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CHAIRMAN,
SUBCOMMITTEE ON DOMESTIC POLICY

COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM

COMMITTEE ON EDUCATION AND LABOR

July 30, 2010

Mr. Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Proposed Consent Agreement: In the Matter of Pilot Corporation, a corporation, Propeller Corp., a corporation, and Flying J Inc., a corporation; FTC File No.: 091-0125

Dear Chairman Leibowitz:

I am writing to note my concerns with the FTC's preliminary decision to approve Pilot's acquisition of Flying J Inc.'s travel center and related businesses for approximately $1.8 billion (the "Acquisition"). The FTC's analysis of its proposed agreement and the proposed consent orders ("Consent Order" and "Analysis") only superficially addresses the antitrust issues raised pursuant to Section 7 of the Clayton Act, and there is a similar dearth of analysis on whether these anticompetitive concerns are adequately addressed by the Consent Order.

Because the FTC has not analyzed these issues, or at least shared this analysis publicly, there still appears the substantial possibility that the post-acquisition Pilot would be able to exercise market power unilaterally to the detriment of consumers.

The Analysis fails to provide an adequate discussion of the competitive landscape of the industry. In particular, neither the complaint nor the related materials includes an analysis of industry concentration – either before or after the acquisition. In addition, the FTC has not divulged whether it has applied the Horizontal Merger Guidelines or employed the Herfindahl-Hirschman Index (HHI), which is the tool the Guidelines expressly require in analyzing market concentration in conjunction with horizontal mergers, such as this. While the FTC has proposed conditioning its final approval of the Acquisition on Pilot's divesture of 26 travel centers to Love's, a competitor, there is no real analysis whether Love's will be in an suitable market position to provide competition nationwide that could alleviate the use of market power. In addition, there is no analysis of the types of market power that Pilot could possibly apply, which is particularly surprising given that FTC has filed a complaint that alleges that the consummation of the Acquisition would violate both Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission.

The need for a more in-depth analysis of the merger is also manifest by what appears to be the weak remedial measures proposed by the FTC to mitigate the Acquisition's anticompetitive effects, which chiefly involve the divestment of 26 travel centers. The economic essence of the proposed transaction is the merger of the top two market participants in what is a \$25 to \$30 billion national industry. The number of gallons of diesel fuel sold by the fourth-ranking market participant, who will now become the third-ranking participant, will be approximately 850 million gallons, which amounts to only a small percentage of the national market for annual diesel fuel sales among the current top four competitors, which is approximately 8.33 billion gallons.

The Analysis does not explain how the sale of 26 centers to the fourth largest market participant will be adequate to address the antitrust violations that the FTC alleges would otherwise occur. And, without further analysis, there is some reason to doubt that this measure would address those violations, given that 26 travel centers represent only a small fraction of the 550 travel centers that will be controlled by the post-Acquisition Pilot, and that Love's, even with the divestiture, will basically remain a regional player in the market.

Sincerely,

Dennis J. Kucinich
Member of Congress