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CT-2021-006

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the acquisition of Terrapure Environmental Ltd. by GFL Environmental Inc.;
and

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

GFL ENVIRONMENTAL INC.

Respondent

REPLY OF THE COMMISSIONER OF COMPETITION

**Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC
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I. OVERVIEW

1. In trying to downplay the intense rivalry that existed between GFL and Terrapure in the relevant markets prior to the Acquisition, GFL's Response (the "**Response**") ignores internal documents showing that GFL and Terrapure were very close competitors (even one another's closest competitors in many markets) that regularly tracked each other's marketplace activities. The Response also ignores that many of GFL's customers considered GFL and the former Terrapure to be the closest substitutes for one another.

II. POINTS IN REPLY

2. The Commissioner repeats and relies upon the facts in his Notice of Application, Statement of Grounds and Material Facts and Concise Statement of Economic Theory (collectively, the "**Application**"), and except as hereinafter expressly admitted, denies the allegations in the Response and in Schedule "A" thereto. Unless otherwise indicated, defined terms in this Reply have the meaning ascribed to them in the Application.

A. THE COMMISSIONER'S PRODUCT MARKET DEFINITION IS APPROPRIATE

3. With respect to, amongst other matters, paragraphs 14 to 22 of the Response, the Commissioner denies, amongst other matters, the Respondent's allegations of fact and grounds and says that each of industrial waste services ("**IWS**") collection and IWS processing is a relevant product market. Industrial Waste generators typically expect a variety of IWS offerings from a single supplier. Similarly, IWS collectors generally deal with a variety of Industrial Waste streams that require processing. The same considerations apply to oil recycling services

(“ORS”) collection and processing. The remaining suppliers are unable to effectively constrain the ability of the merged firm to exercise market power. With respect to industrial fuel oil (“IFO”), other fuels are not in the same product market because of a significant price differential and the switching costs incurred in order to consume a fuel other than IFO.

4. With respect to, amongst other matters, paragraphs 4 to 11 of the Response, the Commissioner denies, amongst other matters, the Respondent’s allegations of fact and grounds that their businesses were largely complementary. GFL and the former Terrapure vigorously competed against each other for many of the same customers and projects.

B. THE COMMISSIONER’S GEOGRAPHIC MARKET DEFINITION IS APPROPRIATE

5. The Commissioner denies, amongst other matters, the Respondent’s allegations of fact and grounds that point to “straw man” outliers, which are not an appropriate basis for defining geographic markets. Transportation of waste is a major cost driver, especially before it has been processed. With respect to IFO, allocating longer lead times to source IFO from faraway suppliers makes it more complicated for road pavers to stick to a schedule. Therefore, the costs associated with distant suppliers are necessarily higher.

C. BARRIERS TO ENTRY AND EXPANSION ARE HIGH

6. The Commissioner denies, amongst other matters, the Respondent’s allegations of fact and grounds in paragraphs 29 to 88 of the Response, and with respect to paragraphs 30(c)(i) and (ii), the Commissioner says more is required to become an effective competitor. Merely “buying a specialized truck or sending trucks to collect from a greater distance” is not sufficient to effectively constrain GFL. GFL

(including the former Terrapure) has dense collection networks that cannot be easily replicated. Likewise, timely and sufficient entry or expansion is not likely. GFL concedes that the permitting alone for the most basic type of processing facility can take up to a year, and permitting is just one of multiple (and often sequential) hurdles that must be overcome in constructing a processing facility, such as securing financing and construction time.

D. REMAINING COMPETITORS WILL NOT EFFECTIVELY CONSTRAIN GFL'S STRONG INCUMBENCY POSITION

7. Furthermore, in reply to paragraph 30(c)(iii) of the Response, which allegations of fact and grounds therein are denied, the Commissioner says that GFL has a strong incumbency position, including an ability to entrench itself with customers across many waste streams, despite GFL claiming the opposite because of a lack of final disposal sites in Western Canada. GFL's claim ignores that it, especially post-Acquisition, is a major vertically-integrated IWS and ORS collector and processor. The mere existence of other companies that provide similar services does not constitute effective remaining competition. The ability of the companies mentioned in the Response to constrain the ability of GFL to exercise market power is not borne out by the evidence.

E. RE-REFINERY MARGIN RECAPTURE CONTRIBUTES TO THE LIKELY SUBSTANTIAL LESSENING OF COMPETITION

8. With respect to the Respondent's allegations of fact and grounds about a dearth of overlap between the re-refineries of GFL and the former Terrapure, the Commissioner says, amongst other matters, that overlap is irrelevant to GFL's ability to recapture margin upstream due to ownership

of a re-refinery that can upgrade used oil. Such ability allows GFL greater latitude to profitably raise ORS prices, thereby exacerbating the likely substantial lessening of competition.

F. A LIKELY SUBSTANTIAL LESSENING OF COMPETITION IN THE SALE OF INDUSTRIAL FUEL OIL CANNOT BE IGNORED

9. The Commissioner denies, amongst other matters, the Respondent's allegations of fact and grounds relating to IFO in paragraphs 87 and 88 of the Response, including questioning the longevity of the market and highlighting that the market is seasonal in nature. In reply, the Commissioner says that IFO will likely continue to be in use for the foreseeable future. Additionally, the seasonality of a market does not make it less worthy of consideration.

G. ANY COGNIZABLE EFFICIENCIES DO NOT OUTWEIGH OR OFFSET THE LIKELY ANTI-COMPETITIVE EFFECTS OF THE ACQUISITION

10. The Commissioner denies, amongst other matters, the Respondent's allegations of fact and grounds in paragraphs 89 to 92 of the Response and says that the efficiencies in the Response include efficiencies that are not cognizable under the Act. Any cognizable efficiencies that may flow from the implementation of the Acquisition, which are not admitted but denied, are not likely to be greater than, and not likely to offset, the likely anti-competitive effects of the Acquisition.

11. The material and substantial anti-competitive effects resulting from the Acquisition 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 Acquisition.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January,
2022.

Matthew Boswell
Commissioner of Competition
Competition Bureau
Place du Portage, Phase I
50 Victoria Street
Gatineau, Quebec
K1A 0C9

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