

services in several markets in violation of Section 7 of the Clayton Act. This loss of competition would result in consumers paying higher prices and receiving fewer services for the collection and disposal of waste.

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

The United States, New Jersey, and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. In compliance with the APPA, the United States filed a Competitive Impact Statement ("CIS") on July 22, 2003. Waste Management and Allied filed statements pursuant to 15 U.S.C. § 16(g) on August 4, 2003. A summary of the terms of the proposed Final Judgment and CIS were published in the *Washington Post*, a newspaper of general circulation in the District of Columbia, for seven days

during the period of August 9, 2003 through August 15, 2003. The Hold Separate Stipulation and Order, proposed Final Judgment, and CIS were published in the *Federal Register* on August 12, 2003, 68 Fed. Reg. 47,930 (2003). The sixty-day comment period commenced on August 15, 2003 and terminated on October 14, 2003. During the sixty-day comment period, the United States received two public comments (attached as Appendix A).

II. RESPONSE TO PUBLIC COMMENTS

A. Legal Standard Governing The Court's Public Interest Determination

Upon the publication of the public comments and this Response, the United States will have fully complied with the Tunney Act. After receiving the motion of the United States for entry of the proposed Final Judgment, the Tunney Act directs the Court to determine whether entry of the proposed Final Judgment “is in the public interest.” 15 U.S.C. § 16(e). In making that determination, the “court’s function is not to determine whether the resulting array of rights and liabilities is one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest.” *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir.), *cert. denied*, 510 U.S. 984 (1993). The Court should evaluate the relief set forth in the proposed Final Judgment and should enter the Judgment if it falls within the government’s “rather broad discretion to settle with the defendant within the reaches of the public interest.” *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *accord United States v. Associated Milk Producers*, 534 F.2d 113, 117-18 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976). The Court should review the proposed Final Judgment “in light of the violations charged in the complaint and . . . withhold approval only (a) if any of the terms appear ambiguous, (b) if the enforcement mechanism is inadequate, (c) if third parties will be positively

injured, or (d) if the decree otherwise makes a ‘mockery of judicial power.’” *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997) (quoting *Microsoft*, 56 F.3d at 1462). The Tunney Act does not empower the Court to reject the remedies in the proposed Final Judgment based on the belief that “other remedies were preferable,” *Microsoft*, 56 F.3d at 1460, nor does it give the Court authority to impose different terms on the parties. *See, e.g., United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 153 n.95 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (mem.); accord H.R. Rep. No. 93-1463, at 8 (1974).

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

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

1. Peter Anderson

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

The United States appreciates Mr. Anderson’s comment on the proposed Final Judgment. However, the United States is unable to make public the data that it collected on local disposal

markets. Disclosing such data would require that the United States reveal information that was received pursuant to a statute that limits its disclosure¹ or, alternatively, produce sensitive information that the United States will not disclose unless required by law or necessary to further a legitimate public purpose. The United States believes, however, that some of the information requested by Mr. Anderson may be available through various public sources, including the New Jersey Department of Environmental Protection website.

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

2. Gregory Nepl

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

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

XIII.

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

III. CONCLUSION

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

Dated this 9th day of December, 2003.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

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

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