UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, and STATE OF NEW JERSEY, Plaintiffs, v. WASTE MANAGEMENT, INC., and ALLIED WASTE INDUSTRIES, INC., Defendants.	Case No.: 1:03CV01409 (GK) DATE STAMP: May 11, 2004 Judge: Gladys Kessler

JOINT MOTION AND MEMORANDUM OF UNITED STATES, NEW JERSEY AND WASTE MANAGEMENT TO MODIFY FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 60(b)(5) and Section XIV of the Final Judgment entered in this matter on December 16, 2003 ("Final Judgment"),[1] Plaintiffs United States of America ("United States") and the State of New Jersey ("New Jersey"), and Defendant Waste Management, Inc. ("WMI") jointly move this Court to approve minor modifications to Sections II.K.3., II.K.4. and IV.A. of the Final Judgment.[2] The proposed modifications are

[1] Section XIV of the original Final Judgment provides in part that "any party to this Final Judgment ...[can] apply to this Court at any time . . . to modify any of its provisions, ..." This Court has jurisdiction to modify the Final Judgment pursuant to Section XIV of the Final Judgment, Fed. R. Civ. P. 60(b)(5), and "principles inherent in the jurisdiction of the chancery." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *see also In re Grand Jury Proceedings*, 827 F. 2d 868, 873 (2nd Cir. 1987).

[2] On June 30, 2003, Allied Waste Industries, Inc. consummated its sale of waste hauling assets in Colorado, South Carolina and Georgia to WMI. On August 16, 2003, Allied completed the stock and asset sale of its New Jersey waste hauling and disposal operations to WMI. Accordingly, Allied Waste Industries, Inc. is no longer involved in the divestitures affected by the proposed Final Judgment modifications, and has informed the United States that

equitable in nature and seek to refine the Final Judgment's definition of the relevant hauling assets to be divested in Pitkin and Garfield Counties, Colorado and Bergen and Passaic Counties, New Jersey. The minor modifications proposed serve the public interest by effectuating the remedies intended in the Final Judgment. Accordingly, this Court should grant the Joint Motion of the United States, New Jersey and WMI to modify the Final Judgment.

I. BACKGROUND

Defendants WMI and Allied Waste Industries, Inc. ("Allied") entered into stock and asset purchase agreements on January 29, 2003, pursuant to which WMI would acquire the waste hauling and disposal assets and stock of certain Allied subsidiaries in a number of areas throughout the United States. The Plaintiffs filed a civil antitrust Complaint on June 27, 2003, alleging that the likely effect of this acquisition would be to lessen competition substantially for waste collection and disposal services in several markets, and sought to enjoin the proposed acquisition.

At the same time the Complaint was filed, the Plaintiffs also filed a Hold Separate Stipulation and Order and proposed Final Judgment. The Final Judgment requires WMI, among other things, to divest waste disposal assets serving Bergen and Passaic Counties, New Jersey, and waste hauling assets serving Pitkin and Garfield Counties, Colorado; Morris County, New Jersey; Bergen and Passaic Counties, New Jersey; Myrtle Beach, South Carolina; and Augusta, Georgia. To date, WMI has successfully divested waste disposal assets serving these areas and the United States has approved the respective purchasers proposed by WMI for each divestiture.

After filing the proposed Final Judgment, the Plaintiffs and WMI learned of facts

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it takes no position thereon.

relevant to the waste hauling assets serving Pitkin and Garfield Counties, Colorado and Bergen and Passaic Counties, New Jersey that require the Final Judgment be modified in order to remedy appropriately the anticompetitive effects asserted by the Plaintiffs in the Complaint.[3]

A. Pitkin and Garfield Counties, Colorado

Pursuant to Sections II.K.3. and IV.A. of the Final Judgment, WMI agreed to sell various waste collection routes serving a mixture of small container commercial waste collection customers and residential waste customers in Pitkin and Garfield Counties, Colorado. The original package of routes to be divested produced approximately $2 million in annual revenues. After filing the proposed Final Judgment, the United States and WMI discovered that some of the accounts on the routes to be divested did not address the relevant product or geographic markets as originally anticipated. For example, many accounts initially understood to be small container commercial waste collection accounts in Garfield County and identified in the Final Judgment as assets to be divested, were, in fact, residential waste accounts or accounts located in Mesa County, Colorado. Although the discrepancy was inadvertent, certain accounts identified in Section II.K.3. of the Final Judgment for divestiture now fail to address or remedy the competitive concerns alleged in the Complaint.[4]

B. Bergen and Passaic Counties, New Jersey

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[3] Although New Jersey joins in this Joint Motion and Memorandum to Modify the Final Judgment, it is only aware of facts relevant to the sale of the New Jersey assets.

[4] In addition, prospective purchasers rejected accounts located on the rural western edge of Garfield County, Colorado because such accounts would be difficult to service on an efficient basis relative to the other assets being sold.

Pursuant to Sections II.K.4. and IV.B. of the Final Judgment, WMI also agreed to divest identified small container commercial waste collection routes previously owned by Allied and serving Bergen and Passaic Counties, New Jersey. The original package of assets to be divested produced approximately $3 million in annual revenues. After WMI acquired the routes from Allied, WMI learned that a number of accounts located on routes to be divested were simultaneously serviced on routes to be retained by WMI. As a result, the Final Judgment could arguably require a divestiture of more revenue than was intended or necessary to address the competitive concern alleged in the Complaint.

The United States, New Jersey and WMI determined that the Final Judgment requires minor modification of Sections II.K.3., II.K.4., and IV.A. in light of these facts.

II. THE PROPOSED MODIFICATIONS SERVE THE PUBLIC INTEREST AND SHOULD BE APPROVED

A. Applicable Legal Standard

This Court concluded that entry of the proposed Final Judgment in this matter was in the public interest, and so entered it on December 16, 2003. Where, as here, the United States has consented to a proposed modification of a consent decree, the issue before the Court is whether modification is in the public interest. *See e.g., United States v. Western Elec. Co.,* 993 F.2d 1572, 1576 (D.C. Cir. 1993); *United States v. Western Elec. Co.,* 900 F.2d 283, 305 (D.C. Cir. 1990); *United States v. Loew's, Inc.,*783 F. Supp. 211, 213 (S.D.N.Y. 1992); *United States v. Columbia Artists Management, Inc.,*662 F. Supp. 865, 869-70 (S.D.N.Y. 1987) (citing *United States v. Swift & Co.,* 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,702-03 (N.D. Ill. 1975). *Cf. United States v. American Cyanamid Co.,* 556 F. Supp. 361, 367 (S.D.N.Y. 1983), *rev'd on other grounds,* 719 F.2d 558 (2d Cir. 1983). This is the same standard that a federal district court

applies in reviewing an initial consent decree in a government antitrust case. *See* 15 U.S.C. section 16(e); *Western Electric,* 900 F.2d at 295; *United States v. AT&T,* 552 F. Supp. 131, 147 n.67 (D.D.C. 1982); *aff'd sub nom Maryland v. United States,* 460 U.S. 1001 (1983); *United States v. Radio Corp. of Am.,* 46 F. Supp. 654, 656 (D.Del. 1942), *appeal dismissed,* 318 U.S. 796 (1943).

It has long been recognized that the government has broad discretion in settling antitrust litigation on terms that will best serve the public interest in competition. *See Sam Fox Publ'g Co. v. United States,* 366 U.S. 683, 689 (1961). The government may reach any of a range of settlements that are consistent with the public interest. *See e.g., United States v. Microsoft Corp.,* 56 F.3d 1448, 1461 (D.D.C. Cir. 1995); *Western Electric,* 900 F.2d at 307-09; *United States v. Bechtel Corp.,* 648 F.2d 660, 665-66 (9th Cir. 1981); *United States v. Gillette Co.,* 406 F. Supp. 713, 716 (D.Mass. 1975). The Court's role in determining whether the initial entry of a consent decree is in the public interest, absent a showing of abuse of discretion or a failure to discharge its duty on the part of the government, is to determine whether the government's explanation is reasoned, and not to substitute its own opinion. *United States v. Mid-America Dairymen, Inc.,* 1977-1 Trade Cas. (CCH) ¶ 61,508 at 71,980 (W.D. Mo. 1977); *see also Microsoft,* 56 F.3d at 1461-62; *Bechtel Corp.,* 648 F.2d at 666 (citing *United States v. National Broad. Co.,* 449 F.Supp. 1127 (C.D. Cal. 1978). Accordingly, where the United States has offered a reasoned and reasonable explanation of why the modification vindicates the public interest in free and unfettered competition, the modification is clear and provides an adequate compliance mechanism, and there is no showing of abuse of discretion or corruption affecting the government's recommendation, the Court should accept the United States' conclusion

concerning the appropriateness of the proposed decree modification.

B. The Proposed Modifications

The proposed modifications are necessary to effectuate the remedies originally intended in the Final Judgment and previously determined by this Court to be in the public interest.

1. Colorado Modifications

To resolve the issue raised in Pitkin and Garfield Counties, Colorado, the United States and WMI seek to modify Section II.K.3. of the Final Judgment to require that WMI divest the same waste collection routes previously identified, but excluding route 730 and accounts located west of Glenwood Springs, Colorado, including those in Silt, New Castle, Rifle, Parachute and Battlement Mesa, Colorado. The United States and WMI further seek to supplement the existing Colorado divestiture package with certain additional commercial and residential accounts located in Garfield and Pitkin Counties.[5] The net effect of this modification is that, as originally intended, WMI will now be required to divest waste collection accounts in Pitkin and Garfield Counties roughly equivalent in value to the small container commercial waste collection accounts that WMI owned in these areas prior to its acquisition of Allied's assets in the instant

[5] Section II.K.3. of the Final Judgment requires WMI to divest "Waste Management's waste collection routes 730, 824, 825, 831, 850, 851, and 853 that operate out of Waste Management's facility located at 226 North 12th Street, Carbondale, Colorado 81623." The parties have filed with this Joint Motion and Memorandum, an Order Modifying Final Judgment requesting the Court to amend Section II.K.3. to require WMI to divest "Waste Management's waste collection *routes 824, 825, 831, 850, 851, and 853* that operate out of Waste Management's facility located at 226 North 12th Street, Carbondale, Colorado 81623, *and additional waste collection customers serviced from the same location that collectively generate at least $25,000 in monthly commercial revenue and $14,500 in monthly residential revenue, except that Waste Management need not divest any customer located west of Glenwood Springs, Colorado, including those in Silt, New Castle, Rifle, Battlement Mesa or Parachute, Colorado*" (requested modifications italicized).

transaction. The Colorado divestiture package specified in Section II.K.3. of the Modified Final Judgment will again generate roughly $2 million in annual revenues, while permitting the purchaser to form collection routes having greater operating efficiency.

To allow for the sale of these assets, the United States and WMI further request that the time period provided in Section IV.A. of the Final Judgment for the sale of the Colorado assets be extended until April 30, 2004.[6]

2. New Jersey Modifications

To resolve the issue raised in Bergen and Passaic Counties, New Jersey, the United States, New Jersey, and WMI seek to modify the Final Judgment to require that WMI divest the same New Jersey routes identified in Section II.K.4. of the original Final Judgment, but excluding those accounts on divested routes which generate less than 33.3 percent of their total revenue from services provided on the divested routes. Eliminating these accounts from the divested assets ensures that WMI is not required to divest more assets than necessary to remedy the alleged competitive harm. The agreement to exclude such accounts was based on the specific composition of the divestiture assets at issue and done only to achieve the result originally intended in the Bergen and Passaic Counties, New Jersey market; the 33.3 percent

[6] On January 6, 2004, the parties filed a Notice, Stipulation and Order Regarding Time Extension whereby the United States notified the Court that the time period to divest the Relevant Hauling Assets (including those serving Pitkin and Garfield Counties, Colorado) was extended until February 19, 2004. WMI was unable to sell the assets within the prescribed time frame, but entered into an asset sale agreement to divest the modified package of waste hauling assets serving Pitkin and Garfield Counties, Colorado, and described herein, on February 19, 2004. The United States approved the purchaser proposed by WMI and the divestiture was consummated on April 30, 2004, subject to this Court's approval as requested in the instant pleadings.

calculation has no significance outside of its effect on these specific assets.[7] The net effect of this modification is that WMI is required to divest waste collection revenues of about $3 million per year, roughly equivalent to those anticipated from the New Jersey hauling divestiture described in the original Final Judgment. The divestiture, as modified, sufficiently addresses the competitive concern in Bergen and Passaic Counties, New Jersey without inhibiting the likely efficiencies resulting from the transaction.[8]

III. ADDITIONAL PUBLIC NOTICE OF THE PROPOSED FINAL

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[7] Section II.K.4 of the Final Judgment requires WMI to divest "Allied's commercial waste collection routes 700, 705, 706, 401, and 405 that operate out of Allied's VMI Waste Services Hauling facility located at 75 Broad Avenue, Fairview, New Jersey 07022, except that Waste Management is not required to divest real property or improvements to real property (i.e., buildings, garages, or leasehold rights related thereto)." The parties have filed with this Joint Motion and Memorandum, an Order Modifying Final Judgment requesting the Court to amend Section II.K.4. to require WMI to divest "Allied's commercial waste collection routes 700, 705, 706, 401, and 405 that operate out of Allied's VMI Waste Services Hauling facility located at 75 Broad Avenue, Fairview, New Jersey 07022, *except that Waste Management is not required to divest any account or contract serviced on any route identified above where less than 33.3 percent of the total revenue generated by the account or contract is attributable to services provided on any route(s) identified above*, or to divest any real property or improvements to real property (i.e., buildings, garages, or leasehold rights related thereto)" (requested modifications italicized).

[8] WMI was unable to sell the New Jersey Assets by January 6, 2004, as provided in the Notice Regarding Time Extension filed with the Court on November 19, 2003. Pending before the Court is a Notice, Stipulation and Order Regarding Time Extension filed January 6, 2004, whereby the parties requested that the time period to divest the New Jersey Assets be extended until February 19, 2004. On February 17, 2004, the United States approved the purchaser proposed by WMI and WMI divested the modified package of waste hauling assets serving Bergen and Passaic Counties, New Jersey, and described herein, subject to this Court's approval as requested in the instant pleadings.

JUDGMENT MODIFICATIONS IS UNNECESSARY AND DOES NOT SERVE THE PUBLIC INTEREST

The Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16 (b)-(h), does not expressly apply to the modification of entered final judgments.[9] Nonetheless, the United States and the courts have concluded that notice to the public and an opportunity for comment are appropriate where significant decree modifications are proposed.[10] Here, however, the modifications are minor and only serve to effectuate what was intended in the original Final Judgment. Thus, no notice or public comment period is necessary for a determination that the proposed modifications are in the public interest.[11]

IV. CONCLUSION

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[9] The procedures mandated by the APPA govern federal district courts' consideration of "[a]ny proposal for a consent judgment submitted by the United States," 15 U.S.C. § 16(b), and are designed to facilitate a public interest determination "[b]efore entering any consent judgment proposed by the United States," 15 U.S.C. § 16(e).

[10] *See United States v. AT&T*, 552 F. Supp. 131, 144-45 (D.D.C. 1982), *aff'd. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[11] Few courts have addressed the issue of the applicability of the APPA to judgment modifications. Courts in this district have made non-material modifications of final judgments without requiring notice to the public and opportunity for comments. *United States v. Halliburton and Dresser Industries*, Civil Action No. 98-2340 (D.D.C. March 13, 2000, Judge Thomas Penfield Jackson); *United States v. Tidewater, Inc., et al.*, Civil Action No. 92-106 (D.D.C. October 7, 1992, Judge Thomas F. Hogan); *United States v. Baker Hughes*, Civil Action No. 90-0825 (D.D.C. June 20, 1990, Judge Louis F. Oberdorfer).

Two courts have further held that the APPA is not applicable to judgment termination proceedings, suggesting that those courts would not view the APPA as applicable to minor judgment modifications. *United States v. American Cyanamid Co.*, 719 F.2d, 558, 565 n.7; *United States v. General Motors Corp.*, 1983-2 Trade Cas. ¶ 65,614 at 69,093 (N.D. Ill. 1983). *But see United States v. Motor Vehicle Mfrs. Ass'n*, 1981-2 Trade Cas. ¶ 64,370 (C.D. Cal. 1981).

For all of the foregoing reasons, the United States, New Jersey and WMI respectfully request that the Court approve the modifications of the Final Judgment as discussed herein.

Dated this 11th day of May, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2004, I caused a copy of the foregoing Joint Motion and Memorandum of United States, New Jersey, WMI, and Allied to Modify Final Judgment to be served by electronic filing on Waste Management, Inc. and Allied Waste Industries, Inc., and by first class mail, postage prepaid, on the State of New Jersey at the addresses given below:

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