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March 28, 2006

VIA FEDERAL EXPRESS

Thomas O. Barnett
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D.C. 20530

Re: Request for Business Review Letter

Dear Mr. Barnett:

We represent The Southeastern Public Service Authority of Virginia ("SPSA"). We are writing pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. We request a statement of the Antitrust Division's current enforcement intentions with respect to the enclosed contract proposal made to SPSA by John C. Holland Enterprises, Inc. ("Holland"), a direct competitor of SPSA in the Hampton Roads, Virginia market for the disposal of Construction Demolition & Debris waste ("CDD"). Holland proposes a contract by which Holland would commit to deliver significant volumes of CDD to SPSA at publicly available rates even though Holland is in the business of landfill disposal and would appear to profit by accepting more CDD itself not by paying a competitor to accept it. While Holland has not joined in this request at this time, SPSA invites Holland to do so by a copy of this letter to its counsel, Kilpatrick Stockton LLP.

SPSA is a public body established pursuant to the laws of the Commonwealth of Virginia for the purpose of providing certain public services, including a waste disposal system in the Hampton Roads, Virginia area. SPSA is an authority comprised of the Cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach and the Counties of Isle of Wight and Southampton.

Holland is a private Virginia corporation engaged in the business of operating a landfill for the disposal of CDD. Holland's landfill is located only a few miles from SPSA's landfill. To the best of SPSA's knowledge, Holland's primary source of revenue comes from acceptance of CDD.

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Reply to Norfolk Office

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On April 22, 2005, Holland filed a lawsuit against SPSA in the Circuit Court of the City of Suffolk, Virginia, making the following allegations:

98. SPSA's conduct, among other things, shows that landfill services for the disposal of CDD waste represents a separate and distinct relevant economic market from the market for landfill services for the disposal of MSW waste.

99. The relevant geographic market within which SPSA competes with [Holland] for the sale of landfill disposal services for CDD is the territory in and immediately around the geographic area comprised of the Cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk, and Virginia Beach and the Counties of Isle of Wight and Southampton (the "Geographic Market"). The costs of transporting CDD and other factors generally necessitate that customers within the Geographic Market dispose of their CDD at SPSA's, [Holland's], or Higgerson-Buchanan's landfills and even in the face of a price increase or other exercise of market power, upon information and belief, customers would still not have any viable economic alternatives outside the Geographic Market.

100. SPSA possesses either monopoly power or something dangerously close to monopoly power in the Relevant Market. Upon information and belief, SPSA now disposes of more than 50% of the CDD waste in the Geographic Market. The only other current participants in this Relevant Market are [Holland] and Higgerson-Buchanan, who roughly split the remaining share of this market. And upon information and belief, Higgerson-Buchanan will be forced to close its CDD landfill to the public in the near future.

101. Numerous entry barriers exist that will help preserve SPSA's market power and that will greatly facilitate SPSA in obtaining or maintaining monopoly power in the Relevant Market for landfill services for the disposal of CDD waste. In addition to the costs associated with identifying and developing an appropriate landfill site, there are a myriad number of regulatory approvals a potential entrant would need to obtain before entering the market. The approval process takes years to complete.

102. A potential entrant also needs to be assured of a long-stream of revenues because the initial investment in the structure along with the ongoing operations of this type of structure has to be recovered over the course of filling up the landfill cell.

SPSA encloses a copy of the Bill of Complaint for the Division's review. SPSA strongly disagrees with Holland's allegations with respect to SPSA's market share, but is uncertain as to the remaining number of effective competitors in the relevant market. SPSA believes the best

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market data available is contained in the Commonwealth of Virginia's Department of Environmental Quality's Solid Waste reports issued each year by June 30 for the prior year. These reports list volume accepted by particular landfills during the prior year and remaining capacity. SPSA encloses reports for calendar years 2004, 2003, 2002, and 2001. The relevant data for Holland and Higginson-Buchanan is found on pages 30 and 31 of the 2004 report, pages 30 and 31 of 2003, 29 of 2002, and 25 of 2001. The report for 2005 should be issued by this June.

Because SPSA's waste includes MSW, the Department of Environmental Quality reports do not separately segregate SPSA's CDD waste. We enclose a spreadsheet showing the amount of CDD accepted by SPSA for 2005, 2004, and 2003. SPSA did not separately track CDD volume prior to 2003. When compared against the volumes for Holland listed in the Department of Environmental Quality's Solid Waste reports, it appears that Holland's share of the market dwarfs that of SPSA's by a factor of between four (4) and twelve (12).

Holland has proposed that SPSA enter the enclosed agreement with it. The proposed agreement is based on terms SPSA offers to any waste hauler who commits to providing SPSA with a minimum quantity of CDD. The contract provides that SPSA will pick up CDD waste at an approved transfer station for a fixed fee per trailer load set by SPSA's public fee schedule. SPSA provides the trailers and delivery from the approved transfer station to SPSA's landfill.

From SPSA's viewpoint, the contract proposed by Holland is attractive and lucrative. The contract will result in substantial revenue to SPSA with minimal costs. SPSA has enjoyed substantial excess revenue from the exact same contract with one other waste hauler.

SPSA is unclear about what, if any, economic benefit Holland realizes from the proposed agreement. As Holland primarily derives its revenue from accepting CDD as a landfill operator, Holland's economic interest seemingly would be in accepting more CDD itself not in paying a competitor to accept it. Holland has provided SPSA with no explanation as to how it expects to benefit from the proposed agreement. Because of the lack of an apparent economic motive for the proposed contract, SPSA would like the Division's views on any possible enforcement action prior to entering the agreement. SPSA requested that Holland's counsel provide an opinion letter that the proposed contract raised no antitrust issues, but Holland's counsel declined to do so. SPSA encloses copies of the correspondence.

In the interest of complete disclosure, SPSA also wishes the Division to understand that Holland first made the proposal just one week after the parties received an order from the Circuit Court of the City of Suffolk dismissing Holland's lawsuit in its entirety. SPSA encloses a copy of the Court's opinion. Holland has never indicated that the dismissal of the lawsuit is tied in any way to the proposed contract. Holland has noted its intention to appeal the dismissal of the lawsuit. SPSA also has filed a Motion for Attorney's Fees with the Court based on state law conspiracy claims made by Holland in the litigation. As of this time, Holland has made no offer to resolve any of the pending issues with any tie to the proposed contract.

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SPSA understands that it may be immune from any antitrust liability given its status as a public entity under the state action doctrine. Regardless of possible immunity, SPSA as a public entity wishes to act in the public's best interest and solicits the Division's views with respect to any effects on competition the Division sees from the proposed agreement independent of SPSA's immunity.

Particularly, SPSA solicits the Division's views on whether the proposed agreement presents any risk of an intentional or inadvertent facilitating practice or "plus factor" involving conscious parallelism. *See, e.g., Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 1999 WL 691840 at 9 (4th Cir. September 7, 1999) (plus factors [include] "motive to conspire," "opportunity to conspire," "high level of inter-firm communications," irrational acts or acts contrary to a defendant's economic interest, that are rational if the alleged agreement existed, and departure from normal business practices).

As explained in the enclosed correspondence, counsel for Holland sees no risk of the proposed agreement being viewed as a facilitating practice citing the United States Supreme Court's decision in *Aspen Skiing*. SPSA hopes the Division agrees with Holland's counsel's analysis given the substantial revenue SPSA will receive as a result, but wishes above all to act only in the public interest and to take no steps that would reduce competition.

Given SPSA's desire to enter the proposed agreement with Holland as soon as possible, SPSA agrees to respond as quickly as possible to any follow-up requests of the Division for additional information. By a copy of this letter, SPSA requests that Holland agree likewise to cooperate with the Division and provide any materials for the Division's review on an expedited basis.

SPSA looks forward to the Division's prompt response. Please feel free to contact me with any questions.

Sincerely,



Michael R. Katchmark

MRK:sew

Enclosures

Cc: Gary H. Baise, Esquire (via Federal Express - w/encls.)