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October 5, 1999

J. Robert Kramer II, Esq.
Chief, Litigation II Section
Antitrust Division
U.S. DEPARTMENT OF JUSTICE
1401 H Street, NW • Suite 3000
Washington, D.C. 20530

RE: Comment on Merger Between Allied Waste Industries and Browning Ferris Industries — Case 99-CV-01962 (D.C.D.C.)

Dear Mr. Kramer:

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16, this is to submit comment on the consent decree that was entered into on July 26, 1999, concerning the proposed merger between ALLIED WASTE INDUSTRIES (AWI) and BROWNING FERRIS INDUSTRIES (BFI).

We have previously filed extensive comments on the preceding mega-mergers of USA WASTE SERVICES and old WASTE MANAGEMENT, and of new WASTE MANAGEMENT and EASTERN ENVIRONMENTAL SERVICES, by letters dated November 23, 1998, and April 27, 1999, respectively, both of which are incorporated herein as if set forth in full.

Instead of repeating them, we would like to make the following observations not previously presented that bear on this merger.

At the outset, the Department should be commended for continuing to improve the terms of its settlement agreements. Specifically noted are the limitations on reacquisitions of divested assets and of follow-on tuck-ins with significant anti-competitive implications for five years. More importantly, we note the rejection of Republic's purchase of Allied's Chicago decree assets.

However, we continue to harbor serious concerns with the fundamental underlying philosophy of the Department in addressing the obvious implications of these major mergers in the waste industry. That is to say, we understand that philosophy to, first, be limited to the prevention of higher concentration ratios in either the market for collection or disposal in geographic markets with overlapping assets between the merging firms.

Second, the Department appears to believe that the divestiture of those overlapping assets that create greater market share than the larger partner had before merger will maintain preserve competition, even if they are spun off to other consolidators so long as those other consolidators are not presently in that market. This forbearance even extends to consolidators who have, as we

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have documented previously, "taken the pledge" to the investment community to push for higher margins, not compete on price for more share — even when, as we have also previously documented, Wall Street and the private investment pools have the power and the demonstrated inclination to enforce those pledges on publicly traded companies and those indebted to private pools for acquisition war chests.

Our concern is that, as to the first, concentration in many markets for disposal — the bottleneck in this industry — is already perilously close to being locked down and is creating insurmountable barriers to entry when concentration among those consolidators is assumed to be poised to act tacitly in concert against new competitors. We are working to organize data bases of disposal capacity in major markets that will show whether this concern is valid or not, but have not yet completed that study.

As to the second, we continue to find evidence to show that consolidators such as REPUBLIC and SUPERIOR, who are reported to have agreed to purchase the divested assets from this merger, have made commitments to investors to not compete on price for share and they have not limited that promise to their existing markets, somehow excluding those that they are entering with the purchase of these decree assets.

We are in the process of evaluating field data to discern what pricing strategy Republic followed in those markets it entered following its purchase of the USA/WMI divestitures. Unfortunately, that information is not presently completed for inclusion in this comment. But, their public statements are indicative in the meantime.

According to CIBC World Markets (*Environmental Services*: Republic Services, Sep 21 '99), after first giving indirectly — very indirectly — a nod to Justice's intervention the Chicago market by observing the restrictions "prevented [Republic] from realizing the expected synergies," the analyst goes on to characterize the impressions which the major consolidators have given him about their pursuit of profit margins vs. market share:

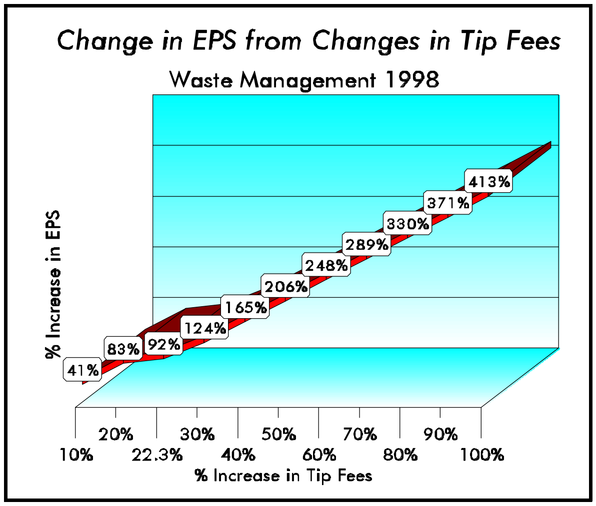
> "We believe that the primary sources of risks to [Republic's] 2000 results are a slowdown in the domestic economy and/or a large competitor becoming less rational on the pricing front. . . . We believe the chance of either of the other large national players starting a price war to gain volume is unlikely given their high debt loads and understanding that such pricing action ultimately benefits no one."

And, regarding SUPERIOR, according to an article by Bill Wolpin, "A Strong Current of Change," in *World Wastes* (Apr '98), at p. 27:

> "[Peter] Rudd [vice-president of Superior Services] also predicts that the merger will add stability to the nature of competition. He says in some cases, 'local [Waste Management] operation's activities were somewhat unpredictable.' He expects 'more rational pricing and a more disciplined approach to producing earnings' under the new

leadership."

It is important to emphasize that these representations that the haulers make to the Street are not idle comments that it is reasonable to expect can be violated in practice. Investors have a major stake in the consolidators acting cooperatively. To illustrate the economic incentives that will be acting on investors, we used WMI's 1998's income statement to show how sensitive earnings per share is to percentage increases in tip fees at municipal landfills. As explained in the note,[1] a conservative projection would be a 10% tip fee increase leading to a 41% increase in EPS. *See* accompanying CHART. As to gauging how large an increase is contemplated by the consolidators, following WMI's receipt of Justice approval of its last major merger with Eastern Environmental (which, at the time, WMI thought gave it a dominant position in the northeast market), it instituted tipping fee increases ranging from 40% to 138%, in that region or an unweighted average of 89%.[2]



As AWI's CEO, Mr. Van Weelden, has been the first to acknowledge in an article Mike Malloy, "Allied Waste Industries: Letting Them Grow," in *Waste Age* (Aug. '98), p. 28, there are no scale economies that the national consolidators can utilize to provide the kind of earnings growth necessary to assuage the industry's investors, including many of the large institutional investors whose stakes are presently under water:

> "'The reality of this business is that it's local,' Van Weelden says. 'There's no great synergy in running businesses in Chicago and Indiana, let alone in the Northeast, from here,' he says. ...'These markets are extremely unique, with their peculiarities in the labor force, the type of equipment, the climate...We have never bought off on the philosophy that you can make grand decisions from a corporate headquarters,' he says. When the company acquired Laidlaw in 1996, critics of the deal said 'we couldn't manage a billion-dollar company,'says Van Weelden.'But the reality is that we don't have a $1 billion

1 The 1998 reported net income of new Waste Management before excluding one-time merger expense was a loss of -$770,702,000, which, with 584,201,000 outstanding shares, is a negative earnings per share of -$1.32. Disposal revenues contributed $3,179,400,000 to operating revenues. New WMI SEC Form 10-K (Mar 31 '99), at pp. 5 and 55. Not all of the waste it collects goes to its own landfills where it would profit from its fee increase. Approximately 58% is internalized after old WMI and USA Waste merged. M. Bari, *The Solid Waste Industry* (Deutsche Morgan Grenfell, Oct 1 '97), at p. 19. Not all of its landfills will be in geographic markets in which the consolidators have control at endgame. As a working estimate, one-half is conservatively assumed to be subject to these types of fee increases, considering that part of its landfill revenues are in the separate market for hazardous waste.

2 B. Brown, "WMI raises tip fees," *Waste News* (Mar 1 '99).

> company out there— what we have are many very good, very well-managed \$10 to \$50 million collection companies around the country.'"

Thus, it is does not take extra-sensory perception to anticipate how will the interests of the billions of dollars at risk will be exercised.

For all of these reasons, we continue to advance the view on the Department that the only remedy commensurate with the overwhelming threat to competition in an industry with insurmountable barriers to entry through vertical integration is the divestiture of disposal from hauling.

As more field data becomes available, we will pass it along to the Department for its consideration.

Your attention is appreciated.

Sincerely,

RecycleWorlds
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By

Peter Anderson
PRESIDENT