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CT- 2021-002

Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

CT-2021-002

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

AND IN THE MATTER OF the acquisition of Tervita Corporation by Secure Energy Services Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to 92 of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

SECURE ENERGY SERVICES INC.

Respondent

REPLY OF THE COMMISSIONER OF COMPETITION

1. **Overview.** Secure uses the struggling oil and gas industry to attempt to avoid the obvious; Secure has likely substantially lessened and prevented competition for the provision of Waste Services in the WCSB by removing Tervita, its largest and closest competitor.¹
2. Oil and gas companies benefit when there is competition to provide the best price and service for Waste Services. Instead, at a time when the industry is struggling, Secure has obtained the ability to exercise new and increased market power that will harm oil and gas customers. Contrary to Secure's allegations, the power of competition, not anticompetitive mergers, can more effectively address changing market conditions, including overcapacity, to the benefit of oil and gas customers. Moreover, any cognizable efficiencies that Secure may obtain through the Transaction and that would be lost if the order sought were made will not be greater than or offset the anticompetitive effects of the Transaction.
3. The Commissioner denies the allegations in Secure's Response, except paragraphs 6, 14, and 16. In addition to repeating and relying on the facts pleaded in the Application, the Commissioner makes four additional points in this Reply.
4. **Geographic market is clear.** Secure alleges that the Commissioner's definition of the geographic market is uncertain in an attempt to distract from the fact it has no answer for: Secure can and does engage in price discrimination. Secure charges different prices to a customer based on, among other factors, the geographic location of the customer's waste relative to its disposal options.
5. Defining the geographic market with reference to locations of customers most likely to be harmed by a merger is appropriate when price discrimination is practiced which the Commissioner has pleaded. The Commissioner's definition of

¹ Unless otherwise indicated, defined terms in this Reply have the meaning ascribed to them in the Commissioner's Amended Notice of Application and Statement of Grounds and Materials Facts (together the "**Application**")

geographic market is clear, it is the aggregate locations of customers that have lost the benefit of competition between Secure and Tervita in the WCSB. Secure also ignores the fact the Commissioner has identified the areas in the WCSB where customers are most affected.

6. **Barriers to entry are high.** Secure alleges in one sentence in its response (para. 18) that there are no material barriers to entry without providing a single fact to support this allegation. In fact, Secure's response contains two material facts that contradicts its position on barriers to entry. First, Secure argues that the industry is overcapitalized and shrinking, which if true, is a barrier to entry. Second, in paragraph 30 of its response, Secure describes the problems it has faced trying to obtain approval to build its proposed landfill in Wonowon all which demonstrates high barriers to entry.
7. The reality is that Secure is providing Waste Services to dispose of waste so hazardous to the environment that the applicable regulations are strict. Secure's contention that there are no material barriers to entry is unsupportable.
8. **Countervailing power will not constrain Secure's ability to exercise new or increased market power.** Secure alleges that its customers will be able to exercise countervailing buyer power because they are large and operate in different areas of the WCSB. Secure can and does charge large customers different prices for the same service depending on which Secure facility the customer uses demonstrating the limited nature of any countervailing power.
9. Prior to the Transaction, oil and gas companies' bargaining leverage arose from the ability to turn to Secure or Tervita if the oil and gas customers failed to negotiate favourable terms with one of them. With the Transaction completed, a Secure customer can no longer use its ability to ship its waste to a Tervita facility as leverage, which significantly weakens the customer's bargaining position given

that Secure and Tervita facilities were often each other's closest substitutes (a fact implicitly acknowledged by Secure in its efficiencies claims).

10. Even if it is possible for some of Secure's customers to exercise countervailing power, it will not be sufficient to constrain Secure from exercising new or increased market power.
11. **Any efficiencies do not outweigh or offset the anticompetitive effects of the Transaction.** Secure takes one paragraph in its response to allege efficiencies without describing any of the categories of efficiencies it expects to obtain. The Transaction will not generate cognizable gains in efficiencies to the extent alleged by Secure. Any cognizable efficiencies that may be obtained through the Transaction and that would be lost if the Order sought by the Commissioner were made will not be greater than or offset the anticompetitive effects of the Transaction. The efficiencies, if any, are unlikely to be passed on to oil and gas producers and will not contribute to the efficiency and adaptability of the Canadian economy.
12. Oil and gas producers will likely pay materially higher prices and experience a deterioration in the quality of services to dispose of waste as a result of the Transaction. These effects will result in a corresponding loss of allocative efficiency, or deadweight loss, to the Canadian economy that outweighs any cognizable efficiencies that may arise from the Transaction.

DATED AT Gatineau, Quebec, this 29th day of September, 2021.

Matthew Boswell

Commissioner of Competition
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