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October 31, 2018

**Via E-Mail and U.S. Mail**

Linda J. Butler  
Licensing and Compliance Specialist, Div. of Technical Services  
Maine Department of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017

Re: Application for Public Benefit Determination for the Proposed Expansion of the  
Crossroads Landfill in Norridgewock, Maine

Dear Linda:

On behalf of Waste Management Disposal Services of Maine (WMDSM), the following responds to the September 13, 2018 comments filed by PERC Holdings, LLC and Penobscot Energy Recovery Company (collectively "PERC"). PERC owns and operates a waste to energy facility located in Orrington, Maine. It has raised (i) general concerns about the State allowing the landfilling of waste at the expense of disposal options higher up on the solid waste hierarchy, (ii) specific concerns about waste disposal agreements involving WMDSM and the proposed Fiberight Facility, and (iii) requested that the DEP delay issuing a decision on WMDSM's pending public benefit application. Each of these issues is addressed below.

A. The Agreement with Fiberight Supports the Waste Hierarchy

WMDSM has entered into an agreement with the MRC and Fiberight (and subsequently with Coastal Resources of Maine) to provide exclusive disposal capacity for residuals, by-pass, and bridge capacity waste from the Fiberight facility (the "Waste Disposal Agreement"). Availability of landfill disposal capacity at competitive rates is critical to the success of the Fiberight facility and, more generally, waste to energy facilities such as PERC.<sup>1</sup> PERC does not appear to dispute the fact that landfills complement processing and waste to energy facilities. Instead, it objects to bridge capacity waste being landfilled. Providing bridge capacity disposal, however, is just one component of a comprehensive contract for managing the solid waste disposal needs of the Fiberight facility. Moreover, unlike residuals and by-pass waste, which will be generated throughout the life of the facility, bridge capacity represents a short-term waste

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<sup>1</sup> Indeed, for many years PERC has sent residuals and by-pass to landfills in Maine, including currently the Juniper Ridge Landfill (JRL).

stream due to start-up delays in the Fiberight facility becoming operational.<sup>2</sup> WMDSM's public benefit application is for its Phase 14 project, which will provide additional capacity beginning in 2024, long-after the Fiberight facility will be operational and bridge capacity will no longer be needed. As such, PERC's focus on bridge capacity waste seems misplaced.

B. There is no Support for PERC's Claims of Unfair Trade Practices

PERC mistakenly claims that WMDSM's agreements with Fiberight and MRC constitute a restraint of trade and unfair trade practice under Maine law.

As a threshold matter, PERC has mischaracterized the agreements regarding disposal of bridge capacity waste. WMDSM agreed to take MSW destined for the Fiberight facility beginning April 1, 2018 and continuing until the Fiberight facility becomes operational. Because of delays occasioned in part by PERC, the Fiberight facility is not yet operational. Thus, under the terms of the Waste Disposal Agreement, MRC communities are sending bridge capacity waste to Crossroads. PERC is correct that there were challenging logistics in transporting waste directly from the MRC communities to Crossroads.<sup>3</sup> As a result, and at the request of MRC, WMDSM entered into a Waste Swap Agreement with MRC, Fiberight, Pine Tree Waste, Inc. (Pine Tree) and NEWSME Landfill Operations, LLC (NEWSME) (the "Waste Swap Agreement").

The Waste Swap Agreement allows certain MRC members to divert waste to Juniper Ridge Landfill (JRL) in Old Town, Maine, which is operated by NEWSME. This diverted waste would otherwise be sent to the Crossroads Landfill under the Waste Disposal Agreement. In exchange, WMDSM agreed to accept an equivalent amount of replacement waste from southern Maine that would otherwise have been delivered by Pine Tree to JRL. The Waste Swap Agreement simply allowed communities closer to JRL to send waste to that landfill and, in exchange, waste from southern Maine that was destined for JRL could instead be delivered to Crossroads. PERC is not a party to that contract.

WMDSM, again at the request of MRC, separately agreed to waive the exclusivity provision in the Waste Disposal Agreement in exchange for a reasonable per ton fee for any bridge capacity waste delivered to another facility, in this case PERC, instead of to Crossroads. In doing so, WMDSM allowed MRC communities increased flexibility and provided an additional solution to the logistical challenges in transporting waste to Crossroads.

Neither the Waste Disposal Agreement (and the subsequent waiver of the exclusivity provision in that agreement) nor the Waste Swap Agreement raises antitrust or unfair trade practices concerns. Maine's antitrust law is similar to the federal Sherman Act. *See Tri-State*

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<sup>2</sup> Ironically, PERC has contributed to the delays that have resulted in the bridge capacity waste MSW being sent to Crossroads and now complains that it is occurring.

<sup>3</sup> PERC fails to mention that it contributed to the logistical challenges that resulted in the need for the Waste Swap Agreement. Specifically, PERC unilaterally terminated a contract that allowed the MRC communities to deliver waste to the PERC facility for reloading and transfer off-site for an agreed upon transfer and processing fee.

*Rubbish, Inc. v. Waste Management, Inc.*, 998 F.2d 1073, 1081 (1st Cir. 1993). Under federal precedent, “exclusive dealing contracts are not disfavored by the antitrust laws.” *Eastern Food Services, Inc. v. Pontifical Catholic University Services Ass’n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004). In fact, “it is widely recognized that in many circumstances they may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all.” *Id.* The Waste Disposal Agreement is a standard long-term contract in the waste management industry.<sup>4</sup> In this case, WMDSM has waived the exclusivity provision in its agreement to allow MRC members to divert waste to PERC upon the payment of a reasonable per ton fee. Far from restraining trade, this provides increased flexibility. To the extent that PERC cannot compete in this environment, that is the result of competition, not a restraint of trade.

PERC’s reference to Maine’s Unfair Trade Practices Act is similarly unavailing. *See* 5 M.R.S. §§ 205-A—214.<sup>5</sup> An act or practice is “unfair” under the statute if it (1) causes or is likely to cause substantially injury to consumers, (2) the injury is not reasonably avoidable by consumers, and (3) the injury is not outweighed by any countervailing benefits. *State v. Weinschenk*, 2005 ME 28, ¶ 16, 868 A.2d 200. PERC has failed to explain how the agreements cause any injury to consumers or competition. Contrary to PERC’s claim, the agreements benefit consumers because they provide for a more cost effective waste disposal alternative. Again, PERC’s primary complaint appears to be that it cannot compete and therefore asks the State to come to its assistance.

Finally, the agreements are exempt from state antitrust and unfair trade practice restrictions under Maine law. The Maine law under which MRC is organized includes an explicit exemption from state antitrust and unfair trade practices laws for contracts related to waste disposal. 38 M.R.S. § 1304-B(6). MRC has selected WMDSM to provide waste disposal services, and MRC is explicitly authorized by law to enter into long-term waste disposal agreements. *Id.* § 1304-B(5). The mere receipt of authorized payments from MRC is not an antitrust violation. *Tri-State Rubbish, Inc.*, 998 F.2d at 1079. Thus, there is no basis for claiming that WMDSM’s receipt of a payment in exchange for waiving the exclusivity provision of its contract violates Maine or federal law.

### C. There is no Basis for Delaying Action on the Public Benefit Determination

PERC also argues that the DEP should delay action on the application until after the appeal of the JRL permit appeal is decided and the DEP issues its next solid waste generation and disposal capacity report. There will always be changes occurring in the solid waste landscape and the DEP (and businesses) must make decisions based on current knowledge and reasonable expectations as to future needs and events. It may be years before the JRL appeal is resolved (although the BEP process has been concluded, there are potential judicial appeals that may take years to complete), and the DEP is continuously evaluating waste capacity needs both in the context of permitting decisions as well as preparation of annual reports. Maine law

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<sup>4</sup> Indeed, PERC previously had a similar exclusive long-term contract with MRC.

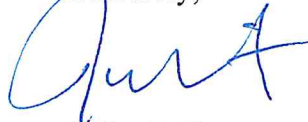
<sup>5</sup> In determining what constitutes an unfair or deceptive trade practice under Maine law, Maine courts are guided by federal law. *See* 5 M.R.S. § 207.

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requires the DEP to act on the application within 60 days and, absent legislative action, there is no basis for granting PERC's request to delay issuance of a decision. 38 M.R.S. § 1310-AA(2).

Thank you for consideration of this response, and if you have any questions, please don't hesitate to contact me.

Sincerely,



Juliet T. Browne

cc: David Burns (DEP) (via email)  
Jeff McGown (WMDSM) (via email)  
Sherwood McKenney (WMDSM) (via email)  
Steve Poggi (Waste Management, Inc.) (via email)  
Scott Luettich (Geosyntec Consultants, Inc.) (via email)  
Mat Todaro (Verrill Dana LLP) (via email)