

August 28, 2008

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**VIA HAND DELIVERY**

Mr. Thomas O. Barnett  
Assistant Attorney General  
Antitrust Division  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

**Re: Business Review Request of the Reliance Network**

Dear Mr. Barnett:

Pursuant to the Department of Justice ("Department") Antitrust Division's Business Review Procedure, 28 C.F.R. § 50.6, Averitt Express, Inc. ("Averitt"), DATS Trucking, Inc. ("DATS"), Lakeville Motor Express, Inc. ("Lakeville Motor"), Land Air Express of New England ("Land Air"), Pitt Ohio Express, LLC ("Pitt Ohio"), Canadian Freightways, and Epic Express (collectively, the "Applicants"), submit this business review request for a statement of the Department's present enforcement intentions with respect to the proposed business conduct described herein.

The Applicants are all motor carriers of property engaged in the Less- Than-Truckload ("LTL") segment of the transportation industry. Each operates in a distinct geographic region in the U.S. On January 31, 2008, the Surface Transportation Board ("STB") approved a pooling agreement (the "Pooling Agreement") under which the Applicants will pool and integrate their operations into a collaboration known as the Reliance Network.<sup>1</sup> The purpose of the Reliance Network is to create pro-competitive efficiencies to enable the Applicants to compete more effectively with larger carriers that offer broader service and pricing. Although STB approval of the Pooling Agreement exempts the Applicants from the antitrust and other laws when carrying out the agreement, the Applicants propose to build upon the Pooling Agreement to create a full-fledged joint venture. In order to carry out the joint venture, as described in more detail below, the Applicants propose, among other things, to 1) define each member carrier's geographic operational boundaries; and 2) establish a procedure to bid for or respond on behalf of the Reliance Network to opportunities to provide services on a nationwide or multi-regional basis. These proposals would provide additional incentives to enhance efficiencies, enable the Applicants to compete more effectively on a nationwide basis, and have negligible anticompetitive effects.

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Accordingly, the Applicants respectfully request the Antitrust Division to issue a statement of its present intention not to seek any enforcement action against the Applicants' proposed business activities.

## **I. Background**

Extensive background on the Reliance Network and the Applicants is set forth in the STB's approval of the Pooling Agreement (attached hereto as Exhibit A) and the Applicants' application to the STB for approval of their Pooling Agreement (Exhibit B). To summarize, each Applicant currently serves a distinct geographic region in North America. Land Air primarily operates in New England, Pitt Ohio operates in the Mid-Atlantic through the eastern Great Lakes region, Averitt operates in the Southeast, DATS operates in Western states, Lakeville operates in the Midwest, and Canadian Freightways and Epic Express operate between points in Canada and certain U.S. states. All of these carriers engage in the transportation of property pursuant to operating authorities issued by the U.S. Federal Motor Carrier Safety Administration or analogous Canadian regulatory authorities.<sup>ii</sup>

In their application to the STB, the Applicants proposed integrating their respective service territories into a nationwide service network, enabling them to operate more efficiently in their own service areas as well as to broaden their services to the regions of the other participating carriers. As explained in their application, integrating their operations would allow the Applicants to provide seamless, nationwide shipping services to their customers, enhance operational efficiency, provide greater control over and tracking of movements of freight, increase their physical transport capacity, and better meet the demands of their customers. These benefits would enable the Applicants to compete with national carriers, transportation networks arranged by third-party logistics providers, other motor carriers using interline agreements, and intermodal operations.<sup>iii</sup>

The STB approved the proposed Pooling Agreement without hearing, finding it would not unduly restrain competition nor be of major transportation importance. The STB found the Pooling Agreement would not be of major transportation importance because it would transport a small fraction of shipments and that similar services were provided by numerous other motor carriers or other modes of transportation. The STB found the Pooling Agreement would not unduly restrain competition due to the large number of carriers that could provide competing services. In fact, the STB found that the Pooling Agreement would enhance competition:

Under the proposed transaction, the national transportation system would have the benefit of an efficient network able to compete efficiently and economically with existing national carriers, the transportation networks arranged by transportation intermediaries, and other motor carriers.<sup>iv</sup>

The STB authorized the pooling of services, traffic, and revenues as proposed by the Applicants, effective January 31, 2008.<sup>v</sup>

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Under 49 U.S.C. § 14302(f), a motor carrier participating in an STB-approved pooling agreement “is exempt from the antitrust laws and all other law . . . as necessary to let that person carry out the arrangement.” Accordingly, the Applicants are exempt from the antitrust laws when carrying out their STB-approved Pooling Agreement.

## II. Necessity for DOJ Business Review

Antitrust immunity provided by STB approval of the Applicants’ Pooling Agreement extends only to certain joint conduct. Specifically, under 49 U.S.C. § 14302(a), STB approval permits a motor carrier to “agree or combine with another such carrier to pool or divide traffic or services or any part of their earnings . . .”. The STB’s decision explicitly authorizes only the “pooling of services, traffic and revenues”.<sup>vi</sup> More importantly, the STB decision expressly excludes collective ratemaking from the scope of the antitrust immunity it affords.<sup>vii</sup>

Historically, motor carriers could seek ICC or STB approval under 49 U.S.C. § 13703 to engage in collective ratemaking and related activities under agreements that were immunized from the antitrust laws. Yet on May 7, 2007, the STB issued a decision in Ex Parte No. 656 terminating antitrust immunity for all such agreements (attached hereto as Exhibit C). That decision, according to the STB, was “the final step in a process that began more than a quarter century ago of making the motor carrier industry fully competitive.”<sup>viii</sup> The STB noted that its decision “does not prohibit carriers from entering into agreements with each other to engage in collective activities related to ratemaking” or to establish divisions<sup>ix</sup> and “does not require that [such] agreements be submitted” to the STB.<sup>x</sup> In fact, the STB expressly invited motor carriers to avail themselves of the Department’s business review procedure in order to confirm that certain joint activities, in which motor carriers previously could engage under antitrust immunity, did not run afoul of the antitrust laws after antitrust immunity expired.<sup>xi</sup>

In accordance with the STB’s decision in Ex Parte No. 656, the Applicants now seek to confirm that certain joint activities beyond the scope of the STB-approved Pooling Agreement would not warrant antitrust enforcement action. The Applicants neither seek nor desire to extend the antitrust immunity afforded under their Pooling Agreement to the business conduct proposed herein. However, successful collaboration by the Reliance Network members requires a certain level of coordination beyond the limited activities authorized by the STB. The Applicants propose to undertake collaborative activities in addition to pooling of traffic, services and earnings, but that are nevertheless typical of more formal joint ventures. The Applicants submit this business review request to confirm that the Department does not presently intend to undertake any enforcement action against the proposed collaborative activity that is beyond the scope of the STB-approved Pooling Agreement.

### **III. Proposed Business Activities**

In order to carry out their joint venture, the Applicants have executed the Supplemental Agreement to the Reliance Network Pooling Agreement (“Supplemental Agreement”), attached hereto as Exhibit D. The provisions of the Supplemental Agreement that are the subject of this request will become operative upon a favorable outcome of the Department’s business review process.

The Supplemental Agreement sets forth specific details about how the Applicants will manage the joint venture, how disputes will be resolved, participation in or withdrawal from the joint venture, and other issues common to structuring joint ventures. The Applicants submit that only two aspects of the Supplemental Agreement raise any antitrust issues: A) geographic limitations on participants’ operations; and B) the Applicants’ proposed process to respond to requests for nationwide or multi-regional transportation services. These issues, discussed below, are the primary focus of this business review request. The Applicants further submit, however, that any antitrust concerns are negligible and substantially outweighed by the procompetitive efficiencies achieved by the joint venture, and thus would not warrant any enforcement action.

#### **A. Geographic Limitations on Participants’ Operations**

Section 24 of the Supplemental Agreement pertains to expansion or contraction of each Applicant’s operating territory. As set forth in the Pooling Agreement, each Reliance Network member currently serves a distinct geographic operating area. Taken together, the Applicants’ combined service area covers the entire U.S., Canada and Mexico. Movements of freight solely within one carrier’s region would be moved by that carrier alone and not involve Reliance Network partners. However, movements of freight originating within one carrier’s region and ending in another’s would be transported by the joint venture under the terms of the Pooling and Supplemental Agreements.<sup>xiii</sup>

Under the Supplemental Agreement, a member carrier seeking to expand beyond its defined operating territory, and thus encroaching into another carrier’s, would be required to give 90 days advance notice to all other Reliance Network members, and obtain the consent from any member impacted by the expansion into its operating territory. If consent is not granted or an agreement cannot be reached, and the expansion is determined to cause a material loss of revenue, a disruption of service, and/or is deemed detrimental to the joint venture, the Reliance Network Executive Committee will ask the expanding carrier voluntarily to withdraw from the joint venture.

This provision is designed to ensure that each member advances the interests of the joint venture and does not usurp collective opportunities. By expanding its service territory,

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a member would be taking for itself any freight movements between its old territory and the new point of service. Absent that carrier's expansion, such movements would otherwise be made by the joint venture. This provision is therefore designed to protect the interests of the joint venture for the benefit of all its members. This provision is also designed to preserve, encourage and facilitate cooperation between the Reliance Network members. It is crucial that, in agreeing to cooperate with the other members to provide an effective nationwide service, each member is assured that it will not also be competing against its partners in its historical service area. The joint venture will work more efficiently if carriers cooperate rather than compete.

A member carrier wishing to expand is free to do so, just not at the expense of the joint venture. Section 24 of the Supplemental Agreement explicitly provides that:

[I]t is understood and agreed that each participating carrier, apart from the joint venture activities of the Reliance Network, remains free to conduct transportation activities, and otherwise compete for transportation service business, outside its regional operating territory consistent with its operating authorities.

Any member can withdraw from the joint venture at any time simply by providing notice to the other members. A member is also free to seek consent to remain part of the joint venture even if it intends to expand. Accordingly, the Applicants do not lose their autonomy by virtue of being a member in the joint venture.

## **B. Nationwide or Multi-Regional Pricing**

Section 23 of the Supplemental Agreement covers pricing. In most situations, an individual carrier will negotiate pricing with its customer for all shipments originating in that carrier's region. The other carriers will not have any input into the pricing of shipments not originating in their respective regions. Other carriers participating in a given shipment will accept the pricing and agreed upon divisions of revenue negotiated by the originating carrier. If a carrier identifies business that is unprofitable to it, all of the carriers involved in that transportation will resolve the pricing and revenue issues on an account-by-account basis.

In some cases, however, a customer may approach a member carrier with a variety of shipping needs originating from multiple regions. Particularly large customers, like big-box retailers for example, could potentially have shipments originating in every region. For these situations, the Reliance Network partners must have a mechanism to respond to such national or multi-regional shipping opportunities. Requiring potential customers to negotiate independently with each member carrier for shipments originating in that carrier's region would be cumbersome, inefficient and result in lost business opportunities.

To address this problem, Section 23 provides that the carrier receiving the request or

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bid for national or multi-regional services will communicate with the other participating carriers to determine an acceptable pricing level. Such discussions would likely involve selecting an appropriate base rate, such as the widely-used Czar-Lite, to apply to the customer's shipping needs and an acceptable discount off that base rate. For example, the Applicants might agree to respond to the customer's bid by offering to charge a 10% discount off Czar-Lite base rates for all of the shipper's traffic, regardless of the region of origin.

Discussions regarding multi-regional or nationwide pricing would be strictly limited to responding to the particular multi-regional or national account bid and to establishing rates for services jointly provided by the Applicants. Section 23 of the Supplemental Agreement explicitly provides that:

[A]ny such communications and exchanges of pricing information shall be limited only to such joint venture purposes pertaining to the national account service request. There shall be no other discussions, exchanges, disclosures, agreements, or understandings reached regarding the actual or proposed baseline class rates, pricing, or accessorial charges of the participating carriers in their respective territories, which shall remain independently determined by each participating carrier.

The Applicants would never discuss rates for an individual carrier operating independently within its respective service territory.

In this manner, a single carrier member could negotiate a bid on behalf of the Reliance Network for large volume contracts that would cover shipments originating in multiple regions. Without such a mechanism, the Reliance Network would not be able to compete with the nationwide carriers or other modes of transportation that can respond to such bids or service requests almost instantaneously. Moreover, the Reliance Network member having the best relationship with a potential customer could negotiate on behalf of the joint venture.

#### **IV. Analysis**

##### **A. Antitrust Safety Zone**

As a threshold matter, the Applicants' joint venture would not warrant enforcement action because it falls within the antitrust safety zone set forth in the Department's Antitrust Guidelines for Collaborations Between Competitor's ("Collaboration Guidelines"). Under § 4.2, the Department will not challenge a competitor collaboration "when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected."

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In this case, the relevant market is much broader than the nationwide LTL freight transportation market. Even looking at that market alone, however, the Applicants' market shares would collectively account to far less than 20% of it. The Applicants have projected that in 2008 the Reliance Network will move approximately 300,000 shipments. The STB recognized that this number "represents a small fraction of domestic motor carrier shipments."<sup>xiii</sup> In 2007 the Applicants moved over 10 million shipments with combined revenues of approximately \$1.6 billion.<sup>xiv</sup> It is our understanding that this combined revenue figure is less than 10% of the revenues earned by the top ten LTL carriers alone, let alone of the nationwide market for LTL services. While there may be traffic lanes between the Applicants' regions in which their shares of traffic exceed 20%, the relevant product market is in any event much broader than LTL carrier services; it includes other modes of transportation, as the STB recognized.<sup>xv</sup> The Applicants' collaboration would not permit the exercise of market power.

The total market share of the Applicants' combined operations is minimal and falls easily within the Collaboration Guidelines' antitrust safety zone. Nevertheless, even if the Department were to undertake a in-depth analysis, the substantial procompetitive benefits of the joint venture outweigh its negligible anticompetitive effects.

## **B. Procompetitive Efficiencies**

The Reliance Network achieves many of the procompetitive efficiencies recognized by the Collaboration Guidelines. To begin with, the Reliance Network enables the Applicants to offer a service that no member can provide alone. Since their route systems are complementary, together the Reliance Network carriers can offer nationwide services to compete with the large, national LTL carriers and other modes of transportation. In this respect, the effect of the joint venture is to increase competition in the marketplace for LTL and other transportation services by adding another player with nationwide capabilities.

The Reliance Network functions as a comprehensive interline agreement between its member carriers. Interline agreements between carriers are common in the industry and provide one way for shipments to flow into and out of a carrier's service territory. Yet existing interline agreements are piecemeal and only provide for fragmented service coverage. By linking their complementary route systems, the Applicants can overcome the shortcomings and inefficiencies of traditional interline agreements and provide a truly nationwide platform, as well as enhanced services like shipment tracking.

The joint venture will also allow the Applicants to make more efficient use of their resources. By joining together, each Applicant hopes to transport a higher volume of shipments on a more consistent basis within its respective service territory. This creates efficiencies in several ways. First, it enables a carrier to combine various freight for shipment in the most efficient manner and minimizes the need to travel with empty cargo space. Second, the volume of shipments will be more predictable and will thus enable

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carriers to deploy their physical assets to maximize transportation capacity. In addition, each member carrier can focus on serving its current geographic region in which it most efficiently and economically provides service. These enhanced efficiencies should reduce costs, enabling the Applicants to offer more competitive pricing and rates that are attractive to consumers, both for shipments being transported by the joint venture as well as solely within each carrier's service area.

Finally, the ability of a single carrier to negotiate with larger customers seeking national or multi-regional shipping services will enhance service and allow the Reliance Network to solicit business like a fully-integrated company. Instead of customers having to negotiate multiple times with each member carrier for shipments originating with that carrier's service territory, offering nationwide or multi-regional pricing will enable a customer to negotiate once to fill all of its shipping needs.

The procompetitive efficiencies achieved by the Applicant's proposed conduct are well recognized. In *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*,<sup>xvi</sup> the court held that a motor carrier pooling agreement implemented under terms similar to those proposed herein did not offend the antitrust laws. Atlas maintained a network of affiliated carriers capable of transporting household goods between any two points in the nation. Atlas coordinated and set rates for all transportation throughout its nationwide network, while its affiliates found customers and carried out the packing and hauling. The court noted that the use of affiliates spared Atlas from obtaining "enormous amounts of capital necessary to perform the same services" and also avoided diseconomies of scale.<sup>xvii</sup> In order to participate in the pooling agreement, Atlas required its affiliated carriers to cease their independent interstate operations. The court noted that the result

is an interstate system for the carriage of household goods in which legally separate companies integrate their activities by contract. In this way, the participants achieve many of the same benefits or efficiencies that would be available if they were integrated through ownership by Atlas.<sup>xviii</sup>

The court went on to hold that any restraint was ancillary to an efficiency enhancing integration of the productive capacities of the members of the joint venture, and since Atlas controlled at most 6% of the relevant market, the restraint had no anticompetitive effects.<sup>xix</sup>

In this case, the integration of the Applicants' operations will achieve the same procompetitive efficiencies the court noted in *Rothery Storage*. Similarly, since the Applicants' combined market share is also comparatively small, as the STB recognized, no anticompetitive effects will result.

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## V. Conclusion

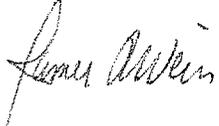
To create a successful joint venture, the Applicants must coordinate beyond the limited activities authorized by the STB. Such coordination is necessary to create incentives for cooperation, protect the interests of the joint venture and respond effectively to shipping opportunities that originate from multiple regions. Any potential anticompetitive effects of such coordination are outweighed by the vast procompetitive efficiencies created by the joint venture, which would enhance competition in the nationwide market for the transportation of goods. For the reasons set forth herein, the Applicants respectfully request that the Antitrust Division issue a statement that it does not presently intend to bring any enforcement action against the Applicants' proposed business activities.

Please let us know if we can provide additional information to assist in your analysis of this request.

Sincerely,

K & L GATES LLP

By

  
James R. Weiss

Attachments

cc: Donna Kooperstein

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<sup>i</sup> See STB Docket No. MC-F-21023, *Averitt Express, Inc., DATS Trucking, Inc., Lakeville Motor Express, Inc., Land Air Express of New England, Pitt Ohio Express, LLC, Canadian Freightways, and Epic Express—Pooling Agreement*, STB Decision (Jan. 31, 2008).

<sup>ii</sup> See *id.* at 2-3.

<sup>iii</sup> See *id.* at 3-4.

<sup>iv</sup> *Id.* at 5.

<sup>v</sup> *Id.* at 6.

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<sup>vi</sup> *Id.* at 6.

<sup>vii</sup> *See id.* at p. 5 (“The proposed transaction would not result in collective ratemaking”).

<sup>viii</sup> STB Ex Parte No. 656 (Sub-No. 1), Motor Carrier Bureaus – Periodic Review Proceeding; Investigation into the Practices of the National Classification Committee; Section 5a Application No. 46 (Sub-No. 20); Southern Motor Carriers Rate Conference, Inc. (served May 7, 2007) (“Ex Parte No. 656”) at 5.

<sup>ix</sup> *Id.* at 11 (referencing the activities enumerated in 46 U.S.C. § 13703, one of which is to establish divisions).

<sup>x</sup> *Id.*

<sup>xi</sup> *Id.* at 24 (“If the bureaus are in doubt about the likelihood of exposure to antitrust liability for those [beneficial collective activities], they may take advantage of the business review procedure administered by DOJ’s Antitrust Division”).

<sup>xii</sup> Pursuant to the Pooling Agreement, each Applicant would continue to honor its existing interline agreements as well as those specified by their customers. *See id.* at 3.

<sup>xiii</sup> *Id.* at 4.

<sup>xiv</sup> *See* STB Docket No. MC-F-21023, Section 14302 Pooling Agreement Application (Dec. 31, 2007) (“Pooling Agreement Application”) at 10-11.

<sup>xv</sup> STB Decision, *supra* note i, at 4-5.

<sup>xvi</sup> 792 F.2d 210 (D.C. Cir. 1986).

<sup>xvii</sup> *Id.* at 212.

<sup>xviii</sup> *Id.* at 217.

<sup>xix</sup> *Id.* at 229-230.