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July 27, 2010

Donald S. Clark
Office of the Secretary
Room H-135 (Annex D)
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Pilot- Flying J Consent Agreement, File No. 091-0125

Dear Secretary Clark:

TravelCenters of America LLC ("TA"), a major travel center operator in the United States, submits these comments on the Proposed Agreement Containing Consent Orders ("Proposed Consent Agreement") in connection with the proposed takeover by Pilot Corporation and Propeller Corp. (collectively, "Pilot") of Flying J Inc.'s ("Flying J") travel center business (the "Acquisition").

TA notes that the Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comment ("Analysis to Aid Public Comment") contains virtually no analysis of the competitive effects of the proposed transaction and fails to explain how the divestiture of only 26 travel centers will cure the competitive harm that the FTC obviously concluded would be caused by the proposed transaction.

Beyond the small number of required divestitures, TA believes the Proposed Consent Agreement is disturbingly deficient in two key respects. The following comments explain these deficiencies and suggest modifications to address them.

I. The Proposed Order Contains No Effective Provisions For Oversight of Future Consolidation of Existing Market Resources By Pilot.

As presently conceived, the Proposed Order (incorporated into the Proposed Consent Agreement by reference, *see* Proposed Consent Agreement ¶¶ 5(b), 18), lacks any provisions concerning Commission oversight of Pilot's ability to further consolidate (through purchase, affiliation, franchise or otherwise) travel center assets in the future.¹

The Acquisition will combine the largest and second-largest travel center operators in the contiguous United States in a market the Commission has concluded has only four competitors.² This 4-to-3 deal will create a giant that easily dwarfs TA and Love's Travel Stops and Country Stores ("Love's"), the only two remaining competitors in the relevant market as determined by the Commission. Given the size and scale of the newly-merged entity, TA submits that the Proposed Order should be revised to require Pilot to obtain prior Commission approval of any future consolidation (through purchase, affiliation, franchise or otherwise) of travel center assets for ten years, regardless of whether such acquisition exceeds the Hart-Scott-Rodino ("HSR") reporting threshold. A requirement that Pilot obtain prior Commission approval of future travel center consolidation, regardless of whether such acquisitions meet the HSR reporting thresholds, will ensure that an already-too-large monopolist will not be permitted to further increase its market share by consolidating existing market resources without an appropriate Commission

¹ The Proposed Order requires only that Pilot and Flying J notify the Commission prior to "(A) any prior dissolution of any Respondent; (B) any proposed acquisition, merger or consolidation of a Respondent; or (C) any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order." Proposed Order ¶ VII.

² *See* Complaint ¶¶ 1, 11 (identifying Pilot, Flying J, TA and Love's as the four travel center operators with "the scale and scope to compete for any substantial portion of long-haul over-the-road diesel business"; identifying Pilot as the "owner of the largest travel center network in the United States," and identifying Pilot and Flying J as "the first and second choices for a number of long-haul fleets"). *See also* Analysis to Aid Public Comment at 2 (same).

determination of competitive impact. Prior notification to the Commission of Pilot's future consolidation activities that would give Pilot control over diesel sales at existing travel center assets is insufficient here given Pilot's post-acquisition market position. The Proposed Order should be modified to enable the Commission to affirmatively consider the impact of any such transaction and make an actual determination as to whether competition in the relevant market would be negatively impacted.

A prior approval, or at least a prior notification, provision is necessary for two reasons. First, Pilot and its relevant subsidiaries are privately-held entities.³ As such, they are not subject to the extensive reporting requirements imposed on publicly-held corporations by the securities laws. Pilot is therefore under no obligation to report publicly any future acquisitions of travel center assets. Unless the Commission imposes a prior approval, or at least a prior notification, requirement on Pilot, it likely will be difficult for anyone, including the Commission, adequately to monitor Pilot's post-acquisition increase in market share and monopoly power.

Second, the nature of the industry precludes reliance on the HSR notification process alone as a mechanism for supervising competitive conditions in the relevant market. Travel center assets are often bought and sold as individual sites or in small groups. Such small travel center asset transactions would typically fall below the HSR reporting thresholds. In addition, franchising or other forms of affiliation that would allow Pilot to control diesel sales at non-owned sites generally require even lesser capital expenditures and therefore are even less likely to trigger HSR filings. By pursuing a strategy of piecemeal acquisition, Pilot could easily continue to increase its size and market share without expanding total market capacity and without ever having to notify the Commission. During the life of the consent order, the Commission should therefore require the merged entity to notify the Commission of all future acquisitions or affiliations of travel center assets. Even if such travel center assets are not part of the relevant market today, they would become part of the market by virtue of an acquisition or affiliation by Pilot.

The Commission has included similar provisions in a number of recent consent decrees. For example, the Commission's June 25, 2010, final Decision and Order in the matter of Agilent Technologies, Inc., Docket No. C-4292 ("Agilent Order") – issued just weeks before the Proposed Order and Proposed

³ See Analysis to Aid Public Comment at 1-2.

Consent Agreement in the present matter – implements stringent reporting and notification requirements for the newly-merged entity. The Agilent Order requires Agilent, following its acquisition of Varian, Inc., to seek Commission approval prior to reacquiring any assets divested pursuant to the order for a period of ten years from entry of the order. *See* Agilent Order ¶ IX.A. In addition, over the same time period Agilent must provide the Commission with advance written notification prior to acquiring (i) any stock, share capital equity, or other interest in any person engaged in production, design, manufacture or sale of the three relevant products, or (ii) any assets used in the design, manufacture, production or sale of the three relevant products. *See id.* ¶ IX.B. The Agilent Order spells out the notification requirements in detail; these apply without regard to whether the acquisition meets the applicable HSR reporting threshold.

Similarly, the Commission’s February 3, 2010 Decision and Order in the Matter of Agrium, Inc., Docket No. C-4277 (“Agrium Order”), requires Agrium, following its acquisition of CF Industries Holdings, Inc., to obtain the Commission’s prior approval before re-acquiring any assets divested pursuant to the order for a ten-year period. *See* Agrium Order ¶ VIII.A. Agrium must also notify the Commission before acquiring (i) any entity that owns a terminal storing anhydrous ammonia, or (ii) any terminal that stores anhydrous ammonia, in the relevant geographic areas. *See id.* ¶ VIII.B. The Commission’s November 23, 2009, Decision and Order in the Matter of Carilion Clinic, Docket No. D-9338 (“Carilion Order”) and May 14, 2009 Decision and Order in the Matter of BASF SE, Docket No. C-4253 (“BASF Order”) also contain similar approval and notification requirements. *See* Carilion Order ¶ VI.A-B; BASF Order ¶ VIII.A-B.

Consistent with these recent precedents, and in light of the market-specific factors discussed above, here the Commission’s Proposed Order should also require, for a ten-year period, prior Commission approval of, or at least notification to the Commission, for any future consolidation of existing market resources by Pilot (through purchase, affiliation, franchising, or otherwise) by Pilot or by any entity under common control with Pilot.

II. The TCH Firewalls that Protect Only Love’s Should Be Extended to Protect All Travel Center Operators.

In its present form, the Proposed Order requires Pilot to provide to Love’s (the acquirer of the divested travel center assets), upon Love’s request, access

to and use of the TCH Fuel Card System.⁴ *See* Proposed Order Para. II.C. The TCH Fuel Card System is a payment system introduced by Flying J several years ago. Until very recently, TA was the only other major travel center operator to honor the TCH Fuel Card at its travel centers. The use of the TCH Fuel Card by trucking fleets enables the card issuer (previously Flying J, and now Pilot) to gather sensitive competitive data such as the identity of the merchant's customers, the location of customer purchases, products or services purchased or sold, and prices of products or services, volumes and discounts.

In the event Love's requests access to the TCH Fuel Card System, the Proposed Order requires Pilot to implement a firewall protocol regarding the use of Love's confidential data, as well as the appointment of an internal Pilot compliance officer responsible for assuring that the firewall protections are met. *See* Proposed Order Para. II.D. The duration of the firewall protections is not clear from the face of the Proposed Order.⁵ What is clear, however, is that the Proposed Order presently limits the firewall protections to data gathered from Love's. *Id.* But TA, the third and only current competitor in the post-Acquisition relevant market,⁶ has equal concerns about the protection of sensitive data gathered from TCH Fuel Card use at TA travel centers.

It is simply unfair for the Commission to guarantee these comprehensive data protections only to one competitor. There is no good reason that the entire industry should not also benefit from such government-imposed protections, regardless of whether privately negotiated confidentiality protections are

⁴ It appears that Love's has already contracted for the use of the TCH Fuel Card System. *See* Proposed Order ¶ I.Y (referencing a "TCH Merchant Agreement" dated May 19, 2010).

⁵ The Proposed Order sets out that Pilot shall provide to Love's "non-discriminatory access and use of the TCH Fuel Card System for a period of up to three (3) years pursuant to a TCH Merchant Agreement." Proposed Order ¶ II.C. The firewall provisions apply if the parties enter into such an agreement. *Id.* ¶ II.D. The TCH Merchant Agreement is non-public; however, the Proposed Order does not appear to prevent Pilot and Love's from renewing the TCH Merchant Agreement, and is silent as to whether, in the event of renewal, the firewall protections would continue in force.

⁶ The Analysis to Aid Public Comment impliedly acknowledges that Love's is not a current competitor when it addresses Love's expansion plans to possibly become a competitor. *See* Analysis to Aid Public Comment at 3.

in place with TCH.⁷ For the sake of parity among competitors in a two or three player market, not to mention protection of other travel center operators across the country, and because accountability to a federal government agency provides far stronger incentives than any privately negotiated agreement,⁸ TA requests that the Commission (i) modify the Proposed Order to guarantee the Commission-backed firewall protections for all travel center operators, including TA, that participate in the TCH Fuel Card System, regardless of whether Love's continues to honor the TCH Fuel Card; and (ii) clarify that these firewall protections should remain in place for at least the duration of the Proposed Order.⁹

* * *

TA believes that the remedy the Commission proposes to accept is wholly inadequate. The Proposed Consent Agreement appears to rely upon the effectiveness of Love's "aggressive and independent expansion plan."¹⁰ However, the failure of the Proposed Consent Agreement to restrict Pilot's demonstrated aggressive plans to consolidate and gain control over existing travel center capacity virtually ensures that the proposed remedy will fail.

The consent decree papers provide no basis for even assessing the sufficiency of the proposed divestiture of only 26 travel centers, let alone for concluding that it will cure the substantial competitive harm that the Acquisition will cause in the relevant market. TA urges the Commission to reconsider and modify the provisions of the Decision and Order to (i) require prior approval of any future acquisitions or affiliations of other travel center assets by Pilot, and (ii) bolster the firewalls around the TCH Fuel Card business.

⁷ TA acknowledges that it has certain confidentiality provisions in its existing Merchant Agreement with TCH. However, these provisions are not as comprehensive as those in the Proposed Order.

⁸ For example, Pilot faces the possibility of civil penalties for any violations of the Proposed Consent Agreement. See Proposed Consent Agreement ¶ 18.

⁹ TA believes that these firewall provisions should remain in place for so long as the TCH Fuel Card business remains vertically integrated by common ownership with Pilot; however, TA is cognizant of the Proposed Order's envisioned ten-year duration.

¹⁰ Analysis to Aid Public Comment at 3.

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Sincerely,

/ John H. Lyons /

cc: Jon Leibowitz, Chairman
William E. Kovacic, Commissioner
J. Thomas Rosch, Commissioner
Edith Ramirez, Commissioner
Julie Brill, Commissioner
Mary Lehner, Esq.