

G. SOLID WASTE UTILITY REGULATION

Solid waste utility regulation began in New Jersey when the Legislature enacted the Solid Waste Utility Control Act (Utility Act), which took effect in 1970. The Utility Act was adopted in response to a State of New Jersey Commission of Investigation (SCI) report published in 1969 that detailed the influence organized crime held on the New Jersey solid waste collection industry. The Board of Public Utilities (BPU) was given the responsibility of regulating the economic aspects of solid waste collection and disposal. In determining whether a proposed increase or decrease in rates was justified and reasonable, the BPU could consider the safety and adequacy of service rendered. The BPU required that each utility maintain a uniform system of accounts, furnish a detailed report of finances and operations on an annual basis and have an approved uniform tariff of its rates and services.

In 1989, the SCI released a second report concerning the solid waste industry in New Jersey. This report was highly critical of continued rate regulation of solid waste collection utilities. The SCI found that traditional rate regulation of solid waste collectors had no impact on corruption in the industry. Moreover, the SCI contended that deregulation of the solid waste collector rate aspect of the industry would serve to protect consumers by creating a more competitive marketplace. Persons with criminal backgrounds would continue to be excluded from the solid waste industry by way of the A-901 Disclosure Law (N.J.S.A. 13:1E-126 et seq.) wherein known criminals or associates are precluded or removed from participation in the industry. The responsibility for the economic regulation of solid waste was transferred to the Department of Environmental Protection (Department) under Reorganization Plan No. 002-1991, section 6, effective August 19, 1991. In response to the 1989 report, the Legislature enacted the Solid Waste Collection Regulatory Reform Act (Reform Act) on April 14, 1992. The Reform Act established a four-year transition period during which time the Department phased out its rate setting authority over solid waste collectors. Solid waste collection companies remained public utilities but were no longer required to petition the Department for authority to raise or lower their rates. Solid waste disposal utilities remained under traditional rate regulation.

On June 3, 1996, new solid waste utility regulations were adopted in response to the Reform Act. In regard to solid waste collectors, the Department no longer had authority to set collection rates. The new focus for the Department would be monitoring the collector industry to insure that the rates which collectors charged were rates that resulted from effective competition in the marketplace. Criteria for evaluating effective competition in the marketplace included, but was not limited to, the following:

1. Existence of barriers to entry into the solid waste collection industry;
2. Intensity of competition in the industry within each service area;
3. Concentration of ownership in the industry within each service area;
4. Observable patterns of anti-competitive behavior; and
5. Availability of substitute services within the service area.

The Department retained the authority to adjust a collector's rate when it could be shown that the rate charged by a particular collector was a rate that did not result from effective competition.

A significant result of the deregulation of rates was a major consolidation within the collection industry in New Jersey. Major national solid waste companies began to purchase almost all of the large and medium-sized independently owned and operated solid waste companies. Waste Management, Inc. Republic Services of New Jersey, Inc. Allied Waste Industries, Inc. and Onyx Waste Services, Inc. purchased most of the large and medium size collection companies in the State. During 2003 Waste Management, Inc., purchased essentially all of Allied Waste Industries, Inc.'s New Jersey assets accept for one transfer station and five small container routes that the United States Justice Department required Waste Management, Inc. to sell off due to effective competition issues. Chart G-1 demonstrates the consolidation that occurred in the collection industry. Of the top fifty collection companies in 1995, based on gross operating revenue, only six were not acquired by one of the four major companies by 2002. During calendar year 2004, the three major collection companies in New Jersey (Republic, Waste Management and Onyx) accounted for 52% of all the gross operating revenue reported by the collection industry. (See chart G-1). Although the gross operating revenue in the industry is becoming more concentrated in the three major collection companies, the number of collectors in the entire marketplace has risen to 660 in 2004, up from 462 in 1993 and 431 in 2000. Most of the new collection companies entering the industry are small, one or two truck operations that focus on commercial customers.

The Reform Act also required the Department to establish bid specifications for municipalities that contract with private solid waste collection companies to provide service to their municipality. In fact, the 1969 SCI report was most critical of the limited number of collectors that bid on municipal contracts, and concluded that bid rigging and collusion were common practices in this area of the industry. New regulations were adopted that went into great detail regarding how a municipality could advertise for solid waste collection services. The purpose of the specifications was to prevent arbitrary requirements in the bid document or the contract. For example, a municipality could no longer require that a bond be posted for the entire length of the contract period. Instead a bond was required to be secured on an annual basis during each year of the contract. This would allow smaller companies that could not afford a bond for the entire length of a contract, to bid on municipal collection contracts. Once a municipal solid waste collection contract was awarded, the collection company must file a copy of the contract with the Department. The municipality is then responsible for filing a Department form, which summarizes the contract. The Solid and Hazardous Waste Management Program has entered this municipal solid waste collection contract data into a database and the information is available on the Bureau's web page, www.state.nj.us/dep/dshw/swr. Municipal purchasing officials may access the information and determine what similar municipalities are paying for their collection services.

Solid waste disposal utilities have remained subject to traditional rate control with one major change. As a result of the loss of solid waste flow control following the Atlantic Coast court decision in 1997, traditional rate regulation of solid waste disposal utilities has become a system fraught with inequities. The Department established the concept of a "peak rate", defined as a facility's Department approved rate for each waste type on the day that flow control ended, November 10, 1997. Each facility could adjust their rate up or down without Department approval as long as the facility did not exceed its peak rate. At the time it was believed that this

would allow facilities the flexibility to adjust rates in a competitive market place without coming before the Department in a protracted rate case. Unfortunately, the current definition of peak rate has only helped those facilities with high rates under flow control and those that abandoned county oversight. Facilities that had low rates during flow control and counties that didn't abandon their solid waste system have come to the Department requesting rate increases on several occasions following the end of flow control.

After a thorough review of the current rules and in an effort to remove the inequities created by the definition of a peak rate, the Department is initiating regulatory reform of the solid waste utility rules. The Department believes that the changes described below will provide solid waste facilities the flexibility to adjust rates in a competitive marketplace, yet still allow the Department a substantial role in rate oversight to protect against excessive rates.

The current definition of peak rate will be changed to put all solid waste facilities on an equal playing field. The proposed peak rate will be the highest Department approved rate for each waste type statewide, prior to November 10, 1997. This definition will establish the rate for type 10 waste at \$132.00 per ton for all facilities that accept type 10. If the proposed definition is adopted and higher peak rates established, it would be imperative that the Department continue to monitor rates especially in those areas where there is a lack of effective competition. A facility holding a dominate market share could raise rates above those that would result from effective competition but also keep rates below the peak rate.

In order to retain some rate oversight at disposal facilities, the Department should use two concepts that already exist in statute and regulation. The Commercial Landfill Regulatory Reform Act, which was enacted at the end of 2003, defines "market-based rates" as the solid waste disposal rates collected by a privately-owned sanitary landfill facility which do not exceed rates charged at other solid waste facilities in this State or at competing out-of-state facilities. This definition only addresses privately owned landfills. An expanded definition of market-based rates could include each type of facility, for example privately-owned transfer stations or publicly-owned/operated landfills, and rates in each case would only be compared to facilities in the same market sector.

The Solid Waste Collector Regulatory Reform Act removed solid waste collection companies from traditional rate regulation, but it did create a mechanism for the monitoring of rates charged by collectors. In those instances where the Department can demonstrate a lack of effective competition in a particular service territory (county), the Department can then use cost of service models to determine if the rate is excessive. If the Department can demonstrate that a particular rate is excessive, the facility can be ordered to reduce the rate on a going forward basis. Using these two concepts, the Department could investigate (using cost of service models) the facility with the highest market-based rate as well as any facility that has dominate control over the market place. Cost of service models would evaluate the rate based on numerous factors including outstanding debt, administrative costs, enforcement costs (county), and also any revenue received from outside sources (state funds).

In addition, recognizing the importance of recycling activities in reducing waste flow and its economic and environmental benefits, facilities may include costs related to recycling activities

in their solid waste disposal rates at their own discretion. The statute is clear at N.J.S.A. 48:13A-4(c) where all recyclable or potentially recyclable materials, when markets are available, are exempt from rate regulation. When a facility can demonstrate that it has a certain rate component dedicated to recycling activities, that particular rate component will not be considered part of a facility's peak rate or market rate and will be outside the purview of utility regulation.

*see chart on following page

Chart G-1
2003 Gross Operating Revenues For SW Collection

