

**Testimony of Francis A. Ferraro,
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Chairman Fonfara, Chairman Fontana, and Members of the Energy and Technology Committee, thank you for the opportunity to testify here today. My name is Frank Ferraro. I am the Vice President of Environmental Management and Public Policy for Wheelabrator Technologies. Wheelabrator owns and operates 16 waste-to-energy ("WTE") facilities nationally, two of which are here in Connecticut. Wheelabrator was the pioneer in privately-developed and financed WTE plants, having built the first commercially successful WTE facility in the US in Saugus, Massachusetts in 1975. That plant is still operating today, producing excellent environmental and operating performance results.

I am testifying today in opposition to RB 5817. Wheelabrator shares the concern of Connecticut policymakers over the costs of waste disposal in Connecticut. We have been an important part of the waste disposal industry in Connecticut for 20 years, and we plan to continue in this important role for many years to come.

"Tip fees" are the per-ton fees that municipalities or private haulers pay to a public or private waste disposal facility for the service of disposal of municipal solid waste. This bill attempts to regulate tip fees at Connecticut WTE plants. Wheelabrator is concerned that that tip fee regulation of Connecticut WTE plants and related facilities, could actually increase costs to Connecticut municipalities, jeopardize the viability of an important component of the state's infrastructure and lead to a host of other unintended consequences.

A need for Regulation: The Myth

Today's markets for waste disposal options for Connecticut towns create downward pressure on waste disposal prices through the transparency of a market price that all parties must compete against, without the added costs involved in conducting the regulatory process. There is NO evidence of predatory waste disposal pricing in Connecticut, which would warrant price regulation. Only the "specter" of predatory pricing has been raised by supporters of this proposal. It is premature for legislators to act on this hypothetical fear until the state can observe for the first time in 20 years, how a variety of options available to a number of southwest Connecticut towns, will affect waste disposal costs in Connecticut.

The Myth of the "Monopoly" in waste disposal

Proponents of rate regulation have asserted that waste disposal in Connecticut is a "monopoly."

This is a ludicrous assertion. The facts demonstrate that the state of trash disposal in Connecticut is far from a monopoly. Mr. Chairman and members of the Committee, a free market for waste disposal is alive and well in Connecticut.

No town in Connecticut is forced to send their trash to any particular disposal facility. With the impending expiration of the contract between Wheelabrator Bridgeport and Connecticut Resources Recovery Authority (CRRA) at the end of 2008, and the contract between CRRA and the southwest Connecticut towns, these towns will be free to choose whatever disposal location they wish. In fact, towns currently served by the Bridgeport plant are currently exploring different choices for trash disposal.

Stamford has recently awarded a bid for disposal of their trash, and Norwalk and six other towns have issued a Request for Proposal (RFP) for trash transport and disposal, and are evaluating bids from a number of companies. Does that sound like a monopoly?

CRRA, itself, recently issued a request for an expression of interest (RFEI) for disposal of trash from all the remaining southwest Connecticut towns currently served by the Bridgeport plant through CRRA, thus

demonstrating clearly that other disposal options remain a viable alternative for any town served by this plant. If there were a monopoly, would any of these entities have been able to issue an RFP, let alone award contract, for trash disposal?

There is certainly no monopoly on waste disposal, and without a monopoly, there is no public policy reason for imposing the costs of a regulatory structure on Connecticut municipalities.

Some parties have argued for "below market" tip fees at our Bridgeport plant. We would note that any party arguing for "below market" rates has by definition, admitted there is a market rate for trash disposal. If there is a market rate, then there must not be a monopoly. If there is no monopoly, we see no need for regulation.

The assertion of a "monopoly" is not consistent with the actual market conditions for waste disposal in Connecticut, and is thus without any foundation.

Violation of the Interstate Commerce Clause

One of the most glaring flaws in this legislation is the attempt to regulate interstate commerce. The very first subsection of this bill, Section 1(a) prohibits facilities covered by this bill from charging "a tipping fee or other fee for disposal of such municipal solid waste or ash residue at such facility in excess of the rate approved by the Department of Public Utility Control." This language does not exempt waste which is brought to Connecticut facilities from out of state, and would therefore violate the Commerce Clause of the United State Constitution.

Beware of Unintended Consequences

This bill unfairly singles out one segment of the disposal industry--waste-to-energy facilities. While the bill would limit tip fees at in-state waste-to-energy facilities, it leaves uncontrolled the tip fees charged to towns that are not served by waste-to-energy plants. This sets up a winners and losers scenario.

If intra-state tip fees at WTE plants are regulated to below-market rates, privately-owned WTE plants in Connecticut will be financially harmed, and communities NOT served by a WTE plant will have to pay higher tip fees because the out-of-state disposal fees which these towns must pay, cannot be regulated. In addition, if the tip fees are set too low, the WTE plant may refuse to sign with any in-state towns, opting to bring in only out-of-state trash at market rates. This is the very disruptive unintended consequence of attempting to produce "below market" tip fees.

On the other hand, if tip fees at waste-to-energy plants are set at above-market rates, communities will opt to send their trash to out-of-state landfills, leaving the WTE facilities with no in-state trash, and the attempt at regulating tip fees will have accomplished nothing except raise costs for waste disposal.

The logical answer, of course, is to let tip fees be set by the market. The current market system does just that, without inserting extra regulatory costs into the process. The insertion of a regulatory process only diminishes the probability of ever setting the rate properly.

Repeating the history of the CRRRA/Enron failure?

The stated purpose of R.B.5817 is "To promote more affordable electricity." However, as drafted, Section 4 the bill entitles eligible facilities to negotiate long-term (up to 15 year) power purchase agreements ("PPAs") that have historically failed to promote low cost electricity. The General Assembly previously recognized the problems with PPAs when it promulgated Public Act 98-28 (electricity deregulation) that mandated the buyout or buydown of existing PPAs, in recognition of the fact that most PPAs were over-market as a result of poor forecasting at the time of PPA execution. The buydown/buyout mandate led to the CRRRA/Enron buydown which ultimately led to the loss of \$220 million by CRRRA, and as we all know, this resulted ultimately in the lawsuit between 70 towns against CRRRA for \$36 million. Wheelabrator is quite surprised that this bill actually contemplates replicating the circumstances which led to such a disastrous outcome.

What are the cost and other implications of waste disposal rate regulation in Connecticut?

What additional resources will the Department of Public Utility Control need to regulate an entirely new industry? How will they perform at regulating an entirely new industry? There is no *guarantee* that regulation will actually *lower* tip fees, particularly since the costs of rate cases will have to be passed right back to Connecticut taxpayers, either in the same tip fees which this bill attempts to regulate, or in some other fashion. Rate setting simply inserts costs into the process of waste disposal which simply do not exist today.

One might also look at the experience of another state that regulates tip fees. The imposition of tip fee regulation of New Jersey waste-to-energy plants has resulted in increased tip fees. These tip fees are far higher than those paid at the Bridgeport plant. This does not bode well for the results of regulation of tip fees in Connecticut, and thus presents a significant cost risk to Connecticut towns. Here are some of the additional costs which Connecticut municipalities will incur under a regulated system:

- The DPUC and the Office of Consumer Counsel ("OCC") do not receive funding from the State's General Fund. Rather, the regulated utilities contribute to the operation of the agencies and those costs are rolled into rates and passed on to ratepayers.
- The DPUC does not currently have the staff or expertise to regulate tipping fees. Thus a significant increase in staff levels will be required at a significant cost to ratepayers.
- DPUC staff will not only be required to conduct rate cases, but they must also be prepared to conduct enforcement actions. These costs of the necessary staff resources, are all shifted to ratepayers under the existing regulatory framework.
- DPUC and the OCC will be required to engage technical experts to assist with rate cases and enforcement actions. Such costs will also be borne by ratepayers.
- Rate cases are lengthy and expensive. Rate cases before the DPUC for other regulated entities have exceeded one million dollars.
- Costs to consumers will rise, and rates will be unpredictable. The regulating of solid waste is complex, and any attempt to set fees will involve many variables that affect costs to consumers. Setting fees will have to account for differences in transportation costs, volume variability, existing contracts, competitors' pricing, environmental controls and technology, and operating and permitting limits, to name just a few. However, all of these elements are already taken into account when private facilities set their rates. There is simply no need to create an additional bureaucracy to do what is already being done by private enterprise. Furthermore, a regulatory scheme that only regulates less than half of the market participants while leaving the remaining half (i.e., the CRRRA and other public entity-owned facilities) unregulated will further complicate the setting of reasonable rates.
- Historically, favorable rate case outcomes spawn the filing of new rate cases by other regulated entities seeking to match or improve the rates granted in the most recent filing. Rarely, if ever, do rate cases result in the reduction of rates for ratepayers. So in a regulated regime, we can expect a "climb to the ceiling" of rates, rather than downward pressure to be the lowest bidder on competitively set rates.

Some municipalities have already expressed concern that the costs of involvement in regulatory proceedings that would set tip fees, will prohibit smaller Connecticut towns from even being able to be represented at such a rate case. This would then *reduce* local control over waste disposal costs, at the very point in time when Connecticut towns are trying to *increase* local control over these costs. These same towns currently "regulate" their tip fees through a process called "negotiation", and it works quite well.

Antitrust laws will be violated

Connecticut Resources Recovery Authority (the "CRRRA") facilities are not subject to the proposed legislation, only private facilities. Given the nature of some of the exemptions outlined in Section 1 of the bill, it appears the regulation itself, in the short term, may only apply to the Bridgeport and Putnam facilities, which is troubling enough, but will apply to other facilities in later years. While courts have suggested CRRRA enjoys sovereign immunity from the antitrust laws, that may change because under this proposed legislation, CRRRA will now enjoy a significant competitive advantage because it can charge and change prices without the time and expense of a regulatory proceeding. This could induce a court to invoke the "market participant" exception to the CRRRA's immunity from antitrust laws, because CRRRA will be competing with private firms in the sale of a product or service. Price fixing that benefits CRRRA to the detriment of a competing private facility (which not only is subject to regulation, but must pay for such regulation), is a violation of both the antitrust laws and the Commerce Clause of the United States Constitution.

This action constitutes a taking

This action by the Legislature could constitute a taking, subjecting the State to claims for damages. All of the private resource recovery facilities in Connecticut were developed under a known and relatively predictable contract and system of regulation. Financing and investor expectations, and in particular, the disposition of the Wheelabrator Bridgeport plant after December 31, 2008, were made based on the regulatory system in place when these significant investments and agreements were made. To make such a fundamental change in the way facilities expect to charge and collect fees, would subject the State to a claim for taking property without just compensation, or could result in a claim for inverse condemnation and the damages resulting from such an action.

Attempts at exempting existing contracts are unworkable

RB 5817 attempts to exempt municipalities which currently have contracts with WTE facilities. However, this bill will not exempt organizations such as HRRRA or the 11 municipalities in HRRRA which send their trash to the Bridgeport plant. In addition, the bill attempts to exempt extensions to existing contracts from regulation by stating in Section 1 "... this exception shall only apply during the term of such contract or any extension of such contract...."

The future implications of being defined as an "extended" contract versus a "new" contract for waste disposal are huge, as this would determine whether the future tip fee would be regulated or not. This will clearly lead to litigation over what constitutes an "extension" of an existing contract, versus a "new" contract for waste disposal. The term "extension" is not defined, and attempts to do so would constrain what terms could be negotiated in any future contract talks. Wheelabrator sees no reliable way to exempt existing contracts after their current expiration date, and thus this language, though it contains the words "contract extension," is of little value to municipalities who wish to be exempted from regulation, once their current contracts for waste disposal expire.

Are current prices in Bridgeport appropriate?

Some parties have argued that Wheelabrator's tip fee at its Bridgeport plant is too high. The fact is, Wheelabrator currently charges CRRRA \$62.68 per ton for trash disposal. CRRRA charges the southwestern Connecticut towns \$81 per ton. The fee charged by Wheelabrator is completely in line with the current market for disposal services as evidenced by the recent proposals received by Stamford.

Some have argued that waste disposal fees at the Bridgeport waste-to-energy plant should be regulated "below market" since "the state paid for the plant." These arguments conveniently ignore the \$60 million down payment made by Wheelabrator before the plant was even built, its continuing bond payments for the plant, and the tremendous risk taken by Wheelabrator in constructing and operating the plant—a risk that no other entity was willing to take at the time the plant was built. Waste-to-energy plants like the one at Bridgeport are built with private funds at risk—this important investment is made with the natural expectation that rates from

the plant will not be unexpectedly regulated. State control of privately constructed waste facilities after the fact, is unfair and will disincite future private investment in waste facilities.

Ownership of the Bridgeport Plant

Wheelabrator has owned the Wheelabrator Bridgeport waste-to-energy plant since 1988 in the same way that the "homeowner" owns a home even though a bank holds the mortgage and the deed.

Yet some parties still question if it is appropriate for Wheelabrator to maintain control of the Bridgeport plant after the contract with CRRRA expires at the end of this year, since they allege "the towns paid for the plant," through their tip fees. But to use an analogy, suppose an employee of Company X buys a new car, getting a 3-year loan from a bank, with the intention of using the car to drive to work. The employee uses money from their paycheck to make the loan payments. At the end of the three years, who owns the car? The employee, or Company X?

What these parties also fail to note, however, is the \$60 million down payment Wheelabrator made on the Bridgeport plant using its own money, and that Wheelabrator has made all of the "mortgage" payments for the plant out of its own revenues. In 1988 Wheelabrator agreed to make these payments as part of an agreement with the State of Connecticut through CRRRA. We expect all parties to live up to the agreement that was struck in 1988, at which time Wheelabrator undertook the financial risk of building the Bridgeport plant. As previously mentioned, legislative action that resulted in abrogating the terms of this agreement could constitute a taking, subjecting the State to claims for damages.

Wheelabrator has noted that press reports quote various parties as asserting that the Bridgeport plant is "falling into private hands." As previously stated, Wheelabrator has owned the Wheelabrator Bridgeport waste-to-energy plant since 1988. In fact, with the expiration of the current contract between Wheelabrator and CRRRA at the Bridgeport plant, we are approaching a point where control over this waste disposal facility is not falling into the hands of the private sector, but actually into the hands of Connecticut towns, empowering them for the first time in decades, to control their own waste disposal options. To borrow a well used phrase, they can talk with their feet, choosing to stay or leave. The end of the CRRRA contract at Bridgeport provides the opportunity for any town currently served by the plant, to choose their trash disposal options.

CRRRA Control over Waste Disposal

Due to the CRRRA's complex financing and operational structure, participating localities at the Bridgeport waste-to-energy plant over the years came to question what they felt were onerous financial obligations. Administrative fees charged by CRRRA in addition to tip fees became a point of contention. Locked into an unsatisfactory relationship with this regional authority, individual localities were unable to assert control over their own solid waste disposal services.

For the first time in 20 years, towns who previously contracted with CRRRA now have the option to choose waste disposal solutions that do not include CRRRA. Seven towns have taken this approach, and the others have the option of doing so as well. Rather than a dissatisfaction with Wheelabrator or the tip fee, this seems to indicate the dissatisfaction of working through CRRRA. Although these towns have clearly shown an interest in proceeding without CRRRA, they are not adverse to a continued relationship with Wheelabrator, at the right price.

Thank you for the opportunity to testify today. I am available to answer any questions from the Committee.