If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: June 11, 2009.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E9–14137 Filed 6–15–09; 8:45 am]

BILLING CODE 4410–09–P

FOREIGN CLAIMS SETTLEMENT COMMISSION

[F.C.S.C. Meeting Notice No. 3–09]

Meetings; Sunshine Act

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 504) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the transaction of Commission business and other matters specified, as follows:

Date and Time: Thursday, June 25, 2009, at 10:30 a.m.

Subject Matter: Issuance of Proposed Decisions, Amended Proposed Decisions and Orders in claims against Albania.

Status: Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 600 E Street, NW., Room 6002, Washington, DC 20579. Telephone: (202) 616–6975.

Mauricio J. Tamargo,

Chairman.

[FR Doc. E9–14182 Filed 6–12–09; 11:15 am]

BILLING CODE 4410–01–P

DEPARTMENT OF JUSTICE

Antitrust Division

Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comments received on the proposed Final Judgment in *United States et al.* v. *Republic Services, Inc. and Allied Waste Industries, Inc.,* No. 1:08–CV–02076–RWR, which were filed in the United States District Court for the District of Columbia on May 14, 2009, together with the response of the United States to the comments.

Copies of the comments and the response are available for inspection at the Department of Justice Antitrust Division, 325 Seventh Street, NW., Room 200, Washington, DC 20530, (telephone (202) 514–2481), and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia Brink,

Deputy Director of Operations, Antitrust Division.

United States District Court for the District of Columbia

United States of America, State of California, Commonwealth of Kentucky, State of Michigan, State of North Carolina, State of Ohio, Commonwealth of Pennsylvania, and State of Texas, Plaintiffs, v. *Republic Services, Inc., and Allied Waste Industries, Inc.,* Defendants.

Civil Action No.: 1:08–cv–02076
Judge: Hon. Richard W. Roberts
Description: Antitrust
Date Stamp: May 14, 2009

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

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (''APPA'' or ''Tunney Act''), the United States hereby responds to five public comments received regarding the proposed Final Judgment in this case. After careful consideration of the five comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response have been published in the **Federal Register**, pursuant to 15 U.S.C. 16(d).

I. Procedural History

On December 3, 2008, the United States and the State of California, Commonwealth of Kentucky, State of Michigan, State of North Carolina, State of Ohio, Commonwealth of Pennsylvania, and State of Texas (the ''States'') filed the Complaint in this ma tter, alleging that defendant Republic Services, Inc.'s (''Republic'') acquisition of defendant Allied Waste Industries, Inc. (''Allied''), if permitted to proceed, would combine two of only a few significant providers of small container commercial waste collection or municipal solid waste (''MSW'') disposal services in several markets in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Simultaneously, the United States filed a proposed Final Judgment and a Hold Separate Stipulation and Order signed by the United States, the States and the defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the APPA.

Pursuant to those requirements, a Competitive Impact Statement (''CIS'') also was filed in this Court on December 3, 2008; the proposed Final Judgment and CIS were published in the **Federal Register** on December 16, 2008, *see* 73 FR 76,383 (2008); and a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, was published for seven days in *The Washington Post* on December 31, 2008 through January 6, 2009. The defendants filed the statement required by 15 U.S.C. 16(g) on April 24, 2009. The 60-day public comment period ended on March 9, 2009; five comments were received, as described below and attached hereto.

II. The Investigation and Proposed Resolution

After Republic and Allied announced their plans to merge, the United States Department of Justice (the ''United States'') conducted an extensi ve investigation into the competitive effects of the proposed transaction. As part of this investigation, the United States obtained documents and information from the merging parties and others and conducted more than 600 interviews with customers, competitors, and other individuals knowledgeable about the industry. The investigative staff carefully analyzed the information provided and thoroughly considered all of the issues presented. The United States considered the potential competitive effects of the transaction on small container commercial waste collection or MSW disposal services in a number of geographic areas, obtaining information about these services and these areas from market participants. The United States concluded that the combination of Republic and Allied likely would lessen competition in small container commercial waste collection or MSW disposal services in 15 separate geographic markets.

Small container commercial waste collection service is the collection of MSW from commercial businesses such as office and apartment buildings and retail establishments (*e.g.,* stores and restaurants) for shipment to, and disposal at, an approved disposal facility. Because of the type and volume of waste generated by commercial accounts and the frequency of service required, haulers organize commercial accounts into routes, and generally use specialized equipment to store, collect, and transport MSW from these accounts to approved MSW disposal sites. This equipment (*e.g.,* one- to ten-cubic-yard containers for MSW storage, and front-end load vehicles commonly used for collection and transportation of MSW) is un iquely well suited to providing small container commercial waste collection service. Providers of other types of waste collection services (*e.g.,* residential, hazardous waste, and roll-off services) are not good substitutes for small container commercial waste collection firms. In these types of waste collection efforts, firms use different waste storage equipment (*e.g.,* garbage cans or semi-stationary roll-off containers) and different vehicles (*e.g.,* rear-load, side-load, or roll-off trucks), which, for a variety of reasons, cannot be used conveniently or efficiently to store, collect, or transport MSW generated by commercial accounts and, hence, rarely are used on small container commercial waste collection routes. In the event of a small but significant increase in price for small container commercial waste collection services, customers would not switch to any other alternative.

A number of Federal, State, and local safety, environmental, zoning, and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing and disposal of MSW. In order to be disposed of lawfully, MSW must be disposed in a landfill or incinerator permitted to accept MSW. Anyone who attempts to dispose of MSW in an unlawful manner risks severe civil and criminal penalties. In some areas, landfills are scarce because of significant population density and the limited availability of suitable land. Accordingly, most MSW generated in these areas is burned in an incinerator or taken to transfer stations where it is compacted and transported on tractor trailer trucks to a more distant, permanent MSW disposal site. A transfer station is an intermediate disposal site for processing and temporary storage of MSW before transfer in bulk to more distant landfills or incinerators for final disposal.

Because of the strict laws and regulations that govern MSW disposal, there are no good substitutes for MSW disposal in landfills, incinerators, or at transfer stations located near the source of the waste. Firms that do not offer MSW disposal cannot gain significant sales from MSW haulers by offering lower prices. MSW disposal generally occurs in localized markets. Because of transportation costs and travel time to more distant MSW disposal facilities, a substantial percentage of the MSW generated in an area is disposed of at nearby landfills or transfer stations. In the event that a local disposal facility imposed a small but significant increase in the price of disposal of MSW, haulers of MSW generated in that area could not profitably turn to more distant disposal sites.

After its investigation, the United States concluded that the proposed transaction would lessen competition in the provision of non-franchised small container commercial waste collection or MSW disposal services in 15 areas: Los Angeles, California; San Francisco, California; Denver, Colorado; Atlanta, Georgia; northwestern Indiana; Lexington, Kentucky; Flint, Michigan; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Philadelphia, Pennsylvania; Greenville-Spartanburg, South Carolina; Fort Worth, Texas; Houston, Texas; and Lubbock, Texas. In each of these areas, Republic and Allied are two of only a few significant firms providing small container commercial waste collection or MSW disposal services.

As explained more fully in the Complaint and the CIS, this loss of competition would result in consumers paying higher prices and receiving fewer services for the collection and disposal of MSW. Complaint ¶ 23 *et seq.;* CIS ¶ II(B). As alleged in the Complaint, the proposed acquisition of Allied by Republic would remove a significant competitor in small container commercial waste collection and MSW disposal services in already highly concentrated and difficult-to-enter markets. Complaint ¶ 25. In each of these markets, the resulting substantial increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents likely would result in higher prices for small container commercial waste collection or MSW disposal services. *Id.*

The proposed Final Judgment is designed to preserve competition in each of the 15 affected geographic markets. It requires Republic and Allied to divest a total of 87 commercial waste hauling routes, nine landfills and 10 transfer stations, together with ancillary assets and, in three cases, access to landfill disposal capacity. The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in small container commercial waste collection and MSW disposal services in each of these areas. The divestiture of these assets to an independent, economically viable competitor will ensure that users of these services in each market will continue to receive the benefits of competition that otherwise would be lost.

III. Summary of Public Comments and the Response of the United States

During the 60-day public comment period, the United States received comments from: (1) The Center for a Competitive Waste Industry (''CCWI''); (2) Ms. June Guidotti; (3) the Pennsylvania Independent Waste Haulers Association (''PIWHA''); (4) Metro Disposal; and (5) the Cuyahoga County Solid Waste District. The comments are attached in the accompanying Appendix and are summarized below. After reviewing the five comments, the United States continues to believe that the proposed Final Judgment is in the public interest.

A. Public Comment From the CCWI

1. Summary of the CCWI's Comment

The CCWI, through its attorney David Balto, asserts that ''[t]he DOJ must strengthen the [proposed Final Judgment] to remedy the significant competitive problems posed by this merger.'' CCWI Comment, at 1. The CCWI comment may be summarized in eight points.

First, the CCWI argues that ''[t]here should be divestitures of assets in both the [small container commercial waste collection] and [municipal solid waste] disposal markets in local affected geographic areas not named in the [proposed Final Judgment].'' CCWI Comment, at 14.

Second, the CCWI argues that ''[b]ecause [the] markets consist of oligopolies' [sic] with lock holds on local landfills, which create bottlenecks that impede new entry, divested assets should be sold to independent haulers with the right to contract for airspace in the merger companies' landfills.'' *Id.* In effect, the CCWI requests that the proposed Final Judgment be modified to preclude the sale of assets to the top five municipal solid waste companies.

Third, instead of the divestiture of landfills to qualified purchasers, the

CCWI seeks a modification to the proposed Final Judgment that would give independent haulers nondiscriminatory access to landfills. CCWI Comment, at 11–12.

Fourth, the CCWI advocates for additional airspace disposal rights to be included in the proposed Final Judgment. CCWI Comment, at 9.

Fifth, the CCWI asserts that the proposed Final Judgment should be ''modified to immediately impose the use of a monitor trustee to ensure compliance with the order,'' citing to a prior case for support. CCWI Comment, at 6–7.

Sixth, the CCWI advocates for the inclusion of certain behavioral remedies in the proposed Final Judgment, stating that ''[u]se of the merged companies' evergreen contracts ought to be discontinued, especially in their term lengths, renewal provisions, liquidated damages, and escalator clauses.'' CCWI Comment, at 14. The CCWI cites to a prior consent decree that contained such behavioral relief. *Id.* at 7.

Seventh, the CCWI proposes that ''the goal of encouraging new entrants in the commercial waste hauling industry will be better served by requiring the divested assets in each individual market to be offered for sale individually rather than in a package,'' such as the requirements in the proposed Final Judgment relating to the sale of Divestiture Assets in Atlanta, Georgia; Cleveland, Ohio; Philadelphia, Pennsylvania; and Fort Worth, Texas. CCWI Comment, at 10.

Lastly, the CCWI asserts that the proposed Final Judgment departs from past enforcement actions by allowing Republic to acquire an asset, the Newnan Transfer Station, that Allied previously was required to divest as a condition of the Allied/BFI merger in 1999.[(1)] CCWI Comment, at 6.

2. Response of the United States to CCWI's Comment

a. The Final Judgment Need Not Remedy Competitive Concerns Not Addressed in the Complaint

The CCWI's comment that the United States should have alleged harm to competition in small container commercial waste collection and MSW disposal services in other areas is outside the scope of this Tunney Act proceeding. As explained by this Court, in a Tunney Act proceeding, the district court should not second-guess the prosecutorial decisions of the United States regarding the nature of the claims brought in the first instance; ''rather, the court is to compare the complaint filed by the United States with the proposed consent decree and determine whether the proposed decree clearly and effectively addresses the anticompetitive harms initially identified.'' *United States* v. *Thomson Corp.,* 949 F. Supp. 907, 913 (D.D.C. 1996); *accord United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1459 (D.C. Cir. 1995) (in APPA proceeding, ''district court is not empowered to review the actions or behavior of the Department of Justice; the court is only authorized to review the decree itself ''); *United States* v. *BNS Inc.,* 858 F.2d 456, 462–63 (9th Cir. 1988) (''the APPA does not authorize a district court to base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint''). This Court has held that ''a district court is not permitted to 'reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made.' '' *United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1, 14 (D.D.C. 2007) (quoting *Microsoft,* 56 F.3d at 1459).

The CCWI's suggestion that the 2004 Amendments to the Tunney Act require a more extensive review of the United States's exercise of its prosecutorial judgment conflicts with this Court's holding in *SBC Communications.* In *SBC Communications,* this Court held that ''a close reading of the law demonstrates that the 2004 amendments effected minimal changes, and that this Court's scope of review remains sharply proscribed by precedent and the nature of [APPA] proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11. This Court explained that because ''review [under the 2004 amendments] is focused on the 'judgment,' it again appears that the Court cannot go beyond the scope of the complaint.'' *Id.*

In short, the Tunney Act, as amended in 2004, requires the Court to evaluate the effect of the ''judgment upon competition'' as alleged in the Complaint. In this case, therefore, the remedy in the proposed Final Judgment must correspond to the harm to competition in small container commercial waste collection and MSW disposal services in the 15 geographic markets identified in the Complaint. *See* 15 U.S.C. 16(e)(1)(b). Because the United States did not allege that Republic's acquisition of Allied would cause competitive harm in additional markets, it is not appropriate for the Court to determine whether the acquisition will have anticompetitive effects in other regions of the country.

b. There Is No Evidence That Selling Assets to an Appropriate Large National Firm Would Be Less Competitive Than a Sale to a Smaller Firm

The United States has carefully considered the CCWI's concern that divested assets should be sold only to regional haulers, but respectfully disagrees. The United States does not have any evidence that would lead it to conclude categorically that the divestiture of assets to a large national waste firm would be less competitive than a sale to a small regional firm. In fact, larger firms might enjoy some competitive advantages, such as better access to capital and more extensive experience, that might make them more formidable competitors than regional haulers.

The proposed Final Judgment does not require Republic to accept a particular offer, only that any Acquirer of the divested assets meet the conditions set out in Paragraph IV(I)(1) and (2). These provisions require the divested assets to be sold to a purchaser who ''has the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the disposal or hauling business.'' The divestitures in the proposed Final Judgment thus are designed to preserve competition in the marketplace.

c. Divestiture of an Entire Landfill Is Essential to Restoring Competition to Pre-Merger Levels

The CCWI states that ''the [proposed Final Judgment] should be modified to confer upon independent haulers * * * the legal right to acquire 15-year contracts for space in Republic/Allied landfills in all markets that are highly concentrated under the Merger Guidelines, or at least the 15 markets that are the subject of the [proposed Final Judgment].'' CCWI Comment, at 9. Essentially, the CCWI argues against the sale of complete landfill assets to a prospective purchaser, preferring instead to carve landfills into separate, discrete portions to be made available to independent waste haulers. The United States has considered this issue and has determined that such relief is contrary to the public interest. As stated in the U.S. Department of Justice Antitrust Division's Policy Guide to Merger Remedies, the United States believes it is important that a divestiture include all assets necessary for a purchaser to be an effective, stand-alone long-term competitor. *See* U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies, § III(B) (2004) (''Remedies Guide''). Under the CCWI

proposal, the proposed relief would interfere with a landfill owner's ability to manage and operate the assets successfully. In particular, a landfill owner typically attempts to capture as much volume pursuant to long-term contracts under the requisite permits. The profitability of a landfill depends upon a variety of factors, including the volume disposed at the site on a daily basis. Under the CCWI's proposal, the landfill owner no longer would have control over critical operational elements of the landfill, such as determining the price charged for disposal services, establishing the duration of contracts, and managing expected daily volumes at the facility. The CCWI proposal would create uncertainty as to whether the landfill assets would be fully utilized, as independent haulers might not remain in business over the life of a divested landfill. Predicting which small container commercial waste collection service provider would use what capacity over the life of the landfill would be nearly impossible. Thus, this proposed remedy could jeopardize the competitive significance of the landfill assets.

The proposed remedy proffered by the CCWI also would require the United States to oversee and enforce contracts between the defendants and non-vertically integrated MSW haulers for an undetermined period of time. As stated in the Remedies Guide, structural remedies, such as those in the proposed Final Judgment, are preferred in merger cases because they are relatively clean and certain, and generally avoid managing or regulating the merged firm's post-merger business conduct. Remedies Guide § III(A). For the reasons identified above, the CCWI's proposal would be more difficult, cumbersome, and costly to administer. The United States believes that the remedies in the proposed Final Judgment will address the alleged competitive harm more effectively and preserve competition in each of the affected areas.

d. No Additional Airspace Disposal Rights Are Necessary

The CCWI argues for the inclusion of additional landfill disposal rights or ''airspace rights'' in the Final Judgment.[2] Simply because the proposed Final Judgment includes additional airspace rights in Houston, Texas, Northwest Indiana, and Philadelphia, Pennsylvania, the CCWI argues that such relief is warranted in other areas. The United States conducted a case-by-case analysis of the specific facts in each market. In eight areas in which the United States determined the acquisition would result in competitive harm in the market for MSW disposal Charlotte, North Carolina; Greenville-Spartanburg, South Carolina; Fort Worth, Texas; Denver, Colorado; San Francisco, California; Los Angeles, California; Cleveland, Ohio; and Flint, Michigan the proposed Final Judgment requires the divestiture of an entire landfill. In two other areas Atlanta, Georgia and Cape Girardeau, Missouri transfer stations are the preferred option for MSW disposal because the distance to landfills makes them an unattractive option for the direct haul of MSW. In as much as MSW disposal competitors permanently utilize transfer stations, the divestiture of transfer stations in these areas is sufficient to remedy the competitive harm in MSW disposal.[3] In the Philadelphia, Pennsylvania, Northwest Indiana, and Houston, Texas areas, the proposed Final Judgment requires the defendants to sell airspace rights at the buyer's option. These airspace rights generally were intended as an option during a transitional period to assist an Acquirer who might not yet have a plan for final MSW disposal. If the proposed buyer already has an ultimate disposal option(s) in a market, it is not required to purchase these airspace rights.

In the Philadelphia area, the proposed Final Judgment requires the divestiture of the Girard Point Transfer Station and the Philadelphia Recycling and Transfer Station, as well as, at the option of the Acquirer, airspace rights at Republic's Modern Landfill for a period of 18 months. Proposed Final Judgment ¶ II(H)(1)(j). These airspace rights are designed to assist an Acquirer that may not have an ultimate disposal option for a transitional period.

In the Northwest Indiana area, the proposed Final Judgment requires the divestiture of Allied's Valparaiso Transfer Station, various small container commercial waste collection assets, and, at the option of the Acquirer, airspace rights at Allied's Newton County Development Corporation Landfill (''Newton County Landfill'') for a two-year period. Proposed Final Judgment ¶ II(H)(1)(i). Pre-merger, both Allied and Republic owned a transfer station in this area. The proposed Final Judgment requires the sale of Allied's Valparaiso Transfer Station, which will preserve pre-merger competition. With regard to landfill options, pre-merger, both Republic and Allied operate landfills in the area—Republic's Forest Lawn Landfill and Allied's Newton County Landfill. Because Republic's Forest Lawn Landfill is expected to be open for only two more years, the proposed Final Judgment requires the sale of airspace capacity at Allied's Newton County Landfill for the expected remaining life of the Forest Lawn Landfill at the Acquirer's option. Therefore, the remedy preserves competition that otherwise would be lost as a result of the merger.

In the Houston, Texas area, the proposed Final Judgment requires the divestiture of Republic's Hardy Road Transfer Station, Republic's Seabreeze Environmental Landfill, 32 Republic small container commercial waste collection routes, and, at the option of the Acquirer, airspace rights at Allied's Blue Ridge Landfill for a ten-year period. Proposed Final Judgment ¶¶ II(H)(2)(f) & II(I)(6). The United States sought airspace rights at Allied's Blue Ridge Landfill, because the landfill may be a more convenient and cost-efficient disposal option for the divested hauling routes in the southern and western areas of Houston and Harris County. The Houston divestiture package in the proposed Final Judgment is comparable to the remedy in *United States* v. *USA Waste Service,*[4] in which the Modified Final Judgment required divestiture of Waste Management, Inc.'s (''WMI'') Hardy Road Transfer Station, USA Waste's Brazoria County Landfill, 31 WMI small container commercial waste collection routes, and, at the option of the Acquirer, airspace rights at WMI's Atascocita or Security landfills for a period of ten years. Republic used its prior purchase of the group of assets to compete effectively and grow its business in the Houston, Texas area. Therefore, the remedy is sufficient to preserve competition in this area.

e. A Monitoring Trustee Is Unnecessary

The CCWI emphasizes the need for a monitoring trustee in this case. A monitoring trustee would be responsible for reviewing a defendant's compliance with its decree obligations to sell the assets as a viable enterprise to an acceptable purchaser and to abide by injunctive provisions to hold separate certain assets from a defendant's other business operations. The CCWI cites to *United States* v. *Computer Associates Int'l*[5] as support for its contention that additional oversight is needed to ensure compliance with the proposed Final Judgment.

The United States has considered the CCWI's position and respectfully disagrees. In *Computer Associates,* a trustee was appointed at the outset to sell the divested assets because the United States had reason to believe that the parties would not effectuate the divestitures in a timely manner. Here, the United States had no reason to

believe that the defendants would not comply promptly with the divestiture requirements of the proposed Final Judgment, and the defendants have done so. The CCWI 's conclusion that a monitoring trustee is necessary in this matter rests on an assumption that the United States's own monitoring efforts will not suffice, and it is counter to the position stated in the Remedies Guide on the use of monitoring trustees in merger-related actions.

Remedies Guide § IV(I)(3). According to Section IV(I)(3) of the Remedies Guide, ''[i]n a typical merger case, a monitoring trustee's efforts would simply duplicate, and could potentially conflict with, the Division's own decree enforcement efforts * * * [and] should be reserved for relatively rare situations where a monitoring trustee with technical expertise unavailable to the Division could perform a valuable role.'' *Id.* In this particular case, the Division has sufficient knowledge of the industry to ensure compliance with the proposed Final Judgment.

f. Restriction of Evergreen Contracts Is Unnecessary

The CCWI states that the United States ''fails to limit the ability of the merged firm to use evergreen contracts.'' CCWI Comment, at 7. In seeking the discontinuance of such contracts, the CCWI cites to a single prior enforcement action in which the United States employed such a remedy.(6) CCWI Comment, at 7. Simply because that prior consent decree contained such a remedy, the CCWI believes similar provisions are necessary in this case.

As stated above, *see supra* Part III.2.c, the structural remedy of a divestiture is preferable to a behavioral remedy in merger cases because of the speed, certainty, cost, and efficacy associated with such a remedy. Unlike a structural remedy, a behavioral remedy of contract relief is less certain and is required only when warranted by the facts of the case. The United States has extensive experience reviewing mergers in the waste industry, and it reviews each transaction and each implicated geographic area on a case-by-case basis. The United States has considered this issue and has concluded that the modification of contracts is not necessary to preserve effective competition in the markets identified in the Complaint.

The United States conducted a thorough market-by-market investigation, which included hundreds of hours of interviews with customers and competitors of the merging parties. The United States heard no specific concern that would warrant the type of relief suggested by the CCWI. The United States determined that the proposed remedy, *i.e.,* the divestiture of all or most small container commercial waste collection routes of one of the merging parties in each affected market, is sufficient to provide effective competition in small container commercial waste collection services in each market and is consistent with prior Antitrust Division practice.

The proposed Final Judgment would require the divestiture of either Republic's or Allied's entire small container commercial waste collection business in six of the nine geographic areas in which it has alleged competitive harm to competition in the provision of small container commercial waste collection services: Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Lexington, Kentucky; and Lubbock, Texas. The sale of the entire small container commercial waste collection business preserves the pre-merger market structure in each of these markets. Accordingly, no additional contract relief is necessary.

In the remaining three areas in which the United States has alleged competitive harm to competition in the provision of small container commercial waste collections services Houston, Texas, Atlanta, Georgia, and Northwest Indiana the proposed Final Judgment would require the divestiture of most of either Allied's or Republic's small container commercial waste collection business. In the Houston, Texas area, the small container commercial waste collection routes and related assets that would be divested pursuant to the proposed Final Judgment, Proposed Final Judgment ¶ II(I)(6), represent a set of assets comparable to those divested in *USA Waste.*(7) In *USA Waste,* the defendants divested 31 routes; by comparison in this case, the proposed Final Judgment includes 32 routes. Republic, as the purchaser of the Houston assets in *USA Waste,* was able to use these assets as a platform for entry into the area and to grow and become an effective, fully integrated, and viable competitor in the area. No contract relief was required to remedy any market in *USA Waste,* including Houston, Texas. In the present case, the divestiture of the small container commercial waste collection assets, coupled with the related sale of disposal assets, once again will enable a qualified acquirer to provide effective competition in the Houston, Texas area, much as Republic was able to do. Therefore, contract relief is not necessary here.

In the Atlanta, Georgia area, the proposed Final Judgment would require the divestiture of all of Allied's routes in the northern and eastern areas of Atlanta, where Allied and Republic most directly overlapped and competed most intensely. Proposed Final Judgment ¶ II(I)(1). Numerous factors affect waste transport and disposal in the area, such as local requirements that require MSW to be disposed at designated disposal facilities, congestion, traffic patterns, and local ordinances. In light of these factors, haulers typically do not travel outside the northern and eastern portions of the area. The remedy here was designed to preserve the small container commercial waste collection competition that existed pre-merger. The United States has approved Advanced Disposal Services, Inc., which already has a presence in the area, as the Acquirer of these assets. With a footprint in the area, Advanced Disposal not only will replace competition lost as a result of the merger, but will become a more efficient competitor. Therefore, contract relief is not necessary here.

In the Northwest Indiana area, the proposed Final Judgment would require the divestiture of most of Allied's small container commercial waste collection business in Porter, LaPorte, and Lake Counties. Proposed Final Judgment ¶ II(I)(9). In these areas, Republic and Allied competed most directly to provide customers with small container commercial waste collection services. The proposed Final Judgment addresses the harm alleged in the Complaint by requiring the divestiture of those routes necessary to create an effective competitor. To the extent the CCWI argues that additional routes or contract relief, might be necessary to create an effective remedy in MSW disposal, the United States concluded that this is not necessary because there are numerous hauling competitors in the area to support the divested Valparaiso Transfer Station. Therefore, the proposed remedy is sufficient to restore competition to pre-merger levels.

g. The Individual Sale of All the Divestiture Assets Is Not Necessary

The CCWI suggests that the proposed Final Judgment be modified to require that the Divestiture Assets in each market be offered for sale separately and that no Divestiture Assets be sold together as a bundle. The CCWI cites to the requirements in the proposed Final Judgment that the assets in Atlanta, Georgia, Cleveland, Ohio, Philadelphia, Pennsylvania, and Fort Worth, Texas be sold separately from the Divestiture Assets in the other areas. Proposed Final Judgment ¶ IV(A).

The United States has considered the CCWI's position and respectfully disagrees. Based on its extensive experience in overseeing divestitures of assets in antitrust cases, the United States has concluded that it is most efficient to allow the defendants to manage the process of selling divestiture assets, which may include the bundling of assets. In particular, a sale of bundled divestiture assets typically results in a quicker divestiture and a more efficient utilization of the divestiture assets by the acquirer. As always, the United States retains the authority to review a proposed acquirer of divestiture assets to determine whether the respective acquirer will fully utilize a package of divestiture assets.

In this case, based on a fact-specific investigation of potential buyers in each area, the United States concluded that competition would benefit from the separate sale of the Divestiture Assets in the Atlanta, Georgia, Cleveland, Ohio, Philadelphia, Pennsylvania, and Fort Worth, Texas areas.[8] Specifically, the separate sale of the Divestiture Assets in each of these four markets may permit a local or regional waste firm to acquire them and combine such assets with their own existing assets already serving these markets. The decision of the United States to require the sale of the Divestiture Assets in certain markets separately was also based on the recognition that approval of a single purchaser of all of the Divestiture Assets in the 15 relevant markets would be unlikely given the potential competitive overlap in some of these markets by some likely purchasers. For the reasons above, the CCWI's proposal is both unnecessary and contrary to the purposes of antitrust relief. If implemented, the proposal could substantially lengthen the divestiture process.

h. Republic's Acquisition of the Newnan Transfer Station Would Not Substantially Diminish Competition for the Provision of MSW Disposal Services in the Atlanta, Georgia Area

The CCWI states that the proposed Final Judgment ''permits Allied to reacquire assets it was required to divest as a condition of previous final judgments,'' which ''represents a departure from previous agreements preventing such reacquisitions.'' CCWI Comment, at 6. The CCWI cites to Republic acquiring the Newnan Transfer Station, a disposal asset that was required to be divested in 1999 pursuant to the terms of a Final Judgment entered in *Allied/BFI.*

In 1999, in connection with the acquisition by Allied of Browning Ferris, Industries, Allied was required to divest the Newnan Transfer Station located in Newnan, Georgia, which at the time was serving the Atlanta, Georgia area. As part of the Final Judgment entered in *Allied/BFI,* Republic acquired the Newnan Transfer Station from Allied and owns it today. Paragraph VIII(A) of the *Allied/BFI* Modified Final Judgment prohibits for a ten-year period Allied's reacquisition of divested assets without the prior written consent of the United States. Although Republic's acquisition of Allied will recombine the Newnan Transfer Station with Allied's other disposal assets in the Atlanta area, the United States has consented to this recombination because it concluded that the Newnan Transfer Station no longer participates meaningfully in the Atlanta market for MSW disposal services, and no competitive issues exist in the rural areas southwest of Atlanta served by the Newnan Transfer Station. Specifically, the United States found that, although Allied used the Newnan Transfer Station to serve the Atlanta MSW disposal market as of 1999 and that facility competed directly with transfer stations in the Atlanta area that Allied was acquiring in the *Allied/BFI* merger the focus of the Newnan Transfer Station has changed under Republic's ownership, and other transfer stations in the Atlanta area now accept the MSW that previously was disposed at the Newnan Transfer Station. Waste flow reports show that the Newnan Transfer Station disposes of waste generated in rural areas southwest of Atlanta and competes much less directly with other disposal facilities in the Atlanta area. Accordingly, the United States concluded that the proposed acquisition of Allied by Republic, whereby Allied's MSW disposal assets would be recombined with the Newnan Transfer Station, would not substantially diminish competition for the provision of MSW disposal services in the Atlanta, Georgia area. Instead, the divestiture of Republic's Central Gwinnett Transfer Station and Allied's BFI Smyrna Transfer Station will be an effective remedy for the anticompetitive effects of the proposed acquisition on MSW disposal services in this market.

B. Public Comment From June Guidotti

1. Summary of Ms. Guidotti's Comment

Ms. June Guidotti owns property adjacent to Republic's Potrero Hills Landfill. Guidotti Comment, at 1. As a neighbor to the Potrero Hills Landfill, Ms. Guidotti, through her counsel William Reustle, asserts that the Potrero Hills Landfill ''should be put back to its original status as a marsh environment.'' *Id.* Ms. Guidotti further contends that ''Republic Services should be required to forever clean up and be accountable for the damage they have caused to untold plants and marine life.'' *Id.* Also, she requests that ''Republic Services (Allied Services) bear the costs to make the land useable once again, and to restore it to its prior pristine condition.'' *Id.*

2. Response of the United States to Ms. Guidotti's Comment

In this antitrust suit, the allegations in the Complaint are based on current market conditions. In the current market, Potrero Hills is being used as a landfill. Given its current use as a landfill, the proposed divestiture will remedy the competitive harm that would have resulted from the merger. Whether the landfill continues to operate is within the purview of the State of California and local authorities; nothing in the proposed Final Judgment affects their authority or precludes the responsible State and local authorities from discontinuing the operation of a landfill on the site. The decision whether to permit the continuing use of the site for waste disposal should be left to the appropriate regulatory entities.

C. Public Comment From the Pennsylvania Independent Waste Haulers Association

1. Summary of the PIWHA's Comment

The PIWHA submitted a comment through counsel, Anthony Mazillo and Leonard Dimare. In the comment, the PIWHA opined that the proposed Final Judgment should be revised to: (1) Require the ''divestiture of the Quickway transfer station * * * and the T.R.C. transfer station * * *, or at least one of them, instead of the Girard Point transfer station * * * and the Philadelphia Recycling and Transfer Station;'' PIWHA Comment, at 1, (2) require the sale of the ''divested facilities * * * to small, independent acquirers, if possible, and should permit the sale of each facility * * * to separate acquirers''; *id.,* (3) ''permit seller financing''; *id.,* (4) require ''the two facilities in the Philadelphia area * * * to be sold separately to two different acquirers;'' *id.* at 3, and (5) ''require the defendants to offer three (3) year disposal contracts to all waste haulers.'' *Id.* at 1.

2. Response of the United States to the PIWHA's Comment

a. The Divestitures in the Proposed Final Judgment Will Preserve Competition

The proposed Final Judgment requires the defendants to divest the Girard Point Transfer Station and the Philadelphia Recycling and Transfer Station. Proposed Final Judgment ¶ II(H)(2)(h)(i)–(ii). The Final Judgment also requires that the Acquirer of the transfer stations be offered the option of an 18-month disposal agreement at Republic's Modern Landfill in York, Pennsylvania for the final disposal of waste received at the transfer stations. Proposed Final Judgment ¶ II(H)(1)(j). The PIWHA's comment asserts that this proposed remedy is insufficient for several reasons. First, PIWHA states that, although PIWHA does not have access to the defendants' financial data, ''marginal profitability of the Girard Point and [Philadelphia Recycling and Transfer Station] facilities has been the distinct impression of various PIWHA members.'' PIWHA Comment, at 2. Also, the PIWHA asserts that the Girard Point Transfer Station and the Philadelphia Recycling and Transfer Station are ''substantially further geographically from haulers servicing Bucks and Montgomery counties than Quickway and TRC, and, accordingly, are more costly for those haulers to use.'' *Id.*

With regard to the financial viability of the Philadelphia assets, the bidding process for these assets has generated interest from several proposed purchasers; this demonstrated interest is persuasive evidence of the substantial value of the two transfer stations as ongoing business concerns.

With regard to the PIWHA's contention that the United States should have selected different MSW disposal assets, the United States respectfully disagrees. The relief proposed by the PIWHA goes beyond the scope of the allegations in the Complaint and, as discussed in Part III.A.2(a) above, should not be considered by the Court. The United States alleged in the Complaint that the merger would have the effect of reducing competition in the market for MSW disposal services in the Philadelphia, Pennsylvania area—which identifies specifically in Philadelphia County—and not in the areas identified by the PIWHA. Complaint ¶ 22. Both the Girard Point Transfer Station and the Philadelphia Recycling and Transfer Station are located in Philadelphia County and are accessible to MSW haulers in Philadelphia County. Based on current market conditions, the ordered divestitures of Republic's Girard Point Transfer Station and Allied's Philadelphia Recycling and Transfer Station will alleviate the competitive concerns alleged in the Complaint by introducing a new MSW disposal services competitor into the Philadelphia, Pennsylvania area described in the Complaint.

b. The Divestiture Will Be Sold to a Viable and Competitive Firm

As stated in Part III.A.2(b) above, Paragraphs IV(I)(1) and (2) of the proposed Final Judgment require the divested assets to be sold to a purchaser that ''has the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the disposal and hauling business.'' When presented with a proposed acquirer of the Divestiture Assets, the United States will evaluate the proposed acquirer to determine whether it meets these requirements. Thus, the proposed Final Judgment already addresses this aspect of the PIWHA's comment.

c. Requiring the Separate Sale of the Philadelphia Assets Will Not Resolve Harm Alleged in Complaint

With regard to separating the Divestiture Assets in the Philadelphia area, the United States does not believe that this proposal is appropriate. The goal of the divestiture of the Girard Point Transfer Station and Philadelphia Recycling and Transfer Station facilities to one acquirer is to find a purchaser that possesses both the means and the incentive to maintain the level of premerger competition in the area. In this area, transfer stations are the primary disposal option for haulers of MSW in this market because roadways in much of the area are highly congested and MSW landfills generally are too far from collection routes for the direct haul of MSW to landfills to be economical. Because transfer stations are the primary disposal options for haulers in this area, an acquisition of both transfer stations is necessary for a new competitor to compete for large municipal contracts in the area. Such contracts require a firm to handle large volumes of waste. The proposed remedy will enable a purchaser to maintain the premerger level of competition between Republic and Allied.

d. Seller Financing is Strongly Disfavored

The PIWHA advocates the need for seller financing of the Divestiture Assets. PIWHA Comment, at 3–4. Seller financing essentially is a loan provided by the seller of an asset to the buyer, to cover part or all of the sale price. The PIWHA argues that small independent purchasers will not have access to the capital needed to bid on the assets. *Id.* at 3. In its view, the benefits of seller financing outweigh the ''potential problems'' associated with it. *Id.*

The United States strongly disfavors seller financing of the divestitures for several reasons. Remedies Guide § IV(G). First, the seller may retain partial control over the assets, which could weaken the purchaser's competitiveness. Second, the seller's incentive to compete may be impeded because of the seller's concern that vigorous competition may jeopardize the purchaser's ability to repay the debt. Third, the seller may have some legal claim on the Divestiture Assets in the event the purchaser goes into bankruptcy. Fourth, the seller may use the ongoing relationship as a conduit for the exchange of competitively sensitive information. Lastly, a purchaser's inability to obtain financing from banks or other lending institutions may raise questions about the purchaser's viability. The United States believes that it is unnecessary to accept the risks associated with seller financing when a satisfactory divestiture is likely to occur without them.

e. Requiring the Defendants to Offer Three-Year Disposal Contracts Is Unnecessary

In its comment, the PIWHA requests that ''the defendants be required to offer three year disposal contracts to all haulers, not just the larger ones as is currently the case.'' PIWHA Comment, at 4. The PIWHA believes that ''large, vertically integrated waste industry firms are generally unwilling to offer smaller haulers disposal contracts for a term exceeding one year.'' *Id.* Thus, PIHWA asserts that a three-year disposal contract requirement will benefit the independent haulers and, ultimately, competition generally in the Philadelphia, Pennsylvania area. *Id.*

The United States does not believe that additional injunctive relief is necessary to eliminate the competitive effects from the merger in the Philadelphia area. The proposed Final Judgment should be no more restrictive than necessary to keep the Divestiture Assets competitive. Remedies Guide § II. The United States has no evidence that the defendants' merger would raise competitive issues warranting the imposition of the additional relief proposed by the PIWHA. Because the Divestiture Assets will remain competitive without such injunctive relief, the remedy in the proposed Final

Judgment is sufficient to resolve the harm alleged in the Complaint.

D. Public Comment From Metro Disposal

1. Summary of Metro Disposal's Comment

Metro Disposal operates small container commercial waste collection and MSW disposal services principally in the Cleveland, Ohio area. In its comment, Metro Disposal asserts that the proposed Final Judgment should be revised to include the sale of 15 small container commercial waste collection routes in Cuyahoga County along with the sale of the Harvard Road Transfer Station and an unspecified number of additional routes in the town of Mansfield to the purchaser of the Oakland Marsh Landfill. Metro Disposal Comment, at 2. Metro Disposal further asserts that the Divestiture Assets will not be attractive ''[w]ithout having some guarantee of volumes into the Harvard transfer [station].'' *Id.*

2. Response of the United States to Metro Disposal's Comment

The United States conducted a thorough investigation into small container commercial waste collection and MSW disposal services in the Cleveland, Ohio area. During the investigation, the United States conducted many interviews of market participants to determine the competitive impact of the proposed merger. Based on the investigation and current market conditions, the ordered divestitures of Allied's Superior Oakland Marsh Landfill and Republic's Harvard Road Transfer Station will alleviate the competitive concerns alleged in the Complaint by introducing a new MSW disposal services competitor to the market. A new competitor should provide a significant competitive alternative to the defendants' MSW disposal services in the Cleveland market. Metro Disposal's proposal to revise the proposed Final Judgment to require the sale of small container commercial waste collection routes in effect would require a remedy in a market in which no competitive harm has been alleged, and therefore would exceed the scope of the Complaint. The United States has no evidence that the merger would have anticompetitive effects in the market for small container commercial waste collection services in the Cleveland area. Numerous competitors for the provision of small container commercial waste collection services will remain in the Cleveland area following the merger. Because the merger will not cause competitive harm in this market, the additional remedy proposed by Metro Disposal is unnecessary.

With regard to Metro Disposal's concern that additional MSW volumes are necessary for the continued viability of the Harvard Road Transfer Station and Superior Oakland Marsh Landfill, the United States respectfully disagrees. In its investigation, the United States found that the Harvard Road Transfer Station is centrally located in the City of Cleveland and is accessible to MSW haulers in Cuyahoga County. In addition, the Superior Oakland Marsh landfill will provide the Acquirer with an option for the final disposal of MSW. In the Cleveland, Ohio area, there are several independent haulers who are seeking additional disposal options. Accordingly, in addition to internalizing its own MSW in the transfer station and landfill, the Acquirer of the Divestiture Assets will be able to compete for third-party volumes to supply these disposal facilities. Thus, the ordered divestitures of Allied's Superior Oakland Marsh Landfill and Republic's Harvard Road Transfer Station will alleviate the competitive concerns alleged in the Complaint by introducing a new MSW disposal services competitor into the Cleveland, Ohio area, thereby maintaining the pre-merger level of competition.

E. Public Comment From the Cuyahoga Solid Waste District

1. Summary of the Cuyahoga Solid Waste District's Comment

Like Metro Disposal, the Cuyahoga Solid Waste District urges that ''sufficient small container commercial collection routes in the Cleveland, Ohio market area be added to the Relevant Hauling Assets'' to make ''the sale of the Harvard Road Transfer Station and the Oakland Marsh Landfill a financially viable transaction necessary to attract a qualified buyer.'' Cuyahoga Comment, at 2. The Cuyahoga Solid Waste District also asserts that the proposed Final Judgment should prohibit Republic from acquiring transfer station assets in Cuyahoga County, including the Broadview Heights Recycling Center. *Id.*

2. Response of the United States to the Cuyahoga Solid Waste District's Comment

As explained in Part III.D.2. above, the United States has seen no evidence of anticompetitive harm in the Cleveland, Ohio market for small container commercial waste collection services, and the Complaint contains no allegation of such harm; accordingly, the relief proposed by the Cuyahoga Solid Waste District goes beyond the scope of the Complaint and should not be considered by the Court. Moreover, independent haulers generate sufficient volumes of MSW to support the types of volumes needed to supply the Harvard Road Transfer Station and Oakland Marsh Landfill. With regard to the Cuyahoga Solid Waste District's suggestion that Republic be barred from acquiring transfer station assets in Cuyahoga County, the United States already has addressed this concern in Section VII of the proposed Final Judgment:

> [D]efendants, without providing advance notification to United States and the Relevant State, shall not directly or indirectly acquire, any (1) interest in any business engaged in a relevant service in a relevant area, (2) assets (other than in the ordinary course of business) used in a relevant service in a relevant area, (3) capital stock, or (4) voting securities of any person that, at any time during the twelve (12) months immediately preceding such acquisition, was engaged in MSW disposal or small container commercial waste collection in any relevant area, where that person's annual revenues in the relevant area from MSW disposal and/or small container commercial waste collection service were in excess of $500,000 annually. For clarity, this provision also applies to an acquisition of disposal facilities that serve a relevant area but are located outside the relevant area, whether or not they are physically located in the relevant area.

Section VII of the proposed Final Judgment requires the defendants to notify the United States and the Relevant State if they plan to acquire any additional assets in the area, including Broadview Heights Recycling Center. Such notification would provide the United States and the Relevant State the opportunity to investigate, review, and ultimately determine whether the defendants' potential acquisition of additional small container commercial waste collection or MSW disposal assets in the Cleveland, Ohio area would present the potential for anticompetitive harm. The Cuyahoga Solid Waste District's concern thus is addressed in the proposed Final Judgment.

IV. Standard of Judicial Review

Upon the publication of the Comments and this Response, the United States will have fully complied with the Tunney Act and will move for entry of the proposed Final Judgment as being ''in the public interest.'' 15 U.S.C. 16(e)(1), as amended.

The Tunney Act states that, in making that determination, the Court shall consider:

A. The competitive impact of such judgment, including termination of alleged violations, provisions for

enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

B. The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A)–(B); *see generally United States* v. *AT&T Inc.,* 541 F. Supp. 2d 2, 6 n.3 (D.D.C. 2008) (listing factors that the Court must consider when making the public-interest determination); *United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (concluding that the 2004 amendments to the Tunney Act ''effected minimal changes'' to scope of review under Tunney Act, leaving review ''sharply proscribed by precedent and the nature of Tunney Act proceedings'').[9]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1458–62 (D.C. Cir. 1995). With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted); *cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''); *see generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

The government is entitled to broad discretion to settle with defendants within the reaches of the public interest. AT&T Inc., 541 F. Supp. 2d at 6. In making its public-interest determination, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Court approval of a consent decree requires a standard more flexible and less strict than that appropriate to court adoption of a litigated decree following a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, rather than to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459. Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Id.* at 1459–60. As this Court recently confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). The amendments codified what Congress intended when it passed the Tunney Act in 1974, as Senator Tunney then explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[10]

V. Conclusion

After careful consideration of the public comments, the United States concludes that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. Accordingly, after the comments and this Response are published in the **Federal Register** pursuant to 15 U.S.C. 16(b) and (d), the United States will

move this Court to enter the proposed Final Judgment.

Dated: May 14, 2009.

Respectfully submitted,

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Certificate of Service

I, Stephen A. Harris, hereby certify that on May 14, 2009, 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 Republic Services, Inc. and Allied Waste Industries, Inc., and plaintiffs the State of California, Commonwealth of Kentucky, State of Michigan, State of North Carolina, State of Ohio, Commonwealth of Pennsylvania, and the State of Texas by mailing the document electronically to the duly authorized legal representatives as follows:

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Footnotes

1. *See United States* v. *Allied Waste Industries & Browning-Ferris Industries* (D.D.C. 1999) (No. 1:99 CV 01962) [hereinafter *Allied/BFI*].

2. The CCWI asserts that ''Despite the consistency of prevailing market conditions cited in the [proposed Final Judgment], the remedies vary widely from market to market.'' CCWI Comment, at 8. In particular, the CCWI states that ''the [proposed Final Judgment] provides for the divestiture of airspace disposal rights * * * in several local markets, but requires that such rights remain with the acquirer for varying durations and upon varying terms.'' *Id.* at 9. In the proposed Final Judgment, the United States carefully crafted a remedy based on the particular facts presented in each of the affected areas. The United States's goal is to restore competition lost as a result of the merger, not to enhance premerger competition by requiring additional remedies not warranted by the facts. The CCWI's desire for an identical remedy in each of the affected areas would be counter to this goal. Based on a market-by-market analysis of each of the affected areas, the proposed remedy will restore competition lost as a result of the merger in each area.

3. In two other areas Lubbock, Texas and Lexington, Kentucky it was determined that there was no harm to MSW disposal. Rather, the proposed Final Judgment requires the sale of Allied and Republic's small container commercial waste collection businesses as well as associated hauling facilities, respectively. Because there was no competitive harm to the market for MSW disposal, no disposal remedy is necessary.

4. *See United States, et al.* v. *USA Waste Services, Inc., et al.,* (N.D. Ohio 1999) (Civil No. 1:98CV1616) (hereinafter *USA Waste*).

5. (D.D.C. 1999) (Case No. 1:99 CV 01318).

6. The CCWI cites to *United States* v. *Allied Waste Industries, Inc.,* (D.D.C. 2000) (No. 1:00 CV 01469), in support of its assertion that contract relief should be required in this case. In a more recent case, however, *United States* v. *Waste Management, Inc., et al.* (D.D.C. 2003) (No. 1:03 CV 01409), the United States sought contract relief in *some* markets, but not others, as warranted by the specific facts of the case.

7. *See USA Waste,* at ¶ II(D)(7).

8. In addition, after the filing of the proposed Final Judgment, the defendants agreed to separately market and sell the Divestiture Assets in the San Francisco, California area, pursuant to an agreement with the Attorney General for the State of California.

9. The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004) *with* 15 U.S.C. 16(e)(1) (2006).

10. a> *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to

comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

March 6, 2009

Maribeth Petrizzi,

Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 1401 H Street NW., Suite 3000, Washington, DC 20530.

Re: Comments of the Center for a Competitive Waste Industry, on the Proposed Judgment in U.S. v. Republic Services, Inc. and Allied Waste Industries, Inc., Case No. 1:08–cv–02076 (D.D.C. 2008)

Dear Ms. Petrizzi: The proposed final judgment (''PFJ'') in this case will not fully remedy the competitive problems identified in the complaint but rather will permit a three-firm oligopoly to consolidate into an even more concentrated two-firm oligopoly based upon a remedy that is fatally discredited by the very parties involved. The proposal to create a duopoly in an industry with a history of persistent anticompetitive conduct is something that warrants the utmost scrutiny. In 1998 and 1999 the Department of Justice permitted two mega-mergers by ordering the divestiture of overlapping assets primarily to Republic Services, at that time ranked fifth. Now, in this proceeding, that same Republic Services, which was then supposed to restore competition, is applying to consolidate an already highly consolidated industry into a duopoly, with a few divested assets to the current fifth ranked oligopoly member, in this case Waste Connections.

The PFJ is both inconsistent with past DOJ waste enforcement actions and internally inconsistent. A more lax approach is not warranted; indeed, the failure to abide with past divestitures calls for a more strict approach now. The DOJ must strengthen the PFJ to remedy the significant competitive problems posed by this merger. As we recommend, the merged firm should be required to sell to independent haulers some of the airspace in their landfills where the two firms' markets overlap. Unlocking control over landfills is most often the key element in effective relief, because the extreme difficulty in permitting new sites creates near impenetrable barriers to entry for disposal. Moreover, consistent with past DOJ practice, undisputedly anticompetitive evergreen contracts should be curtailed and enforcement monitors should be established to insure compliance—especially when, as here, the merged firms have a past history of violating prior orders.

On December 3, 2008 the Antitrust Division of the Department of Justice filed a complaint and proposed final judgment (''PFJ'') with this Court regarding the acquisition of Allied Waste Industries, Inc. (''Allied'') by Republic Services, Inc (''Republic''). Although this acquisition creates a dominant waste hauling and disposal company nationally, the DOJ restricted its remedy to a very limited set of geographic markets in which competitive concerns arise in the small container commercial waste collection (''SCCWC'') and municipal solid waste (''MSW'') disposal markets. Moreover, the proposed remedies in these limited markets are inadequate to remedy competitive harm and are overall inconsistent as compared to other previous enforcement actions in the waste hauling and disposal industry.

The Center for a Competitive Waste Industry files these comments pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b–e) (known as the ''Tunney Act'') because the DOJ's complaint and PFJ are seriously inadequate to remedy the competitive concerns arising from this transaction. This merger results in a duopoly that threatens competition in the SCCWC markets in 10 local markets (Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Houston, and Lubbock, Texas; Greenville and Spartanburg, South Carolina; Lexington, Kentucky and Northwest Indiana), with combined market shares of just the merging firms of up to 75%.

This merger also results in Republic dominating the municipal solid waste disposal markets (''MSW markets''), according to the proposed order, just in 13 local markets (Atlanta, Georgia; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth and Houston, Texas; Greenville and Spartanburg, South Carolina; Los Angeles and San Francisco, California; Northwest Indiana; and Philadelphia, Pennsylvania), with combined market shares of just the merging firms of up to 80%.

In these designated markets, the PFJ attempts to remedy the anticompetitive effects of the merger but takes no action in other markets that have an equal or greater level of concentration. Even if the identified local markets are the only markets of competitive concern the PFJ is inadequate in several respects:

- The PFJ is inconsistent with past waste merger enforcement actions;
- The relief in the PFJ is internally inconsistent;
- The PFJ limits itself to divestiture of landfill and transfer station assets, which independent haulers usually cannot afford, and does not include mechanisms for non-discriminatory access to such assets;
- The PFJ fails to restrict the sales of divested assets to the other oligopolists in the waste industry; and
- The PFJ fails to require the modification of evergreen contracts that severely limit customer choice and provide formidable barriers to entry for potential competitors, despite this requirement in previous enforcement actions.

To alleviate these problems we suggest the following modifications to the PFJ:

- The PFJ should prohibit evergreen contracts and provide for modification of terms of length, renewal provisions, liquidated damages, and escalator clauses;
- The PFJ should prohibit divestiture to other oligopolists;
- The PFJ should provide independent haulers access to landfills in all markets on a non-discriminatory basis; and
- The DOJ should appoint a trustee to monitor compliance with the final judgment.

I. The Interests of the Parties

These comments are submitted on behalf of the Center for a Competitive Waste Industry (''The Center''), a non-profit research and advocacy organization dedicated to the protection of a competitive waste industry. The Center advances efforts to restore and maintain competition in the solid waste industry of especial interest for public works directors, independent haulers, businesses using solid waste services, and recyclers. These stakeholders and ultimately consumers will be harmed from this merger even if the PFJ is implemented in its current form. The merger will result in a dominant waste hauling and disposal company with the unilateral ability to reduce competition in the waste industry and extend its market power into the recycling industry, thereby raising prices for consumers while simultaneously reducing services to these consumers.

II. Procedural Background

In June 2008, Republic announced its proposed purchase of Allied for $4.5 billion. In July, the DOJ issued a ''second request'' under the Federal Hart-Scott-Rodino Antitrust

Improvements Act of 1976, seeking more information. The States of California, Kentucky, Michigan, North Carolina, Ohio, Pennsylvania and Texas conducted simultaneous investigations.

On December 3, 2008, the DOJ and the several States mentioned above filed an enforcement action to enjoin the merger of Republic and Allied. The DOJ action claimed that the merger would pose significant competitive problems in the SCCWC market in 9 geographic areas and the MSW market in 13 geographic areas because the merged firm would substantially lessen competition by reducing the number of significant competitors and permitting a single firm to control a substantial market share in each geographic area in each product market. The DOJ alleged this would result in higher prices, fewer choices, and a reduction in the quality of waste services provided in these areas. The PFJ attempts to address these issues by requiring just the divestiture of SCCWC assets (including hauling routes, trucks, containers and customer lists) in 9 markets, and MSW disposal assets (including landfills, transfer stations, airspace disposal rights, and storage) in 13 markets.

III. The Tunney Act Standards

The Tunney Act requires that ''[b]efore entering any consent judgment proposed by the United States * * *, the court shall determine that the entry of such judgment is in the public interest.'', 16 U.S.C. § 15(e)(1). In applying this ''public interest'' standard, the burden is on the government to ''provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' United States v. SBC, 489 F.Supp. 2d 1, 16, (D.D.C. 2007), citing United States v. Microsoft Corp., 56 F.3d 1448, 1460–61 (D.C. Cir. 1995).

The 2004 Congressional amendments to this Act specifically overruled District of Columbia Circuit Court of Appeals and District Court precedent that was deemed overly deferential to Antitrust Division consent decrees.[1] In response to those decisions, Congress reemphasized its intention that courts reviewing consent decrees ''make an independent, objective, and active determination without deference to the DOJ.''[2] Courts are to provide an ''independent safeguard'' against ''inadequate settlements''.[3] Specifically, the Act was amended to *compel* reviewing courts to consider both ''ambiguity'' in the terms of the proposed remedy, as well as the ''impact'' of the proposed settlements on ''competitors in the relevant market or markets.''[4] Moreover, Congress adopted these 2004 amendments to highlight the expectation that an independent judiciary would oversee proposed settlements to ensure that those settlements met the needs of consumers.

We submit the DOJ has an extra burden to justify the limited relief in this case. First, parties in these markets have failed to abide with past DOJ merger decrees and the DOJ has brought enforcement actions to compel compliance with decrees. Second, the PFJ is inconsistent with past enforcement actions. Third, the PFJ is internally inconsistent requiring certain types of remedies in some markets and not others. Fourth, it relies at its center upon an asset divestiture remedy that has demonstrably failed to provide offsetting relief from the anticompetitive effects of major consolidation. Finally, the PFJ does not address several markets that will be adversely affected by the merger.

As to the PFJ, we submit it is inadequate because it fails to provide for airspace disposal rights, access to landfills, nondiscriminatory access and modification of evergreen contracts divestiture.

IV. The PFJ Needs a Monitor Trustee to Ensure Compliance

Waste firms' failure to abide with past merger divestitures raises significant concerns about the adequacy of the remedy in this case. Two examples are illuminating.

In 1999, Allied merged with Browning Ferris Industries (''BFI''). The merger was cleared after the requirement of divestiture of several landfills, incinerators, airspace disposal rights, transfer stations, and commercial hauling routes. In August 2004, the DOJ brought a contempt order against Allied for prematurely terminating landfill disposal rights in a divested asset as part of the Allied/BFI merger. The DOJ secured a fine of $10,000 per day for every day in violation of the untimely termination and required a comprehensive compliance program for Allied's relevant management-level employees.[5]

In 2000, Allied attempted a merger with Republic that resulted in a number of divestitures in hauling routes and contract revisions limiting contracting periods and requiring renewal notices in a number of affected markets. In November 2004, the DOJ brought a contempt action against Republic for failing to comply with certain contract revision requirements. This resulted in the payment of a $1.5 million fine to the Department of the Treasury.[6]

We believe that these violations raise serious concerns about Republic's likely compliance with the provisions of the PFJ and highlight the need to strengthen the PFJ provisions. One of the approaches the DOJ has taken in cases where a firm that has violated past orders proposes to resolve a merger through a divestiture is to appoint a monitor trustee to ensure that the parties fully comply with the PFJ.[7] We suggest that the PFJ be modified to immediately impose the use of a monitor trustee to ensure compliance with the order.

V. The DOJ Has Arbitrarily Departed From Its Past Antitrust Enforcement Policies in Waste Mergers and Should Restrict Evergreen Contracts and Liquidated Damage Provisions Consistent With Past Actions

Even though the waste markets have become more concentrated and there is evidence that past orders have not been complied with the DOJ's PFJ is actually weaker than orders in past waste mergers. In past enforcement actions the

[1] In this matter, the DOJ may claim that the court's review is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to go beyond the scope of the complaint. See Fed. Reg. Vol. 73, No. 47, at 12774 (March 10, 2008). We believe that view is inconsistent with the legislative history of the 2004 Amendments to the Tunney Act. Congress amended the Tunney Act in 2004 to overrule District of Columbia Circuit Court of Appeals and District Court precedent that was overly deferential to Antitrust Division consent decrees. The amendments to the Tunney Act *compel* the reviewing court to consider, inter alia, the ''impact'' of the entry of judgment on ''competition in the relevant market.'' See Pub. L. 108–327, § 221(b)(2) rewriting 15 U.S.C. § 16(e).

No suggestion is made in the statute or legislative history that the courts should defer to either the Government's identification of injury or the Government's proposed remedy to that injury. On the contrary, as one of the authors of the legislation noted, the reviewing court is to achieve an ''independent, objective, and active determination without deference to the DOJ.'' See 150 Cong. Rec., S 3617 (April 2, 2004) (Statement of Sen. Kohl).

For criticism of the overly deferential standard see Darren Bush and John J. Flynn, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the ''Microsoft Fallacies''*, 34 Loy. U. Chi. L.J. 749 (2002–2003).

[2] See 150 Cong. Rec., S 3617 (April 2, 2004) (Statement of Sen. Kohl).

[3] *Id.*

[4] *Id.*

[5] See DOJ Press Release (Aug. 2, 2004), available at *http://www.usdoj.gov/opa/pr/2004/August/04_crt_529.htm.*

[6] *See* DOJ Press Release (Nov. 30, 2004), available at *http://www.usdoj.gov/atr/public/press_releases/2004/206569.htm.*

[7] Proposed Final Judgment, US v. *Computer Associates International, Inc. and Platinum Technology International, Inc.,* Case No. 99CV01318 (D.D.C., May 25, 1999).

DOJ has relied on various forms of behavioral relief in addition to divestiture of assets in order to ensure that mergers between MSW companies do not harm competition.[8] If DOJ has changed its enforcement policy on waste services mergers it bears an obligation to disclose the reasons for those changes, so that the court can determine whether entry of the PFJ is in the public interest.

For example, the 2000 Allied/Republic merger Final Judgment required modification of commercial waste hauling contracts to limit contract durations and the availability of liquidated damages by the merging firms. As described below, initial contracts were limited to two years, with renewal contracts limited to one.[9] Although included as a key component of the 2000 Allied/Republic decree, contract revision requirements are noticeably absent from the PFJ in this case.

Second, the PFJ permits Allied to reacquire assets it was required to divest as a condition of previous final judgments (''FJs''). The Allied/BFI merger in 1999 resulted in Allied being ordered to divest the Newnan Transfer Station, which was purchased by Republic.[10] As a result of the Allied/Republic merger, the transfer station will once again be owned by Allied, in contravention of the FJ. The DOJ has consented to the reacquisition because the ''focus of the Newnan Transfer Station changed under Republic ownership,'' other transfer stations accept waste that previously went to Newnan, and because the transfer station ''competes much less directly with other disposal facilities in the Atlanta area.'' [11] Regardless of the impact of the shift in ownership on the status of the previously divested asset, permitting Allied to reacquire assets previously divested represents a departure from previous agreements preventing such reacquisitions.

Third, the PFJ fails to limit the ability of the merged firm to use evergreen contracts. In past enforcement actions, the DOJ has repeatedly acknowledged the significance of evergreen contracts and the impact of such contracts on competitiveness in local waste hauling markets. For example, in the 2000 Republic/Allied merger the DOJ articulated the important reasons for restricting evergreen contracts:

[T]he common use of long-term self-renewing ''evergreen'' contracts by existing commercial waste collection firms can leave too few customers available to the entrant in a sufficiently confined geographic area to create an efficient route. These contracts often run for several years and frequently have high liquidated damage terms which make it costly to a customer who wishes to change its collection service without giving proper notice. When giving proper notice, the customer must often inform the firm in writing 60 days before the contract renews. This time period allows the incumbent firm an opportunity to react to a prospective entrant's solicitation to that customer. The incumbent firm can inquire why the customer wishes to change its service, and if a prospective entrant has offered a lower price, the incumbent can lower its price to retain the customer. This can result in price discrimination; i.e., an incumbent firm can selectively (and temporarily) charge unbeatably low prices to some customers targeted by entrants, a tactic that would strongly inhibit a would-be entrant from competing for such accounts, which, if won, may be unprofitable to serve, and would limit its ability to build an efficient route. Because of these factors, a new entrant may find it difficult to compete by offering its services at pre-entry price levels comparable to the incumbent.[12]

The DOJ also recognizes similar concerns in the present case. Particularly in the commercial waste hauling industry, ''the incumbent's ability to engage in price discrimination and enter into long-term contracts with collection customers is effective in preventing new entrants from winning a large enough base of customers to achieve efficient routes in sufficient time to constrain the post-acquisition firm from significantly raising prices.'' [13] Moreover, ''incumbent firms frequently use three to five year contracts, which may automatically renew or contain large liquidated damage provisions for contract termination.'' [14]

However, despite this clear acknowledgement of the serious competitive problems posed by long-term commercial waste-hauling contracts, the PFJ does not provide a remedy. The PFJ fails to require the modification of evergreen contracts that severely limit customer choice and provide formidable barriers to entry for potential competitors. As a result, the success of other remedies, like asset divestitures, is jeopardized, especially in markets in which commercial waste hauling routes are not being divested. In the absence of a reliable customer base and without the opportunity to entice competitors' customers to switch firms, new competitors will be unable to build efficient routes capable of generating a profit. These new ''competitors'' will be quickly precluded from providing any meaningful competition.

In previous waste hauling merger cases, the final judgments have included provisions limiting both the length of contracts by merging firms for commercial waste collection services and the circumstances under which the contracts renew. For example, in the 2000 Allied/Republic merger, the FJ required that commercial waste hauling contracts be revised to adhere to strict limits.[15] New contracts were limited to two years, and renewal contracts could not exceed one year. The FJ also attempted to decrease the effectiveness of automatic renewal provisions by forbidding contracts from requiring customers to provide written notice of termination more than 30 days before the end of the contract term. Liquidated damage provisions were also limited to no more than three times the customer's average monthly charge during the first year, and two times the average monthly charge for subsequent years. In order to provide relief for existing customers, Allied and Republic had to offer the revised contract terms to customers who previously agreed to ''evergreen'' contracts.

In this case we recommend adding the requirement of modifying the merging firms' current contracts consistent with the Allied/Republic matter. The customer should be permitted to cancel the contract without penalty after one year in the case of non-compacting container service, and after two years for compacting container service; automatic renewal provisions should be prohibited except if the customer's express written agreement is secured; liquidated damages should not exceed charges for the last three months in cases where

[8] *See e.g.,* Final Judgment, *United States* v. *Allied Waste Industries, Inc. and Republic Services* (D.C. Dist. 2000) at XII.

[9] Notably, Republic's alleged failure to adhere to the contract revision requirements of the FJ resulted in Republic making a $1.5 million payment to settle a civil contempt claim. See ''Republic Services Inc. Agrees to Pay $1.5 Million Civil Penalty,'' Dept. of Justice Press Release, Nov. 30, 2004.

[10] Modified Final Judgment, United States v. *Allied Waste Industries, Inc. and Browning-Ferris Industries, Inc.,* Case No. 1:99CV01962 (D.D.C. 1999).

[11] *Id.*

[12] Competitive Impact Statement, *United States* v. *Allied Waste Industries, Inc. and Republic Services, Inc.,* Case No. 1:00–cv–01469 (D.C. Dist. 2000).

[13] Complaint, *United States* v. *Allied Waste Industries, Inc. and Republic Services, Inc.,* Case No. 1:08 CV02076 (D.C. Dist. 2008) at 20.

[14] *Id.*

[15] Final Judgment, *United States* v. *Allied Waste Industries, Inc. and Republic Services, Inc.,* Case No. 1:08 CV2076 (D.C. Dist. 2008) at XII.

they would apply; escalator charges should be barred unless the specific basis of the calculation is based upon an independent third party's index, clearly stated in the contract, and shown in the bill as a separate line; and any escalator must also operate reciprocally when the index declines as when it increases.

VI. The Remedies in the PFJ Are Internally Inconsistent and the PFJ Should Be Modified To Require Divestiture of Airspace Rights and Restrictions on the Sales of the Assets in all Markets

The PFJ identifies similar threats to competition due to increased concentration in 15 markets. In each affected market recognized in the PFJ, initially high concentration levels are exacerbated by further consolidation by Allied/Republic. In the majority of markets, the resulting Allied/Republic market presence will be at least 50 percent, with no more than three significant competitors. However, the PFJ does not respond to similar market concentration problems with similar remedies. Despite the consistency of prevailing market conditions cited in the PFJ, the remedies vary widely from market to market.

For example, the PFJ provides for the divestiture of airspace disposal rights, or landfill space, in several local markets, but requires that such rights remain with the acquirer for varying durations and upon varying terms. Airspace disposal rights are to be divested only in Houston, Texas, Northwest Indiana, and Philadelphia, Pennsylvania, and not in any of the other markets addressed in the PFJ. Although the PFJ allows for a 10-year contract in Houston, the Indiana and Philadelphia contracts extend for only two years and 18 months, respectively. Neither the Competitive Impact Statement nor the PFJ offer an explanation as to why a lengthy contract is appropriate in one market, but contracts of only minimal duration are acceptable in the others. Moreover, no explanations are offered as to why airspace disposal rights are an unnecessary remedy in other markets. Although the lengthy contract required in Houston may provide disposal rights of a sufficient duration to support a purchaser's needs, given that no landfills are to be divested in either Indiana or Philadelphia, minor provisions granting short-term airspace disposal rights contracts to purchasers are likely to be insufficient to address their disposal needs in any meaningful way.

Airpace rights are crucial to the success of the PFJ in restoring competition. We believe the PFJ should be modified to confer upon independent haulers, namely those without their own landfill assets, the legal right to acquire 15-year contracts for space in Republic/Allied landfills in all markets that are highly concentrated under the Merger Guidelines, or at least the 15 markets that are the subject of the PFJ. These independent haulers should be given the right to secure access non-discriminatorily at the same price that the companies' corporate headquarters have internally billed their divisions, and up to 150% of the volumes the independent hauler has averaged for the past five years. To insure non-discriminatory treatment, Attachment A sets forth proposed terms.

In the alternative, in the event airspace remedies are not afforded in all overlapping markets that the DOJ Merger Guidelines predict will result in the acquisition of market power, at the very least those markets identified by the PFJ as possessing those impacts should be provided with an airspace remedy. If not, in the alternative, the three markets that the PFJ does provide some airspace rights should be enhanced to include the essential type of protections set forth in Attachment A. For without specific and enforceable protections against discriminatory conduct, such as subjecting the trucks of the independent haulers with these contracts to long waits at the landfill, the right will be eviscerated in practice. Ironically, this is exactly what was done to Republic when it purchased similar rights to the 1998–99 merger spinoffs in Florida without anti-discriminatory protections.

Similarly, the PFJ restricts the sales of the divested assets so that all the assets are offered for sale individually. However, this restriction is imposed in only four markets: Atlanta, Georgia; Cleveland, Ohio; Philadelphia, Pennsylvania and Fort Worth, Texas. The DOJ explains that the restrictions in those markets operate to increase the pool of potential bidders.[16] In order to encourage bidding from local and regional firms who may not be interested in or capable of purchasing a large group of divestiture assets, the DOJ requires that certain divestiture assets in certain markets be offered for separate purchase. However, the DOJ fails to indicate why assets in the four markets selected for individual sale are uniquely well-suited to be packaged independently. The choice to restrict the sale of assets in certain markets with the idea of encouraging purchase by local or regional firms is particularly significant given the extreme levels of concentration in all of the markets addressed in the PFJ. We believe that the goal of encouraging new entrants in the commercial waste hauling industry will be better served by requiring the divested assets in each individual market to be offered for sale individually rather than in a package.

VII. The PFJ Should be Modified to Prevent Divestiture to Other Members of the Waste Oligopoly and Provide for Nondiscriminatory Access

We believe that the merger ought not to have been approved in the first instance. If it is approved nonetheless, we ask that eligible buyers be restricted, just as the PFJ attempts to do in four markets (Atlanta, Cleveland, Philadelphia and Fort Worth), but does so with such imprecision as to be marginally useful even there.

The waste hauling industry currently functions as an oligopoly, with only two or sometimes three national or regional companies vertically integrated into landfill competing in a given local market: Waste Management, Allied, Republic, BFI, and Waste Connections. This extreme level of concentration has allowed the top companies to continually and inexorably increase their control of crucial waste hauling assets. For example, the three largest waste hauling companies controlled 68 percent of landfill space in 2004, up from 35 percent in 1994.[17] The consolidation of the waste hauling industry has not escaped public notice, as an article in the Wall Street Journal recently noted:

''The country's three largest garbage haulers have been steadily raising prices despite the slowing economy. And with a major buyout among them looming, prices are likely to continue their climb.

''The increases are a break from the recent past, and follow a strategy shift in the wake of the industry's 1990s consolidation. They also followed some blunt, public suggestions about pricing by the companies' top executives * * *

''Another big merger among the waste giants could spur ever higher contract prices, say industry observers. The big three trash companies already control about two-thirds of the landfill business.'' [18]

While alluding to the dramatic consolidation of waste hauling companies during the 1990s,[19] the

[16] Competitive Impact Statement at 25.

[17] Raymond James, *Landfill Pricing Power,* Waste Business Journal, Landfill Data Bases (2003).

[18] Ilan Brat, *Garbage Haulers Hoist Prices: Truce Allows Waste Management, Allied and Republic to Push Higher,* Wall Street Journal (Sept 18, 2008).

[19] The increase in consolidation of waste hauling firms was aided by a sharp decrease in the number of functioning landfills from 7900 in 1989 to 2142

article also highlights the current levels of consolidation and the role of Allied and Republic in the waste hauling oligopoly. The merger between Allied and Republic will reduce the big three waste hauling companies to two, drawing the wave of consolidations begun in the 1990s to a near close. As the Wall Street Journal article notes, the current conditions in the waste hauling industry have already allowed the three largest firms to raise prices. In the absence of sufficient safeguards to protect and promote competition in local markets, the ability of the new big to firms to control prices may continue to increase dramatically.

In past enforcement actions, the DOJ has agreed that sales should be barred to the other top three firms in this market.[20] But even selling assets to the fourth largest competitor in a market, will effectively allow the fourth player to become number three immediately after a merger of two of the top firms, as the current case demonstrates.[21] Most divested assets in this industry are too expensive to be acquired by independent haulers and smaller sized firms who do not have the capital or the resources to purchase the assets as a package.

Moreover, the PFJ limits itself to divestiture of assets and does not include mechanisms for non-discriminatory access to landfill disposal and airspace rights. Non-discriminatory access would require, for example, a landfill owner to sell disposal rights to an independent hauler at the same rate it charges its local subsidiary, or providing equal access to landfills without ability to incumbent firms to discriminate. The PFJ makes provisions for the divestiture of landfills and landfill rights, transfer stations, commercial hauling routes, and limited airspace disposal rights in the affected markets. As the PFJ notes, a new entrant to commercial waste collection ''cannot provide a significant competitive constraint on the prices charged by market incumbents until it achieves minimum efficient scale and operating efficiencies comparable to existing firms.'' [22]

These divestitures will not be effective without providing nondiscriminatory access to landfills. Given the current and widespread oligopoly in commercial waste hauling, firms in a position to purchase divested assets will likely either be existing members of the oligopoly or small local or regional firms in need of further assistance in order to be competitive. Non-discriminatory access is necessary to allow independent and smaller waste firms to compete in an increasingly concentrated market of oligopolies. In highly concentrated markets, oligopolists have the ability to control prices requiring smaller firms to pay higher prices to even attempt to compete, which are eventually passed on to the consumer. This is evidenced by the ''eye-popping spot market price hikes'' averaged at 89% immediately after the DOJ approved the USA–Waste/Waste Management merger in 1999.[23] In any instance, divestiture of assets alone is unlikely to fully restore competition without additional mechanisms to ensure their enforcement.

We recommend that the PFJ be modified to limit the sales of assets to the the top five municipal solid waste companies, namely, Waste Management, Republic Services, Veolea Environmental Services, Waste Connections and BFI Canada in order to reduce the risk of divestitures becoming little more than a game of musical chairs among other oligopoly members instead of a measure with any chance of restoring competition. In the event that independent haulers without their own disposal facilities are unable to afford certain divested assets, they can be sold the hauling assets and given the right to long-term contracts for airspace in the merged companies' landfills at the same price that the local subsidiary is billed by its parent. This will dissuade anticompetitive concentration in localized markets and permit more access and new entry allowing for competitive pricing of disposal and hauling services, and ultimately improve price and service to the consumer. Finally, we recommend that independent haulers be given nondiscriminatory access to landfills.

VIII. The PFJ Fails To Address Concentration in the Majority of Affected Markets

The PFJ includes remedies for many markets, but fails to include the vast majority of affected markets. The PFJ requires a combination of landfills and landfill disposal rights to be divested in 11 markets, but fails to require divestiture in other markets that have an equal or greater level of concentration. For example, the complaint identified Fort Worth, Texas and Cleveland, Ohio, with premerger HHIs of 2267 and 1928 respectively, as requiring remedial measures. Although the DOJ Merger Guidelines generally consider a market with an HHI greater than 1800 to be highly concentrated, in this case the DOJ ignores several markets with an HHI for waste disposal in tons per day in excess of 4800. The PFJ also fails to secure relief in dozens of markets with HHIs in excess of 2500, which are likely to suffer adverse effects from the further consolidation of commercial waste hauling services.[24]

In an independent analysis of the impact of this merger, the Center for a Competitive Waste Industry identified at least 78 separate highly-concentrated geographic markets in which this merger will cause significant and sustained competitive harm and substantial increases to Republic's market power.[25] Additionally, it found at least 46 of these markets will become so concentrated that they result in post-merger HHIs of more than 2500.

Moreover, the PFJ includes remedies in markets in California, Colorado, Georgia, Indiana, Kentucky, Michigan, Missouri, North Carolina, South Carolina, Ohio, Pennsylvania, and Texas, but Illinois is noticeably absent from the list. The DOJ does not seek divestitures in any market in Illinois, despite the State having six markets exhibiting extreme levels of

in 2001. *See* Ralph E. Townsend and Francis Ackerman, *An Analysis of Competition in Collection and Disposal of Solid Waste in Maine,* 19, Dec. 31, 2002, available at *http://www.maine.gov/ag/dynld/documents/Solid_Waste_Report.pdf.*

[20] Hold Separate Stipulation, *U.S.* v. *USA Waste,* Case No. 98CV1616 (N.D. Ohio, July 23, 1998); Hold Separate Stipulation, *U.S.* v. *Allied Waste,* Case No. 99CV07962 (D.D.C. July 20, 1999); Hold Separate Stipulation, *USA* v. *Waste Management,* Case No. 98CV7168 (E.D.N.Y. February 2, 1999).

In Waste Management's 1999 acquisition of Eastern Environmental Services, Allied attempted to purchase a number of Waste Management divestiture assets, but J. Robert Kramer, chief of the Justice Department's Litigation II section, rejected these sales to another an oligopoly member, ''[s]uch a sale, we concluded, would raise serious competitive concerns in waste collection or disposal or both in virtually all the markets for which the judgment has ordered relief.'' Bob Brown, DOJ Letter Squashed Allied Deal, Waste News.com (May 31, 1999).

[21] On February 9, 2009, Waste Connections, the fourth largest waste company nationally, announced an agreement with Republic to purchase $110 million in divestiture assets across seven markets required by DOJ as a part of the Republic and Allied merger requirements. This is particularly troubling given that if this merger is to be approved, Waste Connections will become the third largest waste company nationally and a large member of the waste oligopoly effectively having the ability to maintain anticompetitive market concentration and behavior.

[22] Proposed Final Judgment at paragraph 48.

[23] Bob Brown, *WMI Raises Tip Fees,* Waste News (Mar 1, 1999).

[24] Examples of markets exhibiting extreme levels of concentration that are likely to be negatively impacted by the Allied/Republic merger include: Lafayette, Elkhart, and Terra Haute, Indiana: Mansfield, Ohio; and Saginaw, Grand Rapids, and Kalamazoo, Michigan.

[25] The Center for a Competitive Waste Industry, *Projected Impacts on Competition from the Merger of Republic Services and Allied Waste* (Nov. 14, 2008).

concentration, and four with post merger HHI's greater than 4000.[26]

IX. Proposed Remedies

The PFJ falls short of adequately remedying the anticompetitive problems at issues here.

- First and foremost, if this merger—which creates a duopoly with overwhelming market power—is to be allowed, the landfill asset divestiture must be eschewed in overlapping markets, and replaced with the right of independent haulers to fairly contract for air space in the merging firms' landfills. The DOJ recognized this alternative, but only did so in three markets and in such a crabbed fashion that their effective enforcement would be dysfunctional. Properly structured for fair application, the air space remedy should be offered to independent haulers in every highly concentrated market.
- Second, due to the already highly concentrated market, and based on past evidence of intentional consolidation, where asset divestitures are nonetheless utilized, the largest five vertically integrated waste firms, which are least inclined to pursue a competitive model, should be ineligible to buy those assets.
- Third, evergreen contracts, as they once had been, should be sharply curtailed to minimize their indisputably anticompetitive effects in those markets.
- Finally, because of the failure of past divestitures in this industry, and the history of non-compliance of consent decrees by the merging parties, a monitor, paid by the Department and States with fees levied on the applicant should be established to enforce the terms of the final order and serve for a term of not less 10 years.

Overall, we believe the remedies should be strengthened in the following fashion:

- There should be divestiture of assets in both the SCCWC and MSW disposal markets in local affected geographic areas not named in the PFJ.
- Because these markets consist of oligopolies' with lock holds on local landfills, which create bottlenecks that impede new entry, divested assets should be sold to independent haulers with the right to contract for airspace in the merger companies' landfills.
- Use of the merged companies' evergreen contracts ought to be discontinued, especially in their term lengths, renewal provisions, liquidated damages, and escalator clauses.
- There should be the appointment of a monitor trustee to ensure compliance with the final judgment.

VIII. Conclusion

After investigation lasting over half a year of a merger posing an unprecedented level of concentration in numerous local markets in the United States, the DOJ chose modest divestitures and limited airspace contracting in a small number of affected geographic regions. In doing so it ignored the very fact of this merger, in which yesterday's white knight now stands before the DOJ as today's ultimate consolidator, proves that, in this industry, asset divestitures do not work in almost all cases.

This PFJ will not fully restore competition and is inconsistent with past DOJ waste enforcement actions. But more important, the PFJ fails to address the significant loss of competition due to the inability of independent haulers to compete with the highly concentrated waste firms in these local markets and the oppressive evergreen contracts with the merging companies' customers. The DOJ action permits a merger that poses a significant threat of causing substantial harm to consumers.

Thus, we believe the PFJ should be rejected. If the court however accepts the PFJ, we strongly urge it to treat the PFJ as an interim remedy and expressly leave open the possibility of supplementing the PFJ with additional remedies to address these competitive concerns.

Respectfully Submitted,

/s/ _____

David A. Balto,
Attorney at Law, 1350 I Street, NW., Suite 850, Washington, DC 20005
Peter Anderson,
RECYCLEWORLDS CONSULTING, 313 Price Place, Suite 14, Madison, WI 53705

Attachment A

Long Term Air Space Contract

1. *Eligible Buyers.* Any municipal solid waste or construction and demolition debris service provider, whether publicly or privately owned, which serves the local market in the year in which the HSR notification was filed, and does not in that year have its own landfill assets, is eligible to purchase airspace as provided here.

2. *Maximum Volume.* Eligible buyers may contract for a maximum volume of airspace at any landfill owned by the merged company and previously used by it to serve the market, in amount up to 150% of the tons the buyer collected from its customers, in the year in which it disposed of the greatest quantity during the prior five years, multiplied by 15 years. The eligible buyer may dispose of up to one-tenth of the maximum volume of waste in any year during the length of the contract, but is not required to dispose of any minimum quantity. Volume shall be converted into weight based upon the density of waste in the landfill in the year the HSR notification is filed.

3. *Price.* The price for disposal in that airspace under the contract may not exceed that which had been internally booked by the parent firm that owned the landfill prior to the merger and charged to its district unit, adjusted annually for inflation by the producer price index.

4. *Length of Contract.* The contract shall be for not less than 15 years.

5. *Purchase Period.* Each State Attorney General in the States with local markets affected by this provision shall timely notify eligible buyers about the opportunity for them to purchase airspace rights. Eligible buyers have 6 months from entry of the settlement or court order to request in writing from the merged company, with copies to the DOJ and State Attorney General, for a contract for airspace as provided here. If the eligible buyer has a contract for airspace at a landfill that is closed prior to the end of the 15-year period, the merged company shall permit the buyer to contractually substitute airspace at another of the merged company's landfills in the market of its choosing.

6. *Non-Discrimination.* (a) *Inspections.* If the seller of landfill airspace conducts inspections of incoming loads to its landfills at which airspace has been contracted for the purpose of rejecting certain loads, it must do so on a non-discriminatory basis as between its trucks with and those with airspace contracts. The seller must also maintain publicly available documentation to show that loads selected for inspection, and the type and severity of violations used to justify rejecting loads, are done on a non-discriminatory basis, including an accurate video record of all inspections and a tabulation of the number of truck loads dumping at the landfill by waste firm and the number of loads rejected, along with the reasons why. (b) *Queues.* Gate queues shall be non-discriminatory. If an airspace buyer claims that its trucks are kept on a longer queue than the seller's, the seller will visually record the queue and make tapes publicly available. (c) *Arbitration.* The buyer may take claims of discriminatory treatment to arbitration.

[26] See Attachment B for a table of the pre and post-merger landfill HHI concentration by state in the specific metropolitan areas where high levels were found based upon tons per day disposed of in the market in 2007, and also the remaining life that year.

If the seller loses the arbitration, he or she must pay the costs of arbitration, including the buyer's legal fees. A record of all complaints and arbitrations will be filed with the State Attorney General.

7. *Succession or Sale.* Landfill airspace contracts shall transfer to successor companies. Holders of landfill airspace contracts may sell their contract to another firm, if that other firm does not own landfill assets.

8. *Dispute Resolution.* If either the merged company or eligible buyer has any other dispute with the other that is not finally resolved under ¶6, DOJ will delegate the arbitration resolution process to the applicable State Attorney General, who may either, after hearing from both sides, issue a final decision, or submit the issue on behalf of the parties for final resolution to arbitration.

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ATTACHMENT B

CONCENTRATION ANALYSIS OF REPUBLIC-ALLIED MERGER

States	Metropolitan Statistical Area	5 Firm % TPD	Concentration Ratio: Tons per Day Pre HHI	Tons per Day Post HHI	Tons per Day Delta	Remaining Life Pre HHI	Remaining Life Post HHI	Remaining Life Delta	Summary: DOJ	AG	ITW
California	Bakersfield	35%	1263	1353	90	1238	1366	128	●	●	
	Fresno	64%	1552	1934	382	2003	2066	64	●	●	
	Los Angeles	39%	1287	1461	173	1489	1677	188	●	●	
	Modesto	65%	1436	2280	844	1766	2437	671	●	●	
	Riverside	45%	1251	1716	465	2195	3552	1356	●	●	
	Sacramento	58%	1432	2198	766	1871	2235	364	●	●	
	Salinas	70%	1582	2532	951	1699	2348	649	●	●	●
	San Diego	41%	1421	1621	199	1795	2030	236	●	●	
	San Francisco	63%	1548	2506	958	1812	2527	715	●	●	●
	Stockton	63%	1516	2418	903	1825	2520	695	●	●	
Georgia	Atlanta	54%	1033	1378	345	1053	1242	189	●	●	
	Augusta	72%	1833	2660	827	1465	1925	460	●	●	
	Chattanooga	65%	1624	1877	253	1516	1568	52	●	●	
	Columbus	54%	1074	1716	642	1163	1593	430	●	●	
	Savannaha	70%	3004	3004	0	2441	2441	0	●	●	●
Illinois	Bloomington	82%	6751	6751	0	5589	5589	0	●	●	●
	Champaign	87%	2980	4252	1272	3519	4851	1331	●	●	
	Chicago	87%	2042	2883	841	2322	3268	946	●	●	
	Davenport-Moline	76%	2713	2894	181	2576	2759	183	●	●	
	Decatur	82%	3864	4850	986	3669	4342	673	●	●	
	Ottawa	86%	2351	2662	310	2582	2744	162	●	●	
	Peoria	79%	4452	4452	0	4080	4080	0	●	●	●
	Rockford	90%	2328	2611	283	2509	2682	173	●	●	
	Springfield	81%	3135	3135	0	3146	3146	0	●	●	●
	St Louis	72%	1984	2395	411	1683	1991	308	●	●	
Indiana	Bloomington	58%	1619	2087	469	1847	2557	710	●	●	
	Chicago	87%	2110	2981	871	2389	3364	975	●	●	
	Elkhart	85%	2645	4357	1712	3198	4852	1654	●	●	
	Evansville	58%	1619	2087	469	1847	2557	710	●	●	
	Fort Wayne	77%	2203	3933	1730	2398	4482	2084	●	●	
	Indianapolis	69%	1809	2791	982	2074	3659	1585	●	●	
	Lafayette	85%	2693	4654	1961	3339	5175	1836	●	●	
	Louisville	57%	1681	1973	291	2175	2731	556	●	●	
	South Bend	90%	2462	3865	1403	2946	4308	1363	●	●	
	Terre Haute	88%	3364	4511	1147	3920	4845	925	●	●	
Michigan	Ann Arbor	87%	2621	3689	1068	2182	3118	936	●	●	
	Detroit	86%	2679	3663	984	2230	3198	967	●	●	
	Flint	88%	2704	3703	999	2301	3118	817	●	●	
	Grand Rapids	88%	2517	3997	1480	2479	3931	1453	●	●	
	Holland	89%	2833	3260	427	2806	3282	476	●	●	
	Jackson	88%	2544	3861	1317	2293	3688	1395	●	●	
	Kalamazoo	93%	2491	3806	1315	2501	4081	1579	●	●	
	Lansing	86%	2518	3657	1139	2275	3216	940	●	●	
	Muskegon	90%	2823	3243	420	2633	3162	529	●	●	
	Saginaw	89%	2800	3779	979	2444	3342	898	●	●	
N Carolina	Ashville	57%	1345	96	-1249	0	53	53	●	●	
	Charlotte	48%	1185	1424	239	565	730	165	●	●	
	Durham	58%	1499	1826	327	4325	4375	51	●	●	●
	Fayetteville	43%	1319	1506	187	628	739	110	●	●	
	Greensboro	50%	1957	2364	407	910	1221	311	●	●	
	Greenville	65%	2097	2394	297	5604	5639	35	●	●	●
	Hickory	52%	1348	1499	151	756	885	129	●	●	
	Raleigh	62%	1717	2047	329	4137	4204	67	●	●	
	Wilmington	27%	1448	1448	0	2538	2538	0	●	●	●
	Winston-Salem	43%	874	1152	277	537	713	176	●	●	

continued from previous page

States	Metropolitan Statistical Area	5 Firm % TPD	Concentration Ratio: Tons per Day Pre HHI	Post HHI	Delta	Remaining Life Pre HHI	Post HHI	Delta	Summary: DOJ	AG	ITW
Ohio	Akron	79%	2643	3705	1062	2457	3615	1157	●	●	
	Canton	75%	2247	3177	929	2188	3003	815	●	●	
	Cincinnati	49%	1528	1807	278	1712	2043	331	●	●	
	Cleveland	82%	2338	3566	1227	1807	2798	991	●	●	
	Columbus	60%	1583	2466	883	3338	5669	2331	●	●	
	Dayton	49%	1358	1849	491	1428	1800	373	●	●	
	Mansfield	80%	2400	4181	1780	1878	3142	1264	●	●	
	Springfield	43%	1546	1931	385	1667	1919	252	●	●	
	Toledo	82%	2223	3518	1295	1965	3317	1352	●	●	
	Youngstown	83%	2129	2824	695	1968	2713	745	●	●	
Pennsylvania	Allentown	39%	1012	1094	82	1107	1157	50	●	●	
	East Stroudsburg	45%	1269	1376	107	1531	1612	81	●	●	
	Erie	77%	1988	2852	864	1831	2729	897	●	●	
	Harrisburg	44%	1248	1248	0	1215	1215	0	●	●	
	Lancaster	39%	1012	1094	82	1107	1157	50	●	●	
	Philadelphia	32%	769	815	46	802	829	27	●	●	
	Pittsburgh	73%	1758	2173	415	1806	2257	451	●	●	
	Reading	37%	925	989	64	970	1011	41	●	●	
	Scranton	39%	1179	1259	80	1917	1949	32	●	●	●
	York	43%	1253	1318	65	1102	1138	36	●	●	
Texas	Austin	64%	2336	2336	0	2152	2152	0	●	●	●
	Beaumont	76%	2382	3006	624	1948	3143	1195	●	●	
	Brownsville	69%	2656	2656	0	2836	2836	0	●	●	●
	Corpus Christi	69%	2656	2656	0	2836	2836	0	●	●	●
	Dallas	41%	1156	1254	98	1452	1560	108	●	●	
	El Paso	73%	4633	4633	0	7348	7348	0	●	●	●
	Houston	70%	2588	2588	0	2262	2262	0	●	●	●
	Killeen	45%	1437	1545	108	1780	1908	128	●	●	
	McAllen	34%	2468	2468	0	3636	3636	0	●	●	●
	San Antonio	71%	2784	2784	0	3092	3092	0	●	●	●
Wisconsin	Appleton	89%	3768	3808	41	2829	2878	49	●	●	●
	Duluth	92%	3264	3264	0	3989	3989	0	●	●	●
	Eau Claire	88%	2853	2853	0	3378	3378	0	●	●	●
	Green Bay	89%	4410	4410	0	3190	3190	0	●	●	●
	Janesville	90%	2361	2558	197	2247	2370	123	●	●	
	La Crosse	81%	2932	2932	0	2968	2968	0	●	●	●
	Madison	88%	2439	2572	134	2238	2306	68	●	●	
	Milwaukee	88%	2219	2636	416	1838	2312	473	●	●	
	Oshkosh	90%	4028	4028	0	3190	3190	0	●	●	●
	Racine	88%	2161	2643	483	1847	2476	629	●	●	
	Wausau	88%	2741	2741	0	2508	2508	0	●	●	●

Source: The Center for a Competitive Waste Industry, *Projected Impacts on Competition from the Merger of Republic Services and Allied Waste* (Nov. 14, 2008) at 14-15.

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January 16, 2009

Via regular and certified mail

Ms. Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H Street, NW, Suite 3000, Washington, D.C. 20530

Re: Comments on Proposed Final Judgment in United States * * * Commonwealth of Pennsylvania, et al. v. Republic Services, Inc., and Allied Waste Industries, Inc., Case: 1:08–cv–02076 (D. D.C. December 3, 2008)

Dear Ms. Petrizzi: We represent the Pennsylvania Independent Waste Haulers Association (''PIWHA'') and on its behalf submit the following comments regarding the Proposed Final Judgment (''PFJ'') in response to the Competitive Impact Statement filed by the United States Department of Justice on December 3, 2008, in the above referenced matter.

PIWHA is a trade association of over one hundred members established sixteen years ago for the purpose of promoting the survival of smaller, independent business owners in the increasingly concentrated waste industry. We respectfully request that our comments be assessed in the context of this purpose.

Summary of Comments

As to the Philadelphia area, the PFJ should require the divestiture of the Quickway transfer station (''Quickway'') and the T.R.C. transfer station (''TRC''), or at least one of them, instead of the Girard Point transfer station (Girard Point'') and the Philadelphia Recycling and Transfer Station (''58th Street''). The PFJ should require that the divested facilities be sold to small, independent acquirers, if possible, and should permit the sale of each facility to be made to separate acquirers. The PFJ should permit seller financing and the Government should encourage such financing for smaller acquirers, provided that they are creditworthy. The PFJ should require the defendants to offer three (3) year disposal contracts to all waste haulers, not just to larger haulers as is the case now.

Comments

A. Hauling services consumers would be better served if the PFJ were to require different transfer stations to be divested in the Philadelphia area.

The PFJ requires divestiture of the following transfer stations: (1) Republic owned Girard Point; and (2) Allied owned 58th Street. The PFJ should, instead, require divestiture of Quickway

and TRC, or at least one of the latter, for two reasons.

First, both Girard Point and 58th Street, PIWHA contends, are substantially less financially viable than Quickway and TRC. Financial viability, of course, should be a significant factor in assessing the likelihood of the long term successful operation of a divested facility. Certainly PIWHA does not have access to the defendants' financial data, but marginal profitability of the Girard Point and 58th Street facilities has been the distinct impression of various PIWHA members who are fully familiar with the eastern Pennsylvania waste hauling/disposal market.

The accuracy of this impression is corroborated by PIWHA's learning, as it reported to the Government while the investigation of the merger was in progress, that the defendants would be willing to divest Girard Point and 58th Street in order to receive Government approval of their then proposed merger. It is further corroborated by the fact, as PIWHA understands it, that these two facilities were/have been unsuccessfully offered for sale for a number of years. The inability of the defendants to sell the facilities no doubt was due to the limited size (and, accordingly, limited profitability) of the two facilities and the impossibility/impracticality of physical expansion.

Secondly, there is a significant issue with regard to the location of the facilities. The 58th Street and the Girard Point facilities are substantially further geographically from haulers servicing Bucks and Montgomery counties than Quickway and TRC and, accordingly, are more costly for those haulers to use. Please see Appendices A and B attached hereto. Further, the 58th Street and the Girard Point facilities are significantly more difficult in terms of ingress and egress, which results in additional increased cost for use of these facilities.

In this connection, it is PIWHA's position that the Government should take into account the anticompetitive effects the increased concentration of ownership of disposal facilities in Philadelphia County will have upon consumers of hauling services in areas close to Philadelphia but located in the contiguous northern counties of Bucks and Montgomery and revise its divestiture order accordingly. In PIWHA's opinion this would require the divestiture of Quickway and T.R.C., or at least one of them.

With the intense development of Bucks and Montgomery counties over the last several decades and the migration of population from Philadelphia to those counties, it would seem extremely likely that a massive number of ''suburban'' hauling services consumers could be adversely affected by the increased concentration of disposal facilities located in the more northern part of Philadelphia County (Quickway and TRC). Quickway and TRC are the facilities which haulers in Bucks and Montgomery counties are far more likely to utilize. Assuming divesture as required by the PFJ, the increased prices haulers are likely to pay for use of Quickway and TRC will, in all likelihood, be directly passed on to the hauling service consumers in Bucks and Montgomery counties.

The relative number of suburban hauling services consumers who could be adversely impacted is magnified by the fact that residential consumers in the suburbs largely use private haulers, unlike in Philadelphia, where the municipal government collects residential waste.

B. The PFJ should require that the divested disposal facilities be sold to small, independent acquirers, if possible, and not sold to large, national or regional waste industry firms

PIWHA contends that wherever reasonable from the perspective of serving the public interest, efforts should be undertaken by the Government to encourage deconcentration in the waste industry, which has for years experienced rapidly accelerating market concentration. In this regard, the PFJ should require that the defendants' disposal assets which are to be divested be sold, if possible, to smaller, independent, non-publicly traded firms, with demonstrated ability to operate the acquired facilities successfully over the long term.

C. The PFJ should be revised to allow sale of the two Philadelphia disposal facilities to be made to separate acquirers, without obtaining prior Governmental written consent, as the PFJ currently requires

Should the Government concur in PIWHA's position that preference should be given to small independent acquirers, achievement of that goal would clearly be facilitated by allowing, perhaps requiring, the two facilities in the Philadelphia area which are to be divested to be sold separately to two different acquirers.

The possibility of the sale of the two divested Philadelphia County disposal facilities to separate acquirers would, of course, necessitate revision of the PFJ provision at Section II. H. 1. j. (p. 8–9) which requires use of the defendants' landfill in York, Pennsylvania be made available ''[a]t the option of the Acquirer [singular] * * * at rates to be negotiated.'' In any event, PIWHA contends that the grant of this option is meaningless in view of the location of the landfill (a three hour, one way drive from Philadelphia) and access being dependent upon the parties agreeing upon price.

D. The PFJ should be revised to permit seller financing of the purchase of divested facilities in this case and the Government should encourage seller financing for small, independent creditworthy acquirers

PIWHA is aware of the inclination of the Government to disfavor seller financing of the purchase of divested assets, as stated in the Antitrust Division Policy Guide to Merger Remedies (''Guide'') (October 2004) Section IV. G. (p. 35–36). The current severe contraction of the availability of credit the country is experiencing, however, warrants the Government's re-evaluating its stated position on the issue of seller financing, particularly if the sale of the divestment assets to small, independent acquirers is a desirable goal, as PIWHA strongly believes it is. The defendants are multi-billion dollar companies and no doubt can well afford to extend financing to buyers of their facilities. All of the ''potential problems'' identified in the Guide regarding seller financing would appear to be capable of being effectively addressed. We discuss each of these ''potential problems'' enumerated in the Guide immediately below.

The problem of the seller retaining ''some partial control over the [divested] assets'' could be resolved by the seller's security interest (mortgage instrument) being so crafted as to deny the seller authority to exercise control over the buyer and that the seller's sole right would be limited to receiving installment payments. In the event of default and foreclosure, the Consent Decree could preclude the seller from regaining ownership and require that the facility be sold to a third party.

The Guide's concern regarding impeding the seller's ''incentive to compete'' with the divested facility because of the seller's fear of jeopardizing the purchaser's ability to repay, would seem unfounded. It would seem unlikely that the seller in the present matter would forego profit opportunities to assure full repayment of a relatively small debt when it retains the ability to resell the facility in the event of default by the buyer. As to the potential concern of the buyer's possible disinclination to compete vigorously because it ''may cause the seller to exercise various rights under the loan,'' this cause for concern evaporates if the

seller's sole remedy is foreclosure and sale if the buyer defaults in repaying the loan.

The Guide's expressed concern regarding the seller's having ''some legal claim on the divestiture assets in the event the purchaser goes bankrupt'' would also be effectively addressed by the Consent Decree's limiting the seller's remedy for the buyer's default to sale of the divested asset to a third party. It is difficult to imagine that a bankruptcy court would ignore this judicial mandate.

As to the concern that the ''ongoing relationship'' between the seller and buyer could be used as ''a conduit for exchanging competitively sensitive information,'': again, the cause for this concern does not exist if the only relationship between the parties is the duty of the buyer to make installment payments to the seller in satisfaction of the loan.

As to concerns which the buyer's need for seller financing might raise regarding the buyer's financial viability, we again submit that in the present financial credit market environment this should not be considered a poor reflection upon a prospective buyer of divested facilities.

In summary as to the issue of seller financing, it is PIWHA's position that, in the language of the Guide, ''none of the possible concerns discussed * * * exist'' and that current conditions in the financial markets warrant allowing seller financing.

E. The PFJ should address the issue of the availability to small haulers of three year disposal contracts and require the defendants to offer such contracts to all waste haulers

During the course of the Government's investigation of the proposed merger of the defendants, PIWHA urged that the defendants be required to offer three year disposal contracts to all haulers, not just the larger ones as is currently the case. The PFJ is silent as to this issue. It is PIWHA's experience that large, vertically integrated waste industry firms are generally unwilling to offer smaller haulers disposal contracts for a term exceeding one year. This practice prevents smaller haulers from submitting bids on longer term hauling contracts required by local governments, school districts and other large organizations. During these bidding processes, the bidders must certify that it has a three year disposal contract at an authorized facility. To require the offering of longer term disposal contracts to smaller haulers as well as larger haulers would certainly stimulate competition for the business of large customers who insist upon longer term hauling contracts.

PIWHA is aware of the Government's hesitancy to seek ''conduct relief'' in Clayton Act Section 7 cases for the reasons stated in its 2004 Merger Remedies Guide, but PIWHA believes, to use the terminology of the Guide at Section III. E. (p. 17) that the ''limited conduct relief'' it proposes here will ''be useful in [the present case] to help perfect structural relief.'' The Government has, in fact, required limited conduct relief in a Section 7 case against these very same defendants, United States v. Allied Waste Industries Inc., and Republic Services Inc. (D.D.C., June 21, 2000) in which the defendants had entered into an asset exchange agreement. The limited conduct relief provided for by the Consent Decree in that case was the revision of onerous hauling services customer contracts in markets where structural relief was ordered.

Certainly, should the offering of three year contracts be required, the defendants should be permitted to offer different prices for different volumes of waste disposal. If the volume/price offerings of the defendants were required to be made publicly available, volume/price offerings not made in good faith would be easily identified by those haulers who were prejudiced and reported to the Government for appropriate action to assure compliance with the Consent Decree.

Respectfully submitted,

PENNSYLVANIA INDEPENDENT WASTE HAULERS ASSOCIATION

/s/ _____

Leonard E. Dimare

/s/ _____

Anthony J. Mazullo, Jr.

February 3, 2009

Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 1401 H Street, Suite 3000, Washington, D.C. 20530

RE: United States of America, et al v. Republic Services, Inc. and Allied Waste Industries, Inc.

Dear Ms. Petrizzi: On behalf of the Cuyhaoga County Solid Waste Management District of Cuyahoga County, Ohio and the Board of County Commissioners of Cuyahoga County, Ohio, I am submitting comments regarding the draft Proposed Final Judgment attached to the Hold Separate Stipulation and Order dated December 3, 2008 in the above referenced case.

The Cuyahoga County Solid Waste Management District was established by the Board of County Commissioners of Cuyahoga County, Ohio on August 29, 1988 pursuant to the requirements imposed by the State of Ohio in Chapter 3734 of the Ohio Revised Code. The Cuyahoga County Solid Waste Management District contains the City of Cleveland and 58 suburban municipalities, villages and townships, with a population totaling 1,393,978. The statutory purpose of the District is the preparation, adoption, submission and implementation of a solid waste management plan of the District and the subsequent safe and sanitary management of all solid waste generated with the District. The Plan must provide adequate solid waste disposal capacity for at least 15 years and present a system to reduce, reuse and recycle at least 25% of the waste generated in the District.

The Board of Commissioners of the Cuyahoga County Solid Waste Management District concurs and supports the civil antitrust complaint filed by the United States and States and Commonwealths party to the complaint. The Board of Commissioners also concurs and supports the remedy stated in the Hold Separate Stipulation and Order filed with the Court on December 3, 2008. The Board of Commissioners, however, does not concur or support the Cleveland, Ohio market remedy Exhibit A, Section I, Relevant Hauling Assets beginning on page 10.

The remedy proposed within Appendix A fails to provide for divestiture of any small container commercial waste collection routes in the Cleveland, Ohio market area. Waste collected on such routes produce the volume of waste needed to make the sale of the Harvard Road Transfer Station and the Oakland Marsh Landfill a financially viable transaction necessary to attract a qualified buyer. The sale of the landfill and transfer assets without the sale of collection routes is akin to taking delivery of a new automobile of which the gasoline tank is bone dry. It is unreasonable to expect a potential buyer from outside the market area to incur the expense of maintaining the transfer and disposal assets while developing revenue volumes from scratch. To achieve a truly competitive remedy in the Cleveland, Ohio market requires the sale of commercial routes along with the transfer station and landfill assets. Thus the Board of Commissioners urges that sufficient small container commercial collection routes in the Cleveland, Ohio market area be added to the Relevant Hauling Assets listed in Section I.

Additionally, the defendants should be prohibited from acquiring additional

transfer station assets within Cuyahoga County for a multi-year period. We understand that the Broadview Heights Recycling Center (aka Transfer Station) owned by Norton Environmental and which is located along Interstate 77 approximately five miles due south of the Harvard Road Transfer Station is for sale. If the defendants were allowed to purchase the Broadview Heights Transfer Station following the sale of the Harvard Road Transfer Station, without the sale of any commercial routes, the defendants would simply re-route its commercial waste to the Broadview Heights facility negating any attempt by the Court to insure competition within the Cleveland, Ohio market.

The Board of Commissioners of the Cuyahoga County Solid Waste Management District appreciates your consideration of the above comments in the protection of the public interest.

Sincerely,

/s/ _____

Patrick J. Holland,

Executive Director

February 3, 2009

Maribeth Petrizzi, Chief
Litigation II Section, Antitrust Division
U.S. Department of Justice
1401 H Street, Suite 3000
Washington, D.C. 20530

RE: United State of America, et al V. Republic Services, Inc. and Allied Waste Industries, Inc.

Dear Ms. Petrizzi;

On behalf of the Cuyhaoga County Solid Waste Management District of Cuyahoga County, Ohio and the Board of County Commissioners of Cuyahoga County, Ohio, I am submitting comments regarding the draft Proposed Final Judgment attached to the Hold Separate Stipulation and Order dated December 3, 2008 in the above referenced case.

The Cuyahoga County Solid Waste Management District was established by the Board of County Commissioners of Cuyahoga County, Ohio on August 29, 1988 pursuant to the requirements imposed by the State of Ohio in Chapter 3734 of the Ohio Revised Code. The Cuyahoga County Solid Waste Management District contains the City of Cleveland and 58 suburban municipalities, villages and townships, with a population totaling 1,393,978. The statutory purpose of the District is the preparation, adoption, submission and implementation of a solid waste management plan of the District and the subsequent safe and sanitary management of all solid waste generated with the District. The Plan must provide adequate solid waste disposal capacity for at least 15 years and present a system to reduce, reuse and recycle at least 25% of the waste generated in the District.

The Board of Commissioners of the Cuyahoga County Solid Waste Management District concurs and supports the civil antitrust complaint filed by the United States and States and Commonwealths party to the complaint. The Board of Commissioners also concurs and supports the remedy stated in the Hold Separate Stipulation and Order filed with the Court on December 3, 2008. The Board of Commissioners, however, does not concur or support the Cleveland, Ohio market remedy Exhibit A, Section I, Relevant Hauling Assets beginning on page 10.

The remedy proposed within Appendix A fails to provide for divestiture of any small container commercial waste collection routes in the Cleveland, Ohio market area. Waste collected on such routes produce the volume of waste needed to make the sale of the Harvard Road Transfer Station and the Oakland Marsh Landfill a financially viable transaction necessary to attract a qualified buyer. The sale of the landfill and transfer assets without the sale of collection routes is akin to taking delivery of a new automobile of which the gasoline tank is bone dry. It is unreasonable to expect a potential buyer from outside the market area to incur the expense of maintaining the transfer and disposal assets while developing revenue volumes from scratch. To achieve a truly competitive remedy in the Cleveland, Ohio market requires the sale of commercial routes along with the transfer station and landfill assets. Thus the Board of Commissioners urges that sufficient small container commercial collection routes in the Cleveland, Ohio market area be added to the Relevant Hauling Assets listed in Section I.

Additionally, the defendants should be prohibited from acquiring additional transfer station assets within Cuyahoga County for a multi-year period. We understand that the Broadview Heights Recycling Center (aka Transfer Station) owned by Norton Environmental and which is located along Interstate 77 approximately five miles due south of the Harvard Road Transfer Station is for sale. If the defendants were allowed to purchase the Broadview Heights Transfer Station following the sale of the Harvard Road Transfer Station, without the sale of any commercial routes, the defendants would simply re-route its commercial waste to the Broadview Heights facility negating any attempt by the Court to insure competition within the Cleveland, Ohio market.

The Board of Commissioners of the Cuyahoga County Solid Waste Management District appreciates your consideration of the above comments in the protection of the public interest.

Sincerely,

Patrick J. Holland,
Executive Director

cc: Board of County Commissioners of Cuyahoga County
Cuyahoga County Solid Waste Policy Committee
Mitchell L. Gentile, Esq. Senior Attorney, Antitrust, Office of the Ohio Attorney General

January 23, 2009

Ms. Maribeth Petrizzi, Chief
Litigation II Section, Antitrust Division
U.S. Department of Justice
1401 N.W., Suite 3000
Washington, DC 20530

RE: OBJECTION TO THE SALE OF LANDFILL OWNED BY REPUBLIC SERVICES, INC. and ALLIED WASTE INDUSTRIES (SOLANO GARBAGE COMPANY)

Dear Chief Petrizzi:

My client, June Guidotti, would like her input to be considered regarding the possible sale of the landfill owned by Republic Services, Inc. and Allied Waste Industries (Solano Garbage Company) that abuts her property.

In the interest, safety, and well being of the people who are living nearby, this landfill should be put back to its original status as a marsh environment. She believes Republic Services should be required to forever clean up and be accountable for the damage they have caused to untold plants and marine life. Further, they should stop the burning in the canyon of the methane gas into the air and leaking into the ground water and adjacent parcels of land. It must be demanded that Republic Services (Allied Services) bear the costs to make the land useable once again, and to restore it to its prior pristine condition. All damages to the marsh and waterways must be repaired.

It is my client's sincere hope that with all of the wrongs that Republic Services, Inc. and Allied Waste Industries have done so far this does not turn into another Erin Brocovich movie.

Conclusion: My client is offering $10 in gold for the rights to useable methane produced from the landfill, provided that the cities and counties build the pipeline to Travis Air Force Base or permit the building of a pyrolysis plant (including all funding of such) on my client's property and take the ash from the waste-to-energy site.

Sincerely,

WILLIAM S. REUSTLE
Attorney at Law

[FR Doc. E9–13549 Filed 6–15–09; 8:45 am]
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DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement—Large Jail Administration: Training Curriculum Development

AGENCY: National Institute of Corrections, Department of Justice.

ACTION: Solicitation for a Cooperative Agreement.

SUMMARY: The National Institute of Corrections (NIC), Jails Division, is seeking applications for the development of curricula on the administration of large jails (jails with 1,000 or more beds). The project will be for an eighteen-month period and will be carried out in conjunction with the NIC Jails Division. The awardee will work closely with NIC staff on all aspects of the project. To be considered, applicants must demonstrate, at a minimum, (1) in-depth knowledge of the purpose, functions, and operational complexities of local jails, (2) expertise on the key elements in jail administration (see ''Supplementary Information''), (3) expertise on the implications of jail size for implementing these elements, (4) experience in developing curriculum, based on adult learning principles, and (5) extensive experience in working with local jails on issues related to administration and operations.

DATES: Applications must be received by 4 p.m. (EDT) on July 6, 2009.

ADDRESSES: Mailed applications must be sent to: Director, National Institute of Corrections, 320 First Street, NW., Room 5007, Washington, DC 20534. Applicants are encouraged to use Federal Express, UPS, or similar service to ensure delivery by the due date as mail at NIC is sometimes delayed due to security screening.

Applicants who wish to hand-deliver their applications should bring them to