UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. ALLIED WASTE INDUSTRIES, INC., and BROWNING-FERRIS INDUSTRIES, INC., Defendants.	Case No. 1:99 CV 01962 JUDGE: Ricardo M. Urbina DECK TYPE: Antitrust

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF JOINT MOTION
FOR ENTRY OF THE PROPOSED MODIFIED FINAL JUDGMENT

The plaintiff United States and defendants Allied Waste Industries, Inc. ("Allied") and Browning-Ferris Industries, Inc. (which has subsequently been acquired by Allied and is included under "Allied" in this memorandum) have jointly moved for entry of a proposed modified Final Judgment. The modification is sought to address certain objections to the proposed Final Judgment received during the 60-day comment period. The motion is made pursuant to Section XIII of the proposed Final Judgment which provides in part that "any of the parties to this Final Judgment [can] apply to this Court at any time . . . for the modification of any of the provisions hereof . . . ."

I. PROCEDURAL BACKGROUND

On July 20, 1999, the United States filed a civil antitrust complaint which alleged that Allied's acquisition of Browning-Ferris Industries, Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleged that the merger would substantially lessen competition in

the disposal of municipal solid waste in thirteen highly concentrated markets and substantially lessen competition in the provision of commercial small container waste collection services in fourteen highly concentrated markets across the United States, including the Chicago metropolitan area.

At the same time the Complaint was filed, the parties submitted a proposed Final Judgment that would require the defendants to divest assets sufficient to preserve the competition that otherwise would be lost in each of the markets in which an antitrust violation had been alleged. The proposed Final Judgment provided that the defendants would divest certain disposal assets (the "Relevant Disposal Assets") and certain hauling assets (the "Relevant Hauling Assets") in the geographic markets alleged in the Complaint. On July 21, 1999, the Court also entered a Hold Separate Stipulation and Order, allowing the defendants to complete their merger transaction, provided that they keep the assets required to be divested separate from their own business operations and adhere to the terms of the proposed Final Judgment pending the United States' compliance with the notice and comment provisions of the Antitrust Penalties and Procedures Act, 15 U.S.C. § 16(b)-(h) (the "APPA").[1]

II. THE PENDING MOTION TO ENTER THE PROPOSED MODIFIED FINAL JUDGMENT

Today, the United States has filed a Certificate of Compliance with the Provisions of the Antitrust Procedures and Penalties Act, certifying that it has notified the public of the terms of the proposed settlement and fully responded to the public comments that were received. The parties

[1] Nothing in the Hold Separate order prevents the defendants from promptly selling the assets to be divested to an acceptable purchaser, and in this case the defendants have already divested several of the assets identified in the proposed Final Judgment prior to APPA compliance.

have also submitted, and moved the Court to enter, a slightly modified version of the Final Judgment that was originally proposed. A copy of the proposed Modified Final Judgment is attached hereto as Exhibit A.

The modification affects only a small portion of a single commercial waste hauling market -- the Chicago area small container waste collection market. Pursuant to Section II.D.(4) of the proposed Final Judgment, defendants are required to divest "BFI's commercial routes that serve the City of Chicago and Cook, DuPage, Will, Kane, McHenry, and Lake counties, IL." As written, this included all of BFI's open (non-franchise) commercial routes in the Chicago metropolitan area, with current annual revenues of around $43.7 million, and would also include some commercial hauling routes, with annual revenues of around $6 million, covered by municipal franchise contracts.

Many of the franchisors (municipalities) objected to the divestiture of their franchises to another company and filed comments with the Antitrust Division. The United States has fully considered and responded to the public comments that were received.[2] After considering the objections, the United States determined that Allied should be permitted to retain the $6 million in municipal franchise contracts in return for the divestiture of additional assets of approximately $10 million in residential and rolloff waste hauling business in the greater Chicago metropolitan market.[3]

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[2] The comments and responses are contained in the United States's Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act.

[3] "Commercial waste" is waste from commercial and industrial customers but not medical waste; organic waste; or special waste, such as contaminated soil, sludge, or recycled materials. Typical customers include office and apartment buildings and retail establishments (e.g. stores and restaurants). It is usually collected in small containers (1 to 10 cubic yards typically made of steel) often known as dumpsters.

"Residential waste" is waste from single family dwellings or small apartment complexes usually put in garbage bags or trash cans.

This divestiture of residential and rolloff waste business is in addition to the approximate $43.7 million in open, non-municipal franchise commercial work divested pursuant to the proposed Final Judgment.[4] The $43.7 million in commercial routes that have been divested has already brought a new entrant into the Chicago market and strengthened a smaller competitor. The substitution of $10 million in residential and rolloff routes for $6 million in commercial routes therefore will not affect the adequacy of relief in the small container market, but will ensure that the new entrant has a sufficient volume of waste to compete effectively in the Chicago hauling and disposal markets.

The proposed modification affects only one provision of the consent decree, adding the following language to the end of Section II.D.(4) (Chicago, IL) at page 9 of the proposed Modified Final Judgment: "provided, however, defendants may substitute, for franchised commercial routes, BFI's residential routes that serve the cities of Northbrook, Wilmette and Winnetka, IL; Allied's

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"Rolloff waste" is typically construction debris collected in large rolloff containers.

[4] Pursuant to a letter agreement between the United States and Allied dated March 29, 2000, Allied was permitted to close on this transaction with Superior (and did so on March 31, 2000) subject to the following conditions:

> 1) The [United States] will seek, as soon as practicable, the modification to the proposed Final Judgment to permit Allied to retain the municipal franchise contracts initially required to be divested and permit Allied to substitute instead the residential and rolloff business contained in the proposed agreement with Superior, and;
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> 2) If Allied elects to close on the transaction before this modification is accepted by the court, Allied agreed to keep separate the municipal franchises required to be divested under the current proposed Final Judgment until the court's acceptance of the modification to the proposed Final Judgment.

Letter from Arthur A. Feiveson, U.S. Department of Justice, to Tom D. Smith, counsel for Allied, dated March 29, 2000 (attached hereto as Exhibit B).

residential routes that serve the cities of Deerfield and Golf, IL; and BFI's rolloff routes that serve Cook and DuPage counties, IL."

III. ENTRY OF THE MODIFIED FINAL JUDGMENT IS IN THE PUBLIC INTEREST

At this stage of the proceedings, after the United States has certified its compliance with the public notice and response to comment requirements of the APPA, the Court must determine whether entry of the proposed Modified Final Judgment "is in the public interest." 15 U.S.C. § 16(e).

The United States believes that substituting the residential and rolloff assets for the municipal franchise assets does not significantly change the relief contained in the proposed Final Judgment. Allied has agreed to divest $37.5 million in commercial waste routes to Superior Services Inc. ("Superior") and an additional $6.2 million in commercial routes to Groot Industries, Inc. ("Groot"), purchasers acceptable to the United States.

Superior currently has no hauling operations in the greater Chicago metropolitan market. Divestiture of the $37.5 million in non-franchise commercial hauling plus the $10 million in residential and rolloff hauling would enable Superior to enter the greater Chicago metropolitan market as a new major hauling competitor, and the residential and rolloff waste hauling business gives Superior a sufficient waste stream for the waste disposal facilities it has just acquired from Allied. In addition to the hauling routes, Superior also acquired from Allied four former transfer stations and two landfills. Furthermore, Allied has divested an additional 16 commercial waste collection routes, with annual revenues of approximately $6.2 million, and a transfer station in the Chicago area to Groot, a smaller commercial hauler in the Chicago area.

Given these divestitures, which will bring a new competitor into the Chicago-area market and strengthen an existing smaller competitor, divestiture of the $6 million in municipal franchise routes, over the objections of many of the franchisors, is not necessary to promote competition in waste disposal and the collection of commercial waste in the Chicago area.

As noted in the Competitive Impact Statement's discussion of the standard of review for entry of proposed consent decrees under the APPA, "the 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 in conducting the public interest inquiry." See Competitive Impact Statement, at 16 (quoting 119 Cong. Rec. 24598 (1973)). Rather,

> 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.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977). And "[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.' (Citations omitted)."[5]

A. *The Public Comments on the Proposed Final Judgment Were Considered.*

"[T]his is not a case wherein objectors speak with one voice," *United States v. Nat'l Broadcasting Co.*, 449 F. Supp. 1127, 1144 (C.D. Cal. 1978) (*distinguishing United States v.*

[5]*United States v. AT&T*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 u.s. 1001 (1983) *quoting United States v. Gillette Co., supra*, 406 F. Supp at 716; *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W. D.Ky. 1985).

Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975), where the court confronted "unified opposition" to a proposed consent decree). Rather, in this case, the 16 public comments submitted on the proposed Final Judgment expressed a wide variety of views, which the United States carefully considered and addressed. The comments led the United States and the defendants to move for the modification contained in these papers. However, the comments did not persuade the United States to withdraw its consent to entry of the proposed Judgment. (See Certificate of Compliance, Ex. 3-17.) In our view, the proposed Modified Final Judgment falls well "within the range of acceptability" and the broad "reaches of the public interest." *United States v. AT&T*, 552 F. Supp. At 150.

V. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the United States's Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act, the United States respectfully requests that this Court enter the Modified Final Judgment.

Dated: ***5/11/00***

Respectfully submitted,

/s/

Arthur A. Feiveson
Illinois Bar No. 3125793

United States Department of Justice
Antitrust Division, Litigation II
1401 H Street, NW, Suite 3000
Washington, DC 20530
(202) 307-0901