

Outline of Texas Disposal Systems Inc. Opposition to Proposed City of Austin Solid Waste Haulers Franchise Ordinance

- Texas Disposal Systems, Inc. (TDS) was started in Austin in 1977. TDS has competed in the Austin market for over thirty years, and currently employs approximately 550 employees. TDS proudly services over 100,000 customers in the Central Texas area, and relies upon the revenue it draws from servicing its Austin customers to pay for the many services TDS provides to the citizens of Austin. TDS has a well-documented record of being committed to service, environmental stewardship and community involvement. TDS has built and operates large compost and waste diversion facilities, which are dependent upon the right to openly compete in the Austin city limits. TDS has plans to build a large recycling facility for C&D waste and for the production of clean alternative fuels, including ethanol.
- The City of Austin is proposing an ordinance that would declare the collection of commercial and industrial solid waste and recyclables within the city limits of Austin a public utility. TDS and some of the members of the local hauling community vehemently oppose the adoption of the proposed franchise ordinance. There are numerous concerns and potential abuses of power associated with the rights granted to the City under such an ordinance, just some of those are addressed below.

Major Concerns regarding the proposed franchise ordinance

- The City would confiscate the business rights of commercial solid waste haulers to compete in an open market for the collection of solid waste and recyclables in Austin by forcing them to request and sign a public utility franchise agreement regulated under Article XI of the City charter and the franchise ordinance proposed under chapter 15-6, Article 3(enclosed).
 - City would create a public utility out of commercial waste and recyclables collection.
 - City would have the right to audit and examine certain confidential financial records of the hauler. The hauler would be forced to employ expensive third party auditors, or waive their rights to confidential information. Confidential information would then be subject to open records requests under the Freedom of Information Act.
 - City could use this confidential information to manage waste and recyclables through Flow Control, directing materials to City owned or approved facilities, and revise the franchise ordinance to put haulers out of business.
 - City would have the right to set all rates, charges and fares for commercial solid waste collection under Article XI of the City charter.
 - City would have authority to grant or deny a franchise to the initial applicants and upon the renewal of the franchise; and to other applicants, effectively allowing the City to determine the number and type of haulers authorized to

- do business in Austin, and the number and type of vehicles placed into service after a franchise is granted to a hauler.
 - A hauler would not have the right to sell or otherwise transfer ownership of their business rights to collect waste within Austin's city limits, without an ordinance approved by council authorizing said transfer.
 - No addition of vehicles or equipment could be made by a hauler without the approval of the director, effectively allowing them to determine the size of a haulers operation, and impose prohibitive restrictions on types of vehicles and equipment allowed.
 - City could restrict a haulers business to only certain parts of the City.
 - City could limit a hauler to particular hours of operation within the City.
- The City would not only be authorized to deny approval of a sale or other transfer of a franchisee's business and hauling rights, but the City would have the right and prerogative to purchase a franchisee's assets associated with providing refuse and recyclables hauling service within the city limits.
 - Franchise agreement must include agreed upon method of appraisal, should the City choose to exercise its right to purchase.
 - Would allow the City to utilize the appraisal process to obtain and keep confidential information that may be otherwise protected, without ever actually intending to purchase franchisee's assets.
 - Provides a mechanism for the City to remove a franchisee from the market without cause.
 - Creates a legal pathway for the City to remove haulers from the city and enter into the commercial solid waste and recyclables collection business themselves.
 - Creates a legal pathway for the City to enter into the business of buying and selling haulers of waste and recyclables for profit.
 - Existing precedent indicates that City would have the authority to invoke its right to purchase at any point in the life of the franchise agreement, if ever the City receives notice from franchisee of its intent to sell or otherwise transfer franchise rights to another entity. In this situation, the City would be aware of what entity is interested in purchasing the assets of franchisee and for how much consideration. City would not have to make a comparable offer when exercising their right to purchase, instead final purchase price would be determined by appraisal methods previously set forth. Once the City purchases franchisee, City will then be in a position to sell acquired assets and realize the premium beyond appraisal value that corporations often pay when purchasing a competitor or other business.
- A hidden tax not to be less than 4% of gross receipts would be passed through to every business and non-profit organization in the city that pays for waste and recyclables collection, processing and disposal.
 - No language indicates that the rate will be the same for every franchise holder.

- No maximum limit will be set for the percentage of gross receipts the City can require.
 - Businesses and non-profit organizations will receive no reciprocal benefits from the imposed fees.
- The August 8, 2008 draft ordinance had an express exemption for hauling recyclables, but the September 4, 2008 draft ordinance does not include this exemption.
 - The City could require recyclables haulers to be subject to all provisions within the franchise ordinance.
- A franchise can be granted for a period of up to one to twenty-five years, and can be revised or revoked at any time at the discretion of the City council, if they determine a hauler has violated the potentially evolving ordinance or any City, State or Federal regulation related to the collection and disposal of solid waste.
 - Haulers will find it difficult to secure long term financing for facilities, equipment or real estate, with the looming possibility of revocation, and requirement for City action to authorize the use of equipment and vehicles financed.
 - The franchise ordinance can be revised over time to place haulers at a competitive disadvantage and thereby to force haulers out of business.
- Broad and unspecified authority will be granted to the administering department's Director.
 - Director will have authority to promulgate rules or regulations, as he/she deems necessary to effect the policy of the ordinance.
 - Director will have the Authority to impound any vehicle or dumpster deemed to be a nuisance or health hazard.
 - City council will only see those franchise applications the Director presents to them, effectively giving control over franchises granted to the Director.
- A business would be similarly culpable in (and pay a fine for) any violation committed by a hauler which they permit to collect and dispose of their commercial waste and recyclables.
- The City can amend the ordinance at will and increase the percentage of gross revenue that must be paid as a franchise fee, set rates for the delivery of services and add many other requirements which must be met by the commercial haulers of waste and recyclables, or the hauler could lose its franchise rights to operate within the city limits.
- The City could begin collecting, transporting, processing and disposing of commercial and industrial solid waste and recyclables, and not be subject to any of the provisions in the franchise ordinance as proposed now, or as amended in the future. This could create a competitive advantage for the City that no private hauler could overcome.

- The City could separately implement a “Flow Control” ordinance involving solid waste and recyclables, which could force the delivery of waste and recyclables commingled with waste, or arguably a solid waste, to only City owned or City approved facilities. This would insure that financing will not be available to anyone except the City and the largest haulers, who finance through stock offerings, for the purchase of equipment and the construction of facilities needed to meet the City’s Zero Waste goals.

History of City of Austin’s attempts to enter into market and/or franchise commercial waste collection and disposal.

- **1985 – Central Business District “Crisis”**
 - The City staff was actively pursuing the construction of a large waste to energy facility that needed a dedicated flow of high BTU content waste. The City did not control the collection and disposal of commercial and industrial waste in Austin.
 - Businesses, restaurants and bars located in the downtown central business district were serviced by haulers competing in an open-market.
 - Some haulers failed to properly maintain their equipment and provide adequate levels of service to their customers. The City chose to document the matter and allow it to persist, rather than address it through enforcement of existing ordinances.
 - The City’s solution to the problem was to enter into the commercial waste collection market and begin providing services within 30-days of announcement. Letters were sent by City staff to customers and haulers announcing that the City was taking over the service. The City staff entered into a lease purchase agreement and took possession of (2) new sideload trucks and new sideload containers to be used in the downtown area.
 - It was later determined City staff’s plans and decision to lease/purchase equipment were unknown by members of the City Council.
 - TDS purchased the equipment and used it to begin providing commercial sideload service as part of the agreement that that the city would allow the continuation of open market competition for the collection of commercial and industrial solid waste.
- **1993 – Non-exclusive Franchise**
 - The City faced a significant budget shortfall at the time. In an attempt to overcome this shortfall and generate revenue to the City, a proposal to designate solid waste collection a public utility and to franchise commercial waste collection services was drafted by Staff.
 - The proposed franchise ordinance declared commercial waste collection within the city a public utility, like telephone, gas and cable television.
 - Haulers would be required to submit an application in order to receive a franchise agreement by the vote of city council. In return, the City would

grant haulers a right and privilege to use city streets and alleys to provide commercial waste collection services.

- Private haulers were generally united in opposition to the proposed franchise agreement.
 - Within one week haulers secured over 1,200 petition signatures from different businesses, resolutions and statements opposing the proposed franchise ordinance.
 - Ultimately, the City staff withdrew their proposed franchise agreement and agreed to implement a proposal from the haulers requiring annual truck permits and monthly container fees for small, commercial containers.
 - City staff has failed to enforce compliance with this ordinance, thus allowing justification for another attempt to confiscate the rights of haulers.
- **2008 – Non-exclusive Franchise**
 - Fifteen years later, the City is once again proposing to create a public utility to regulate the collection of solid waste and recyclables through a non-exclusive franchise ordinance similar to, but even worse than, the ordinance opposed and defeated by the haulers and business community in 1993.

The Bottom Line

- TDS will do everything in its power to maintain its right to do business in the city limits of Austin and to continue to finance and build facilities needed by the businesses and citizens of Austin.
- The City has several options, which do not require the confiscation of the rights of private haulers of solid waste and recyclables.
- The City now has in place a legally defensible way of receiving the fees it reasonably needs without confiscating the rights to the collection, transportation and processing of solid waste and recyclables in the city limits of Austin.
- In order for the City to meet its goals involving the maximum diversion of waste from landfill disposal the city has the choice of either encouraging the development of facilities needed to process the waste products that can be diverted or seize the rights and dictate the cost and manner that waste is managed. TDS is concerned that the City's efforts involve their moving to be the one who controls all aspects of waste collection and disposal. We believe this would stifle the development of facilities needed to meet the City's Zero Waste goals available in a market open to competition without such government control.

Appeal

All the City has to do is enforce the solid waste haulers permit ordinance that was enacted in 1993. The City staff's failure to enforce the 1993 ordinance should not be used to create a public utility to control the management of solid waste and recyclables in the city limits of Austin.

The City has the rights to completely control the collection, transportation, processing and disposal of waste generated within the city through franchise and flow control ordinances. Once controlled the City can set rates and determine the acceptable means to manage waste and recyclables. Then all benefits of open competition will be lost and rate payers will be subjected to the costs and specifications set by the City.

Since this proposed franchise ordinance has not received enough attention and discussion from interested and affected parties and it has not been determined to be necessary in the first place, TDS requests that the City Council not approve the proposed franchise ordinance, and to delay action so as to provide additional time to allow all affected parties to participate in forming an acceptable compromise.