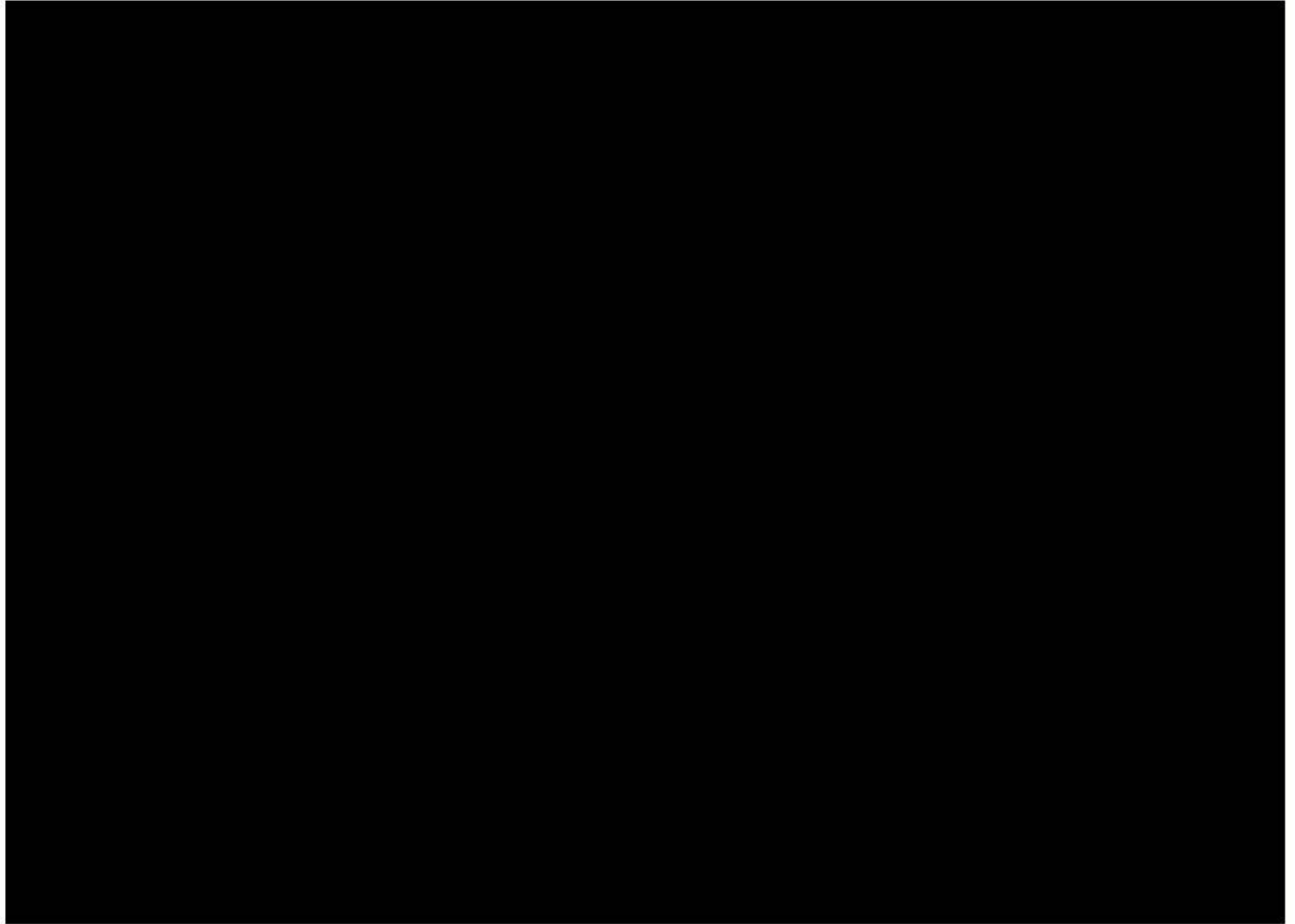
- Q. Do you still send waste to any BSFR facilities?
- A. I don't believe we have. We have **stopped doing that**, but we may – we may have in the last year or two, but I don't know. In general, we've tried – we've tried not to.
- Q. Why?
- A. Two reasons: We're a little nervous about the program itself from a regulatory point of view. And the second is with the **opening of the exempt cell at WCS**, it economically did not make a lot of sense to do the program.
- Q. Let's talk about the first reason that you mentioned. Can you describe what you meant when you said that you were a little nervous about the program itself?
- A. We were very concerned that there was material going into the BSFR program and would escape the detection systems and end up in an improper disposal facility the way the program's operated and the standards. We have looked at – we have a technology we developed in how we were going to do it, which would have been total sort segregation so that there is no chance of anything slipping through. **We were very uneasy that the present program will allow stuff to slip through.**
- * * *
- Q. So the limitations at a BSFR facility are **way below** the limitations of the WCS exempt cell?
- A. Correct, yes.

U.S. Ecology: [REDACTED] for Operational Waste



**Joe
Weismann**

U.S. Ecology



U.S. Ecology: Not a Competitive Constraint on Defendants



**Terrance
Dickinson**

APS

- Q. Do you send LLRW to U.S. Ecology in Idaho now?
- A. No.
- Q. Why not?
- A. My understanding is that their **waste acceptance criteria is so limited** that my material would not fit into their disposal environment. Also, there's **additional transportation costs** as the facility is located further away. . . .

* * *

- Q. If EnergySolutions acquires WCS, do you think that telling EnergySolutions that you're going to send your LLRW to U.S. Ecology in Idaho instead of EnergySolutions would be an effective negotiating strategy?
- A. No. **I can't send my material there**, so why would that be a negotiating strategy? The answer is no.

Source: Trial Tr. (Dickinson) 74:14-21, 75:16-21, 4/24/2017; see also id at 74:9-13, 74:22-75:15



Brian Wood

Tennessee Valley
Authority

- Q. So sending your waste to US Ecology in Idaho is **prohibitively expensive**?
- A. **It is for us, yes.**

Source: Trial Tr. (B.Wood) 544:25-545:2, 4/26/2017

BSFR: Not an Option for Decommissioning Waste



Scott State
NorthStar

- Q. And you had mentioned that there were logistical issues about **BSFR** facilities that affected your ability to use them. Could you describe what those logistical issues were?
- A. . . . At a typical municipal landfill, you, know, you're looking at – at options where you're bringing material in by truck. It may be in drums. If we had to put all the material from Vermont Yankee in 55-gallon drums, it would be a mountain of material bigger than this building, and **we would simply never be able to do that in a cost-effective manner.**

Source: Trial Tr. (State) 989:4-990:4, 4/28/2017; see also id. at 990:22-991:5



Ken Robuck
EnergySolutions

- Q. And at least since you have taken over the project, since you arrived at the company, **EnergySolutions has not used BSFR landfills** to dispose of waste generated by the Zion decommissioning; is that correct?
- A. **We have not.**
- * * *
- Q. And for Zion, it has been **more cost-effective to send waste directly to Clive** by rail than to use the BSFR program?
- A. **That is correct.**

Source: Trial Tr. (Robuck) 867:23-868:2, 868:10-13, 4/27/2017; see also id. at 868:3-9

BSFR and U.S. Ecology Are Fringe Players



Dr. John
Mayo

U.S. Expert

“So what you are doing is looking at the levels of concentration in picocuries for gram at the waste criteria of **WCS**, and noting that that is **2,000 times higher** than the waste accepted and the criteria that is allowed to go into the **BSFR** facility at EnergySolutions. . . .

And then in the second column actually brings in **US Ecology**. For those particular nucleides, again, **even lower**.

So what you see here, I think the economic takeaway is that these are companies that are positioned in **very different spaces** in the marketplace in terms of their ability to accept waste.”

Competitive Effects: Overall Conclusion



**Dr. John
Mayo**

U.S. Expert

Q. . . . Professor Mayo, what are your overall conclusions with respect to the direct effects evidence that you've identified, head-to-head competition between the defendants in all four of these markets?

A. . . . [I]t's very clear from the direct effects evidence that **these guys were at each other's throats**. That they're competing, the competition is driving competition down. The competition is benefiting consumers.

The implication is that **if you lose one of those principal competitors, you're going to lose the benefits of that competition.**

“[T]he anticompetitive effect of the merger is further enhanced by high barriers to market entry.”

Fed. Trade Comm’n v. H.J. Heinz Co., 246 F.3d 708, 717 (D.C. Cir. 2001)

“[T]he history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future.”

United States v. Anthem, Inc., --- F. Supp. 3d ---, 2017 WL 685563, at *38 (D.D.C. Feb. 8, 2017)
(quoting *Fed. Trade Comm’n v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998))

EnergySolutions: Entry Barriers Are High

Case 7:15-cv-00034 Document 3 Filed 03/13/15 Page 1 of 25

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

III. BARRIERS TO ENTRY

50. Regulatory barriers to entry limit competition in the markets for disposal of Class A, B, and C waste. In North America, four commercial LLRW landfills have exclusive, regulated control over any LLRW generated within a permitted geographic region.

51. It is extremely expensive and time-consuming to enter the LLRW disposal market. It took WCS approximately eight years to complete the licensing process for its new LLRW landfill, which began accepting waste in April 2012.

PRELIMINARY STATEMENT

EnergySolutions denies the allegations in the unnumbered paragraphs on pages 1-2 of the Petition.



WCS: Entry Barriers Are Incredibly High



Rod
Baltzer

WCS

Q. So back in 1995, when Mr. Bigham and Mr. Simmons are sitting around, deciding to build this landfill out in Texas, how long did they think it would take to build?

A. The initial business plan was for three years and \$25 million. They would have a low level radioactive waste site ready to go.

Q. And how long did it take?

A. It took them until 2012 to get the facility up and operating.

Q. So 17 years?

A. **17 years.**

* * *

Q. And how much to date is put in or at risk at this landfill?

A. Approximately **\$700 million**, including the financial assurances.

* * *

Q. So you and your counsel discussed the timeline for WCS's entry during your direct, and you well know that in this industry, there are **incredibly high barriers to entry**, aren't there?

A. There are high barriers to entry.

Q. And they are incredibly high?

A. They are.

No Evidence of Entry or Expansion



**Dr. John
Mayo**

U.S. Expert

- Q. . . . Professor Mayo, could you explain your conclusions with respect to **US Ecology's** ability to enter, expand in a way that could discipline the merged firm?
- A. I will just simply say at this point that I have seen **no evidence** that entry by US Ecology would be timely, likely and sufficient to deter a post merger price increase.

* * *



“Once the Government has established a *prima facie* case that the merger may substantially lessen competition, the burden shifts to the [defendants] to rebut the Government’s *prima facie* case.”

Fed. Trade Comm’n. v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347 (3d Cir. 2016)

“The *more compelling* the *prima facie* case, the *more evidence* the defendant must present to rebut it successfully’”

United States v. Anthem, Inc., --- F.3d ---, 2017 WL 1521578, at *2
(D.C. Cir. Apr. 28, 2017)

“[W]e are **skeptical** that such an efficiencies defense even exists.”

Fed. Trade Comm'n v. Penn State Hershey Med. Ctr., 838 F.3d 327, 348 (3d Cir. 2016)

“[I]t is **not at all clear** that [efficiencies] offer a viable legal defense to illegality under Section 7.”

United States v. Anthem, Inc., --- F.3d ---, 2017 WL 1521578, at *5 (D.C. Cir. Apr. 28, 2017)

Efficiencies must (1) “offset the anticompetitive effects,” (2) “be ‘merger specific,’” (3) “be verifiable,” (4) “not arise from anticompetitive reductions in output or service,” and (5) “ultimately be passed on to consumers.”

Fed. Trade Comm'n v. Penn State Hershey Med. Ctr., 838 F.3d 327, 348-51 (3d Cir. 2016)

EnergySolutions' Efficiencies Are a Stretch



Ken Robuck
EnergySolutions

- Q. And Mr. Eshleman has more knowledge than you about the financial model of the synergies and their costs; is that right?
- A. Correct.
- Q. And he has more knowledge than you do about how much it will cost to actually achieve those synergies; is that correct?
- A. Correct.

Source: Trial Tr. (Robuck) 928:8-15, 4/27/2017; see also id. at 927:1-24



On Jul 30, 2016, at 6:32 AM, Ken Robuck <kwrobuck@energysolutions.com> wrote:

When did we start committing to 20M in synergies?
We had initially proposed 18M, but had an internal target of 19M.

I had Troy move it up to 20M for the DOJ presentation, but it was a stretch for us and was not supposed to be our new acquisition target.
Looks like it is now....

I do like their attitude toward price reduction and I think the [REDACTED] is achievable.

ken

Source: PTX039 at ESD0J00022672

Defendants' Efficiency Claims Are Unsupported



**Dr. Gregory
Eastman**

U.S. Expert

Q. Will you remind us of your overall opinion with respect to defendants' efficiency claims?

A. Yes. My overall opinion is that the defendants' efficiency claims are – you know, lack the appropriate analysis and support, and so therefore they're unsupported, unverifiable and don't provide a reliable basis.

* * *

Q. And will you just summarize briefly what your – with a led you to your opinion with respect to the defendants' efficiencies claims.

A. [U]nder the Horizontal Merger Guidelines, they attempt to talk about, you know, various components that one must need in order to get claimed efficiency that could offset the competitive harm inform a transaction. . . . [A]nd so the defendants . . . have not shown that the efficiencies are merger specific. They're unverified efficiencies. The claimed efficiencies are about fixed costs and the variable costs, and the claimed efficiencies occur outside of the market in which the U.S. has alleged competitive harm.

“The failing firm defense rarely succeeds in the case law and has often been proclaimed . . . to be a waste of litigants’ time.”

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 951e (4th ed. 2016)

“It is, in a sense, a “lesser of two evils” approach, in which the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business.”

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

“Notwithstanding the analysis above, a merger is not likely to enhance market power if **imminent failure**, as defined below, of one of the merging firms would cause the assets of that firm to exit the relevant market.”

Horizontal Merger Guidelines § 11 (2010)

“Th[e] test is met only if two requirements are satisfied: (1) that the resources of [the company] were ‘so depleted and the prospect of rehabilitation so remote that it faced the **grave probability of a business failure**’ and (2) that there was **no other prospective purchaser** for it.”

United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 555 (1971)

WCS: Not A Standalone Company



Amy Samford

WCS

Q. And all of [WCS management] are Contran employees; right?

A. They are. We are all **paid by Contran**.

* * *

Q. . . . **WCS's taxes** are filed as part of Contran's consolidated tax return; is that right?

A. Under the federal tax rule, any subsidiary that's more than 80 percent owned is required to file a return with the parent company.

Source: Trial Tr. (Samford) 1373:22- 25, 1374:21- 25, 5/01/2017



Robert Graham

Valhi



WCS Is Meeting Its Current Financial Obligations



Rod
Baltzer

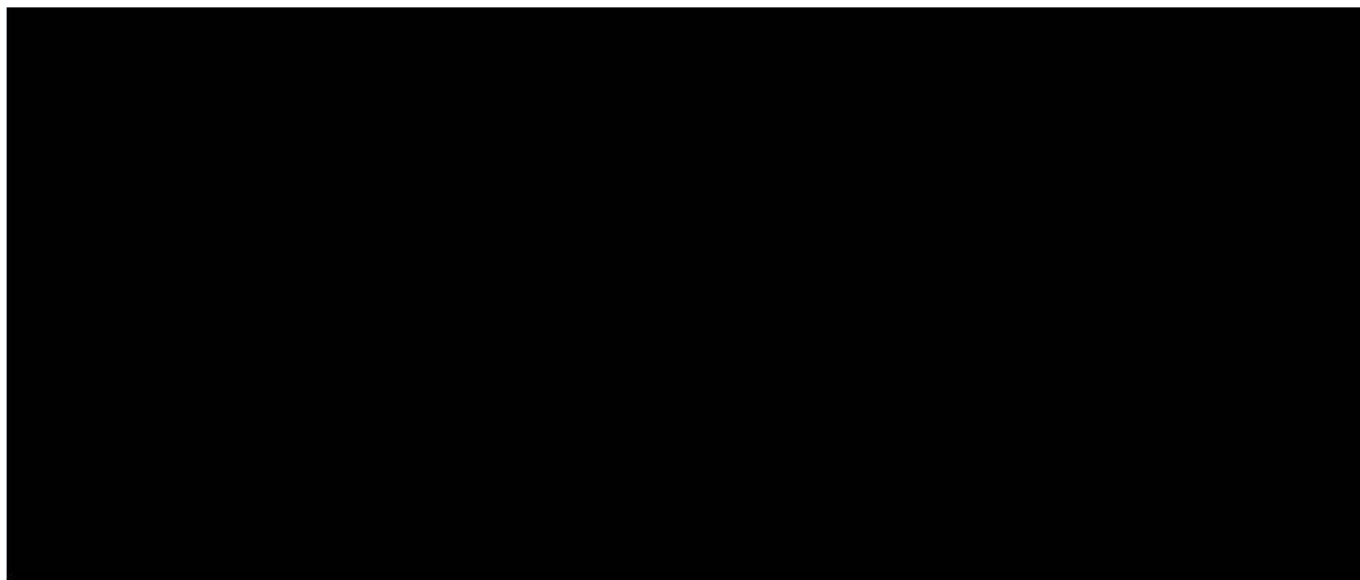
WCS

- Q. But **WCS is still paying employee bonuses**; is that correct?
- A. WCS is still trying to retain employees, so that involves an incentive package that includes health care, a salary, bonuses for certain levels, trying to get them to stay with the company through these uncertain times.
- Q. And **WCS's parent company, Valhi, is still paying dividends**; is that correct?
- A. I believe they are.
- * * *
- Q. And **it's continuing to engage in lobbying efforts** as well; right?
- A. We do have lobbyists.
- * * *
- Q. In any event, **as recently as November of 2016 you advocated for an increased lobbying budget for WCS** for your parent; is that correct?
- A. I did.

Valhi Extended WCS's Credit Facility



Robert Graham
Valhi



“While the 2017 and first quarter of 2018 plan has WCS borrowing an additional \$28.3 million during that period of time the projected balances at March 31, 2018 of \$70.0 million is still **below the maximum availability** under the credit facility.”

Source: DTX358 at WCS-0000417507

WCS Is Meeting Its Current Financial Obligations



**Dr. Gregory
Eastman**

U.S. Expert

Q. How about **looking forward** into the future?

A. And so looking forward, there have been some discussions so far about a letter of credit that has been made available to WCS and so that **letter of credit has \$43 million in available funds**. WCS has estimated that it may need 19 million of available funds, so it has an excess amount of credit available for it in the near future, and that letter of credit lasts until at least the first quarter of 2018. All right.

WCS's Conduct Is Consistent With Future Growth

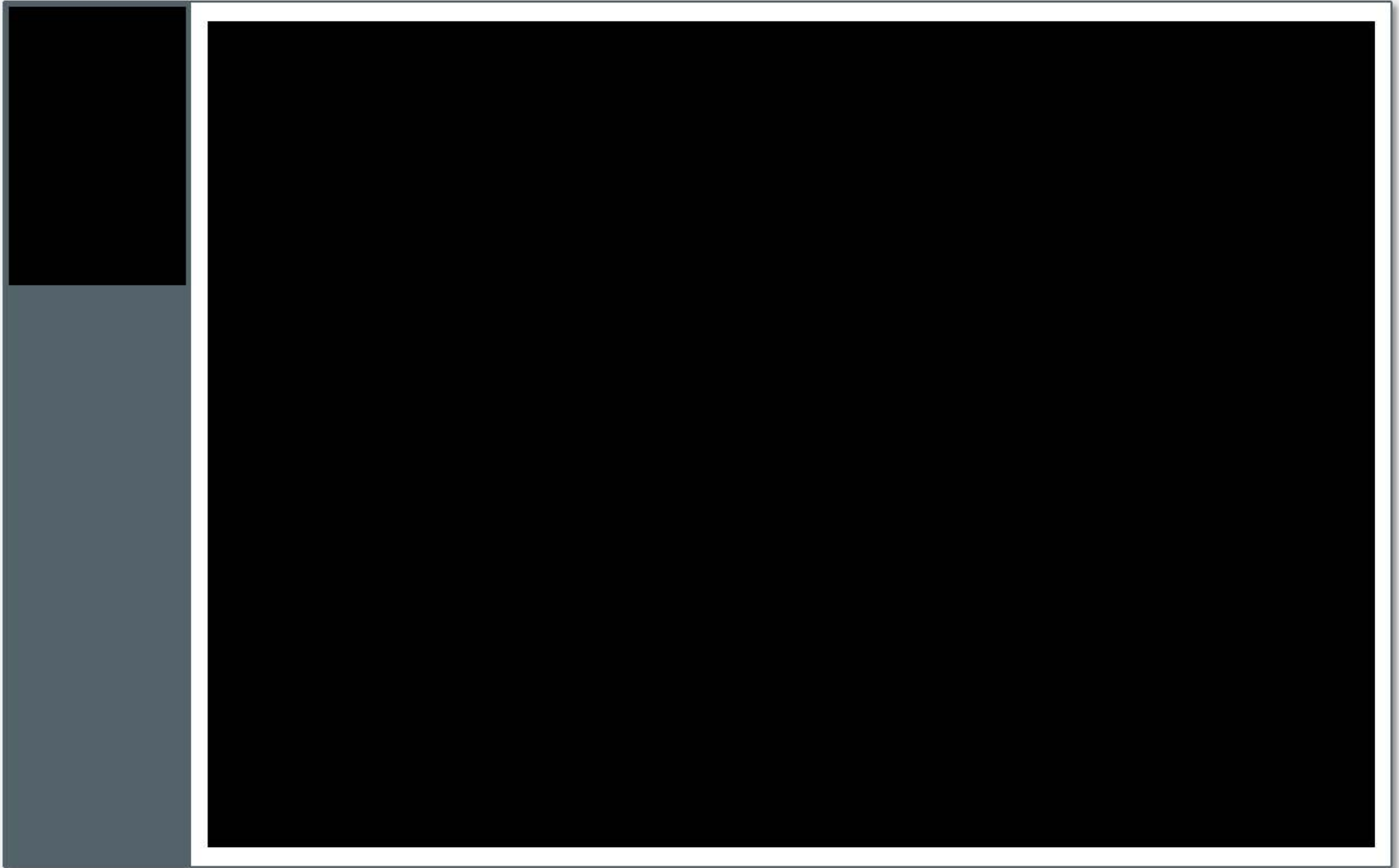


**Dr. Gregory
Eastman**

U.S. Expert

- Q. Turning to the fourth of your grounds that WCS is not facing imminent failure, can you describe what WCS's market conduct leads you to that conclusion?
- A. . . . They're trying to . . . **pursue future growth opportunities** and doing the kind of things you would expect someone to try to do with the forethought to going forward into the future. . . . **WCS is making investments on various projects that have long-term future payoff**, and those could include the **CIS application**, the **Class C waste**. It could -- or **decommissioning projects** for a variety of the timing periods. . . . And, in addition, go to the flip side is they have not done anything to reduce shutdown. They have not taken steps to shut down, you know, and they have not notified anyone, and made the opposite representation to the TCEQ or Andrews County.

Steady Stream of Decommissioning Projects



WCS Will Benefit from Its Teaming Agreement with NorthStar



Dan Burns

WCS

Q. So WCS has a teaming agreement with NorthStar; is that right?

A. Yes, we have a teaming agreement with NorthStar.

Q. That agreement provides that **NorthStar will use WCS as its exclusive** low level radioactive waste provider; is that right?

A. If they win the work, yes, sir.

* * *

Q. And NorthStar and its partner have asked WCS to **expand** the teaming agreement to cover any additional decommissioning projects they undertake; right?

A. Yes, sir. And we have not done that, but, yes, they have asked for that.

Source: Trial Tr. (Burns) 829:1-7, 832:5-9, 4/27/2017



Scott State

NorthStar

Q. All right. And at a general level, do you have an understanding of what the amount of that money **would be dedicated towards WCS in waste disposal?**

A. It's roughly **\$100 million.**

Source: Trial Tr. (State) 1003:9-1003:12, 4/28/2017

WCS Investing in Growth Opportunities



Amy Samford

WCS

Q. Okay. And that line item [in WCS 2017 budget] for **capital expenditure is for \$6.7 million** in 2017; is that right?

A. That sounds right.

Q. And **the largest part of those expenditures are to expand WCS's RCRA cell**; is that correct?

A. It's about **four-and-a-half million dollars**.

Source: Trial Tr. (Samford) 1398:23-1399:3, 5/01/2017; see also id. at 1399:4-1401:2



Scott State

NorthStar

Q. . . . What's the **dollar value of the capital funding** that you've committed to?

A. The – the request – the current request from WCS that we got on Monday and that we're working on agreements to document is for a total in two different baskets of probably around **35 million**.

Q. When you say "on Monday," prior to Monday, you – you had already made a commitment to provide capital funding to WCS; correct?

A. We in – in, I believe, a later revision of this teaming agreement, yes, we had agreed to a funding, I – I believe, of **\$12 million for – specifically for a rail tipper facility**.

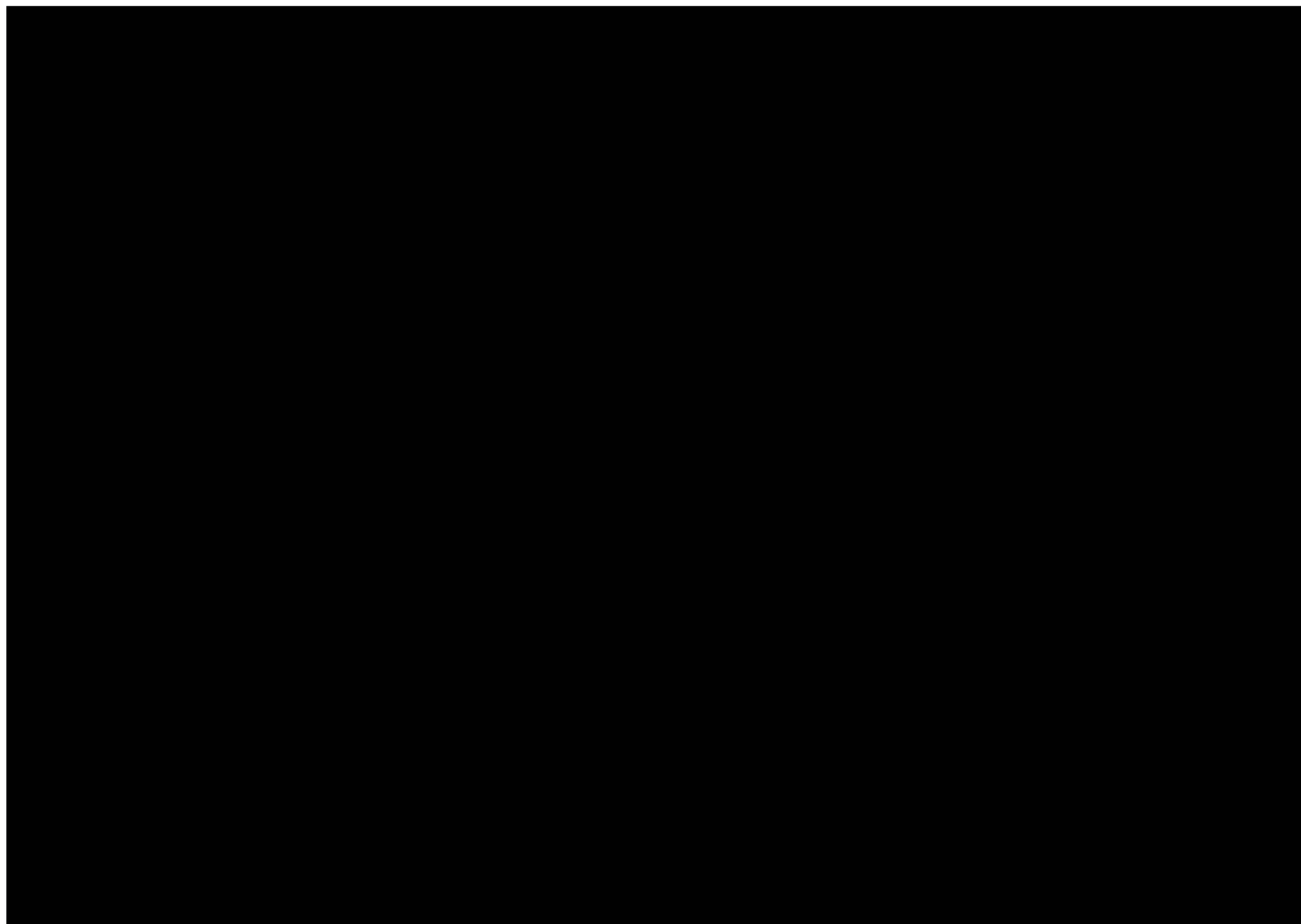
Source: Trial Tr. (State) 978:21-979:9, 4/28/2017

WCS Has Guaranteed Revenue for [REDACTED] Years



**Robert
Graham**

Valhi



EnergySolutions Negotiates Disposal Agreement with WCS



Ken Robuck
EnergySolutions

- Q. And under this disposal agreement with WCS, EnergySolutions can dispose of Class B and C waste at WCS even if the merger is not consummated; is that correct?
- A. Correct.
- Q. And having a disposal agreement for B and C waste is important to EnergySolutions in the decommissioning context, is that right?
- A. That is correct.

Source: Trial Tr. (Robuck) 855:6-13, 4/27/2017



“EnergySolutions has an active, multi-year Class B/C disposal contract with Waste Control Specialists”

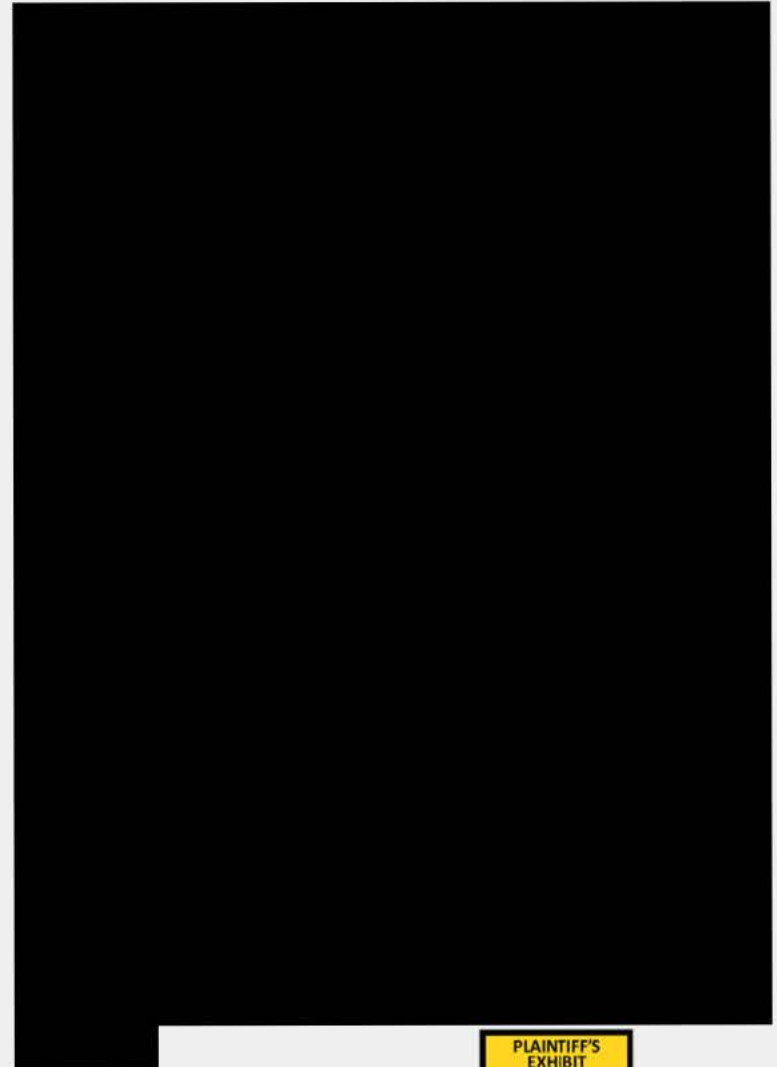
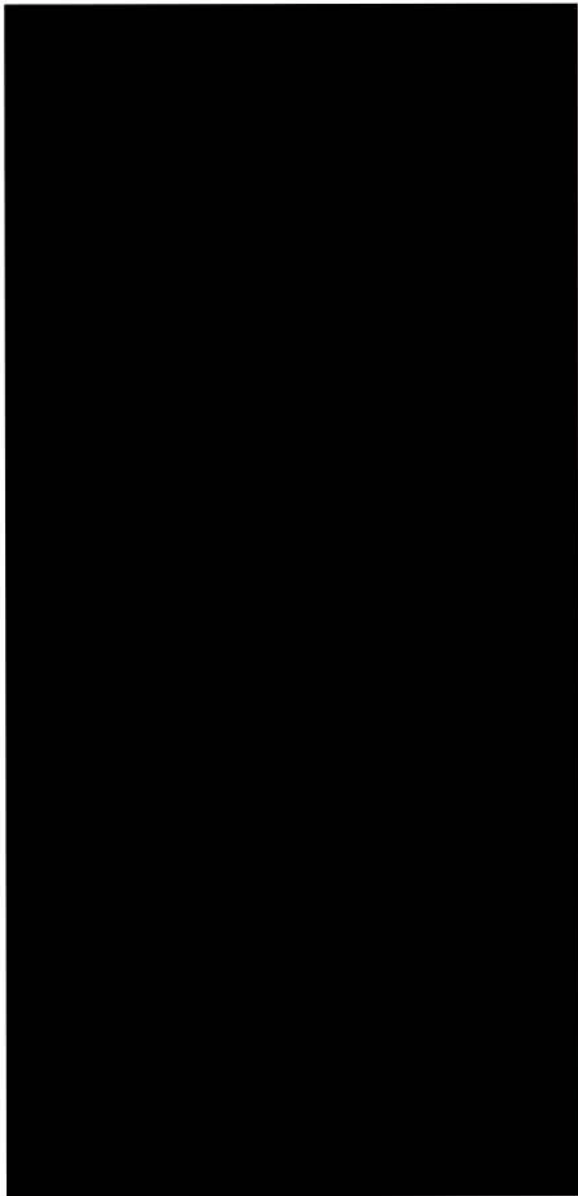
Source: PTX041 at ESD0J00034568

2016 Negotiations Between Defendants



**Robert
Graham**

Valhi



PLAINTIFF'S
EXHIBIT
U.S. v. EnergySolutions et al.,
Civ. No. 1:16-cv-01096
PTX077

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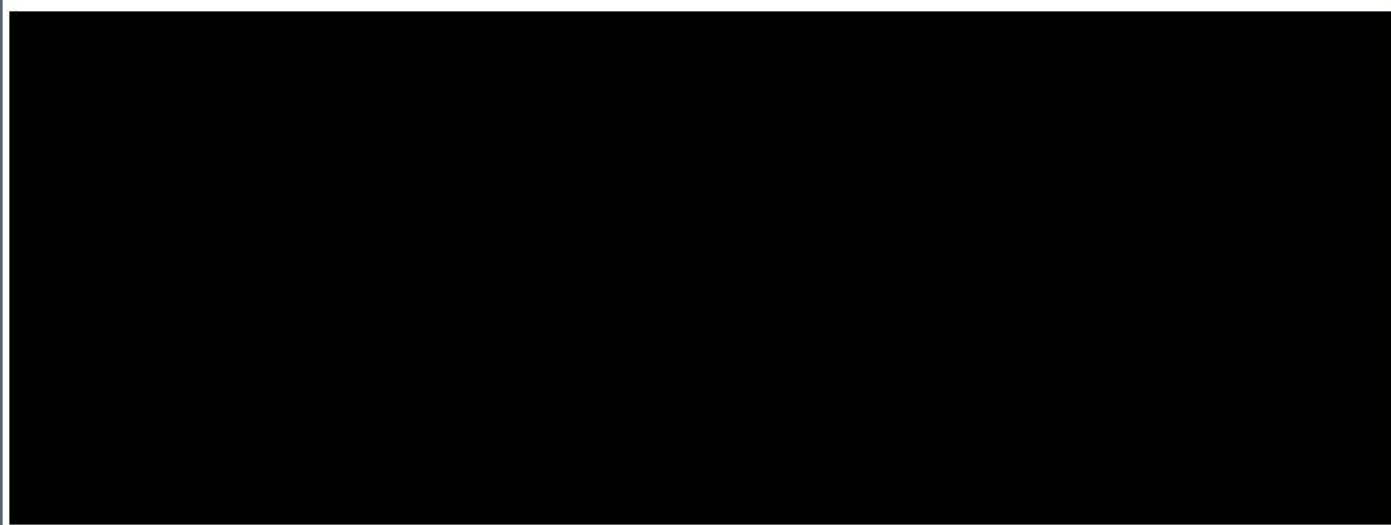
WC6-0000415519

No Incentive to Exit Due to High Costs



Robert Graham

Valhi



Amy Samford

WCS



WCS Is Not in Imminent Distress



Amy
Samford

WCS

Q. . . . **If Valhi were to cut its dividend** from eight cents . . . per share to six cents per share . . . then **Valhi would be roughly cash flow neutral; is that correct?**

A. Depending on the year and the holding company expenses, that could work.

* * *

Q. . . . Ultimately, this letter was successful and **PWC did not issue a going concern** opinion; is that correct?

A. . . . [T]his letter in combination with their analysis went to their national office, and the PWC national office gave approval for them not to issue a going concern opinion.

Source: Trial Tr. (Samford) 1368-12, 1382:22-1383:4, 5/01/2017; see also DTX358



“Due to, among other things, the size of our WCS business relative to our other businesses in terms of both net sales and asset size, the disposal of WCS would not constitute a strategic shift that would have a major effect on our consolidated operations and financial results under the guidance in ACS 205-20.”

Source: DTX394 at ESD0J00144074

“The **failing company** doctrine plainly cannot be applied in a merger or in any other case unless it is **established** that the company that acquires the failing company or brings it under dominion is the **only available purchaser.**”

Citizen Pub. Co. v. United States, 394 U.S. 131, 138 (1969)

Liquidation Value

Horizontal Merger Guidelines



U.S. Department of Justice
and the
Federal Trade Commission

Issued: August 19, 2010

“Any offer to purchase the assets of the failing firm for a **price above the liquidation value** of those assets **will be regarded as a reasonable alternative offer.**”

WCS Did Not Make Good Faith Attempts to Elicit Reasonable Alternative Offers



Dr. Gregory
Eastman

U.S. Expert

- Q. So let's move on to your third opinion [which] was to evaluate **whether Valhi's efforts to sell WCS constitute a good-faith effort to elicit reasonable offers** or WCS and above liquidation value under Horizontal Merger Guidelines. . . . [C]ould you remind us again of your opinion here?
- A. Yes. My opinion is that Valhi's 2014 effort and their 2015 effort **were not focused on eliciting that alternative offer above WCS's liquidation value, and instead were focused on maximizing the value maximizing the value of Valhi to WCS.**

EnergySolutions' Offer Was Too Low in 2014



Rod
Baltzer

WCS

Q. And as part of the Wunderlich process, EnergySolutions provided Valhi with a term sheet for the purchase of WCS; is that right?

A. They did.

Q. And that material sheet offered about **\$225 million total enterprise value**?

A. I don't recall.

* * *

Q. It was unacceptable to Valhi?

A. It was.

Q. **It was too low?**

A. **It was.**

Valhi Held Out For More Money



VALHI, INC.

SPECIAL MEETING OF THE BOARD OF DIRECTORS

OCTOBER 2, 2015

MINUTES

Upon a notice given, a special meeting (the "Meeting") of the "Board" of Valhi, Inc., a Delaware corporation ("Valhi" or the "Company") was held on Tuesday, October 2, 2015 at approximately 3:00 p.m. (the special meeting was to receive an update on Waste Control Specialists limited liability company that is a subsidiary of Valhi ("WCS").

The following directors were present at all or a portion of the

Thomas E. Barry
Loretta J. Feehan
W. Hayden McIlroy
Bobby D. O'Brien
Steven L. Watson

Also present at all or a portion of the Meeting, by the invitation of the Board, were the following individuals:

Robert D. Graham	Executive Vice President
A. Andrew R. Louis	Vice President, Secretary and Associate General Counsel
Kelly D. Lutimer	Executive Vice President and Global Tax Director
Andrew B. Nace	Vice President and General Counsel
Courtney J. Riley	Executive Vice President of Legal and Environmental Affairs
Amy A. Sanford	Executive Vice President and Chief Financial Officer
John A. St. Wrb	Vice President and Treasurer
Gregory M. Swallow	Executive Vice President and Controller

All the individuals present at the Meeting participated by means of a telephone conference call.

Steven L. Watson, chairman of the board, president and chief executive officer of Valhi, served as chairman of the Meeting. A. Andrew R. Louis, secretary of Valhi, recorded the minutes and served as secretary of the Meeting.

\\fs01\valhi\legal\corporate\minutes\2015\october\10-02-2015.docx

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PLAINTIFF'S
EXHIBIT
U.S. v. EnergySolutions et al.
 Civ. No. 1:15-cv-01056
PTX571

WCS-2R-0000039431

“The negotiations with ECP resulted in a **significant increase in the proposed purchase price of WCS totaling \$300 million**, represented by \$270 million in cash payable at closing, \$30 million of Series A preferred stock of the purchaser, plus the assumption of approximately \$80 million of WCS debt. ”

Valhi Held Out for More Money



“they need to believe they are getting much higher value to consider the deal”

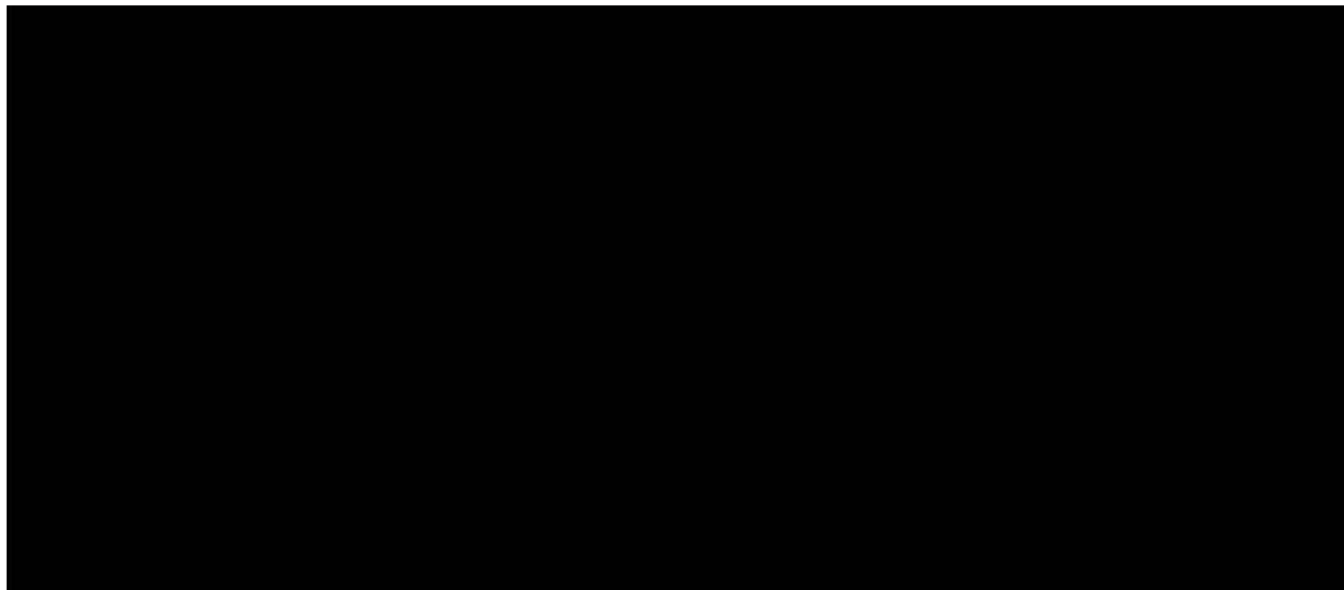
“risk that they view the value as way too low”

Source: PTX438 at ESI-0005239



Tyler Reeder

Energy Capital Partners



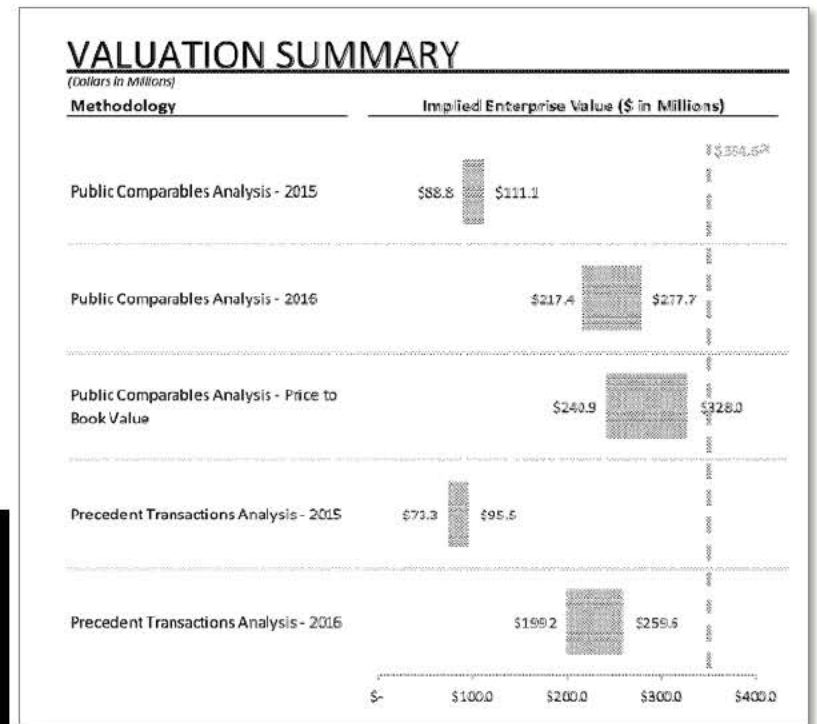
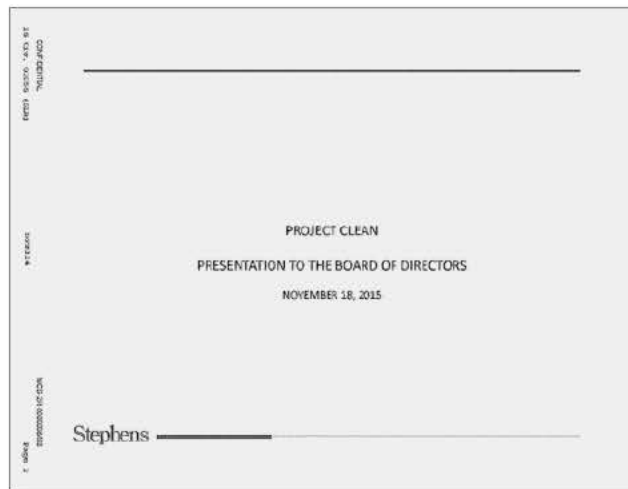
Source: Trial Tr. (Reeder) 951:21-952:12, 4/28/2017

EnergySolutions Paid a Premium for WCS



**Robert
Graham**

Valhi



“Wunderlich Process” Not a “Failing Firm” Shop

REDACTED

MEMORANDUM PRIVILEGED & CONFIDENTIAL

TO: Lisa Simmons, Serena Connelly and Annette Simmons
FROM: Dallas Corporate Management Team –
Steve Watson, Bob O'Brien, Bill Lindquist, Rob Graham, Greg Swahwell,
Kelly Luttmer, Andy Nace
cc: Lori Feehan, Andy Fleck, Sandy Myers
DATE: April 11, 2014
RE: Update Report

In addition to promptly advising you of major developments affecting the Conran Group, we

MEMORANDUM PRIVILEGED & CONFIDENTIAL

TO: Lisa Simmons, Serena Connelly and Annette Simmons
FROM: Dallas Corporate Management Team –
Steve Watson, Bob O'Brien, Bill Lindquist, Rob Graham, Greg Swahwell,
Kelly Luttmer, Andy Nace
cc: Lori Feehan, Andy Fleck, Sandy Myers
DATE: September 8, 2014

“[W]e believe it will also be acceptable to continue to manage the **development of the business** as a 100% owned subsidiary of Valhi.” – September 2014

Sale of miscellaneous assets.

PLAINTIFF'S
EXHIBIT
U.S. v. EnergySolutions et al.
 Civ. No. 1:16-cv-01006
PTX595

CONFIDENTIAL

WCS-2R-0000036700

Source: PTX595 at WCS-2R-0000036700

its extensive current portfolio of business investments and past history of partnering with closely-held businesses, Lindsay Goldberg held a significant investment in Energy Solutions during the period that business grew from a single disposal facility site to a broad based publicly held business in the radioactive waste industry. Lindsay Goldberg was instrumental in the transformation of the Energy Solutions business, beyond the financial capital they provided and/or helped procure. Lindsay Goldberg sold its remaining interest in Energy Solutions in 2010. We have been discussing a potential investment in WCS with the same lead partners of the firm who oversaw the prior investment in Energy Solutions. We believe their prior experience in the industry enhances the value of the firm's potential direct investment in WCS. We also believe their desire to work collaboratively with us in identifying appropriate acquisitions and other growth opportunities, as well as being a future source of capital for the

PLAINTIFF'S
EXHIBIT
U.S. v. EnergySolutions et al.
 Civ. No. 1:16-cv-01006
PTX293

CONFIDENTIAL

WCS-2R-0000036769

Source: PTX293 at WCS-2R-0000036770

Wunderlich Terminated in August 2014



Rod Baltzer

WCS

Q. Okay. Ultimately though, Wunderlich did not do a very good job for WCS, did it?

A. They did **exactly what we told them** to do.

Source: Trial Tr. (Baltzer) 1172:10-12, 4/28/2017



Page 10, 11

Special Agent
John A. Mendenhall
Wunderlich Services, Inc.
1175 Avenue of the Americas
New York, NY 10020

Dear Mr. Mendenhall:

The undersigned, William E. Wunderlich, is the President of Wunderlich Services, Inc. ("Wunderlich"). The undersigned has been advised by Mr. Mendenhall that you are a Special Agent of the Federal Bureau of Investigation ("FBI") and are currently investigating the activities of WCS. The undersigned is providing this information to you for your information.

WCS is a company that provides engineering and construction services to the U.S. Government. WCS is a company that provides engineering and construction services to the U.S. Government. WCS is a company that provides engineering and construction services to the U.S. Government.

William E. Wunderlich
President
Wunderlich Services, Inc.

PTX166

“In the view of WCS, Wunderlich has acted with **misconduct** and **reckless disregard** of their obligations and duties to WCS.”

Source: PTX166 at WCS-2R-0000441075

Valhi Took the “For Sale” Sign Down

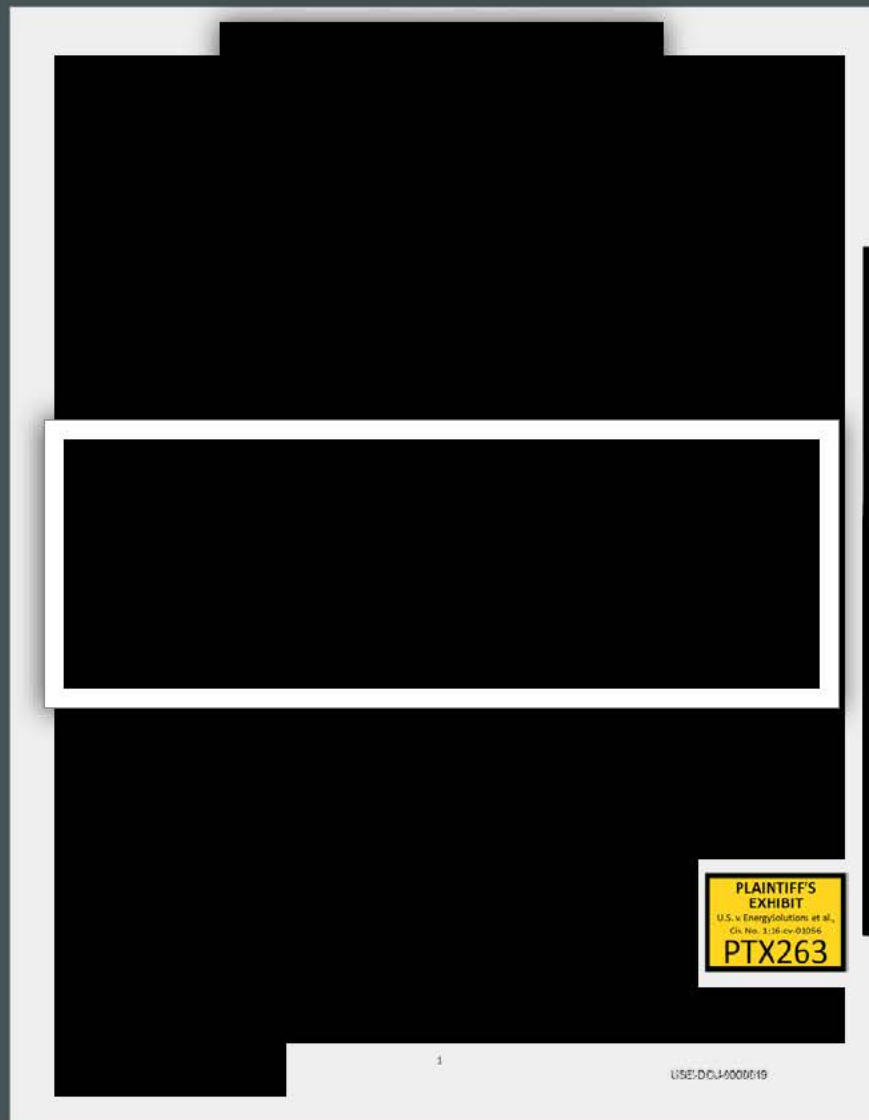


**Robert
Graham**

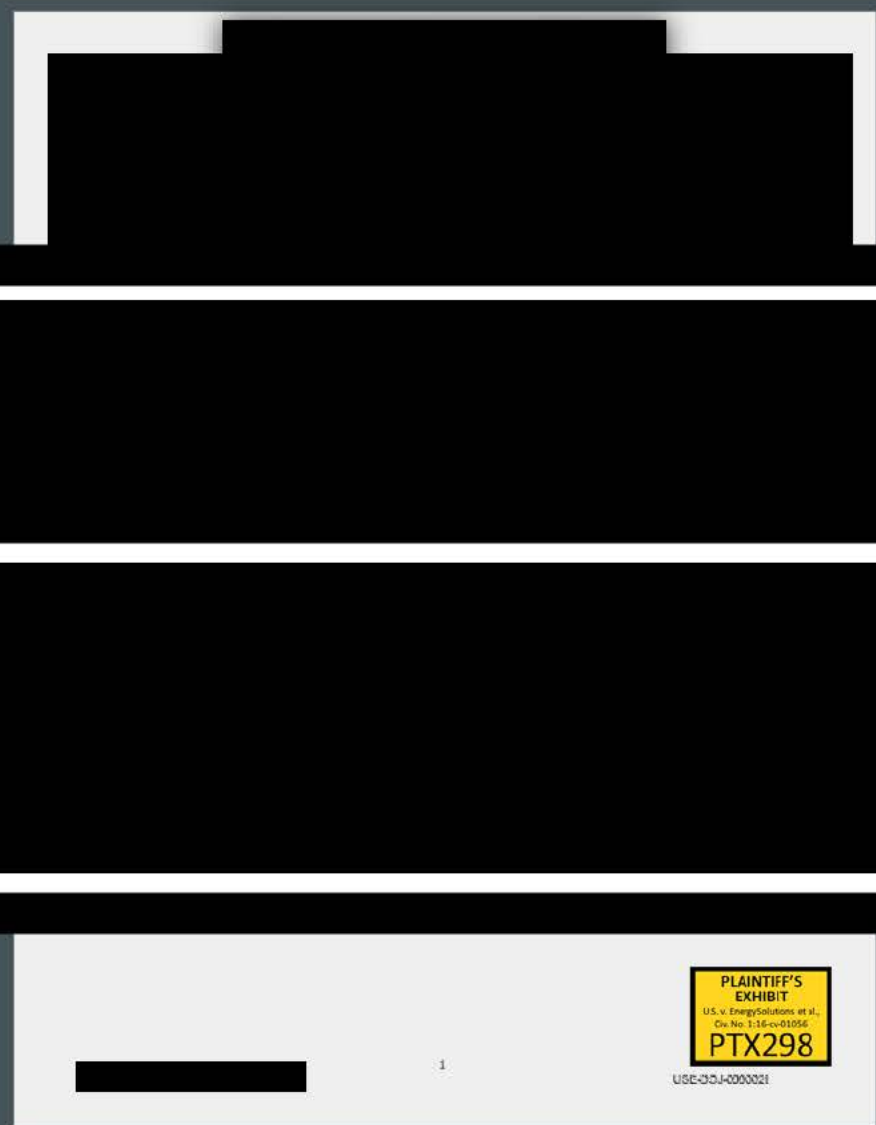
Valhi



Despite U.S. Ecology's Persistent Interest, WCS Favored ES



Source: PTX263 at USE-DOJ-0000019



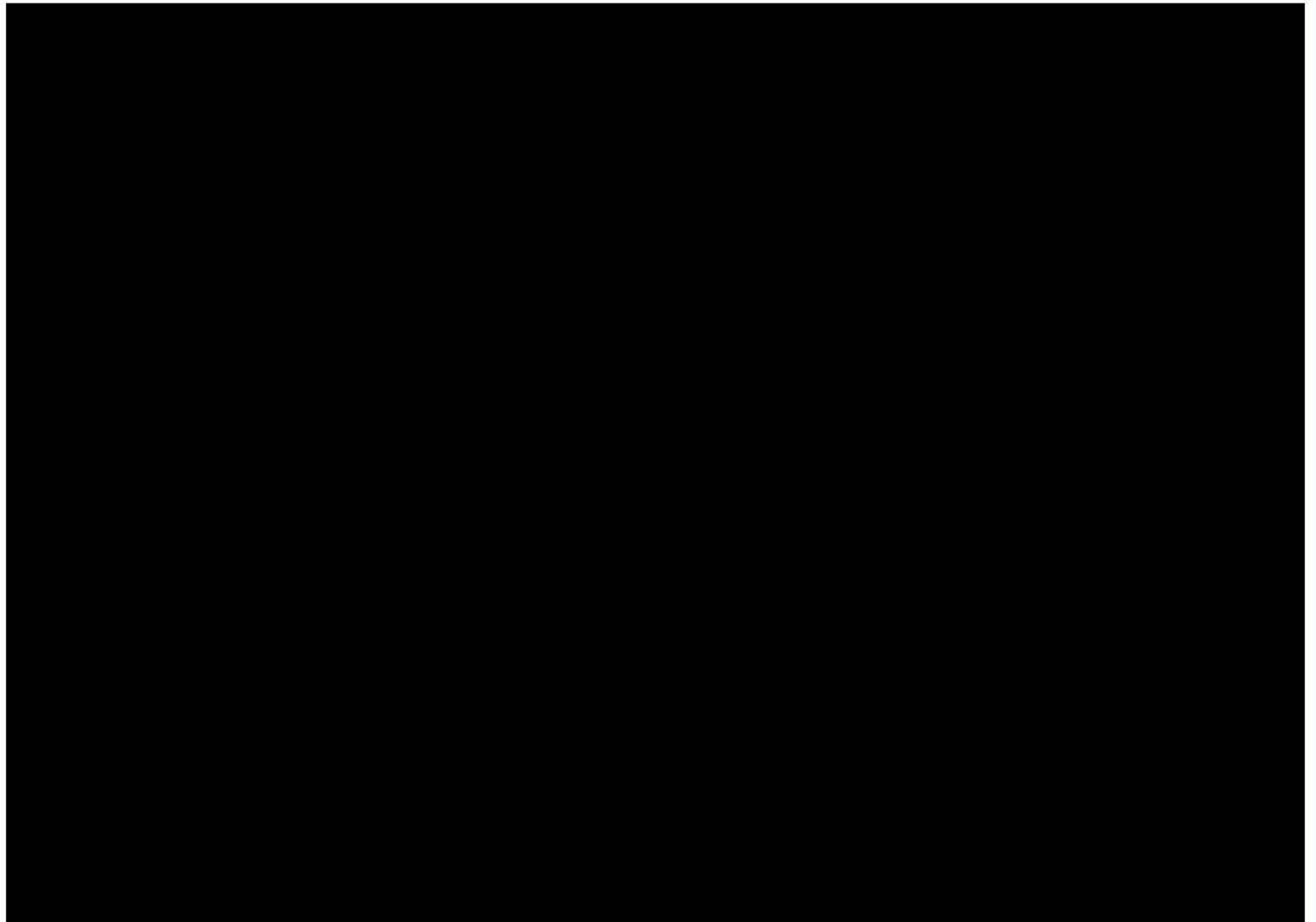
Source: PTX298 at USE-DOJ-0000021

Valhi Has Never Done Liquidation Value Shop



**Robert
Graham**

Valhi



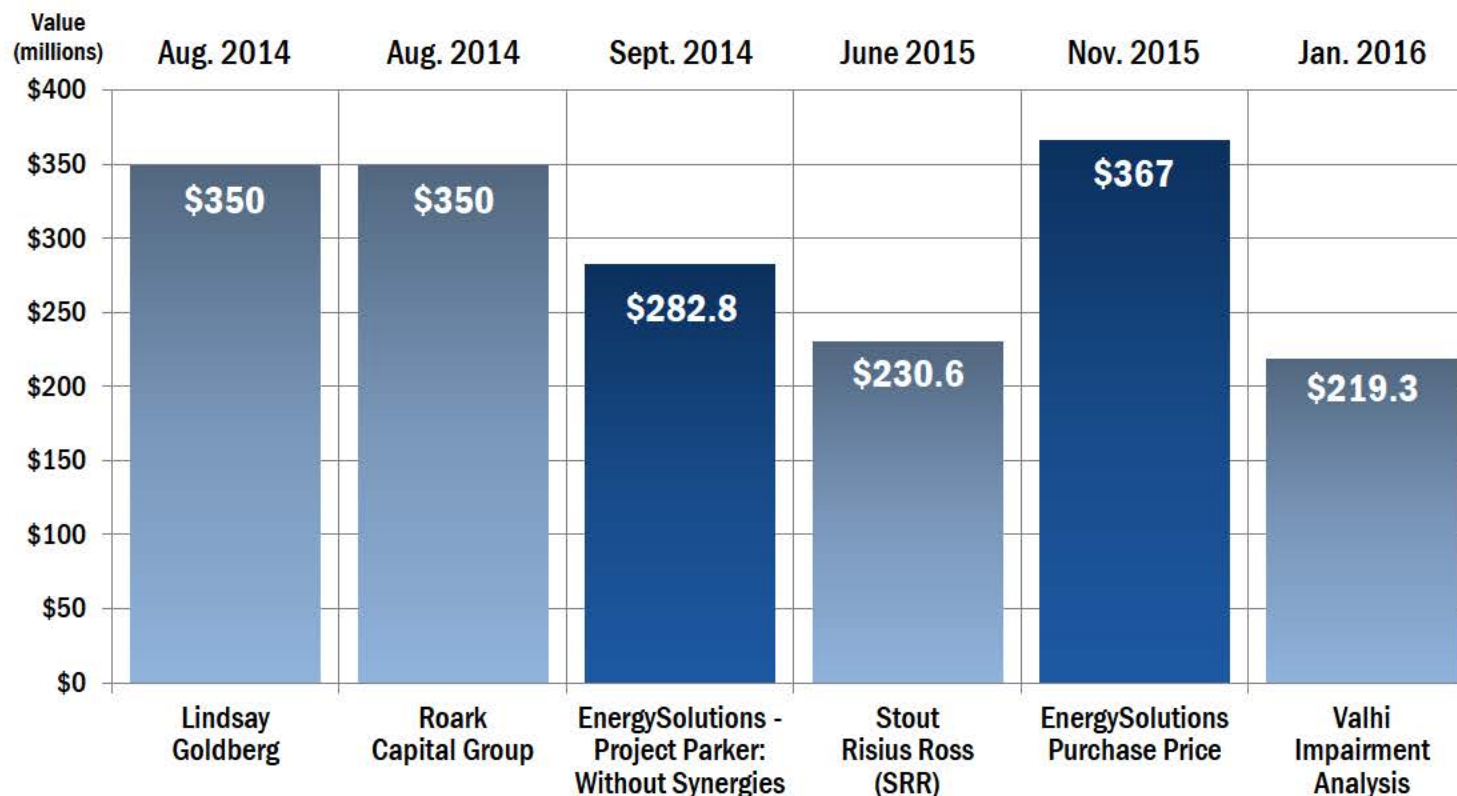
Closing WCS Economically Irrational



Dr. Gregory Eastman
U.S. Expert

- Q. So how do you determine that WCS has value?
- A. Because WCS is a division within a larger corporate entity, you can't just look at the stock price and try to figure out what their value is and you have to try to rely on an alternative method to do that. In this case, there were a number of different valuations that were done over time that helped lay out what people thought WCS's value was. And I have a demonstrative here that lays out some of those, those values.

Source: Trial Tr. (Eastman) 1864:23-1865:6, 5/3/17



Defendants Failed to Meet Their Burden of Eliciting Alternative Offers



Dr. Gregory Eastman

U.S. Expert

Q. And Mr. Eckles asked you if you had gone out and talked to Roark Capital, and if you've had gone out and talked to Lindsay Goldberg, and if you have gone out to elicit any reasonable alternative offers for WCS. As the government's expert in this case, is it your **obligation to go out and elicit reasonable alternative offers for WCS above its liquidation value?**

A. Not as I understand it, I don't believe it's mine.

Q. And **whose obligation is that** under the Horizontal Merger Guidelines?

A. I would – my understanding is **that is the defendants'**, but I'm not going to give a legal opinion on that, so, but that's my understanding.

Q. And, again, **did you see any evidence** in the record that Valhi at any time had done that, gone out to seek reasonable offers?

A. I have **not seen any**.

Alternatives to Merger Exist



Amy Samford
WCS

Q. Do you see the final . . . sentence on this page that reads: “**If such pending sale transaction were not to be successfully closed**, we would in the future continue to consider and **evaluate various other alternatives** with respect to our waste management segment.”

A. Yes.

* * *

Q. Okay. And this memo was **written less than two months ago**; is that right?

A. Yes.

Source: Trial Tr. (Samford) 1388:13-20, 1388:23-25, 5/01/2017; DTX358 at WCS-0000417511



Rod Baltzer
WCS

Q. And you received a call from a Mr. Sean McCabe in January 2016 on behalf of a **potential buyer**; is that correct?

A. I believe I did.

Q. And he's the former president of WCS?

A. He is.

Q. And you took **no steps** to determine who he was calling on behalf of, did you?

A. I did not.

Q. And three months later, Mr. McCabe returned and made another inquiry on behalf of **another potential investor**?

A. I'm not sure if it was a different investor or the same investor.

Q. Again, you took **no steps** to pursue that; is that correct?

A. I did not.

Source: Trial Tr. (Baltzer) 1174:17-1175:7, 4/28/2017

Alternatives to Merger Exist



Scott State

NorthStar

- Q. So, Mr. State, you've got teaming agreements with WCS. Is it true that you recently have been in talks with WCS to make an offer to acquire the company?
- A. We've not made an offer to acquire the company. We've – we've let the company know that if the process that they're in is not successful, we think there's potentially an opportunity out there to find an acquirer; that **we have an interest in the business, AREVA has an interest in the business, Burns and McDonnell has an interest in the business**, but there's never been an offer to buy the company.
- Q. Have you been involved in talks with WCS on this subject, personally?
- A. I personally made one statement, that **we believe there would be alternatives** should this not happen.

Courts disregard or discount “a firm’s behavior undertaken with the aim of persuading a court or the government regarding the legality of a merger.”

United States v. Aetna Inc., --- F. Supp. 3d ---, 2017 WL 325189, at *59 (D.D.C. Jan. 23, 2017)

“[T]he [FTC] was not required to take account of a post-acquisition transaction that may have been made to improve [the defendant’s] litigating position. . . .
Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to **little or no weight.**”

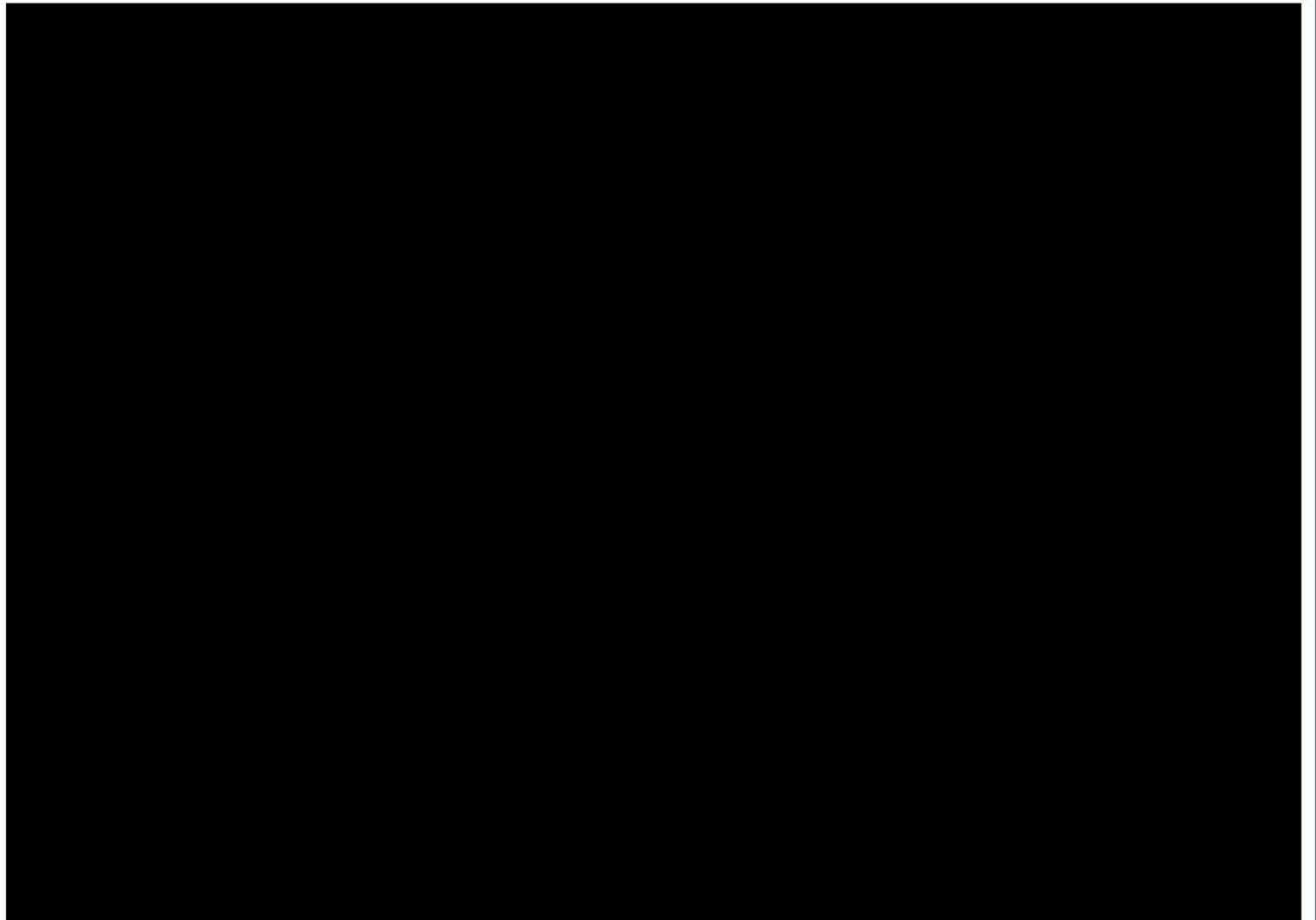
Hosp. Corp. of Am. v. Fed. Trade Comm’n, 807 F.2d 1381, 1384 (7th Cir. 1986)

BRG Analysis Was Done for Litigation



**Robert
Graham**

Valhi



Failing Firm Representations to This Court Inconsistent with Valhi's Certifications to SEC



Amy
Samford

WCS

Q. Do you see the sentence here that says, “We believe **our broad range of permits** for the treatment, storage and disposal of exempt waste, LLRW and mixed LLRW streams **may position us better than our competitors and are a key element of our long term strategy** to provide one-stop shopping for exempt waste, LLRW and mixed LLRW.”

A. Yes.

Q. **And Valhi filed this statement with the SEC describing the long-term strategy for WCS just six weeks ago**; is that right?

* * *

THE COURT: And was this filed six weeks ago?

THE WITNESS: It was filed six weeks ago.

Source: Trial Tr. (Samford) 1392:3-1393:3, 5/01/2017; DTX395



“This price competition resulted in minimal use of our RCRA landfill in the past. Beginning in 2014, we gained the ability to accept a broader range of waste for disposal in the RCRA landfill. This has increased the use of our RCRA landfill because it has **allowed us to be more competitive for ‘low activity waste,’** which is hazardous waste that possesses very low levels of radioactivity and has been exempted by law from management and disposal requirement applicable to LLRW. We believe our broad range of permits for the treatment, storage and disposal of exempt waste, LLRW and mixed LLRW streams may position us better than our competitors and are a key element of our **long-term strategy** to provide ‘one-stop-shopping’ for exempt waste, LLRW and mixed LLRW.”

Source: DTX395 at ESD0J00144346

Failing Firm Representations to This Court Inconsistent with Valhi's Certifications to TCEQ



Amy Samford

WCS

- Q. And the Valhi Holding Company certifies in these documents that it meets all of the requirements of TCEQ's financial test for each of [WCS's disposal] licenses; is that right?
- A. Yes.
- Q. And as part of meeting TCEQ's financial test, the Valhi Holding Company certifies that it has not received a going concern qualification from an independent auditor; is that right?
- A. That's correct.
- Q. And . . . **no going concern qualification means that [Valhi's] auditors believe that it will be in business 12 months from now; is that right?**
- A. **Twelve months from the date of the report.** I'm not sure what the date of the report is. At the end much March-ish.

Source: Trial Tr. (Samford) 1396:22-1397:12; 1397:20-1398:4, 5/01/2017

We confirm, to the best of our knowledge and belief, as of March 31, 2017, the date of your report, the following representations made to you during your engagement:

1. We have made available to you all significant information that we believe is relevant to the subject matter or assertion and the agreed-upon procedures, including, if applicable, information about actions taken at meetings of the board of directors and committees of the board of directors.
2. We are responsible for the completeness and accuracy of the information supplied to you.
3. There are no known matters contradicting the subject matter or the assertion.
4. There are no communications from regulatory agencies affecting the subject matter or assertion.

Gregory M. Swalwell
Executive Vice President, Chief Financial Officer
and Chief Accounting Officer
Valhi Holding Company

Failing Firm Representations to This Court Inconsistent with WCS' Representations to its Regulator



Rod Baltzer
WCS

- Q. WCS has filed a number of supplements and updates to this application, including one on March 2016, 2017; correct?
- A. Correct.
- Q. And that March 2016, 2017 revised application contains **the same Section 1.6 financial qualifications and financial assurance**, as the original application; is that correct?
- A. I believe it does.

Source: Trial Tr. (Baltzer) 1231:4-11, 5/01/2017



“1.6 FINANCIAL QUALIFICATIONS AND FINANCIAL ASSURANCE
This section demonstrates that WCS’ financial qualifications are adequate to carry out the activities for which the license is sought WCS has invested over \$300 million in licenses, buildings, equipment and improvements at the current radioactive waste disposal facility in Andrews County, Texas. In addition, its owner has invested additional capital to fund other cash needs. The investments made to date demonstrate the strong commitment that WCS and its owner have to the current and future facilities.


Source: PTX421 at WCS-0000314581

Failing Firm Representations to This Court Inconsistent with WCS' Representations to the Public



Rod
Baltzer
WCS

4/30/2017



AMERICA'S NUCLEAR SOLUTION

Rod Baltzer, President & CEO
Waste Control Specialists

Comments to Nuclear Regulatory Commission Public Meetings in Hobbs, New Mexico Monday, March 13 and Austin, Texas Wednesday March 15, 2017.

I'm Rod Baltzer, President and CEO of WCS, and I'm here to ask for your support of our project. WCS has been a proud part of this community since 1995 when we started construction of our facility on the Texas/New Mexico border near Eunice. WCS began hazardous waste operations in 1997; radioactive storage and treatment in 1999; and radioactive waste disposal in 2012.

People have asked why WCS is trying to take high level waste when we originally told Andrews County we would only take low-level waste. In 2012, after WCS opened our low-level waste facility, the Blue Ribbon Committee appointed by President Obama said that consolidated interim storage was an important part of a waste management solution. People approached WCS to see if we were interested in high level waste storage and we approached the local community before we decided to pursue it.

We have approximately 170 employees at our facility – half of which live in NM and the other half in TX. WCS employees participate in both communities and WCS sponsors scholarships and supports organizations on both sides of the border.

This region has been found environmentally suitable for other nuclear facilities in addition to WCS, including URENCO, which was licensed by the NRC. The

Page 1 of 3

<http://www.gsa.com/npa/content/npa/back/2007/03/Rod-Baltzer-Comments-for-Public-Meeting-Andrews.pdf>

PLAINTIFF'S
EXHIBIT
U.S. v. Transpacific et al.
Case No. 1:15-cv-00188
PTX708

“A healthy company like WCS, that is not oil & gas dependent, is beneficial to diversify the local economies and provide higher paid, professional jobs for our children.”

CISF Suspension = Litigation Tactic



“temporarily suspend all safety and environmental review activities as well as public participation activities associated with WCS’ license application”

Source: DTX450 at WCS-0000429636



Rod Baltzer
WCS

Q. And a month later, on **April 18, 2017**, you notified the NRC that WCS was temporarily suspending its application?

A. Yes. . . .

* * *

Q. And, in fact, that temporary suspension occurred the **same day as the pretrial conference** in this case didn't it?

A. I'm not sure.

Q. April 18th, 2017?

A. I believe that was the date of our withdrawal letter.

Source: Trial Tr. (Baltzer) 1281:17-1232:5, 1233:25-1234:5, 5/01/17

Closure Decision = Sham



Rod Baltzer

WCS

FRIDAY, APRIL 28, 2017

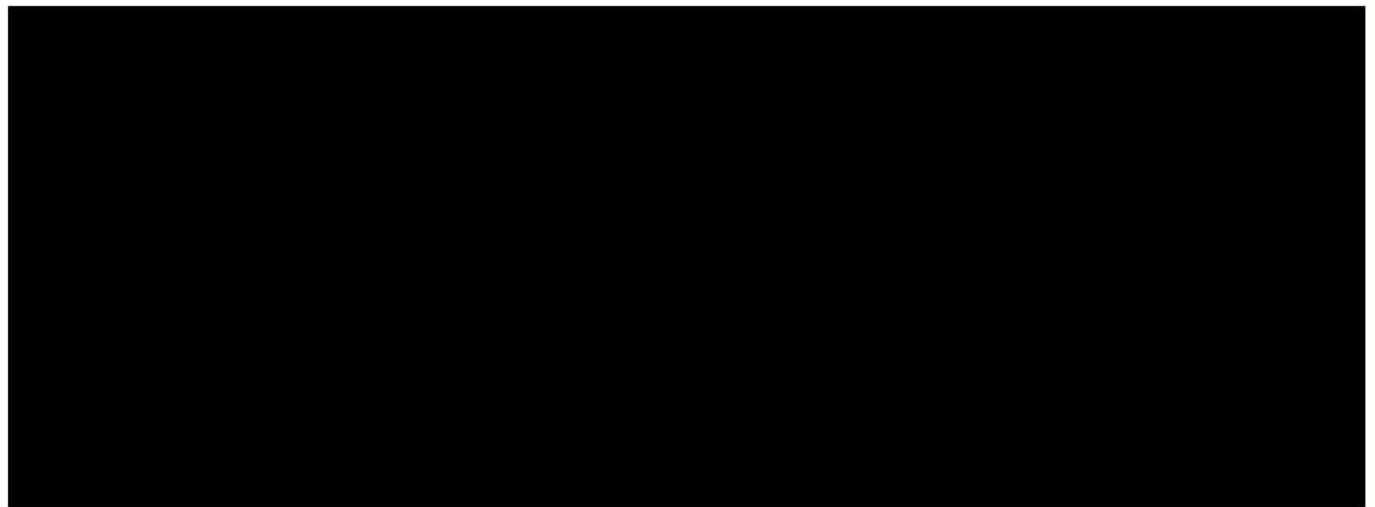
- Q. And as of the time now, **WCS has not made a decision** to cease operations if the merger does not close, has it?
- A. At this point, we're required to operate in the ordinary course under our acquisition agreement.
- Q. So it has **not yet decided to shut down WCS** if the merger does not occur?
- A. **Correct. No decision has been made.**

Source: Trial Tr. (Baltzer) 1209:18-24, 4/28/2017



**Robert
Graham**

Valhi

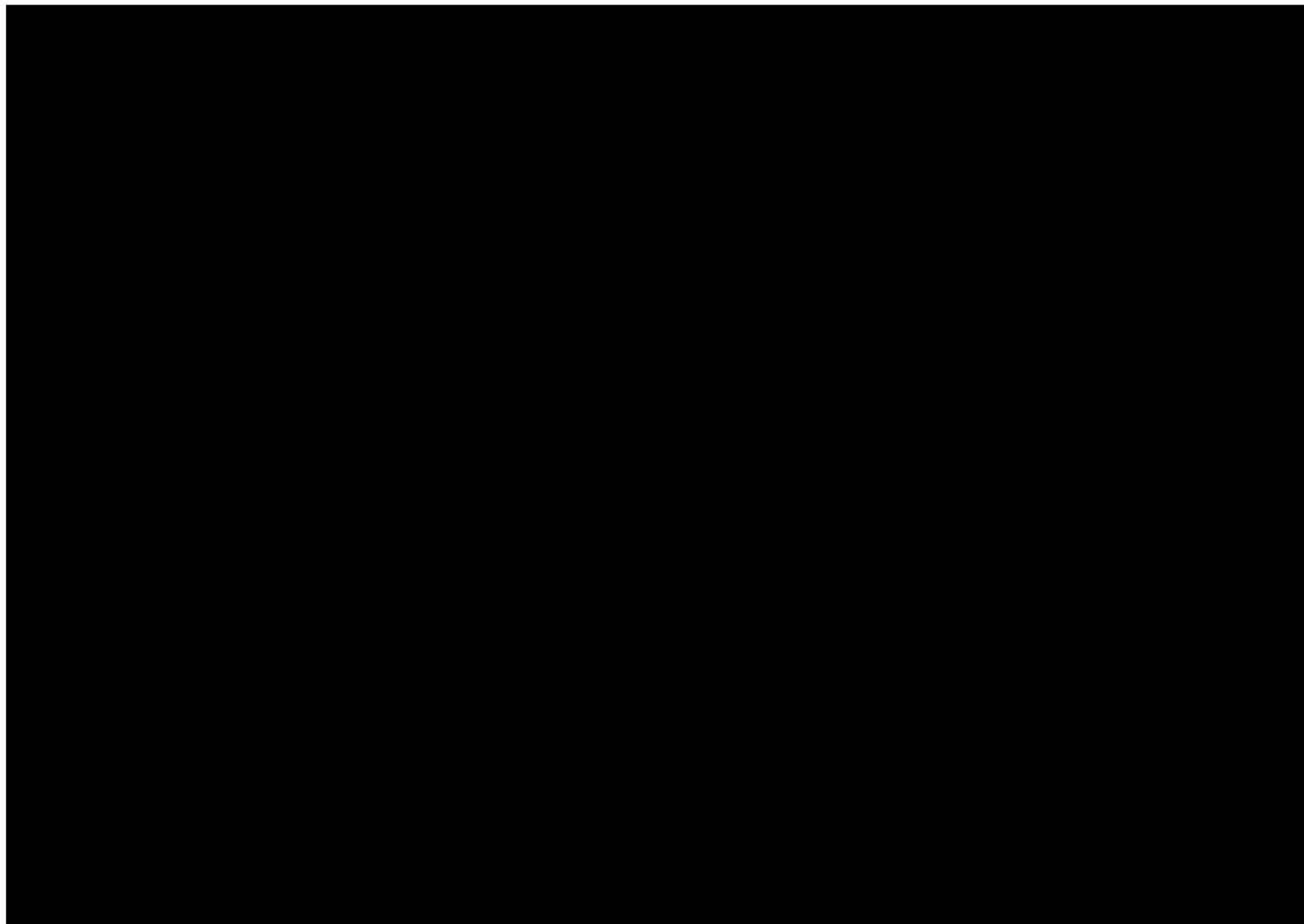


Nothing Changed in 4 Weeks



**Robert
Graham**

Valhi

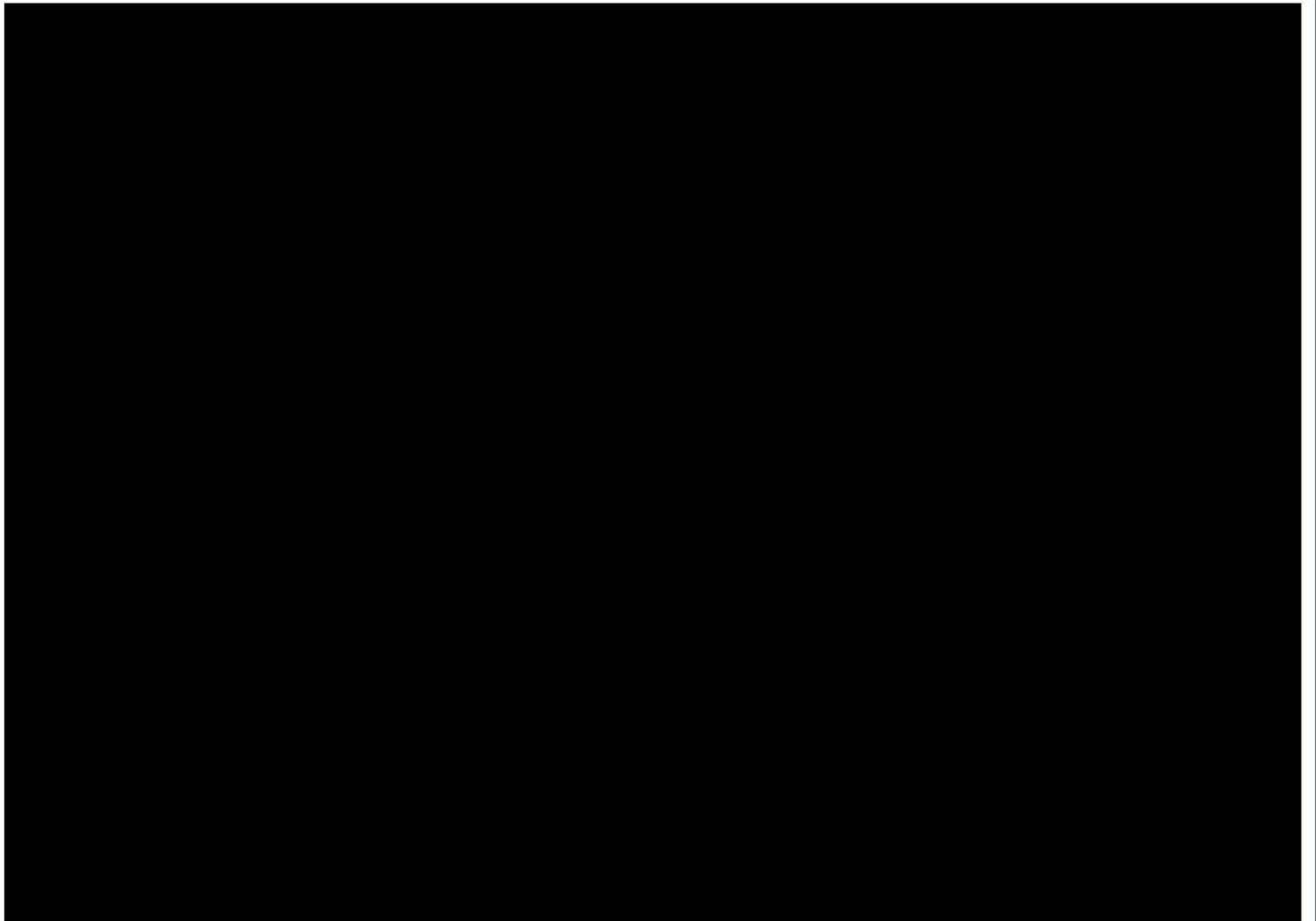


Tuesday, May 2, 2017



**Robert
Graham**

Valhi



Appendix



Rod
Baltzer

WCS

Q. Now, during your direct examination, your counsel was asking you questions about DTX-292. If you would like to refer back to that, please feel free to do so. But **Mr. Charles Maguire does not have the authority to impose a price cap, does he?**

A. **He believes he does.**

Source: Trial Tr. (Baltzer) 1167:10-15, 4/28/2017



Charles
Maguire

TCEQ

Q. Do you recall generally what you said to Mr. Baltzer?

A. Well, I – I did try to explain to him that **there would be a significant process involved if we were to undertake that kind of rulemaking and that I was not at all sure whether or not we would be interested** in undertaking that kind of rulemaking should it be proposed because of the impact that would have on revenues received.

* * *

Q. You said that you were not at all sure that the State of Texas would be interested in pursuing this rulemaking because of its impact on revenues. Could you explain in greater detail what you mean by that?

A. Well, first of all, I want to make it clear whether or not we would be interested in pursuing a **rulemaking is a Commission decision, not – not a lowly division director**. . .

Source: Trial Tr. (Maguire) 1817:25-1818:7, 1818:8-25, 5/03/2017

Benefits from ES-WCS Competition

October 2, 2014

“[J]ust notified by [REDACTED] that ES has a first right of refusal price to beat from WCS.”

“To be clear – [REDACTED] received a T&D price from WCS the [REDACTED] pieces. Now, they want [REDACTED] reduced disposal price and a response by 10/3.” – Tony Didgeon (ES)

REDACTED

From: [REDACTED]
Sent: Thursday, October 2, 2014 11:40 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: [REDACTED]

Who actually sent the paper work to WCS?

Do they do this often? No

Is this a vote of no confidence on our performance on the project to date?

Maybe. See it more of

just a negotiating tactic to reduce pricing same as their own emotional outbreaks.

If they can do this and get a [REDACTED] discount, it looks like it became standard practice.

This is the 2nd time.

Best regards, Tony

Sent from my iPhone

On Oct 2, 2014, at 11:40 AM, Jason Williams <[REDACTED]> wrote:

CONFIDENTIAL

PTX489

Source: PTX489 at ESI-0204537; see also Trial Tr. (Didgeon) 221:6-222:19, 4/24/2017

January 7, 2015

“We can raise prices by [REDACTED] in Jan 2015; but given [REDACTED] desire to go shop it would not play well”

“Mid 2014 [REDACTED] said if ES were to go back to its [REDACTED] that they would not implement the go shop period and would extend contract for an additional [REDACTED]”

REDACTED

Current Window of Opportunity

ENERGY SOLUTIONS

- [REDACTED] per year price
- We can raise prices by [REDACTED] in Jan 2015; but given [REDACTED] desire to go shop it would not play well
- CPI is in range of 1.7% for 2015
- Mid 2014 [REDACTED] said if ES were to go back to its [REDACTED] that they would not implement the go shop period and would extend contract for an additional [REDACTED]
- This unofficial verbal offer has [REDACTED] expects huge savings from the [REDACTED]
- If we were to go back to [REDACTED] compounded discount of [REDACTED]

PROPRIETARY AND CONFIDENTIAL

ESI-0039809
CONFIDENTIAL - Subject to Protective Order

Source: PTX054 at ESI-0039809; see also Trial Tr. (Robuck) 857:4-858:17, 4/27/2017; Trial Tr. (Didgeon) 214:16-215:9, 222:1-19, 4/24/2017

REDACTED

Exelon Benefits from ES-WCS Competition



Carol Peterson
Exelon

Q. And Exelon got lower prices for Class A waste disposal as a result of its 2015 renegotiation; is that correct?

A. Yes, I'm aware of that.

Source: Trial Tr. (Peterson) 1439:14-16, 5/01/2017



“[T]he bottom line is that the average annual savings to [REDACTED] is [REDACTED] year”

– *Tony Didgeon (ES)*

Source: PTX230 at ESI-0029906; Trial Tr. (Didgeon) 215:10-217:13, 4/24/2017

EnergySolutions Sought to Lock Up Processors (LAO)

REDACTED

From: djlockw [REDACTED]
Sent: Thursday, March 12, 2015 2:58 AM
To: [REDACTED]
Subject: Re: [REDACTED]

I will call tomorrow.

Sent from my iPhone

On Mar 11, 2015, at 9

This is the last
I authorized B

Remind me to

BTW...we only
We hope to a

Ken

From: Bret R
Sent: Wedne
To: Ken Robu
Subject: RE

Increase. In
revenue/wa
[REDACTED] This p

From: Ken R
Sent: Wedne
To: Bret Rog
Subject: Re

Does this roll

Sent from my iPad

On Mar 11, 2015, at 3:14 PM, Bret Rogers <brag [REDACTED]> wrote:

Ken,

I met with [REDACTED] a couple weeks ago to discuss a disposal agreement for the shredded filters they are generating. [REDACTED] has been shipping us about \$1M/year worth of waste to the CWF via [REDACTED]. WCS has engaged them on a disposal contract. [REDACTED] submitted an import petition to the Texas Compact Commission in January. I convinced [REDACTED] to hold off signing an agreement with WCS until we were able to meet.

PLAINTIFF'S
EXHIBIT
U.S. v. EnergySolutions et al.
Cv. No. 1:16-cv-01056
PTX055

1

CONFIDENTIAL

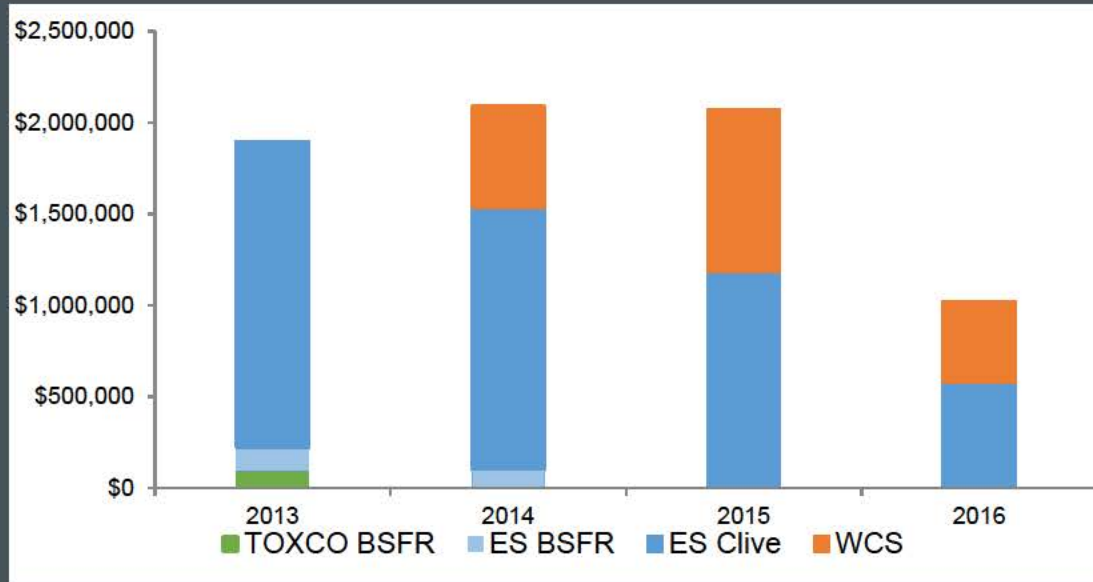
ESI-0039843

March 11, 2015

“This is the last processor we have to tie-up to ensure all processed LLW comes to Clive. I authorized Bret to close the deal!”

- Ken Robuck (ES)

Processors Divert Waste from EnergySolutions to WCS (LAO)



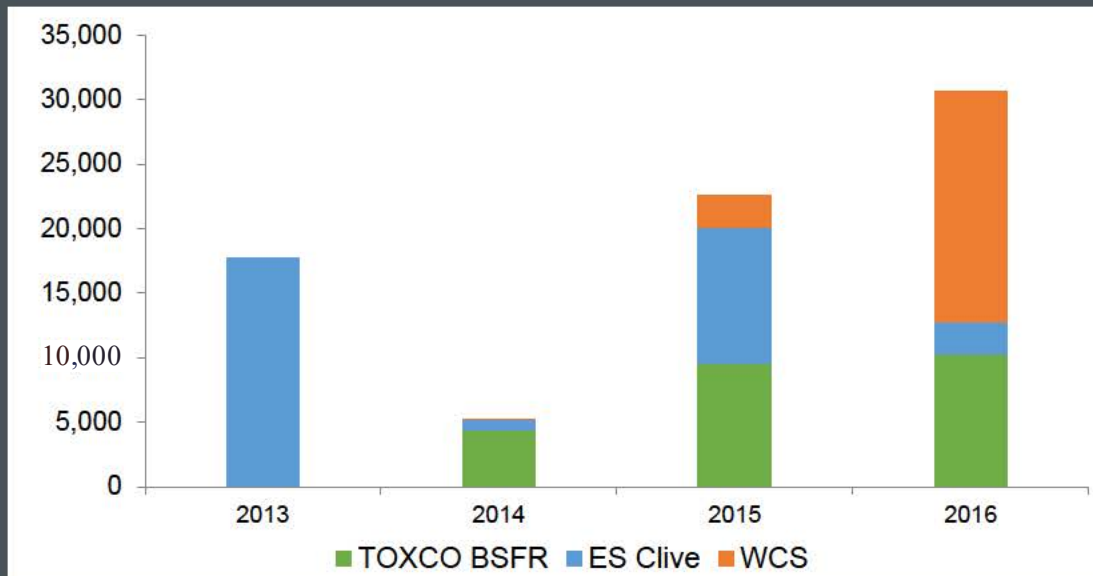
Dr. John Mayo
U.S. Expert

“And all you’re seeing here is, you do see a diversion, a diversion of waste from EnergySolutions over – giving business now, **PermaFix** is now giving business to WCS.

And on the next slide, you’ve got another processor whose name is **Aaron**. This same picture emerges.

What you see is Aaron increasing the amount of waste that it’s shipping to **WCS, again having a competitive impact, presumably.”**

Source: Trial Tr. (Mayo) 628:6-14, 4/26/2017



Processors Do Not Compete for Disposal



John Christian
EnergySolutions

“The processors don’t dispose of anything. Everything that comes on-site has to get processed and has to leave the site and go someplace.”

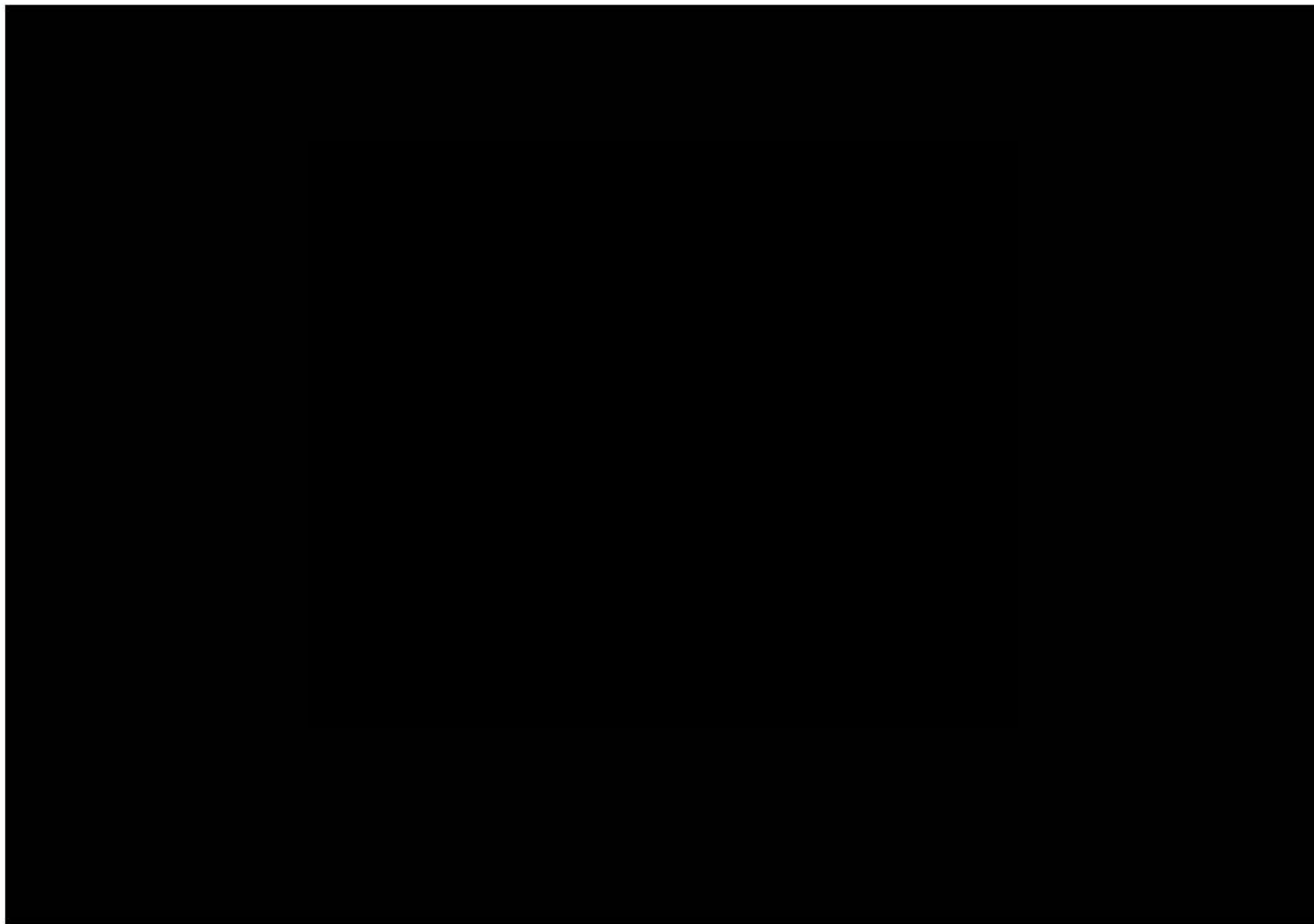
Source: Trial Tr. (Christian) 1017:11-13, 4/28/2017; see also id. at 1016:21-1017:13



Dr. Mark Israel
Defendants’ Expert

“But what’s critical is not to confuse processor competition with disposal competition. Disposal competition’s question is who can dispose of the waste.”

Source: Trial Tr. (Israel) 1616:4-6, 5/2/2017; see also id. at 1615:14-1616:16



WCS Has Sufficient Capital Until 2018



Amy
Samford

WCS

Q. The **credit facility that WCS has comes through Andrews County Holdings**; is that correct?

A. That's correct.

Q. But **ultimately, the money comes from Valhi**, Incorporated; right?

A. Yes.

* * *

Q. Right. And Valhi said that the credit facility was for \$85 million; is that right?

A. The **credit facility is for \$85 million**, that's true.

Q. Okay. And Valhi told PWC that the credit facility was good through March 31st, 2018; is that right?

A. The **credit facility expires on March 31, 2018**.

Q. And Valhi told PWC that it expected WCS to borrow less than the full amount of the credit facility this year; is that correct?

A. **WCS told PWC that they expected to borrow less than the full amount** of the credit facility.

Source: Trial Tr. (Samford) 1375:8-13; 1383:14-24, 5/01/2017



“While the 2017 and first quarter of 2018 plan has WCS borrowing an additional \$28.3 million during that period of time the projected balances at March 31, 2018 of \$70.0 million is still below the maximum availability under the credit facility.”

Source: DTX358 at WCS-0000417507