

DEPARTMENT OF JUSTICE

Antitrust Division

United States and New Jersey v. Waste Management, Inc. and Allied Waste Industries, Inc.; Public Comments and Plaintiff's Response

Notice is hereby given pursuant to section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(d), that the Public Comments and Plaintiff's Response thereto have been filed with the United States District Court for the District of Columbia in *United States and New Jersey v. Waste Management, Inc. and Allied Waste Industries, Inc.*, Civil No. 1:03CV01409 (GK).

On June 27, 2003, the United States and the State of New Jersey filed a civil antitrust Complaint alleging that Waste Management's acquisition of certain voting securities and waste-hauling and disposal assets of Allied would lessen competition substantially in the provision of small container commercial waste collection services in the areas of Pitkin County, Colorado; Garfield County, Colorado; Augusta, Georgia; Myrtle Beach, South Carolina; Morris County, New Jersey; and Bergen and Passaic Counties, New Jersey, and in the provision of municipal solid waste disposal services in the Bergen and Passaic Counties, New Jersey and Tulsa and Muskogee, Oklahoma disposal areas, in violation of section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires, among other things, that defendant Waste Management (1) divest small container commercial waste collection assets in the areas of Pitkin County, Colorado; Garfield County, Colorado; Augusta, Georgia; Myrtle Beach, South Carolina; Morris County, New Jersey; and Bergen and Passaic Counties, New Jersey; (2) alter the contracts it uses with its existing and new small container commercial waste customers in the areas of Augusta, Georgia and Myrtle Beach, South Carolina; (3) divest transfer station facilities serving Bergen and Passaic Counties, New Jersey; and (4) sell throughput disposal rights at a facility serving Bergen and Passaic Counties, New Jersey.

Public comment was invited within the statutory 60-day comment period. The two comments received, and the response thereto, are hereby published in the **Federal Register** and filed with the Court. Copies of these are available for inspection at the U.S. Department of Justice, Antitrust Division, Suite 215 North, 325 7th Street, NW., Washington, DC 20530 (telephone: 202-514-2481)

and at the Clerk's Office, United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

United States District Court for the District of Columbia

In the matter of: United States of America, and State of New Jersey, Plaintiffs, v. Waste Management, Inc., and Allied Waste Industries, Inc., Defendants.

Case No: 1:03CV01409; Judge: Gladys Kessler, Deck Type: Antitrust.

Response of the United States to Public Comments on the Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b) ("APPA" or "Tunney Act"), Plaintiffs United States of America ("United States") hereby files comments received from members of the public concerning the proposed Final Judgment in this civil antitrust suit and the Response of the United States to those comments.

I. Background

On January 29, 2003, Defendants Waste Management, Inc. ("Waste Management") and Allied Waste Industries, Inc. ("Allied") entered into stock and asset purchase agreements pursuant to which Waste Management would acquire certain voting securities and waste-hauling and disposal assets of Allied in a number of areas throughout the United States. The United States and the State of New Jersey ("New Jersey") filed a civil antitrust Complaint on June 27, 2003, seeking to enjoin the proposed acquisition. The Complaint alleged that the likely effect of the acquisition would be to lessen competition substantially for waste collection and disposal services in several markets in violation of section 7 of the Clayton Act. This loss of competition would result in consumers paying higher prices and receiving fewer services for the collection and disposal of waste.

At the same time the Complaint was filed, the parties also filed a Hold Separate Stipulation and Order and a proposed Final Judgment. Under the proposed Final Judgment, Waste Management is required within 90 days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as viable business operations, specified waste-hauling and disposal assets. The proposed Final Judgment also requires Defendants, within 90 days after approval by the New Jersey Department of Environmental Protection of Waste Management's request to acquire assets in New Jersey, to divest, as viable business operations, certain waste-hauling and disposal assets located in New Jersey and New York. In addition to the divestitures, the proposed Final Judgment also requires Waste Management to comply with certain conditions relating to its customer contracts in two identified areas. Under the terms of the Hold Separate Stipulation and Order,

Waste Management is required to take certain steps to ensure that the assets to be divested will be preserved and held separate from its other assets and businesses pending their divestiture.

The United States, New Jersey, and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. In compliance with the APPA, the United States filed a Competitive Impact Statement ("CIS") on July 22, 2003. Waste Management and Allied filed statements pursuant to 15 U.S.C. 16(g) on August 4, 2003. A summary of the terms of the proposed Final Judgment and CIS were published in the *Washington Post*, a newspaper of general circulation in the District of Columbia, for seven days during the period of August 9, 2003, through August 15, 2003. The Hold Separate Stipulation and Order, proposed Final Judgment, and CIS were published in the **Federal Register** on August 12, 2003, 68 FR 47930 (2003). The 60-day comment period commenced on August 15, 2003, and terminated on October 14, 2003. During the 60-day comment period, the United States received two public comments (attached as Appendix A).

II. Response to Public Comments**A. Legal Standard Governing the Court's Public Interest Determination**

Upon the publication of the public comments and this Response, the United States will have fully complied with the Tunney Act. After receiving the motion of the United States for entry of the proposed Final Judgment, the Tunney Act directs the Court to determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e). In making that determination, the "court's function is not to determine whether the resulting array of rights and liabilities is one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest." *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir.), cert. denied, 510 U.S. 984 (1993). The Court should evaluate the relief set forth in the proposed Final Judgment and should enter the Judgment if it falls within the government's "rather broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); accord *United States v. Associated Milk Producers*, 534 F.2d 113, 117-18 (8th Cir.), cert. denied, 429 U.S. 940 (1976). The Court should review the proposed Final Judgment "in light of the violations charged in the complaint and * * * withhold approval only (a) if any of the terms appear ambiguous, (b) if the enforcement mechanism is inadequate, (c) if third parties will be positively injured, or (d) if the decree otherwise makes a 'mockery of judicial power.'" *Mass Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997) (quoting *Microsoft*, 56 F.3d at 1462). The Tunney Act does not empower the Court to reject the remedies in the proposed Final Judgment based on the belief that "other remedies were preferable." *Microsoft*, 56 F.3d at 1460, nor does it give the Court authority to impose different terms on the parties. See, e.g., *United States v.*

American Tel. & Tel. Co., 552 F. Supp. 131, 153 n.95 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (mem.); *accord* H.R. Rep. No. 93-1463, at 8 (1974).

B. Summary of Public Comments and the United States' Responses

Two individuals expressed their views on the proposed Final Judgment. Copies of this response, without the Appendix, are being mailed to them. A summary of their comments and the responses of the United States are below.

1. Peter Anderson

Peter Anderson, writing on behalf of the Center for a Competitive Waste Industry, requests data discovered by the United States concerning local disposal markets, including the size of the municipal solid waste firms in each market, and the ownership and maximum daily throughput for transfer stations. Mr. Anderson also states that the CIS correctly notes the critical importance of free access to disposal capacity on non-discriminatory terms and notes that the proposed Final Judgment requires the partial divestiture of transfer and disposal assets in New Jersey and Oklahoma.

The United States appreciates Mr. Anderson's comment on the proposed Final Judgment. However, the United States is unable to make public the data that it collected on local disposal markets. Disclosing such data would require that the United States reveal information that was received pursuant to a statute that limits its disclosure¹ or, alternatively, produce sensitive information that the United States will not disclose unless required by law or necessary to further a legitimate public purpose. The United States believes, however, that some of the information requested by Mr. Anderson may be available through various public sources, including the New Jersey Department of Environmental Protection Web site.

Mr. Anderson is mistaken in stating that the decree requires Waste Management to divest transfer or disposal assets in Oklahoma. Rather, the Defendants agreed to exclude from the transaction the sale of Allied's waste-hauling and disposal assets located in the Tulsa and Muskogee, Oklahoma area and, as specified in section XI of the proposed Final Judgment, Waste

Management further agreed to provide the United States with notice of any future acquisition of disposal assets in the Tulsa and Muskogee, Oklahoma area.

2. Gregory Nepll

Gregory Nepll filed a comment setting forth his understanding of the purpose and effect of Section XIII of the proposed Final Judgment relating to "Revisions to Contracts." Mr. Nepll states that he understands proposed Final Judgment precludes Waste Management, effective June 27, 2003, from enforcing any contract term inconsistent with those set forth in section XIII.B. and affecting its commercial waste collection customers in the Augusta, Georgia and Myrtle Beach, South Carolina areas. Mr. Nepll further notes that he understands that Waste Management must also offer new contracts that conform with the terms set forth in the proposed Final Judgment to its new and existing customers subject to the deadlines set forth in Section XIII.

The United States concurs with Mr. Nepll's interpretation of section XIII of the proposed Final Judgment as stated in his letter of October 9, 2003.

III. Conclusion

The United States hereby files the comments of the members of the public together with the Response of the United States to the comments, pursuant to 15 U.S.C. 16(d). The Competitive Impact Statement and this Response to Comments demonstrate that the proposed Final Judgment serves the public interest. Accordingly, the United States will move this Court for entry of the proposed Final Judgment after the comments and the Response are published in the **Federal Register** pursuant to 15 U.S.C. 16(d). Dated this 9th day of December, 2003.

Respectfully submitted,
Michael K. Hammaker, Esquire,
D.C. Bar No. 233684, United States Department of Justice, Antitrust Division, 1401 H Street, NW., Room 3000, Washington, DC 20530; (202) 307-0938.

Certificate of Service

I hereby certify that on this 9th day of November, 2003, I caused a copy of the foregoing Response of the United States to Public Comments on the Proposed Final Judgment and the attached Appendix to be served by electronic filing on Waste Management and Allied Waste Industries, and by first class mail, postage prepaid, on

the State of New Jersey at the addresses given below:

Counsel for Defendant Waste Management, Inc.,
James R. Weiss, Esquire, Preston Gates Ellis & Rouvelas Meeds LLP, 1735 New York Avenue, NW., Suite 500, Washington, DC 20006; *jimwe@prestongates.com*; (202) 628-1700.

Counsel for Defendant Allied Waste Industries, Inc.,

Tom D. Smith, Esquire, Jones Day, 51 Louisiana Avenue, NW., Washington, DC 20001-2113; *tdsmith@jonesday.com*; (202) 879-3971.

Counsel for Plaintiff State of New Jersey, Andrew L. Rossner, Esquire, Assistant Attorney General—Deputy Director, New Jersey Attorney General's Office, Division of Criminal Justice, 25 Market Street, Trenton, NJ 08625-0085; (609) 984-0028.

Stacy R. Procter, Esquire,
CA Bar No. 221078, United States Department of Justice, Antitrust Division, 1401 H Street, NW., Room 3000, Washington, DC 20530. Telephone: (202) 514-8666.

To: Hammaker, Michael
Subject: Re: Waste Management: 4/28/03 Sale of \$1 Billion of Allied Waste Assets to Waste Management

We have the Competitive Impact Statement for the Waste Management/Allied swap.

The CIS correctly notes the critical importance to the maintenance of competition of free access to disposal capacity on non-discriminate terms, and goes onto to note the partial divestitures of transfer and disposal assets in New Jersey and Oklahoma.

In order to comment intelligently on the proposed settlement, we would like to ask if DOJ would share its discovery data on local conditions in the market for disposal in those areas. Specifically, the ownership and maximum daily throughputs for transfer stations, and the ownership, maximum daily tonnages and remaining life and locations for landfills. Also, the names and, if possible, very general indices of the size/share (that does impinge on trade secrets) of the municipal solid waste firms in each market.

Thank you.

Peter Anderson,
Center for a Competitive Waste Industry.

BILLING CODE 4410-11-M

¹ See Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a(h); Antitrust Civil Process Act, 15 U.S.C. 1311 *et seq.*

FOLEY LARDNER
ATTORNEYS AT LAW

FOLEY & LARDNER
WASHINGTON HARBOUR
3000 K STREET, N.W., SUITE 500
WASHINGTON, D.C. 20007-5143
202.672.5300 TEL
202.672.5399 FAX
www.foleylardner.com

WRITER'S DIRECT LINE
202.672.5451

CLIENT/MATTER NUMBER
086804.0102

October 9, 2003

BY HAND DELIVERY

Ms. Stacy R. Procter
Trial Attorney
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, DC 20530

Re: U.S. v. Waste Management, Inc. and Allied Waste Industries, Inc.
Civil Case No: 1:03CV01409

Dear Ms. Procter:

Thank you for your recent comments as to the purpose and effect of the language contained in Section XIII of the Final Judgment, entitled "Revisions to Contracts," regarding the obligation of Waste Management not to "attempt to enforce any contract term affecting commercial waste collection customers in the specified areas [Myrtle Beach, SC and Augusta, GA] that conflicts with or is inconsistent with the above terms [reflecting five contract prohibitions], even if those customers choose not to sign a contract with the new terms."

Pursuant to the Final Judgment, these five contract prohibitions provide that "[n]o contract shall:"

1. Have an initial term longer than two (2) years;
2. Have any renewal term longer than one (1) year;
3. Require that the customer give Waste Management notice of termination more than thirty (30) days prior to the end of any initial term or renewal term;
4. Require that the customer pay liquidated damages in excess of three times its average monthly charge during the first year the customer has had service with Waste Management; and
5. Require that the customer pay liquidated damages in excess of two (2) times its average monthly charge after the first year the customer has had service with Waste Management.

BRUSSELS
CHICAGO
DENVER

DETROIT
JACKSONVILLE
LOS ANGELES
MADISON

MILWAUKEE
ORLANDO
SACRAMENTO

SAN DIEGO
SAN DIEGO/DEL MAR
SAN FRANCISCO
TALLAHASSEE

TAMPA
TOKYO
WASHINGTON, D.C.
WEST PALM BEACH

002.1088625.1

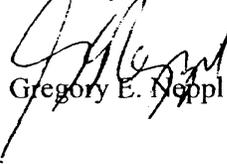
FOLEY ■ LARDNER
 ATTORNEYS AT LAW

Ms. Stacy R. Procter
 October 9, 2003
 Page 2

As you have advised, the language quoted above became effective as of June 27, 2003. At that time, Waste Management became immediately obligated not to enforce any contract provision(s) inconsistent with the five contract prohibitions listed above, although other contract terms may remain enforceable by Waste Management. As a result, contracts in place as of June 27, 2003 must conform to these five contract prohibitions. Moreover, Waste Management is also obligated to offer new contracts to new and existing customers in accordance with these five contract prohibitions, subject to the deadlines set forth in Section XIII the Final Judgment.

In short, the obligation upon Waste Management not to enforce any contract provision(s) inconsistent with the five contract prohibitions currently applies, whether or not the contracts in place physically incorporate the language in question. On that basis, we have no objection to or other comment on the proposed Final Judgment pending before Judge Gladys Kessler.

Sincerely,



Gregory E. Neppel

[FR Doc. 03-31054 Filed 12-16-03; 8:45 am]
 BILLING CODE 4410-11-C

DEPARTMENT OF JUSTICE
Parole Commission
**Record of Vote of Meeting Closure
 (Public Law 94-409) (5 U.S.C. Sec.
 552b)**

I, Edward F. Reilly, Jr., Chairman of the United States Parole Commission, was present at a meeting of said Commission, which started at approximately 10:45 a.m. on Thursday, December 11, 2003, at the U.S. Parole Commission, 5550 Friendship Boulevard, 4th Floor, Chevy Chase, Maryland 20815. The purpose of the meeting was to decide one petition for reconsideration pursuant to 28 CFR 2.27. Three Commissioners were present, constituting a quorum when the vote to close the meeting was submitted.

Public announcement further describing the subject matter of the meeting and certifications of General Counsel that this meeting may be closed by vote of the Commissioners present were submitted to the Commissioners

prior to the conduct of any other business. Upon motion duly made, seconded, and carried, the following Commissioners voted that the meeting be closed: Edward F. Reilly, Jr., John R. Simpson, and Cranston J. Mitchell.

In witness whereof, I make this official record of the vote taken to close this meeting and authorize this record to be made available to the public.

Dated: December 11, 2003.

Edward F. Reilly, Jr.,
Chairman, U.S. Parole Commission.

[FR Doc. 03-31188 Filed 12-15-03; 9:58 am]
 BILLING CODE 4410-01-M

DEPARTMENT OF LABOR
**Employee Benefits Security
 Administration**

[Application No. D-11198, et al.]

**Proposed Exemptions; Bangs,
 McCullen, Butler, Foye & Simmons,
 L.L.P. Employees Profit Sharing Plan
 (the Plan)**

AGENCY: Employee Benefits Security Administration, Labor

ACTION: Notice of Proposed Exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

**Written Comments and Hearing
 Requests**

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.