



U.S. Department of Justice

Antitrust Division

*City Center Building
1401 H Street, NW
Washington, DC 20530*

September 13, 1999

The Honorable Joseph R. Lenthol
Assemblyman 50th District
Kings County, New York
State of New York Assembly
619 Lorimer Street
Brooklyn, NY 11211

Re: *Comment on Proposed Final Judgment in United States, State of Ohio et al. v. USA Waste Services, Inc., Waste Management, Inc., et al., Civil No. 98-1616 (N.D. Ohio, filed July 16, 1998)*

Dear Assemblyman Lenthol:

This letter responds to your written comment on the proposed Final Judgment in *United States v. USA Waste Services, Inc.*, now pending in federal district court in Cleveland, Ohio. The Complaint in that case charged, among other things, that USA Waste's acquisition of Waste Management would substantially lessen competition in the disposal of New York City's commercial waste. The proposed Final Judgment would settle the case by, *inter alia*, requiring the defendants to divest (a) the Waste Management's SPM Transfer Station in the Bronx, NY; (b) USA Waste's All City Waste Transfer Station in Brooklyn, NY; and (c) USA Waste's proposed Nekboh transfer Station in Brooklyn, NY. *See* Judgment, §§ II (C)(2) (i)(1)-(3), IV(A). To ensure USA Waste's continued cooperation with the purchaser in its efforts to permit and construct a transfer station on the Nekboh site, the proposed Judgment further provides that, if the Nekboh Transfer Station is not permitted within one year after entry of the decree, USA Waste must, in addition, divest Waste Management's Scott Avenue Transfer Station, also in Brooklyn, NY. Judgment, §§ II (C)(2)(i)(4) and IV(B).

Your letter raises two issues related to the divestiture of the Nekboh and Scott Avenue transfer stations. First, you point out that the proposed Nekboh facility, though much larger than the Scott Avenue station, is still in the permitting stage and may never obtain a permit to open and operate. For that reason, you urged that we amend the consent decree to require an immediate divestiture of the already-permitted Scott Avenue transfer station. Second, you note that in any event, the proposed Nekboh facility would be adjacent to the Eastern District Terminal, "a beautiful 20 acre parcel of waterfront property" recently placed on an open-spaces list. You suggested that the public interest would be better served if the decree contained a prohibition on the use of the Nekboh site as a waste transfer station.

A. The Contingent Divestiture of the Scott Avenue Transfer Station

After considering your comments, and arguments advanced by the defendants and others, the United States (and its New York co-plaintiff, the State of New York) concluded that the divestiture provisions in the proposed Judgment concerning the defendants' Scott Avenue Transfer Station should indeed be modified. The United States and the State of New York agreed to join the defendants in moving the Court to enter a modified Final Judgment that would replace the current contingent divestiture of the Scott Avenue Transfer Station with a requirement that the defendants immediately divest either of two smaller transfer stations, Gesuale or Vacarro, both in New York City. That obligation was imposed by a recent consent decree, entered in federal district court in Brooklyn, NY, that settled another merger case involving a proposed acquisition by Waste Management of other transfer stations in the New York market, *United States, States of New York and Pennsylvania, and Commonwealth of Florida v. Waste Management, Inc., Eastern Environmental Services, Inc., et. al*, Civil No. 98-7168 (E.D.N.Y., entered May 25, 1999) (the "Waste/Eastern case"). The United States agreed to move to modify the proposed Judgment for basically two reasons.

First, divestiture of the Scott Avenue Transfer Station was primarily an inducement to defendants to ensure that they continue their efforts to get the Nekboh site permitted. However, the Nekboh Transfer Station permit application was divested to a major waste industry firm, Republic, which is fully capable of vigorously pursuing the permitting process. In August 1998, defendants sold the proposed Nekboh Transfer Station (and virtually all of the other assets under the decree) to Republic Services, Inc. With over \$2 billion in annual revenues, Republic is the nation's third largest waste collection and disposal firm. Republic has the financial resources and economic incentive to continue pursuing a permit for the proposed Nekboh Transfer Station without defendants' assistance. In addition, permanent injunctions in the proposed Judgment prohibit the defendants from interfering in any way with Republic's efforts to obtain a permit for that site. Thus, the contingent divestiture of Scott Avenue is unnecessary to ensure that the defendants cooperate in the permitting process.

Second, by permitting the defendants to retain the Scott Avenue Transfer Station, in return for divestiture of the smaller Gesuale or Vaccarro sites, the United States and the State of New York were able to obtain a favorable settlement of the subsequent Waste/Eastern merger case. In September 1998, USA Waste agreed to acquire Eastern Environmental Services, Inc. ("Eastern"), another major competitor in the disposal of New York City's commercial waste. In November 1998, the United States, the State of New York and other states filed an antitrust suit that sought to block that acquisition. To resolve the governments' competitive concerns in that litigation, the defendants agreed to divest two large Brooklyn, NY transfer stations acquired from Eastern (Atlantic and PJ's) in return for the governments' agreement to join the defendants in this case in a motion to modify the proposed Final Judgment to substitute an immediate divestiture of the Gesuale or Vaccarro transfer station for a contingent divestiture of the Scott Avenue Transfer Station. (*See Waste/Eastern Final Judgment, §§ II (D)(2)(a)-(c), IV(A)(2) and (L)*, filed in federal district court in Brooklyn, NY on December 31, 1998, and entered on May

25, 1999, after the United States had responded to all public comments submitted during the 60-day public comment period.)

In light of the divestiture of the Nekboh proposal to Republic, a well-financed industry giant, the United States does not believe that the contingent divestiture of the Scott Avenue transfer station was necessary to alleviate any competitive concerns arising from USA Waste's acquisition of Waste Management. And by agreeing to join Waste Management in seeking to remove that requirement from the Ohio consent decree, the United States and the State of New York were able to avoid a trial on the merits of defendants' acquisition of Eastern.

B. Prohibiting the Construction of a Waste Transfer Station on the Nekboh Site

Finally you suggest that we modify the decree to prohibit the construction of a waste transfer station on the Nekboh site. We strongly believe that promptly permitting and operation of the Nekboh transfer station is necessary to provide an important competitive check on USA Waste in the disposal of New York City's commercial waste. Nothing in the proposed decree, however, would preclude New York state and city officials from deciding not to grant a permit to operate a waste transfer facility on the Nekboh site. Whether the transfer station receives an operating permit depends on any number of factors, including a considered assessment of the environmental impact of the facility. Whether a waste transfer facility on the Nekboh site will have detrimental effects is an issue that is best left to the regulatory agency to review and ultimately resolve.

Thank you for bringing your concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16, a copy of your comment and this response will be published in the Federal Register and filed with the Court.

Sincerely yours,

/s/

J. Robert Kramer II
Chief
Litigation II Section