

No. 04-13035-JJ

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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SOUTHERN WASTE SYSTEMS, LLC,

Plaintiff-Appellee,

v.

CITY OF DELRAY BEACH, FLORIDA and  
WASTE MANAGEMENT INC. OF FLORIDA

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

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REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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## INTRODUCTION

As we argued in our opening brief, the district court plainly erred in believing that the Delray Beach C&D franchise discriminates against interstate commerce. SWS's brief concedes virtually every important point of our argument for reversal.

First, it is clear that the *only* thing alleged to be wrong with the C&D franchise is its exclusivity. SWS expressly concedes that the Agreement and Ordinance impose no local processing or disposal requirements ("flow control"), and that the City selected its waste collection franchisee through a competitive bidding process that was fair and open to out-of-state firms. Furthermore, SWS identifies no other way in which the C&D franchise disfavors out-of-state economic interests.

Second, SWS acknowledges that *C&A Carbone, Inc. v. Clarkstown, New York*, 511 U.S. 383, 114 S. Ct. 1677 (1994), upon which it bases its contention that exclusive franchises are unlawful, concerned a regulation that was held invalid because it involved flow control. Again, SWS concedes that there is no flow control here. Further, SWS does not dispute that in *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995) – the only other case that it advances in support of the district court's decision – the Second Circuit opined that exclusive franchise arrangements do not discriminate against interstate commerce as long as

out-of-state firms are allowed to compete for the franchise. Neither case supports SWS's view that governmentally-created exclusive franchises violate the Commerce Clause unless there is a municipal takeover of the waste collection market.

Third, SWS offers no basis to reject the reasoning of the three appellate courts that have concluded that exclusive franchise arrangements exactly like the Delray Beach C&D franchise do not discriminate against interstate commerce. SWS contends that there is a Commerce Clause issue here because, although the City selected its out-of-state franchisee through an open bidding process, the franchise contract was subsequently assigned to another interstate company that "purchase[d] the successful bidder." SWS Br. at 10. But SWS gives no hint how this assignment reflects discrimination against interstate commerce.

In short, SWS's brief – like the district court's opinion below – fails to show any discrimination here. This Court should join the other courts that have uniformly upheld identical waste collection franchise arrangements and reverse the decision below.

#### **A. The Market Participant Doctrine Is Irrelevant**

SWS begins its brief with a discussion of the market participant doctrine. *See* SWS Br. at 3-5. Under the market participant doctrine, the Commerce Clause is entirely inapplicable when a State or municipality acts in its capacity "as a

market participant, rather than as a market regulator.” *Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 114, 114 S. Ct. 1345, 1358 (1994) (internal quotation marks, brackets and citation omitted). SWS accuses us of “ignor[ing]” the “threshold issue” of whether Delray Beach was acting as a market participant or a market regulator when it granted to BFI (and then transferred to Waste Management) the exclusive franchise for C&D waste. SWS Br. at 3.

The market participant doctrine is an unnecessary distraction. We did not discuss the market participant exception in our opening brief because our argument for reversal does not depend upon its application. For purposes of this appeal, we assume that the Commerce Clause applies fully to the City’s activities, but contend that the Agreement and Ordinance do not violate the Commerce Clause because they do not discriminate against interstate commerce. As we next discuss, SWS fails to show otherwise.

**B. No Cases Support SWS’s Argument That The Agreement And Ordinance Discriminate Against Interstate Commerce**

SWS identifies nothing about the C&D franchise arrangement or the process that the City used to select the franchisee that either disfavors out-of-state firms or limits the movement of commerce across state lines. To the contrary, it concedes that the selection process was open to both in-state and out-of-state firms and that the City actually selected an out-of-state company as its franchisee. SWS further concedes that the Agreement and Ordinance impose no conditions on the collection

or disposal of C&D waste that favor in-state over out-of-state interests: the City does not require its C&D franchisee to make local investments, to hire local employees, or to use local processing or disposal facilities.

Instead, SWS contends that the Agreement and Ordinance discriminate against interstate commerce simply because they “preclude[] out-of-state waste collectors” – as well as all in-state collectors not selected to perform the franchise – “from collecting waste in Delray Beach.” SWS Br. at 6. This constitutes a broadside attack on any exclusive franchise created by a state or municipality, and on any other limitation by the government on the number of businesses that can engage locally in a particular commercial activity (*e.g.*, the grant of a limited number of taxi licenses). Under SWS’s theory, such arrangements are “virtually per se invalid” (*id.*) under the Commerce Clause because they prevent all but the selected firms – including firms, like SWS, that have not even competed for the franchise or license – from engaging in the activity. *See id.* at 7 (“Depriving an out-of-state hauler of waste of access to the Delray Beach market discriminates against interstate commerce.”). Although the rule for which SWS argues would have very broad application, SWS neither identifies any case adopting such a rule nor offers a reasoned argument for construing the Commerce Clause to impose one.

SWS cites two cases in support of its argument that the Agreement and Ordinance violate the Commerce Clause: *C&A Carbone, Inc. v. Clarkstown, New York*, 511 U.S. 383, 114 S. Ct. 1677 (1994), and *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995). Neither case supports SWS's position.

*Carbone* addresses the constitutionality of "flow control" laws, which are state or local regulations requiring the in-state processing or disposal of waste. See generally, e.g., John Turner, *The Flow Control of Solid Waste and the Commerce Clause: Carbone and its Progeny*, 7 VILL. ENV'T'L L.J. 203 (1996); Eric S. Petersen and David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 FORDHAM URB. L.J. 361 (1995). "Since *Carbone*, flow control ordinances have been subjected to searching Commerce Clause scrutiny." *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 800 (3d Cir. 1995). Because it is undisputed that the Agreement and Ordinance do not impose "flow control" (SWS Br. at 7), however, *Carbone* is utterly irrelevant here.

Although it concedes that the absence of flow control makes this case "distinguishable factually" from *Carbone* (SWS Br. at 7), SWS argues that the Agreement and Ordinance are invalid under *Carbone* because they "deprive[] out-of-state businesses of access to a local market." *Id.* at 8 (quoting *Carbone*, 511 U.S. at 388). The quoted language from *Carbone*, however, refers to a type of market foreclosure not present here; the regulation at issue benefited the local

economy by requiring services that could be performed out-of-state – waste processing and disposal – to be performed within the local jurisdiction. Nothing like that is involved here: C&D from Delray Beach may be taken anywhere for processing and disposal. Moreover, because the City invited out-of-state firms to bid for the collection franchise, out-of-state businesses have not been denied access to the local market on the basis of location.

*USA Recycling* likewise fails to support SWS’s argument that the Agreement and Ordinance are discriminatory. SWS contends that, under *USA Recycling*, a municipality that has not eliminated the market for waste collection discriminates against interstate commerce if it “‘hoard[s]’ the collection of waste exclusively for an in-state waste collection company.” SWS Br. at 9. In fact, in *USA Recycling*, the Second Circuit upheld every aspect of Babylon’s waste management regime. To be sure, the Second Circuit opined that Babylon’s takeover of the waste collection market eliminated any Commerce Clause problem potentially arising from the exclusive waste collection franchise challenged by the plaintiffs. 66 F.3d at 1283. But it also explained that the creation of an exclusive franchise does not, in itself, disfavor interstate commerce, noting among other things that “the open bidding process used by the Town to hire a single garbage hauler could readily result in the hiring of an out-of-state garbage hauler – which would actually shift a portion of the garbage collection market *into* interstate commerce.” *Id.* at 1287.

Although we discussed this part of the *USA Recycling* opinion in our opening brief, SWS simply ignores it.

**C. SWS Offers No Reason To Reject The Decisions Of Other Courts Upholding Exclusive Franchises Similar To The One At Issue Here**

In our opening brief, we described decisions of three appellate courts holding that exclusive waste collection franchises just like Delray Beach's C&D franchise do not discriminate against interstate commerce. *See Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999); *Barker Sanitation v. City of Nebraska City*, 102 Fed. Appx. 514, 2004 WL 1418753 (8th Cir. June 25, 2004), petition for cert. filed, 73 U.S.L.W. 3170 (U.S. Sept. 21, 2004) (No. 04-407); *Waste Management of Alameda County, Inc. v. Biagini Waste Reduction Sys.*, 74 Cal. Rptr. 2d. 676, 63 Cal. App. 4th 1488 (Cal. Ct. App. 1998). SWS concedes that the Eighth Circuit's decision in *Barker Sanitation* and California Court of Appeal's decision in *Waste Management of Alameda County* are squarely on point, and that affirmance of the decision below would create a division in the appellate courts. SWS Br. at 14. However, SWS develops no argument why the Court should reject the reasoning of these contrary decisions, relying instead on the assertion that the courts in those cases misunderstood *Carbone*. *Id.*

SWS gets more specific with respect to *Houlton*, taking the First Circuit to task for supposedly giving "no weight \* \* \* to whether the town had, in fact, taken

over the market.” SWS Br. at 13. That criticism misses the point. The First Circuit held in *Houlton* that a municipality can validly create an exclusive waste collection franchise *without eliminating the private market*, as long the selection process is non-discriminatory. *See* 175 F.3d at 188-189 (“in-state interests are not unduly pampered, nor out-of-state competitors unduly burdened, when a municipality awards an exclusive contract to a low bidder (from whatever state or region) after a fair and open bidding process”); *see also id.* at 188 (“if local legislation leaves all comers with equal access to the local market, it does not offend the dormant Commerce Clause”). SWS fails to acknowledge this holding, much less explain why it is an invalid construction of the Commerce Clause.

SWS also argues that *Houlton* is distinguishable from this case, but it fails to identify *any* significant differences between the exclusive waste collection franchise upheld by the First Circuit and the C&D franchise here.

First, SWS contends that *Houlton* is inapplicable because “Waste Management, a Florida corporation, did not obtain the exclusive franchise through the bidding process but, instead, purchased certain assets of the successful bidder and assumed the franchise.” SWS Br. at 10. As we discuss in Section D, however, the assignment of a properly-awarded contract to another firm that has purchased the contractor’s assets does not raise issues under the Commerce Clause.

SWS next contends that *Houlton* can be distinguished because the district court in that case held that Houlton was acting as a market participant when it contracted with one firm to handle the town's waste. SWS Br. at 12. But SWS immediately notes that the First Circuit did *not* rely on the market participant exception because – as in this case – the town required citizens to pay its waste collection franchisee with their own funds. *See id.* at 13 (“as acknowledged by the First Circuit, Houlton’s ordinance created a forced business transaction which was not ameliorated by the expenditure of public funds to support waste collection services”); *see also Houlton*, 175 F.3d at 188. Indeed, SWS affirmatively argues that “Houlton was not a ‘market participant’ since it did not expend any public funds to support its contractual arrangement.” *Id.* at 12-13. The district court’s decision that the market participant doctrine *can* be invoked to support a waste collection franchise in which customers pay the franchisee directly thus provides no basis to distinguish the two cases.

SWS next argues that *Houlton* is distinguishable because “municipal residents could opt out and haul their waste themselves to the designated transfer station if they did not want to use the chosen waste collector.” Br. 12. But SWS does not explain why such an exemption – which does not allow other waste collection firms to compete with the franchisee, but simply allows residents to haul waste to a designated in-state facility (175 F.3d at 182) – would make an otherwise

problematic exclusive franchise acceptable under the Commerce Clause. In any event, the First Circuit did not rely on that feature of Houlton's ordinance in concluding that the franchise did not discriminate against interstate commerce. Accordingly, it is impossible to avoid the conclusion that, if this Court affirms the decision below, its decision will squarely conflict with the First Circuit's decision in *Houlton*.

Finally, SWS argues that competitive bidding does not have an "absolute protective effect" against violation of the Commerce Clause. SWS Br. at 11. That is true. A contract awarded through an even-handed selection process may, for example, set conditions for performance that favor in-state over out-of-state interests. Here, however, the Agreement and Ordinance are alleged to discriminate *only* through their exclusivity. Because it is clear that exclusivity itself is not a problem under the Commerce Clause as long as the selection process did not disfavor out-of-state firms, the C&D franchise here must be upheld.

**D. The Assignment Of The Franchise To Waste Management Does Not Raise Any Issue Under The Commerce Clause**

Although it concedes that out-of-state firms were free to compete for the franchise contract, SWS contends that "any effect of competition is not applicable when an in-state corporation does not bid for the exclusive franchise but purchases the successful bidder." SWS Br. at 10. Under this argument, even though the award of the franchise to BFI was non-discriminatory, the assignment of the

contract to Waste Management following its purchase of BFI's operations offends the Commerce Clause. This argument – which was neither raised by SWS nor relied upon by the court below – has no merit at all.

In evaluating Commerce Clause challenges to government contracts, courts examine the process by which the contract was awarded for two closely related reasons. First, they do so to determine whether the selection process itself reflects local favoritism. As the First Circuit stated in *Houlton*: “The core purpose of the dormant Commerce Clause is to prevent states and their political subdivisions from promulgating protectionist policies.” 175 F.3d at 188. “To the extent that in-state and out-of-state bidders are allowed to compete freely on a level playing field” for a government contract, therefore, “there is no cause for constitutional concern.” *Id.* See also *Harvey & Harvey, Inc.*, 68 F.3d at 802 (“not every process used to select a single provider is necessarily infected with \* \* \* parochialism”).

Second, an open selection process ensures that out-of-state interests have been given access to the local market. As the First Circuit stated, “[i]n such circumstances, unrestricted access to the bidding process constitutes unrestricted access to the relevant market.” *Houlton*, 175 F.3d at 189; see also *Waste Mgmt. of Alameda County*, 74 Cal. Rptr. 2d at 682, 63 Cal. App. 4th at 1497 (out-of-state companies “are not deprived of access to a local market” when they have been allowed to compete for a franchise).

In light of these purposes, the sale and assignment of BFI's contract to Waste Management is insignificant from the perspective of the Commerce Clause. The assignment plainly does not reflect a parochial preference for in-state economic interests. As SWS concedes, it occurred only because Waste Management "purchase[d] the successful bidder." SWS Br. at 10. Moreover, although Waste Management conducts its Florida operations through a locally-incorporated subsidiary, it is no more "local" than BFI is. Through its many subsidiaries, Waste Management does business in 48 states, the District of Columbia, Puerto Rico, and Canada. *See* Waste Management, Inc.'s 2003 Annual Report 23, *available at* <http://www.wm.com/wm/investor/2003Annual.pdf>. The City's assignment of the franchise contract to BFI's purchaser simply is not suggestive of local favoritism.

Because neither the initial award of the franchise to BFI nor the subsequent assignment of the franchise to Waste Management reflects discrimination against interstate commerce, the district court erred in invalidating the Agreement and Ordinance under the strict scrutiny test.

## CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted.

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