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Working Party No. 2 on Competition and Regulation

WASTE MANAGEMENT SERVICES

-- United States --

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This note is submitted by United States to the Working Party No. 2 of the Competition Committee FOR DISCUSSION under Item VI at its forthcoming meeting to be held on 28 October 2013.

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WASTE MANAGEMENT SERVICES

– United States –

1. Introduction

1. The United States Department of Justice Antitrust Division (DOJ) has extensive experience analyzing competition issues in the waste industry. Most investigations involve merger reviews, but the agency also has conducted investigations of anticompetitive practices and conduct, as well as criminal investigations involving instances of bid-rigging and market allocation. The DOJ has reviewed a variety of relevant product markets in the waste industry, including municipal solid waste disposal; small container commercial waste collection; municipal waste collection (i.e., residential/commercial waste collection for a municipality, county, or solid waste district); medical waste collection and disposal; construction and demolition waste disposal; hazardous waste disposal; and recyclables collection.

2. The analytical framework for waste industry merger investigations in the last ten years has remained largely unchanged and follows the framework and methodologies described in the 2010 Horizontal Merger Guidelines.¹ The focus of the DOJ's investigations has been to assess the competitive effect of a particular transaction or business practice. Defining the relevant market assists the agency in this assessment. The DOJ evaluates both horizontal effects (including coordinated and unilateral theories) and vertical effects, as appropriate.

2. Analysis of Important Waste Industry Markets

2.1. *Municipal Solid Waste Disposal*

3. Municipal solid waste (MSW) is putrescible solid waste commonly generated by households and businesses that does not require special handling. In the United States, the processing, storage, transportation and lawful disposal of MSW is regulated by overlapping federal, state and local environmental, zoning, and public health laws. Disposal of MSW outside of a lawfully permitted facility (i.e., illegal dumping) is subject to strict penalties. Thus, waste collection firms (i.e., haulers) typically have three options for the lawful disposal of MSW: direct haul to a landfill, transfer station² or incinerator.³

4. The DOJ typically has defined a single market for MSW disposal, which includes all of the disposal options within the direct-haul distance of the haulers' routes. In evaluating a merger, the agency uses a fact-specific process to assess whether a hypothetical monopolist of a given set of permitted disposal sites profitably could impose a small but significant, nontransitory increase in price on customers (local

¹ Available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>; <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

² At a transfer station, MSW is stored temporarily and consolidated for bulk shipment in tractor trailers (or railcars) to a more distant landfill for ultimate disposal.

³ Approximately 90 incinerators currently operate in the United States. Development of new incinerators has been slow due to environmental concerns and unfavorable economics.

haulers of MSW) because, other than a permitted disposal facility, there is no lawful alternative for disposal of MSW.

5. In the DOJ's experience, the geographic market for direct-haul disposal is local or regional. Consistent with cost-minimization, haulers prefer to minimize the time spent away from the collection route and driving to the disposal site. Depending on the particular facts, the direct-haul market consists of transfer stations, incinerators, and/or landfills. When the direct-haul market consists only of landfills, the direct-haul market and the ultimate disposal market coincide. In areas with transfer stations and incinerators, the ultimate disposal market may differ from the direct-haul market. Landfills that are too far away from haulers' routes to compete in the direct-haul market nonetheless may compete in the ultimate disposal market. Landfills in or near cities may participate in the direct-haul disposal market against transfer stations as well as in the ultimate disposal market. The agency has observed that disposal markets may extend 25 to 35 miles from the collection routes. Additionally, DOJ has recognized that landfills located hundreds of miles away from local collection routes may compete in certain disposal markets through transfer stations. Price discrimination based on customer location is prevalent in the waste disposal business. Under-utilized landfills that are distant from population centers may offer significantly lower prices to distant haulers or transfer stations, in order to attract "long-haul" waste. A relevant question for antitrust analysis is whether such distant landfills can accept waste volumes sufficient to constrain the prices of disposal sites closer to local collection routes. Given the character of competition in these markets, geographic markets are defined based on the location of demand rather than the location of disposal facilities.

6. Typically, the DOJ evaluates whether a merger of two MSW disposal firms will likely have unilateral anticompetitive effects. The agency assesses whether, post-merger, the combined firm will possess market power derived from its locational advantage over a set of disposal customers (waste haulers), that will likely permit the combined firm to unilaterally impose an anticompetitive price increase. The agency must assess the competitive significance of alternative disposal sites, including any capacity constraints faced by such disposal sites. The agency also may consider the possibility of coordinated effects. The primary competitive concerns in MSW hauling and disposal markets are customer or territorial allocation and large (e.g., municipal) contract bid rigging. MSW hauling and disposal markets often lack transparent pricing and other indicia associated with agreements on price.

7. Experience shows that entry into MSW disposal markets can be costly, time-consuming and, in some heavily populated areas, virtually impossible, because of permitting restrictions for waste disposal. Stringent environmental regulation of landfills in many areas has restricted the permitting and construction of additional landfills. Market entry through a transfer station in many areas is much easier because the waste is stored only temporarily, although even transfer stations can face significant obstacles from local zoning and environmental regulators and local residents concerned about noise, traffic, and odors. In the United States, there are disparities among state and local environmental and zoning regulation. Thus, each investigation requires a careful, fact-specific inquiry into the entry barriers and the capacity of potential entrants in a particular region or local market.

8. In 2008, the DOJ reviewed the merger of Allied Waste, Inc. and Republic Services, Inc., which were the second and third-largest waste companies in the United States at the time. Each firm operated in hundreds of geographic areas and had thousands of collection routes and hundreds of transfer stations and landfills. The agency conducted an extensive, fact-intensive inquiry and reviewed dozens of candidate disposal markets in which the merging parties owned overlapping disposal assets. The geographic size of each market varied according to the circumstances of each geographic area. Ultimately, the DOJ concluded that, absent intervention, the merger would likely reduce competition substantially in 13

separate MSW disposal markets across the country, including major metropolitan areas such as Dallas-Fort Worth, Houston, Los Angeles, and the San Francisco Bay area.⁴

2.2. *Small Container Commercial Waste Collection*

9. The DOJ traditionally has focused on small container commercial municipal solid waste (SCCW) collection as an area of concern in mergers and conduct investigations. The containers are “dumpsters” with two to eight cubic yards of capacity that are serviced by a front-end load truck and typically are used by restaurants and small businesses. Operation of a front-end load truck requires only one person, the driver, because the collection process is automated. Other types of trucks, such as rear-end load trucks, entail greater costs because more labor is required. With *residential* collection, containers are relatively small. With *industrial* collection, containers are much larger, and service is less frequent. Given their costs for the volume generated by commercial customers, residential and industrial collection would not be viable alternatives if a hypothetical SCCW collection monopolist were to impose a small but significant nontransitory increase in price. Therefore, in merger investigations, SCCW is a distinct product market for antitrust analysis.

10. The DOJ has found that SCCW collection geographic markets are local. A hauler needs route density for economic viability. The operating costs of front-end load trucks, along with transportation costs, especially with high gas prices, make geographically expansive routes costly. Large collection companies frequently have the lowest costs because they have higher route density and lower disposal prices. The denser the route, the greater the efficiencies. For a hauler already servicing a particular street, the cost of servicing an additional customer on that street is merely the cost of an additional lift.

11. When reviewing mergers or non-merger conduct, the DOJ evaluates both horizontal and vertical effects of a given merger or practice, as appropriate under the specific facts and circumstances of the case. A firm that owns all or most of the local disposal sites potentially may limit its rivals’ abilities to compete for collection and limit potential collection entry, because disposal costs are approximately 30 percent of SCCW collection costs. Based on the DOJ’s experience in the industry, the DOJ often will analyze the ability and incentive of firms that are vertically integrated in collection and disposal to raise rivals’ costs, or to discipline or squeeze unintegrated collection firms.

12. A firm with a substantial share of the local collection routes may be able to increase prices unilaterally to its collection customers. The removal of a similarly situated low-cost competitor likely will soften price competition. The remaining higher-cost competitors are less likely to constrain prices. In areas where two merging firms are close substitutes, it is more likely that the merged firm will have the post-merger incentive and ability to unilaterally raise collection prices.

13. Without access to disposal at competitive rates, entry into a SCCW collection market is extremely difficult. If vertically integrated companies own landfills and transfer stations, they may have less incentive to make cost-effective disposal available to their hauling competitors. On the other hand, haulers with significant waste volumes under contract often can obtain competitive disposal rates from MSW disposal firms seeking to attract waste to their sites.

14. Even with available disposal sites, entry and expansion into SCCW collection are difficult. The cost of customer acquisition can be high because larger haulers have dense routes that make them more efficient and an incumbent hauler can price discriminate. An incumbent hauler often can retain existing collection accounts by selectively offering discounts to the accounts that the new entrant is soliciting.

⁴ See *United States and Plaintiff States v. Republic Services, Inc. et al.*, No. 1:08-cv-02076 (D.D.C.), Competitive Impact Statement (Dec. 3, 2008) [hereinafter “*Republic/Allied*”].

Large integrated haulers often use contract provisions that can make entry difficult, including long-term contracts, evergreen provisions and liquidated damages provisions for termination outside a particular time period.⁵ For these reasons, the DOJ has found that entry into SCCW collection is rarely *de novo*. Instead, entry usually is accomplished through the acquisition of existing routes and collection customer contracts.⁶

15. In *Republic/Allied*, the DOJ undertook an extensive investigation of dozens of geographic areas where the merging firms' SCCW collection operations overlapped. In each area of overlap, the agency evaluated the market shares of the merging firms, the number and competitive significance of other competitors, and the possibility of entry and/or repositioning by existing firms. The DOJ concluded that the merger would likely reduce substantially competition for SCCW collection in nine different geographic areas.

2.3. Remedies

16. In cases where competitive harm is likely to occur, the DOJ engages in a fact-intensive analysis to tailor an effective remedy for the anticompetitive harm. In most cases involving horizontal mergers, the DOJ prefers structural remedies to standalone conduct remedies.⁷ Structural remedies are presumed to be more effective and are easier to administer than ongoing conduct remedies. However, DOJ's aim is to tailor "remedies that effectively resolve the competitive concerns and protect the competitive process."⁸ Under some circumstances, however, a conduct remedy or a combination of structural and conduct remedies will be appropriate.⁹

17. In merger cases in the waste industry, the DOJ often requires "clean sweep" divestitures of one of the merging firm's assets in a relevant geographic market to preserve competition in disposal and collection. To preserve competition in disposal markets, the DOJ has required divestiture of landfills and/or transfer stations. To preserve competition in local SCCW collection markets, the DOJ has required the divestiture of routes and supporting infrastructure, such as specialized front-end load trucks and associated garages.

18. In *Republic/Allied*, for example, the DOJ obtained relief in 13 MSW disposal markets and nine SCCW collection markets. In most geographic areas, the DOJ obtained a "clean sweep" divestiture of one of the merging firms' assets in the area. In certain other areas, this was not necessary to remedy the competitive harm alleged. The DOJ used a flexible and fact-driven approach to relief. The *Republic/Allied* case demonstrates the fact-intensive inquiry used to identify and redress competitive harm arising from the merger of competing firms. The DOJ continues to employ this approach in its investigation of merger and non-merger conduct affecting competition in the waste industry.

19. Conduct remedies require more administrative time to monitor and enforce but have been used in certain circumstances in lieu of structural remedies, or in some cases, to aid the effectiveness of a

⁵ Evergreen provisions in contracts provide for the automatic renewal of the contract unless prior notice to terminate the contract has been given.

⁶ While modern antitrust review considers valid efficiency effects, they have been raised in only a limited number of recent Division merger investigations in the waste industry.

⁷ Antitrust Division Policy Guide on Merger Remedies (June 2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

⁸ Bill Baer, Assistant Attorney General, U.S. Department of Justice, "Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes," (Sept. 25, 2013), available at <http://www.justice.gov/atr/public/speeches/300930.pdf>, at 2.

⁹ Antitrust Division Policy Guide on Merger Remedies, *supra* note 6, at 4.

divestiture. In such instances, the DOJ has required the collection firms to limit the length of collection contracts and prohibited the use of evergreen and/or liquidated damages provisions. The purpose of the contract remedies is to lower the cost of customer acquisition by a new entrant.