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November 10, 1983

Re: Premerger Notification Requirements  
Under the Hart-Scott-Rodino Antitrust  
Improvements Act of 1976

Wayne Kaplan, Esquire  
Premerger Notification Office  
Room 301  
Bureau of Competition  
Federal Trade Commission  
Seventh & Pennsylvania Avenues, N.W.  
Washington, DC 20580

Dear Mr. Kaplan:

We represent [redacted] in connection with its proposed acquisition of all of the outstanding stock of [redacted]. The purposes of this letter are to describe the factual background of the proposed transaction, to review and discuss the applicable law, and to confirm the applicability of certain exemptions from the premerger notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

FACTUAL BACKGROUND

[redacted] is a holding company which controls, through ownership of stock, certain motor carriers and freight forwarders which hold operating authority issued by, and are subject to the jurisdiction of, the Interstate Commerce Commission ("ICC"). [redacted] proposes to purchase all of the outstanding stock of [redacted] which also controls, through stock ownership, three motor carriers, two of which hold authority issued by and are subject to the jurisdiction of the ICC. All of the outstanding stock of [redacted] is owned by [redacted].

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[REDACTED]  
and the latter's controlling shareholder have entered into an Agreement for the purchase by [REDACTED] of all of the outstanding stock of [REDACTED]. The agreement contains provisions which make consummation of the transaction contingent upon the exemption, or if required, the prior approval of the transaction by the ICC and any other necessary regulatory agencies.

#### APPLICABLE LAW

The parties acknowledge that the proposed transaction is subject to the jurisdiction of the ICC pursuant to 49 U.S.C. §11341, et seq., and is the type of transaction which is subject to ICC approval under 49 U.S.C. §11343(a)(5). However, the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, gave the ICC the power to exempt certain transactions from ICC approval. These exemption powers have been incorporated into the Interstate Commerce Act at 49 U.S.C. §11343(e).

Under 49 U.S.C. §11341(a), as amended by the Bus Act, an entity participating in a transaction approved or exempted by the ICC is exempt from the antitrust laws.

As you know, §7A of the Clayton Act ("the Act"), 15 U.S.C. §18a, commonly referred to as the Hart-Scott-Rodino Amendment, establishes requirements for a waiting period and for notification to the Federal Trade Commission ("FTC") and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to as "the Attorney General") applicable to certain acquisitions of voting securities or assets. The requirements for applicability of these provisions are set forth in §7A(a) of the Act which, for purposes of this letter, we shall assume are applicable to the transactions described herein.

Under §7A(c) of the Act, certain transactions are exempt from the notification and waiting period requirements referred to above. Subsection (5) exempts transactions which are specifically exempted from the antitrust laws by federal statute. Subsection (6) exempts transactions which are exempted from the antitrust laws by a federal statute "if approved by a federal agency." (Emphasis added) The latter provision requires that copies of all information and documentary material filed with the federal agency be contemporaneously filed with the FTC and the Attorney General. Copies of the statutory provisions cited above are attached hereto for convenient reference.

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DISCUSSION

The parties to the proposed transaction have filed with the ICC a petition for exemption pursuant to 49 U.S.C. §11343(e) which has been assigned I.C.C. Docket No. [REDACTED]. A complete copy of the petition is enclosed.

The petition contains all of the information required by the regulations enacted by the ICC pursuant to the afore-said provision, and requests that the ICC find that the proposed transaction is exempt from the merger, consolidation, and acquisition of control provisions for the reason that the requirements of 49 U.S.C. §11343(e)(1)(A) and (B) are satisfied. This would require a finding by the ICC that the application of such provisions is not necessary to carry out the national transportation policy (49 U.S.C. §10101), and either that the transaction is of limited scope, or that the application of such provisions is not needed to protect shippers from the abuse of market power.

It is anticipated that the petition will be granted and that the ICC will determine that the proposed transaction is exempt from the approval requirements of 49 U.S.C. §§11343 and 11344. If the petition is granted and the ICC determines that the transaction is exempt, the exemption from the anti-trust laws contained in 49 U.S.C. §11341(a) will apply, even though the transaction has been "exempted" rather than "approved" by the ICC.

Alternatively, if such petition is denied, resulting in an ICC determination that the transaction is not exempt, the parties will be required to proceed to seek the approval of the proposed transaction by the ICC pursuant to 49 U.S.C. §§11343 and 11344. In the event that such approval is obtained, the antitrust exemption of 49 U.S.C. §11341(a) would still be applicable, but in this case the exemption would be based upon the fact that the transaction had been "approved" by the ICC.

In either event, the transaction would be exempt from the notification and waiting period requirements of §7A(a) of the Act pursuant to the exemptions under §7A(c)(5) or (6), referred to above.

If, as is anticipated, the ICC determines that the transaction is exempt from the requirements of ICC approval pursuant to 49 U.S.C. §11343(e), the transaction would also be

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exempt from the notification and waiting period requirements pursuant to §7A(c)(5) of the Act.

If, on the other hand, the ICC determines that the transaction is not exempt, and it becomes necessary to obtain the approval of the transaction by the ICC, the applicable exemption from the Act would be under §7A(c)(6).

In either event, it would not be necessary to comply with the notification and waiting period requirements, since the transaction would be exempt. If, however, the transaction must be approved by the ICC in order to trigger the applicability of the exemption from the antitrust laws, §7A(c)(6) would require that copies of the application for approval and all related documents filed with the ICC be contemporaneously filed with the FTC and the Attorney General.

#### CONCLUSIONS

Based upon the foregoing, it is our understanding that the applicability of the provisions of §7A of the Clayton Act to this proposed transaction may be summarized as follows:

1. The parties have petitioned the ICC for a determination that the transaction is exempt from approval by the ICC. If the ICC issues an order exempting the transaction from ICC regulations, the antitrust exemption would become operative without the ICC having "approved" the transaction and no documents need be filed with the FTC or the Attorney General.

2. In the event that the petition for exemption is denied, so that the applicability of the antitrust exemption would be dependent upon approval of the transaction by the ICC, upon the filing of such application for approval with the ICC, it would be necessary to contemporaneously file such application for approval and related materials with the FTC and the Attorney General.

3. Assuming that the ICC either exempts the transaction pursuant to 49 U.S.C. §11343(e), or approves the transaction pursuant to 49 U.S.C. §§11343 and 11344, the antitrust exemption set forth in 49 U.S.C. §11341(a) will be applicable, and it will not be necessary to comply with the notification and waiting period requirements of §7A of the Clayton Act.

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If the discussion of the law or the conclusions set forth herein are inaccurate in any respect, we assume that you will contact us promptly. If we do not hear from you, we shall advise our client to proceed to act on the basis of the conclusions stated herein.

Your cooperation and prompt attention to this matter will be greatly appreciated.

Sincerely yours,

A large, dark, rectangular redacted area covering the signature and name of the sender.A small, dark, rectangular redacted area, likely covering the word "Enclosure".

Enclosures

cc: 