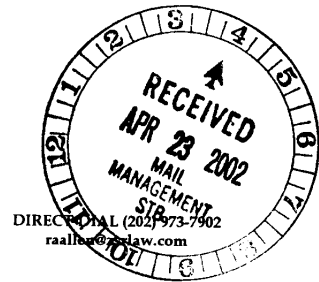


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205247



April 23, 2002

BY HAND

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Government of the Territory of Guam v. Sea-Land Service, Inc.,
and Matson Navigation Company, Inc., STB Docket No. WCC-101;

Dear Secretary Williams:

On behalf of the defendants in the above-captioned proceeding, I am filing an original and 10 copies of Defendants' Initial Submission in Phase II – Appropriate Standards of Rate Reasonableness. A 3-1/2" computer disk of the filing in Wordperfect 5.1 format, which is capable of being read by Wordperfect for Windows 7.0 is also enclosed.

Sincerely,

A handwritten signature in cursive script that reads 'Richard A. Allen'.

Richard A. Allen

cc: All Parties of Record

Before the
SURFACE TRANSPORTATION BOARD



Government of the Territory of Guam,

Complainant,

v.

Sea-Land Service, Inc.,
And Matson Navigation Company, Inc.,

Defendants.

Docket No. WCC-101

**DEFENDANTS' INITIAL SUBMISSION IN PHASE II -
APPROPRIATE STANDARDS OF RATE REASONABLENESS**

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April 23, 2002

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INTRODUCTION AND SUMMARY

On September 10, 1998, the Government of the Territory of Guam ("GovGuam") filed a complaint against Defendants Sea-Land Service, Inc. ("Sea-Land"),¹ American President Lines, Ltd. ("APL") and Matson Navigation Company, Inc. ("Matson") challenging the reasonableness of the totality of the carriers' rates for transportation by water between the mainland United States and Guam. At the outset of the proceeding, the Board approved and adopted the parties' proposal that consideration of the case be divided into three procedural phases: (1) disposition of motions to dismiss or for judgments as a matter of law; (2) determination of an appropriate standard of rate reasonableness; and (3) consideration of the merits.

By decision served November 15, 2001, the Board denied in part and granted in part the motion filed by the defendant carriers in 1999 to dismiss the complaint. That decision, which concluded Phase I of the proceeding, included the following determinations:

1. The applicable statute, 49 U.S.C. § 13701(a) does not "on its face" preclude GovGuam's challenge to the totality of defendants' rates. The Board did not reject the defendants' argument that permitting challenges to the totality of diverse rates would be unworkable, but concluded that the argument was premature, and that the Board would consider in Phase II "whether there is a reasonable methodology for assessing a rate structure complaint in this case." Decision at 4-5.
2. The Interstate Commerce Commission Termination Act of 1995 (ICCTA) "did not clearly articulate a preference for the regulatory approach of the ICC or the FMC," but "left it to the Board to decide whether or not to follow whatever approach the FMC might

¹ After the motion to dismiss was filed, Sea-Land changed its trade name to CSX Lines, Inc. For clarity and convenience, we refer to this defendant as Sea-Land.

finally adopt.” Decision at 4. Again, the Board said it would decide in Phase II whether a rate-of-return methodology is permissible or appropriate in this case.

3. GovGuam’s complaint is dismissed to the extent it alleges that the defendants’ rates, rules and practices are discriminatory. Decision at 5.
4. The statute of limitations period applicable to GovGuam’s complaint is two years. Because APL left the trade more than two years before the complaint was filed (*i.e.*, before September 10, 1996), the Board dismissed APL as a defendant in the proceeding. Decision at 5-7.
5. The “zone of reasonableness” (ZOR) established by 49 U.S.C. § 13701(d)(1) does not preclude GovGuam from challenging “base rates,” even if those rates are not more than 7.5 percent above the rate in effect one year earlier. Decision at 7-9.

In this, their initial submission in Phase II of this proceeding, to determine the appropriate standards for determining the reasonableness of the defendants’ rates, defendants Matson and Sea-Land will show the following:

First, the base rates at issue in this case must be the rates that were in effect on September 10, 1996. That conclusion is necessary if the ZOR established by 49 U.S.C. § 13701(d)(1) is to have any meaning and effect.

Second, Matson and Sea-Land submit that there is no feasible or reasonable methodology for assessing the totality of defendants’ rates in the Guam trade. As shown in the attached verified statements of Matson and Sea-Land employees Peter P. Wilson, Mark D. Miller and Daniel Downes(Tabs 1-3), the rates in that trade, the services to which they apply and the commercial and competitive circumstances pertinent to those services vary tremendously. Given that variation, there is no remedy that could be based on a determination of aggregate

unreasonableness that would be both reasonable and meaningful for shippers. Before the Board embarks on the massive task of trying to determine the aggregate unreasonableness of hundreds of widely varying rates, it is at least incumbent on GovGuam to show that there is some remedial order that could follow from a determination of aggregate unreasonableness that would be both reasonable and of some consequence to shippers. To date, GovGuam has not done so.

Third, if, despite our submission, the Board nevertheless concludes that there is a reasonable and feasible means of determining whether rates in the aggregate are unreasonable and of fashioning a reasonable remedy for that determination, then the Board should apply the rate reasonableness principles it has developed in railroad coal rate cases, with certain appropriate modifications. The Board's "constrained market pricing" standards set forth in its coal-rate guidelines reflect carefully considered principles of rate regulatory theory and policy that are applicable generally to all forms of rate regulation, not just to railroads. *See, e.g., CF Industries v. Koch Pipeline Company*, STB Docket No. 41658 (served May 9, 2000), *aff'd sub nom. CF Industries, Inc. v. STB*, 255 F.3d 816 (D.C. Cir. 2001)(hereafter *Koch Pipeline*). They properly measure rate reasonableness not with reference to the costs and rate-bases of the particular carriers but with reference to the costs of a hypothetical efficient carrier in a competitive market. In this respect, they are consistent with the regulatory scheme that Congress established for the noncontiguous domestic trades in ICCTA.

The threshold inquiry under constrained market pricing standards, which the Board should undertake in this case, is whether there is effective competition in the market at issue. If the Board finds there is effective competition in that market, then rate regulation would be not only unwarranted but positively harmful, and the proceeding should accordingly be terminated. *Koch Pipeline*, 2 S.T.B. 257, 263 (served May 14, 1997). Although whether there is effective

competition in the Guam trade is ultimately a question for Phase III, Matson and Sea-Land submit that there is a very strong prima facie case that there is effective competition in that trade. This conclusion is powerfully supported by the findings of the Department of Transportation in a 1997 report to Congress on competition in the noncontiguous domestic trades that was mandated by Section 407 of ICCTA. United States Department of Transportation, *A Report to Congress: Competition in the Noncontiguous Domestic Maritime Trades* (1997) (hereafter "1997 DOT Report") (relevant pages are included in Appendix A). It is also shown by the verified statements of Peter P. Wilson, Mark D. Miller and Daniel Downes attached to this filing

Because there is a strong prima facie case that there is effective competition in the trade, Matson and Sea-Land submit that the Board should consider and decide the threshold issue of competition first, before accepting evidence bearing on the reasonableness of the rates in the aggregate. To require the parties to adduce evidence both on competition and on the reasonableness of the rates in the aggregate at the same time would likely impose a very large and needless burden on the parties and the Board.

If the Board concludes that there was not effective competition in the Guam trade in September 1996, then it should apply the stand-alone-cost test ("SAC") to determine the reasonableness of the aggregate rates in effect at that time. That test, as noted, appropriately measures the reasonableness of rates not by the costs or rate bases of the carriers involved but by the costs of a hypothetical efficient carrier operating in a competitive market. Measuring the reasonableness of rates by the actual costs and rate bases of the carriers involved would be particularly inappropriate in a two-carrier market because by such measurements the maximum permissible levels would necessarily differ for the two carriers, which would have perverse results if any prescriptive relief were imposed against one or both carriers.

If the Board concludes there was not effective competition in the Guam trade in September 1996, it should not apply a “revenue adequacy” test to determine the reasonableness of the aggregate rates in effect at that time. The only time the Board has applied such a test to constrain rates – in the *Koch Pipeline* case – was to constrain proposed rate *increases*. While a revenue adequacy test might arguably be appropriate to assess the reasonableness of a proposed rate increase, it has no reasonable application to a challenge to *existing* rate levels. Whether a carrier may or may not have been “revenue adequate” with respect to its entire system has no bearing on whether existing rates on a single segment of its system are or are not reasonable.

Finally, if, despite our submission, the Board concludes that there is a reasonable and feasible means of determining whether rates in the aggregate are unreasonable and of fashioning a reasonable remedy for that determination, then the Board should not apply the rate-of-return methodology formerly applied by the Federal Maritime Commission (“FMC”), known as G.O. 11, in GovGuam’s case against Sea-Land and APL. Among the many problems of trying to apply that methodology to the circumstances of this case, perhaps the most fundamental is that it measures the reasonableness of rates on the basis of the costs and rate bases of the carriers involved. That is contrary to principles of rate regulation approved by the Board and its predecessors, is not consistent with the regulatory scheme adopted by ICCTA, and, as noted, could lead to perverse results in a trade, like Guam, served by two carriers.

I. THE RATES AT ISSUE ARE THOSE IN EFFECT ON SEPTEMBER 10, 1996.

In its November 15, 2001 decision, the Board rejected the defendants’ contention that the ZOR established by 49 U.S.C. § 13701(d)(1) made reasonable all rates that were not more than

7.5 percent above the rate in effect one year earlier.² The Board stated that “[w]e understand that Congress wanted to give water carriers some degree of certainty as to whether rate changes could be challenged,” but it concluded that Congress did not intend to preclude shippers from challenging a carrier’s “base rates.” Decision at 9. It is therefore necessary at the outset to identify the “base rates” that GovGuam is challenging. It is necessary to identify the base rates at issue in order to give some meaning and effect to the ZOR. If the base rates are found reasonable, then the ZOR would render reasonable, and protect from subsequent challenge, the rates for the same services in effect one year later if they have not been increased by more than 7.5 percent or decreased by more than 10 percent.

GovGuam’s complaint, filed on September 10, 1998, asserts that the defendants have “since January 1, 1991 continually until the present charged . . . unjust and unreasonable rates for all transportation by water, including the water portion of all intermodal transportation between ports in the United States and Guam.” Complaint, Paragraph 10. Inasmuch as the Board held in its November 15, 2001 decision that the statute of limitations applicable to the complaint is two years, the earliest rates that the complaint can legally challenge are those in effect on September 10, 1996. The “base rates” challenged by the complaint therefore cannot be rates in effect any earlier than September 10, 1996.

GovGuam’s complaint challenges all the defendants’ rates in effect from September 10, 1996 to September 10, 1998. However, for purposes of determining what the “base rates” are, the base rates should be deemed to be the earliest rates that a complaint challenges and may

² Section 13701(d)(1) provides in pertinent part: “a rate or division of a . . . water carrier for port-to-port service . . . is reasonable if the aggregate of increases and decreases in any such rate or division is not more than 7.5 percent above, or more than 10 percent below, the rate or division in effect 1 year before the effective date of the proposed rate or division.”

legally challenge – in this case, those in effect on September 10, 1996, if the ZOR is to have any meaning and effect. If the Board determines that the rates in effect on September 10, 1996 are reasonable, then by the plain terms of § 13701(d), any of those rates for the same service in effect one year later will be deemed reasonable “if the aggregate of increases and decreases in such rate . . . is not more than 7.5 percent above, or more than 10 percent below” the rate in effect on September 10, 1996. In a case where, as here, a complainant challenges rates in effect over a period of time, it would make no sense to select as the “base rates” those in effect at some later date than the earliest date in the period.³

II. THERE IS NO REASONABLE METHOD FOR DETERMINING THE REASONABLENESS OF GUAM RATES IN THE AGGREGATE GIVEN THE ENORMOUS VARIATION IN RATES AND SHIPPING CONDITIONS.

As noted at the outset, the Board’s November 15, 2001 decision deferred to Phase II a determination whether there is a reasonable methodology for assessing a rate structure complaint in this case. Matson and Sea Land submit that there is not.

First, we submit that, in order to be reasonable, a methodology for assessing the reasonableness of rates in a rate case must be one that offers the possibility of some remedy to persons who pay the rates that is both meaningful and reasonable. A methodology that proposes a means of determining whether the totality of the regulated entities’ rates produced aggregate

³ A complainant is free in a complaint to challenge the reasonableness of rates in effect more recently than two years before the filing of the complaint, in which case the base rates would be the ones it challenges. But if the complainant challenges rates in effect over the entire two-year period, as GovGuam has, it would make no sense to select the rates in effect on some date after the date two years before the filing of the complaint -- say, in this case, March 1, 1997 -- as the “base rates” to be examined, because a ruling on the reasonableness of those rates would not necessarily determine the reasonableness of rates in effect on September 10, 1996; nor would it permit a determination of whether the rates in effect (or rate increases proposed) on September 10, 1997 were protected from challenge by the ZOR.

revenues that were “too high” by some measure would not be reasonable, we submit, if it provides no remedy to the rate payers in the form either of reparations or future rate prescriptions (in which case it would simply propose a sterile and pointless exercise) or if it fails to provide a basis by which the regulator is able to fashion a non-arbitrary remedy.⁴

There are two central facts in this case that are relevant to the question whether there is a reasonable methodology for assessing a challenge to the totality of the defendants’ rates. The first is that GovGuam is not challenging a general rate increase proposed by the carriers but is challenging the totality of rates that were in effect on a particular day, September 10, 1996. The second is that, as shown in the attached verified statement of Peter Wilson and Daniel Downes, those rates varied enormously with respect to the rate levels, the services and the commercial and competitive conditions.

If Matson and Sea-land had proposed or taken a general rate increase – *i.e.*, increased all of their rates across the board by a fixed percentage based on an asserted general increase in their costs – and if GovGuam were challenging such an increase, it would be reasonable and appropriate to assess the reasonableness of the increase on the same bases on which the carriers took it and justified it; namely, to examine the percentage increase as applied to all the rates and to determine whether the additional revenues were needed to cover the carriers’ general costs. In such a case, if the increase were found not to be justified, a remedial order refusing to permit the increase, or allowing a smaller general increase, or requiring a general rollback if the increase

⁴ In other words, there might be methodologies that would be feasible to apply to the totality of a carrier’s rates as a possible measure of their reasonableness in the aggregate (*e.g.*, stand-alone-cost, G.O. 11, or others), but they would not be reasonable, we submit, if they provided no basis for fashioning remedies to shippers that are both meaningful and non-arbitrary.

had gone into effect, would be reasonable because it would correspond to challenged action of the carriers. The Board's predecessor, the Interstate Commerce Commission ("ICC") and the Federal Maritime Commission routinely examined the reasonableness of general rate increases on those bases.⁵ Indeed, the FMC's G.O 11 methodology, which GovGuam's complaint asks the Board to apply here, was specifically developed as a means of determining the reasonableness of general rate increases proposed by FMC-regulated carriers. In fact, that methodology was never applied in a case seeking reparations for allegedly unreasonable existing rates until the FMC applied it in 1998 to GovGuam's challenge to the 1987-1991 existing rates of Sea-Land and APL.⁶ See Part IV, *infra*. (In that proceeding, which is still ongoing, the lawfulness of the FMC's ruling under the Shipping Acts is still very much in dispute.)

GovGuam, however, is not challenging a general rate increase, but is challenging the totality of rates in effect on September 10, 1996. In fact, there has not been a general rate increase in the Guam trade since 1984⁷. The last time a general rate increase was proposed by any carrier serving Guam was in 1994, when APL filed a general increase tariff and then promptly withdrew it before it went into effect after Sea-Land elected not to follow the increase.

There is no reasonable methodology for assessing the reasonableness of the totality of the rates in effect on September 10, 1996, however, because those rates (like those presently in effect) varied widely, both in their amounts and with respect to the services and commercial

⁵ See, e.g., *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 311-316 (1975); *Matson Navigation Co. v. FMC*, 959 F.2d 1039 (D.C. Cir. 1992).

⁶ The FMC's 1998 decision concerning Guam rates is reported at *Government of the Territory of Guam v. Sea-Land Service, Inc and American President Lines, Ltd.*, 28 S.R.R. 252 (FMC 1998).

⁷ *Government of the Territory of Guam v. Sea-Land Service, Inc and American President Lines, Ltd.*, FMC Docket No. 89-26, 28 S.R.R. 252, 260 (FMC 1998).

conditions to which they pertained. In September 1996, for example, Matson had two tariffs on file with the Board containing the rates for service to Guam that is subject to Board regulation; these tariffs contained 292 separate rates. The regulated rates for loaded containers ranged from \$1,655, for moving printing paper westbound, to \$14,000, for moving certain hazardous materials eastbound. Verified Statement of Peter P. Wilson at 3. In addition to the rates subject to regulation, Matson and Sea-Land have provided transportation to Guam that is not subject to regulation -- primarily, joint rail-water movements and movements of certain agricultural commodities-- rates which are set forth in exempt circulars.

Furthermore, the rates, both regulated and unregulated, have constantly been adjusted in response to changing commercial and competitive conditions. As Mr. Wilson explains, when Matson first entered the Guam trade in February 1996, as APL was leaving it, Matson adopted APL's tariff rates. Since then, however, Matson has taken approximately 3,400 separate rate actions adjusting particular rates, the vast majority of which have resulted in rate reductions. Wilson V.S. at 2. Matson has taken these actions either on its own initiative, to gain cargo from Sea-Land, or in response to rate reductions by Sea-Land. *Id.* Many of the rates are the product of negotiations with shippers. As Mr. Wilson states: "Matson is continually negotiating rates with its customers." *Id.* Many factors affect the level of rates established by the carrier; these include demand for the transportation, the value of the commodity, the rates for similar commodities and services offered by the other carriers in the trade, the costs of providing the services, and the volume of cargo to which customers can commit. *Id.* at 3. All of these factors differ significantly from rate to rate, and many of them fluctuate significantly over relatively short periods of time. Demand for different transportation services, for example, has fluctuated

greatly with general economic conditions, declines in tourism, changes in U.S. military operations, etc. See Verified Statement of Mark D. Miller at 3-4.

Even if there were some reasonable standard for judging whether the aggregate rates of Matson and Sea-Land in effect in September 1996 produced total revenues that exceeded some permissible maximum, there is no way that such a determination could serve as the basis for a remedy to shippers that would be meaningful to shippers and, at the same time, reasonable and non-arbitrary. That is so because, even if the aggregate revenues were found to be too high, the rates producing those revenues would certainly include many that would have to be deemed reasonable by any rational standard -- for example, low rates that were specifically negotiated with a shipper. A determination concerning rates in the aggregate, however, would provide no basis for identifying the "reasonable" rates and for differentiating them from the "unreasonable" ones. Accordingly, any remedial order based on a determination regarding rates in the aggregate that required the payment of reparations to all shippers (or some subset of them), or any order requiring the carriers prospectively to roll back or hold down all their rates (or some subset of them), would necessarily be arbitrary and unreasonable. Such an order would necessarily provide inappropriate benefits (*i.e.*, windfalls) to shippers who had been enjoying reasonable rates and would undercompensate those who had been paying unreasonable rates. Such an order, moreover, would serve no rational regulatory purpose.

In order to provide a remedy that would appropriately compensate or protect the shippers which had paid unreasonable rates, the Board would have to conduct a further proceeding to determine which of the hundreds of rates were reasonable and which were unreasonable. A determination of "aggregate unreasonableness," however, would have no relevance to that

further inquiry and would serve no purpose.⁸ In sum, there is no methodology for assessing the reasonableness of rates in the aggregate that could provide remedies to shippers that would be both meaningful and reasonable.

In its November 15, 2001 decision, the Board seems to have agreed that a remedial order requiring across-the-board rate reductions would not be a rational remedy in this case for a determination of aggregate unreasonableness, when it commented that “a finding that rates in the aggregate are unreasonable would not necessarily require across-the-board rate reductions as a remedial measure.” Decision at 4. The Board, however, did not suggest any other remedy that might be appropriate, and we submit there is none, for the reasons discussed.

Given the apparent absence of any remedy for aggregate unreasonableness in a case like this one, involving hundreds of widely varying rates, that would be both meaningful and reasonable, it is at least incumbent on the complainant to demonstrate that such a remedy would be available and why before the Board investigates the complaint further. It would make no sense to subject the parties and the Board to the massive burdens and expenses that an aggregate rate investigation would inevitably entail under any standards of reasonableness the Board would

⁸ Consistent with this proposition, in cases involving general rate increases, the ICC and the courts consistently held that an agency determination disallowing a general, across-the-board rate increase had no bearing on the reasonableness of individual rates. *See, e.g., Arizona Electric Power Co-op, Inc. v. ICC*, 675 F.2d 303, 304, n. 2, 306-07 (D.C. Cir. 1982); *Council of Forest Industries of British Columbia v. ICC*, 570 F.2d 1056, 1061 (D.C. Cir. 1978). Similarly, the FMC, in its 1998 decision in its Guam case, held that any determination regarding the overall rate levels would not determine the reasonableness or unreasonableness of any individual rates. *Government of the Territory of Guam v. Sea-Land Service, Inc. and American President Lines*, 28 S.R.R. 252, 288 and n. 46 (1998). Although the FMC nevertheless undertook to decide the reasonableness of APL's and Sea-Land's overall rates in effect in 1987-91, four years later it is still wrestling with the problem (which we submit is insoluble) of finding a rational and meaningful remedy flowing from that determination.

be likely to establish⁹ unless the Board had a sound basis for concluding that such a proceeding could support a remedy that was meaningful and reasonable. In this proceeding, however, GovGuam has never even identified what kind of remedy it believed would be appropriate, let alone explained why a particular remedy would be reasonable. On the contrary, when the carriers in their motion to dismiss argued that the apparent theory of GovGuam's complaint would require across-the-board reparations to all shippers by a single percentage amount and that such a remedy would be plainly unreasonable, GovGuam's reply was conspicuously evasive. GovGuam argued primarily that the implications of its complaint and the reasonableness of any remedies were issues to be considered only in Phase II. GovGuam Opp. To Motion to Dismiss, filed April 1, 1999 at n. 15. It is now Phase II, and GovGuam can no longer avoid the implications of its complaint; it must explain, if it can, how a determination of aggregate unreasonableness could provide a basis for a remedy that is both meaningful and reasonable. Defendants submit that there is no such remedy.¹⁰

⁹ We note that the FMC proceeding is now in its 14th year with no foreseeable termination to the proceeding.

¹⁰ It is highly noteworthy in this regard that in the ongoing remedy phase of the FMC proceeding, GovGuam is pressing for the very remedy that Matson, Sea-Land and APL contended was the necessary implication of its STB complaint -- namely, across-the-board reparations to all shippers in the fixed percentages by which the carriers' aggregate revenues were found to exceed permissible aggregate maximums (which, under the FMC's G.O. 11 methodology, were different for each carrier). The unreasonableness of any such result in this case should be too obvious to require extended discussion. It would mean that the lowest rates in the carriers' tariffs (*e.g.*, \$1,655 per container of printing paper) and the highest rates (*e.g.*, \$14,000 per container of hazardous chemicals) would all effectively be deemed unreasonable and by the same percentage amount, without regard to the obvious differences in the levels of the rates or the transportation circumstances.

III. IF THE BOARD NEVERTHELESS CONCLUDES THERE IS A REASONABLE METHOD FOR DETERMINING THE REASONABLENESS OF GUAM RATES IN THE AGGREGATE, THE BOARD SHOULD APPLY THE RATE REASONABLENESS PRINCIPLES DEVELOPED IN RAIL AND PIPELINE CASES WITH APPROPRIATE MODIFICATIONS.

A. The Board Should Apply Modified Constrained Market Pricing Principles.

If, despite our submission in the previous argument, the Board concludes that there is a reasonable methodology for determining the reasonableness of rates in the aggregate, then Matson and Sea-Land submit that it should apply the rate reasonableness principles, generally referred to as "constrained market pricing" (hereafter "CMP") that the Board and the ICC developed to determine the reasonableness of rates in railroad and pipeline cases, with certain appropriate modifications. These principles are the most appropriate for a case like this because they are founded on economic concepts and considerations of regulatory policy of general applicability and because other methods the Board and the ICC have used to assess the reasonableness of individual rates are not feasible in a case challenging the totality of the carriers' rates in a particular trade. We discuss in Part IV, below, why the G.O. 11 methodology developed by the FMC is not an appropriate methodology in this case.

The ICC initially developed its CMP standards for application in cases involving railroad coal rates. They were most comprehensively explained in *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 532 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987), which described them as "a practical economically sound method of applying competitive pricing principles." They were based on many years of research and

extensive public comment,¹¹ and they continue to reflect the Board's views on the economic theories and regulatory principles on which they are based. *See, e.g., Koch Pipeline Co.*, 2 S.T.B. 257, 262-264 (1997).

CMP embodies various "constraints" designed to constrain rates to reasonable levels in markets that lack effective competition. Broadly speaking, these constraints are designed to allow carriers in such markets to earn adequate revenues (*i.e.*, to cover their costs of capital) while also ensuring that the rates are not higher than what the carriers would charge if the market were sufficiently competitive (or "contestable"). *See Coal Rate Guidelines*, 1 I.C.C.2d at 528-529. Most pertinently for present purposes, the stand-alone-cost ("SAC") constraint is designed to "introduce[] the competitive standard of contestability into a non-competitive market" and to "produce[] a simulated competitive price standard against which rates can be compared." *Id.* at 529.

Although CMP was developed with reference to railroad coal rates, the principles (with some modifications) are applicable to rate regulation in this case. While there are certainly important differences between railroad transportation in the United States and ocean shipping in the domestic offshore trades, the two forms of transportation share common features that make CMP generally applicable to both. First, carriers in both industries exhibit "significant economies of scope and density." *Coal Rate Guidelines*, 1 I.C.C.2d at 526. Second, a major portion of the traffic handled by carriers in both industries is subject to competition; accordingly,

¹¹ *See, e.g., Potomac Electric Power Co. v. Conrail*, 367 I.C.C.2d 532, 545 (1983), *aff'd sub nom. Potomac Electric Power Co. v. ICC*, 744 F.2d 185 (D.C. Cir. 1984), observing that the coal rate guidelines proposed in 1983 (and later adopted in 1985) represented "the best thinking on the subject currently available" and "grew out of years of internal analysis and examination of public comments."

there are substantial variations in the elasticities of demand for the traffic handled by those carriers. This feature of the rail industry was a major impetus for the development of CMP. *See, e.g., Potomac Electric Power Co. v. ICC*, 744 F.2d 185, 189 (D.C. Cir. 1984)

That CMP is not limited to coal transportation or to the regulation of railroad rates is shown by the Board's recent decision in *Koch Pipeline*. In that case, the Board applied CMP to a complaint challenging rates for transporting anhydrous ammonia via a pipeline, which are subject to regulation under 49 U.S.C. §15501. Unlike the statute governing rail rates, §15501 does not make a finding of market dominance a jurisdictional prerequisite to rate regulation. The Board nevertheless found that the CMP principles developed to assess railroad rates should be applied to pipeline rates as well. The Board explained:

Although pipeline rates must be reasonable under 49 U.S.C. §15501(a), the statute does not specify how we are to determine reasonableness. In the rail rate area—where we are confronted with the same broad, undefined standard of reasonableness, see 49 U.S.C. 10701(a), and where carriers also serve both shippers who do not have effective transportation alternatives and shippers who do—we generally apply the Constrained Market Pricing (CMP) principles articulated in Coal Rate Guidelines, Nationwide., 1 I.C.C.2d 520 (1985) . . .

Decision served May 9, 2002, 2000 STB Lexis 260 at *13 (footnotes omitted).

The same considerations apply fully in this case. Like the statutory provisions applicable to rail and pipeline rates, 49 U.S.C. § 13701(a) requires rates for movement by water carriers in the noncontiguous domestic trades to be “reasonable” without specifying how reasonableness is to be determined by the Board. The general principles for determining rate reasonableness embodied in CMP are as pertinent to transportation in those trades as they are to rail and pipeline transportation. Moreover, those principles are certainly far more appropriate for determining the reasonableness of rates in a trade like Guam, which is served by more than one carrier, than any methodology that measures rate reasonableness on the basis of the actual costs and rate-bases of

the particular carriers. If the reasonableness of Matson's and Sea-Land's rates were measured by the actual costs and rate bases of the two carriers, their rates would necessarily be found reasonable or unreasonable to different degrees, even though the competition between them has required their rates to be similar, if not identical. *See Wilson V.S.* at 2. Consequently, if any sanction or remedy were imposed based on such findings, it would have two perverse results: First, any reparations order would fall most heavily on the most cost-efficient carrier.¹² Second, if any rate reductions were required of the more efficient carrier, the marketplace would require them to be matched by the less cost-efficient carrier, whose rates would have been found more reasonable. The latter result might prevent the less efficient carrier from covering its costs and might in any event cause it to leave the market. Because the SAC constraint measures the reasonableness of rates not with reference to the costs or rate bases of the defendant carrier but with reference to the costs of the hypothetical efficient carrier in a competitive market, CMP usually avoids at least those results.¹³

B. The Board Must First Determine Whether There is Effective Competition in the Guam Trade.

Significantly, in *Koch Pipeline*, the Board not only found CMP applicable to rates other than rail rates, but it also held that it was first required to determine whether there was effective competition in the market at issue before considering the reasonableness of the rates. Although,

¹² As the ICC noted in *Georgia Pac. Corp. – Pet. for Declaratory Order*, 9 I.C.C.2d 103, 165-166 (1992), *aff'd sub nom. Oneida Motor Freight, Inc. v. ICC*, 45 F.3d 503 (D.C. Cir. 1995): “One problem with the use of a cost-based approach to define reasonable rates is that, contrary to the statutory directives to encourage efficient operation of motor carriers, such methodologies deprive carriers of an incentive to control their costs.”

¹³ Neither CMP nor any other methodology for determining aggregate unreasonableness avoids the anomalies discussed in the previous section that would necessarily result from finding widely varying rates unreasonable by the same percentage amount, or by amounts unrelated to the unreasonableness of individual rates.

as noted, the statutory provisions pertaining to pipeline rates (like those applicable here) do not make a finding of market dominance a jurisdictional prerequisite to rate regulation, the Board held that sound regulatory policy requires a finding of ineffective competition before the Board may engage in rate regulation. The Board stated: "[I]t is generally recognized that sound regulatory policy allows the marketplace to determine the most efficient level of prices where competition is sufficient to prevent the exercise of market power." *Koch Pipeline Co.*, 2 S.T.B. 257, 263 (served May 14, 1997).¹⁴ Indeed, the Board went on to note that if there is effective competition in a market, then rate regulation is not only unwarranted, but would be positively harmful:

If the market is effectively competitive, then agency action can only distort the economically efficient rate(s). Such ill-advised action would contravene the policy to promote adequate, economical and efficient transportation, and to encourage sound economic conditions in transportation.

If the availability of other economic alternatives does indeed act as an effective constraint on a pipeline's rates, there is no need, absent unreasonable discrimination, for the agency to inject itself into the pricing of services. Therefore, as is our practice in the area of railroad rate regulation, we will not exercise our rate prescription authority where effective competitive alternatives prevent a carrier from exercising any unreasonable degree of market power. In assessing the existence of effective competition, we will be guided generally by our railroad market dominance evidentiary guidelines and the precedent developed under those guidelines.

¹⁴ Significantly, in support of this proposition the Board cited *Georgia Pac. Corp. – Pet. for Declaratory Order*, 9 I.C.C.2d 103, 161 (1992), a case involving motor carrier rates. Like the rates involved here, motor carrier rates were subject only to a general statutory requirement of reasonableness, and a finding of ineffective competition was not a jurisdictional prerequisite. In *Georgia Pacific*, the ICC determined the reasonableness of challenged motor carrier rates by comparing them to clusters of rates for comparable services in competitive markets. Although the ICC's reasons for rejecting a cost-based methodology in that case and for applying market-based criteria (9 I.C.C.2d at 156, 165-166) are also pertinent here, the use of comparisons to clusters of rates is clearly not feasible for determining the reasonableness of the totality of a carrier's rates in a trade.

Id.

These considerations are fully applicable to rate regulation in the noncontiguous domestic trades, and we submit that they require the Board to make a similar threshold determination that there was insufficient competition in the Guam trade in September 1996 to prevent the carriers from exercising an “unreasonable degree of market power” before applying CMP to determine whether the aggregate rates of the carriers were unreasonable.

While the question of whether there was effective competition in the Guam trade at that time is ultimately a question for Phase III, there is a very strong prima facie case that there was effective competition in the trade at the time (as there continues to be). Given the existence of a strong prima facie case, which we summarize below, Matson and Sea-Land submit that the Board should bifurcate Phase III and consider evidence on the question of competition before accepting evidence on the reasonableness of the aggregate rates.

The conclusion that there was effective competition in the Guam trade in September 1996 is strongly supported by the findings in the *1997 DOT Report*, referenced at the outset, which Congress directed DOT to make in Section 407 of the ICCTA. Tab 4 to this filing contains the pages of the report relevant to Guam. In that report, DOT made a number of crucial findings regarding competition in the Guam trade, including:

- Guam has always had scheduled shipping services from the U.S. mainland by at least two U.S. flag carriers at any particular time. Since 1972, seven companies have provided such services, and five of those have left the trade. *1997 DOT Report* at III-15, 18, 19.
- Guam also receives shipping services from foreign-flag carriers based in Asia and Europe, which provide indirect competition to the U.S. flag carriers. *Id.* at III-19.

- “Aggregate freight revenue per container for the U.S. mainland to Guam trade . . . showed a 1995 level of less than 80 percent of the 1990 level, after adjusting for inflation.” *Id.* at III-20.
- No general rate increase has been taken in the trade in recent years. *Id.*
- “Excess capacity in the Guam trade has played a major role in preventing shipping rates from increasing.” *Id.* at III-19.

DOT also noted: “Liner service to Guam is limited by the small volume of traffic being transported, a significant directional imbalance in the flow of traffic, and the Territory’s distance from the U.S. mainland,” and “is economically viable only if it is offered in conjunction with continuing service to the Far East or as part of liner service to Hawaii.” *Id.* at III-15.

As the Board noted in its November 15, 2001 decision (at n.8), DOT also stated that “concentration is high in the Guam trade” (1997 DOT Report at III-18), but this statement does not suggest any conclusion or finding that effective competition is lacking. It only reflects the fact that the market is served by two U.S. carriers.¹⁵ The Board, however, has not merely found but presumed that two carriers serving markets would be sufficient to provide effective competition, and has done so in circumstances where there were far greater barriers to potential new entry than there are in the Guam trade. For example, in its decision approving the merger of the Union Pacific and Southern Pacific railroads, the Board rejected contentions made by various parties that corrective actions were necessary to preserve effective competition at points where the merger would reduce service from three rail carriers to two rail carriers. *See* STB F.D. No.

¹⁵ While the Board viewed DOT’s observation of high concentration in the Guam trade as raising enough of a question about competition to preclude summary dismissal of Guam’s complaint (*see* Decision at 3, n. 8), the totality of DOT’s findings certainly makes out a *prima facie* case of effective competition in the trade.

32760, *Union Pacific Corp. et al. –Control and Merger—Southern Pacific Rail Corp. . et al.*, 1 S.T.B. 233 , 384-390 (1996), *aff'd sub nom. Western Coal Traffic League, et al. v. STB*, 169 F.3d 775, 778-79 (D.C. Cir. 1999) (hereafter “UP/SP”). The Board noted that in prior merger cases, the ICC had often permitted the number of railroads offering service in a given market to decrease to two railroads. It pointed out that these mergers had resulted in only two railroads serving large portions of the East, and it observed that those two railroads “have competed effectively in these markets.” 1 S.T.B. at 386. It also noted that effective competition by two carriers had been exemplified in the Powder River Basin, where BNSF and UP “offer vigorous competition to PRB coal shippers who have seen rates continuously decline.” *Id.* The Board’s conclusion that having only two carriers in 3-to-2 markets would not result in “duopoly pricing” was upheld by the Court of Appeals. *Western Coal Traffic League v. STB*, 169 F.3d 775, 778-79 (D.C. Cir. 1999).¹⁶ The Board reached the same conclusion in *Koch Pipeline*, 2000 STB LEXIS 260 at *16, where it found that “intramodal competition . . . exists . . . where two or more pipelines could provide transportation between the same origin-destination pairs.”

The Board’s conclusion in *UP/SP* that continuously declining rates in the Powder River Basin demonstrated the effectiveness of two-railroad competition in that market is fully applicable to Guam, where, as DOT found, per container revenues declined 20 percent in real terms between 1990 and 1995. *See also* Peter Wilson’s verified statement that the vast majority

¹⁶ The Board’s conclusion in *UP/SP* that UP and BNSF would provide effective competition in all markets that were previously served by UP, SP and BNSF was not a finding about the degree of competition in existing markets,. It was a general *presumption* about the future based on the Board’s experience and judgment – namely, that two railroads, BNSF and UP *would* provide effective competition after consummation of the UP/SP merger in *all* the markets that were previously served by three carriers.

of the 3,400 rate changes made by Matson since it entered the Guam trade in 1996 have been rate reductions. Wilson V.S. at 2.

Furthermore, if it is appropriate to presume that two railroads or two pipelines serving a market are sufficient to provide effective competition, then it is even more so in the case of ocean shipping companies serving Guam. Railroads and pipeline companies require very substantial fixed infrastructure to serve their customers, in the form of rights of way, tracks and pipelines, and the barriers to entry and exit are substantial. Ocean shipping companies have few such barriers. They can move their vessels from one market to another at relatively low cost. The relatively low barriers to entry and exit in the Guam trade are reflected in the finding of the *1997 DOT Report* that since 1972, seven carriers had entered the trade and five had exited. *1997 DOT Report* at III-18. DOT observed that ocean carriers had been able to acquire vessels and port facilities necessary to enter the trade and provide liner services to Guam and that vessels suitable for the Guam trade were expected to become even more readily available in the ensuing years. *Id.* at III-19. Matson witness Miller also notes: "Entry to the Guam trade is easier than entry to the other noncontiguous domestic trades because foreign-built vessels can be used." Miller V.S. at 2.

The findings in the *1997 DOT Report* concerning competition in the Guam trade are strongly confirmed and reinforced by the testimony of Matson and Sea-Land witnesses attached to this filing. Mr. Wilson, as noted, reports that the vast majority of rate actions taken by Matson since 1996 have been rate reductions. Wilson V.S. at 2. Mr. Wilson states: "Competition is so strong in the Guam trade that Matson must match any rate reductions taken by CSX in order to retain cargo. Similarly, CSX is forced to match all rate reductions taken by Matson or lose the cargo. As a result, cargo often moves from one carrier to the other and then

back again when the rate is matched.” *Id.* He gives many examples of rate reductions taken by Matson “either on its own initiative in an attempt to gain cargo or in response to rate reductions by CSX [Sea-Land]” as well as other examples of the competition between the two carriers. *Id.* at 2-5.¹⁷

The testimony of Matson’s Manager, Market Planning, Mark Miller, further confirms the findings of the 1997 DOT Report regarding competition and overcapacity in the Guam trade. Mr. Miller notes that in 1996 Matson and Sea-Land were each serving Guam on a weekly basis with vessels having an average capacity of 2,532 and 2,320 twenty-foot equivalent units (“TEUs”) respectively.

He states:

At the time that Matson entered the Guam trade, approximately 625 containers per week moved from the U.S. West Coast to Guam. Given the combined capacity of the Matson and Sea-Land vessels calling Guam, it is obvious that the trade was overtonnaged. Even when the smallest vessel in the Matson rotation called Guam, it alone could carry over three times the total number of containers carried to Guam from the U.S. mainland

Miller V.S. at 1. Given this substantial overcapacity, the vigorous competition between Matson and Sea-Land for cargo described by Mr. Wilson is hardly surprising. Since 1996, the situation has worsened. Mr. Miller reports: “Today, the amount of cargo for which Matson and CSX Lines (“CSX”) compete has dropped to approximately 500 containers per week moving from the U.S. West Coast to Guam and Micronesia, with Matson carrying slightly greater than 50% of the cargo.” *Id.*

¹⁷ As the Board observed in *UP/SP (Sub No. 26)*, 3 S.T.B. 1030, 1045 (1998): “Competition between carriers may be judged most effectively when it forces them to adjust rates and/or provide better service in response to each others actions in the market.” (quoting comments of the Department of Transportation).

Mr. Miller also reports that foreign-flag carriers "offer very real competition to Matson." The foreign-flag carriers make regular calls at Guam, accounting for the transportation of as much as 20% of the commercial cargo shipped to a final destination in Guam. Miller V.S. at 2. Moreover, the foreign-flag carriers carry many products that are interchangeable with the U.S. products carried by Matson, as well as some products that are not available from the U.S. mainland and that compete with the U.S.-mainland originating products that could be carried to Guam by Matson. *Id.* at 3. This competitive situation is intensified by the vulnerability of the trade to fluctuations in U.S. military demands, tourism and the U.S. and Far East Asian economies, all of which have combined in recent years to substantially reduce the volume of cargo shipped from the U.S. mainland to Guam. *Id.* at 3-4.

Other compelling evidence of the effectiveness of two-carrier competition in the Guam trade is the fact that the last time one of the carriers in the trade (APL at that time) proposed a general rate increase was in 1994, and the carrier promptly withdrew the proposal when its competitor in the trade (Sea-Land) declined to follow suit.

In view of this strong prima facie case of effective competition in the Guam trade, the Board should bifurcate Phase III of this proceeding. The Board should first consider and decide the threshold issue of competition. Only if the Board concludes that effective competition does not exist in the trade should evidence be required on the question of the reasonableness of the rates in the aggregate. Requiring the parties to introduce evidence both on competition and on the reasonableness of the rates in the aggregate at the same time would impose a heavy and needless burden on the parties and the Board.

While the Board has in recent years generally required market dominance and rate reasonableness evidence to be filed simultaneously in rate cases, in order to try to reduce the

overall length of such proceedings, it has ordered bifurcation in appropriate cases. The Board has stated that bifurcation to consider market dominance issues first is appropriate when "there is substantial doubt as to the complainant's ability in [the] case to demonstrate market dominance." *FMC Wyoming Corp. v. Union Pacific R. Co.*, STB Docket No. 42022, 1998 STB LEXIS 230 at *11 (Decision served Aug. 31, 1998). For example, the Board bifurcated the proceeding in the case of *Sierra Pacific Power Co. v. Union Pacific R. Co.*, STB Docket No. 42012, 1998 STB LEXIS 13 (served Jan 26., 1998). In that case, the Board denied the carrier's motion to dismiss, which motion had alleged, among other things, that the complainants could not establish market dominance. However, on the strength of the prima facie showing made by the carrier in its motion to dismiss that the complainants would not be able to establish market dominance, the Board decided to bifurcate the proceeding. In so doing, the Board stated that this would "minimize the administrative burdens on the parties." Given the strong prima facie showing of effective competition in the Guam trade, a similar process should be used in the instant case.

C. If the Board Finds There Was Not Effective Competition in the Guam Trade in September 1996, It Should Apply the SAC Test to Determine the Reasonableness of the Aggregate Rates.

Only if the Board concludes that there was not effective competition in the Guam trade in September 1996 should it go on to evaluate the reasonableness of the aggregate rates in effect at that time. If it does so, it should apply the stand-alone-cost ("SAC") test under its CMP principles. The SAC test would be the most appropriate test here, because it measures the reasonableness of rates not by the actual costs or rate bases of the carriers involved in the particular market, but rather by the costs of a hypothetical efficient carrier operating in a competitive market. As the Board has explained, "[a] SAC analysis seeks to determine the lowest cost at which a hypothetical, optimally efficient carrier could provide the service to the

complaining shipper free from any costs associated with inefficiencies or cross-subsidization.” See, e.g., *PPL Montana, L.L.C. v. Burlington Northern and Santa Fe R.R.*, STB Docket No. 42054 (Decision Served November 27, 2001); *Coal Rate Guidelines*, 1 I.C.C. 2d at 543. Under the SAC constraint, the rate of the defendant carrier cannot be higher than what a hypothetical stand-alone carrier would need to charge to efficiently serve the complaining shipper while fully covering all of its costs, including a reasonable return on the capital invested. Use of the SAC analysis avoids the perverse consequences, discussed earlier, that would result from imposing prescriptive relief against one or both carriers in a two-carrier market on the basis of the embedded costs and rate bases of the two carriers.

The Board has applied and repeatedly expressed its satisfaction with the use of SAC analysis to implement the CMP standards in rate reasonableness cases. While the Board utilized a “revenue adequacy” test instead of SAC analysis in one rate reasonableness case—the *Koch Pipeline*—case, the revenue adequacy test would not be appropriate here. The Board applied revenue adequacy in *Koch Pipeline* in the context of constraining proposed rate *increases*. (The *Koch Pipeline* case involved a challenge to rate increases averaging almost 20% for pipeline transportation from the Louisiana Gulf Coast to the Midwest.) While a revenue adequacy test may arguably be appropriate in some circumstances to assess the reasonableness of a proposed rate increase, it has no reasonable application to a challenge to *existing* rate levels. Whether a carrier may or may not have been “revenue adequate” with respect to its entire system has no relevance to the reasonableness of existing rates on a single segment of its system.

Using revenue adequacy to measure the reasonableness of rate levels is also inappropriate in two-carrier markets because revenue adequacy (like other cost-based methodologies) depends on the circumstances of each carrier. It could therefore result in

finding one carrier's rates reasonable and the other carrier's unreasonable, or in finding their rates unreasonable in different degrees. If such a finding were to result in requiring the carriers to change any or all of their rates, it would impose differing rate constraints on each carrier. Competition, however, would require the less constrained carrier to match the rates of the more constrained carrier, thereby preventing the less constrained carrier from earning adequate revenue levels or, more likely, driving it out of the trade altogether.¹⁸

IV. PROCEDURES AND STANDARDS DEVELOPED UNDER STATUTES FORMERLY ADMINISTERED BY THE FEDERAL MARITIME COMMISSION DO NOT PROVIDE ACCEPTABLE BASES FOR EVALUATING THE LAWFULNESS OF RATES UNDER ICCTA

GovGuam's Complaint urges the Board to transplant to this proceeding the financial procedures and protocols developed by the Federal Maritime Commission ("FMC") as part of the FMC's administration of the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933. This methodology included annual financial reporting requirements set forth in FMC General Order 11 ("G.O. 11") and related implementing regulations published at 46 C.F.R. Part 552. As part of the transfer of regulatory authority over water carriers in the non-contiguous domestic ocean trades effected by the Interstate Commerce Commission Termination Act ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (1995), Congress repealed the underlying statutory bases for G.O. 11, and the FMC regulations were rescinded. The details of GovGuam's vision for

¹⁸ Use of a revenue adequacy constraint would also present very substantial practical difficulties in a case like this. In *Coal Rate Guidelines*, the ICC stressed that "revenue adequacy is a long-term concept that calls for a company, *over time*, to average return on investment equal to its cost of capital. In any industry, there are business cycles producing years during which earnings exceed projections and years where they fall short of the target." 1 I.C.C.2d at 536. Given that ocean shipping is a highly cyclical industry and that Matson only entered the Guam trade in February 1996, revenue adequacy is not a practical guide to the reasonableness of the rate levels in September 1996.

application of FMC procedures and standards to this proceeding will be evident only after review of GovGuam's Phase II initial submission. However, certain general points of reservation over such an approach can be advanced now.

The concerns expressed in Part II of this memorandum apply with equal force to FMC general rate review standards and procedures. However evaluated, it is an inherently wasteful and futile exercise for shippers to undertake an historic inquiry into the economic implications of the overall rate levels of carriers. The inquiry is detailed, complex and the results are virtually, if not entirely, meaningless when applied to ocean freight monies actually paid by shippers. Whether using ICC, STB or FMC analogs, the problems are the same. In complex, multi-commodity tariffs, shippers pay a variety of rates, each of which reflects its own economic imperatives. Any conclusions reached by a regulatory body that a carrier's rates in the aggregate yield too high, too low, or a "just right" rate of return do not illuminate the past circumstances of the rate payor in his individual relationships with the carrier and do not logically support a conclusion that the shipper has been damaged in the past by a violation of law. Without the demonstration of such particularized damages, reparations defy accurate calculation.

As noted below, the FMC has been well aware of this problem over its history of regulating rates of domestic offshore carriers and has distinguished between its review of proposed general rate increases and individual rate complaints by shippers. The latter are based on the physical and commercial attributes of a particular commodity shipment. The former reflect that agency's specific (and now repealed) statutory responsibility to monitor general rate activity of domestic carriers. As will be shown, the FMC's sensitivity to the inappropriate use of general revenue data as they apply to specific rate transactions between shippers and carriers is derived from ICC experience and also has been reflected in judicial review proceedings.

The Board should reject any contention by GovGuam that it ought to borrow FMC standards for application here. FMC financial reporting and rate regulation procedures arose in a particular statutory context that no longer exists. The FMC fashioned its G.O. 11 procedures to enable it to discharge its specific mandate under the 1933 Intercoastal Shipping Act to review, suspend and investigate General Rate Increase proposals by carriers within extremely tight statutory deadlines. The statutory regime administered by the Board differs substantially from that formerly administered by the FMC. Moreover, even if it did not, the FMC's G.O. 11 standards would have significant drawbacks when applied to conditions in the Guam trade. The FMC system was one that determined rate reasonableness by reference to the revenues, costs and individual rate bases of a particular carrier.¹⁹ This approach is inconsistent with the Board's view of correct principles of rate regulation.²⁰ Moreover, given the differing cost, rate base and revenue profiles of the two carriers in this litigation, a cost-based approach would lead to differing permissible maximum rates for each carrier, a commercial impossibility in a competitive, two-carrier trade.

The governing statute in this proceeding is 49 U.S.C. § 13701. It provides simply that "A rate, classification, rule or practice related to transportation or service provided by a carrier subject to jurisdiction under chapter 135 for transportation or service . . . in noncontiguous domestic trade. . . must be reasonable." The former Interstate Commerce Act employed similar

¹⁹ Return on rate base was calculated by using G.O. 11 data to determine net income and interest expense in relation to a carrier's capital investment in the trade.

²⁰ See *Georgia Pacific Corp. – Pet. for Declaratory Order*, 9 I.C.C.2d 103-165-166 (1992), cited earlier. See also *Coal Rate Guidelines*, 1 I.C.C.2d at 556, where the ICC observed: "Ramsey pricing is a significant improvement over traditional methods of rate regulation, which involved arbitrary allocations of 'unattributable costs' among various rail services. These methods have created serious economic distortions, causing harm to shippers and railroads as a result."

language. *See* former 49 U.S.C. §§ 10701(a), 10701a(b)(1). These provisions sharply contrast with the 1933 Intercoastal Shipping Act's direct authorization to the FMC to conduct general rate of return analysis for purposes of evaluating General Rate increases in the domestic trades. Moreover, the provisions of section 13701(d)(1) of ICCTA set forth a standard of reasonableness (the ZOR) based on reference to historic rate levels, rather than analysis of a water carrier's costs, capital investments and revenues in a particular trade. Had there been any Congressional enthusiasm for the type of rate-of return analysis that governed FMC rate proceedings it would not have been necessary for Congress to repeal the 1933 Intercoastal Act, and to terminate FMC jurisdiction over the non-contiguous domestic ocean trades.

Statutes administered by the FMC generally contemplated two types of actions affecting rates charged by carriers in the regulated domestic offshore trades. First, pursuant to provisions of the Intercoastal Shipping Act, 1933, as substantially amended in 1978, the agency could investigate rate changes (increases or decreases) and prescribe just and reasonable minimum or maximum rates. 46 U.S.C. app. §§ 843 - 845 (1988 and Supp. V 1993). The relevant provisions of the 1933 Act define general rate increases and decreases (section 1), require the filing and posting of proposed rate changes (section 2), grant the FMC powers of suspension and investigation of proposed rate changes to determine their lawfulness (section 3) and authorize the FMC to establish just and reasonable maximum or minimum rates (section 4). The entire structure of the 1933 Act and its amendments was geared toward ensuring prompt and predictable disposition of prospective general revenue inquiries concerning proposed rate changes, not individual shipper complaints and not historic review of past rates.²¹ The 1933 Act

²¹ *See, e.g., Matson Navigation Co. - Proposed Overall Rate Increase of 2.5% Between U.S. Pacific Coast Ports and Hawaii Ports*, (FMC Docket No. 85-24), 23 SRR 1216 (FMC 1986), (continued...)

did not set out complaint procedures that authorized private litigants to bring actions attacking the levels either of overall revenues of carriers or of individual commodity rates within a carrier's tariff. The rights of individual shippers under the 1933 Act were limited to protests seeking or commenting on Commission investigation of General Rate Increases or other rate changes. 46 U.S.C. app. § 845(a) (1988).

Second,, individual shipper complaints about rates were brought under the Shipping Act, 1916, specifically under the general requirement of section 18(a) that carriers maintain just and reasonable rates and pursuant to the broad complaint provisions of section 22 of that Act. 46 U.S.C. §§ 817(a) and 821. Such actions were "dependent upon a particular defect" in a carrier's rate structure and rested on "on the theory that the *specific transportation factors affecting a particular commodity rate* were such that the rate charged was unjust or unreasonable."²² The 1933 Act referenced this possibility by stating that, upon a finding that a rate is unjust and unreasonable, ". . . in a proceeding instituted by a complainant pursuant to the provisions of section 22 of the Shipping Act, 1916, the Commission shall direct full reparation to the

(...continued)

in which the FMC initiated investigation of a proposed general rate increase under the authority of the 1933 Act, but confined its review of existing rates to provisions of the Shipping Act, 1916.

²² *Matson Navigation Company - Proposed Rate Increases in the U.S. Pacific Coast/Hawaii Domestic Offshore Trade*, (FMC Docket Nos. 75-57, 76-43), 19 SRR 263 (FMC 1979). The context of this decision discussing the distinctions between a shipper's complaint against a carrier's rate on specific commodities and the FMC's authority to investigate general revenue levels was an argument from a shipper, the Military Sealift Command, that Matson be required to divest itself of excess revenues following a Commission determination that a proposed rate increase resulted in unreasonably high rate or return for the carrier. The Commission rejected this position and stated that shipper complaints following a general rate investigation might be pursued, but that section 22 complaints prior to any such (continued...)

complainant of the difference between the charge collected and the just and reasonable rate. . .”
46 U.S.C. app. §§ 845(b) and 845a (1988).

The factors relevant to a section 18(a) inquiry have been identified by the FMC as “value of service, necessity, cost of service, capacity, volume and competition.” *Hawaii Meat Co. v. Matson Navigation Co.*, (FMC Docket No. 77-45), 18 SRR 479, 484 (Initial Decision 1978). The FMC also acknowledged additional commodity-specific factors such as the effect of transportation costs on the market for a particular commodity, the relationship of a particular commodity rate to comparable services, and the impact of risk factors in the movement of the commodity. See, e.g., *Alaska Village Elec. Coop., Inc. v. Northland Marine Lines*, (FMC 69-55), 12 SRR 147 (Initial Decision 1971) and *Thatcher Glass Mfg. Co. v. Sea-Land Service, Inc.*, (FMC Docket No. 1082), 6 SRR 329 (1965). It was also accepted in FMC practice that high value commodities would sometimes be required to bear more than their share of the fully allocated costs of carriage in order to subsidize the movement of essential low-value commodities. *Trailer Marine Transport Corp. - Proposed Reduced and Initial Through Rates Between U.S. Atlantic and Gulf Ports in the U.S. Virgin Islands*, (FMC Docket No. 78-41), 19 SRR 177, 187, (Initial Decision, 1979). Thus, inquiries or complaints about the lawfulness of any particular rates under the Shipping Act, 1916 were fact-intensive examinations of particular rates and had little or nothing to do with the overall revenue and cost levels of a particular carrier.

Numerous FMC cases acknowledge the fundamental disconnect between commodity rate claims for reparations and the general revenue inquiries undertaken pursuant to G.O. 11 and the

(...continued)

determination by the Commission were geared to the “transportation factors affecting a (continued...) ”

1933 Act. In *Matson Navigation Company - Proposed Rate Increase in the Pacific Coast/Hawaii Domestic Offshore Trade* (FMC Docket No. 75-57), 16 SRR 1701, 1704 (FMC 1977), the Commission observed that “it would be difficult, if not impossible, for any individual shipper to establish a claim for reparations on a *specific* commodity solely on the basis of a Commission finding that a *general* rate increase is unlawful.” (emphasis in the original). In a subsequent Matson rate case, an FMC ALJ commented that a finding that overall rates were unreasonably high: “would not be tantamount to a finding that its rates on particular commodities were unreasonable. It is well settled that the reasonableness of rates for particular commodities is not measured by the reasonableness of a carrier’s general level of rates.” *Matson Navigation Company - Proposed Changes in Rates*, 17 SRR at 180. In a rulemaking proceeding the Commission made the obverse point that findings concerning the legality of individual rates are extraneous to considerations of the lawfulness of rates generally. Mixing the two inquiries was viewed by the FMC as “futile”, “irrelevant”, and “wasteful.”²³ That this was not just the FMC’s view is apparent from a passage in the Commission’s order: “The Commission, other regulatory agencies, and the courts have recognized that the issues in a general-revenue case are essentially different from those in specific commodity cases. [internal citations omitted].” *Id.* In the same order, the FMC relied on ICC precedent, citing to a D.C. Circuit case where the Court of Appeals had addressed the same principle:

In 1905 the [ICC] pointed out the difference between such a rate and an entire system of rates. It said the question whether the revenue yielded by all the rates is a fair return has ‘only a very remote, if any

(...continued)
particular commodity rate. . .”

²³ *General Order 16, Amendment 20* (FMC Docket No. 77-12) 17 SRR 1221, 1225 n.3 (FMC 1977).

practical, bearing on the reasonableness of a rate on a single article of traffic.' On the other hand, it said, the reasonableness of a single rate depends on 'the value, volume and other characteristics affecting the transportation of a particular commodity.' . . . So far as we can ascertain, that rule is well established law.

Chicago Board of Trade v. United States, 223 F.2d 348, 351 (D.C. Cir. 1955).

It is thus apparent that the irrelevance of rate of return analysis to the identification of harm to individual shippers is a long-recognized limitation on the utility of such analysis in any context other than prospective review of general rate levels in a trade. This awareness was well ensconced at the FMC, the ICC, and in the federal courts. To the extent GovGuam advocates that the Board resuscitate FMC general revenue review procedures as a predicate for some sort of reparations award to shippers in the Trade, it is asking the Board not only to cut itself loose from its governing statute, but also to repeat the kind of futile exercise, abundant warnings against which have been provided by the ICC, the FMC, and the Courts.

Only once in the 86-year history of the FMC has a shipper sustained a full-scale general rate analysis of domestic carriers in support of reparation claims on individual shipments. *Government of the Territory of Guam v. American President Lines and Sea-Land Service, Inc.*, FMC Docket No. 89-26. That proceeding, initiated by GovGuam in 1989, is now in its fourteenth year. Its ultimate disposition is neither certain nor close at hand. The matter is now on remand to the ALJ and is presently confined to a contentious dispute over reparations calculations on approximately 40 shipments by two carriers in the 1987 to 1991 time period. Recent rulings by the presiding Administrative Law Judge Dolan confine the maximum scope of dispute between Sea-Land and the shipper complainants in the FMC proceeding to five shipments where slightly more than \$4,000 in freight charges are in dispute. Millions of dollars

in fees and expenses have been consumed in this exercise. The present positions of the parties indicate that both sides will undertake judicial challenges to differing aspects of the proceeding.

As applied to the totality of existing rates in the Guam trade, G.O. 11 had a number of glaring shortcomings, including:

1. The FMC's methodology, designed for use in the context of prospective regulatory review of proposed General Rate Increases (or decreases), is ill-suited to complaints by shippers about the lawfulness of specific commodity rates and is of no moment in addressing whether particular commodity rates within a rate structure are too high or too low. Even were a carrier's rate structure as a whole determined to yield an unlawful rate of return, the FMC's methodology provided no specific information about the lawfulness of particular rates. As noted previously, both carriers' tariffs contain numerous commodity rates that reflect differing physical characteristics, economic conditions, port pairings, trade volumes, and commercial concerns. The general revenue analysis of G.O 11, even if it could be reconstructed for the years here at issue, leaves completely unsettled issues about the lawfulness of particular commodity rates.
2. Because the FMC traditionally relied on Fully Distributed Cost (FDC) methodology in assessing the lawfulness of a carrier's rate of return, significant obstacles are (and would be in an STB context) presented in allocating costs between the various components of a mixed regulated/unregulated service of which Guam is a relatively small

regulated component. FMC allocation formulae, whatever their validity in regulated two-way, dominant carrier trades, have anomalous applications where applied to a small regulated domestic component of a large international service.²⁴

3. The FMC's G.O. 11 procedures and standards were designed to operate prospectively in evaluating the effects of proposed rate changes on overall revenues of carriers. Because no historic period will yield actual operating results that match a presently conducted G.O. 11 analysis, the misapplication of FMC methodology to historic data, as GovGuam apparently intends to advocate here, could force an anomalous ratemaking outcome that is disfavored at law and that would render impossible forward planning by carriers on matters affecting their future rates, capital investments and service levels in the trade.
4. FMC general revenue analysis depended for its timely completion in General Rate Increase investigations on the routine annual filing by carriers of financial reports conformed to the form and methodology requirements of G.O. 11. The Board has no analogous requirement and

²⁴ Sea-Land and Matson also serve the continental U.S./Hawaii trades, either directly with the ships used to call Guam or through the use of other vessels. The carriers also offer Hawaii/Guam services that are economically and operationally separate from the West Coast/Guam services provided by the carriers. Both carriers also employ Guam vessels to move Far East international cargoes back to the United States following Guam port calls. *See, e.g.,* Downes Verified Statement. Attempting to allocate common, "unattributable" costs over these very diverse services would be extraordinarily difficult and inherently arbitrary (*see Coal Rate Guidelines*, 11.C.C.2d at 556) and would result in widely varying results between the two carriers.

should not, particularly given the problems inherent in using FMC-type analysis in this context, impose such a requirement “now-for-then.”

For these reasons, the Board should reject any effort by GovGuam to inject FMC procedures into this proceeding. FMC G.O. 11 and related regulations were developed decades ago to meet specialized statutory requirements and conditions that no longer exist. They were intended by the FMC to address dedicated turn-around trades of the sort typified by Hawaii and Puerto Rico in the late 1960s and 1970s. The FMC never has applied on its own motion G.O. 11 standards to the peculiarities of the Guam Trade.²⁵ The FMC staff reasoned that G.O. 11 presented daunting methodological issues in an imbalanced, one-way trade where operations combined not only relatively small volumes of outbound Guam traffic, but also substantial volumes of outbound and inbound international cargo not subject to rate regulation.²⁶

The FMC’s 1998 decision in FMC Docket No. 89-26 does not diminish the validity of our arguments against STB adoption of G.O. 11 methodologies in reviewing rates under ICCTA. That decision, if not reversed by reviewing courts, appears to permit invocation of G.O. 11 standards by complainants where complainants undertake a challenge to “a carrier’s general level of rates.” Order at 57. GovGuam and the respondent carriers continue to find themselves locked in combat over a limited number of shipments. Although it is clear that the Commission allowed

²⁵ FMC Docket No. 89-26. *GovGuam, et al. v. Sea-Land Service and APL* (FMC 1998).

²⁶ Testimony in Docket No. 89-26 from the FMC’s retired Chief Economist, Dr. Robert Ellsworth, confirmed that the FMC staff did not regard data in Guam carriers’ annual G.O.11 reports as providing meaningful regulatory guidance given the peculiarities of its application to that trade.

GovGuam to pursue its section 22 complaint any way it saw fit, the question remains whether a shipper's decision to attack the general rate structure can ever result in a meaningful outcome. The Commission held that "... GovGuam cannot rely on a finding that overall revenues are unreasonably high to establish the unreasonableness of individual commodity rates." *GovGuam, et al. v. Sea-Land Service, Inc. and APL*, slip op. at 54 (FMC 1998). Pending judicial review, the FMC's holding appears, at best, to reflect the Commission's view that the complaint procedures of section 22 of the 1916 Act are broad and permissive and that complainants are to be given great latitude in the structuring of their complaints. It should not be regarded as rendering G.O. 11 methodologies an attractive choice for use in section 13701 proceedings.

As a final point on FMC methodologies, defendants note that FMC procedures designed to examine across-the-board rate actions on a prospective basis expose carriers to an untenable economic and commercial result if employed as Guam intends here. If a shipper can apply FMC procedures to STB proceedings in a manner that requires trade-wide reparations for past periods, the practical impact on the carrier is to adjust his revenues retrospectively. All the economic assumptions governing the carriers' investment and service level decisions in, for example, 1996, would be nullified by trade-wide revenue reductions ordered in 2002 based on a review of 1996 results. Such an outcome does not promote the certainty that is a stated goal of both the Intercoastal Shipping Act and ICCTA. In *Trans World Airlines v. Civil Aeronautics Board*, 336 U.S. 601, 605 (1949), the Court referred to "the customary pattern of fixing rates prospectively" and described prospective regulatory review as part of the "traditions of ratemaking." *Id.* Ocean carriers have substantial options for the deployment of their vessels. Fleet deployments are based on present expectations about the commercial impacts of operations under existing rates. If shippers such as GovGuam can invoke general rate structure review to scramble historic

economic assumptions that support investment and service level decisions, a carrier can never have certainty within the limitations period that his business judgments were valid. Conversely, a carrier can never recover from shippers the margin by which his operating results fall short of an allowable rate of return. Moreover, by the time a decision adverse to the carrier is reached, the carrier cannot re-deploy his assets to a more promising use.

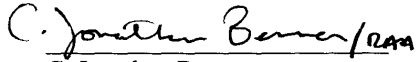
Although we await GovGuam's submission to be certain that we fully understand GovGuam's intent with regard to FMC methodologies in this proceeding, defendants cannot contemplate any circumstances in which the Board would find FMC experience under the 1933 or 1916 Acts to be valuable in fulfilling its statutory obligations under 49 U.S. § 13701.

CONCLUSION

For the foregoing reasons, the Board should rule (1) the rates at issue are those in effect on September 10, 1996, and (2) there is no reasonable methodology of determining the reasonableness of those rates in the aggregate given the enormous variation in such rates and the shipping conditions and other circumstances pertaining to them.

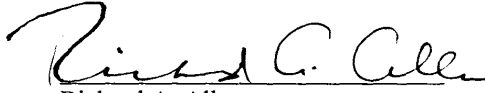
If the Board nevertheless determines that there is a reasonable methodology for determining the reasonableness of the rates at issue in the aggregate, the Board should first determine whether there was effective competition in the Guam trade in September, 1996, given the strong prima facie case that there was effective competition. If it determines that there was not effective competition in the trade at that time, it should apply the stand-alone cost test developed in rail and pipeline cases to test the reasonableness of the aggregate rates. The Board should not apply the G.O. 11 procedures and standards developed by the FMC (under a now-repealed statute) to assess proposed general rate increases.

Respectfully submitted,



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April 23, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of April, 2002, 1998, a copy of the foregoing
Defendants' Initial Submission in Phase II – Appropriate Standards of Rate Reasonableness was
hand delivered to:

Roger A. Berliner
Mary Eva Candon
Berliner Candon Jimson
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Richard A. Allen

VERIFIED STATEMENT OF PETER P. WILSON

My name is Peter P. Wilson. I am General Manager Pricing of Matson Navigation Company, Inc. and have held that position since 1990. My responsibilities include setting the rates that Matson charges to transport cargo and supervising the tariffs, exempt circulars and government tenders through which Matson's rates are published. I have been employed by Matson since 1969. I began my career with Matson in the Law Department as a regulatory law attorney and became Manager Pricing in 1983. Prior to my employment with Matson, I was employed at the Federal Maritime Commission from 1965 to 1969. I have a B.A. degree in History and a law degree.

The offshore domestic trade to Guam is highly competitive. The only attempt by a carrier to take a general rate increase in recent years occurred in 1994, before Matson entered the trade, when APL filed a general rate increase. Sea-Land did not follow, forcing APL to withdraw the increase. Matson has not taken a general rate increase in the Guam trade.

Section 407 of the Interstate Commerce Commission Termination Act of 1995 required the Department of Transportation to prepare a report on competition in the noncontiguous domestic maritime trades. In its Report to Congress, completed in March of 1997, the Department concluded that aggregate freight revenue per container for the U.S. mainland to Guam trade in 1995 was less than 80 percent of the 1990 level, after adjusting for inflation. The Department also reported that there is fluid exit and entry into the Guam trade, partly due to the fact that there is no requirement that U.S.-built vessels be used to carry cargo to Guam from the U.S. mainland as there is in the other offshore domestic trades. Since 1972, seven carriers have entered the trade and five have exited.

The carriers in the Guam trade must match each other's rates in order to remain competitive. When Matson entered the trade in 1996, it adopted the rates published by American President Lines, Ltd. ("APL") and then made selective rate cuts in order to gain customers from the established carrier in the trade, Sea-Land Services, Inc. (now renamed CSX Lines) ("CSX"). Since entering the trade in 1996, Matson has taken approximately 3,400 separate rate actions. The vast majority of these rate actions have resulted in rate reductions. (Any increases were often merely passing through increased drayage and other expenses incurred by Matson to perform the service.) For example, on September 21, 1996, Matson reduced its rate for refrigerated containers by \$200 and reduced its rate for mixed groceries by \$100 on 20-foot containers and \$250 on 40 and 45-foot containers. Matson has continued to reduce rates over the entire time that it has been in the Guam trade, either on its own initiative in attempt to gain cargo or in response to rate reductions by CSX. As examples, Matson reduced its rate for beer from \$96 to \$91.50 per 2000 pounds on September 28, 1996 and reduced its rate for non-alcoholic beverages from \$85 to \$80 per 2000 pounds on October 11, 1996. CSX matched the rate reductions that Matson initiated.

Competition is so strong in the Guam trade that Matson must match any rate reductions taken by CSX in order to retain cargo. Similarly, CSX is forced to match all rate reductions taken by Matson or lose the cargo. As a result, cargo often moves from one carrier to the other and then back again when the rate is matched. Matson is continually negotiating rates with its customers. CSX negotiated a rate with the military to carry U.S. Department of Defense cargo to Guam. Matson matched the rate in its Tariff 2048. Other examples of Matson matching a rate charged by CSX include the rate for animal feed moving out of Portland, Oregon. Matson added pet food to the items included in its foodstuffs, all kinds rate in order to be competitive with

CSX. Similarly, Matson matched CSX's rate and the items included in horticultural supplies. Matson matched CSX's rate action on household appliances in order to retain the business. Matson and CSX both have lowered the rate for various commodities at different times and temporarily gained the cargo until the other carrier matched the rate. Matson matched a CSX rate for paint, lacquer and, in turn, published a new rate for paint, lacquer that CSX then matched. Matson published point rates from several locations for mixed groceries and restaurant supplies, including foodstuffs, that were matched by CSX. CSX also matched Matson's rate for plastic pipe, while Matson matched CSX's rate for salt in bags and resin.

Matson publishes two tariffs in the Guam trade, Tariff Nos. 2045 and 44, which are filed with the Surface Transportation Board (STB), and two exempt circulars, Circular Nos. 7800 and 7600. In September, 1996, the STB-filed tariffs contained 292 separate commodity items, and the two exempt circulars contained 283 separate commodity items. The rates that Matson charges to carry dry cargo to Guam vary enormously. In September 1996, those rates ranged from \$1,655 for moving a 40-foot container of for printing paper westbound to \$14,000 for moving a container of PCB waste eastbound.

Many factors determine where within that range the rate for a particular commodity will fall. One obvious factor is the demand for the transportation. Another is the rates and services offered by other carriers in the trade for the same or similar commodities. Other factors include the cost of providing the services, the volume of cargo to which customers can commit and the value of the commodity. Matson generally charges more to carry valuable commodities, such as furniture or machinery, than it does to carry lower value commodities, such as animal feed or rice. All of these factors vary greatly from commodity to commodity, and many of them can change quickly over relatively short periods of time. For example, demand for different services

or commodities has fluctuated tremendously with changes in tourism, U.S. military operations and general economic conditions. Since 1996, demand has generally declined, which has been reflected in the many rate reductions Matson has effected, described earlier.

Matson offers a variety of modes of service, from exclusively ocean carriage (container yard to container yard or CY-CY for short) to intermodal moves involving vessel and one or more other modes of transportation, such as rail or truck. In setting intermodal rates, Matson must consider the ocean freight rate that Matson currently charges for a similar commodity, wharfage charges at the applicable ports, the rail or motor carrier cost, origin drayage cost and any fuel surcharges. Many customers prefer that drayage from their warehouse to the terminal yard be included as part of the through rate. In that case, there is no longer a recognizable CY-CY charge but, instead, the participating carriers each receive a division of the through rate.

As noted earlier, the volume of cargo to which a customer can commit is also important in the rate setting process. Large shippers use their large volume of cargo to negotiate lower freight rates. A customer may commit business to Matson in order to receive a lower rate. Large volume shippers who have received favorable rates based on a volume commitment include Macy's (department store merchandise), Morrico (vehicles), Bensen-Do-It-Best (building materials), Xerox (duplicating machines), Ross (department store merchandise) and Dewitt (packing material). CSX has also been successful in securing the cargo of large shippers. Matson lost the Payless account to CSX last year and also lost the vast majority of the cargo shipped by Cost U Less. CSX carries all the Procter & Gamble shipments to Guam.

Matson frequently offers project rates for shippers who supply goods to a particular project, basing the rate on the size of the project and the projected number of containers that will be offered for transport. This is a highly competitive aspect of the Guam trade. Examples of

projects for which Matson has offered special rates include the Anderson Air Force Base Pipeline Project, the Dodea Schools Project, the Anderson Air Force Base 102 Unit Housing Project, the Army National Guard Armory Project and the Army Reserve Project. Matson lost the Tycom Project after CSX undercut the rates that Matson had negotiated.

Third parties, such as freight forwarders, can often obtain lower rates than the beneficial cargo owner could on his own because the freight forwarder has the ability to mix and match various commodities that he receives from his own customers. Shippers of over-dimensional cargo usually ask for a reduced rate and Matson will tailor a rate for a specific piece of equipment that will expire after the piece has been shipped.

The status of the customer can affect the rate that Matson charges. For example, the U.S. Department of Defense places limitations on rates. The U.S. Postal Service requires carriers to submit blind bids for cargo.

In my 37 years of experience, I have never known General Order 11 to be used to examine existing rate levels but only to assess proposed general rate increases.

VERIFICATION

I, Peter P. Wilson, verify under penalty of perjury, that the foregoing statement is true and correct. I further certify that I am qualified and authorized to file this statement.

Executed this 17th day of April, 2002.


Peter P. Wilson

Testimony of Mark D. Miller

My name is Mark D. Miller. I am employed as the Manager, Market Planning for Matson Navigation Company, Inc. ("Matson"). I have overall responsibility for developing cargo forecasts, which are major components of the Company's planning process.

I have been employed by Matson since 1979 and have held several sales and marketing positions. Before joining Matson, I was Traffic Manager and Customer Service Manager for American Can Company between 1976 and 1979. From 1972 to 1976, I served as an officer in the U.S. Army. I have a B.S. degree in business with additional graduate work in economics, forecasting and business.

Matson entered the Guam trade in 1996, after purchasing the vessels used by American President Lines, Ltd. ("APL") when it served the trade. Matson carried cargo to Guam pursuant to an Alliance Agreement with APL whereby Matson operated five vessels on an itinerary from Oakland to Honolulu to Guam to Busan to Hakata to Nagoya to Yokohama to San Pedro. A Matson vessel called Guam on a weekly basis. The five vessels used were three C-9 vessels with a capacity of 2,824 TEUs, one C-8 vessel with a capacity of 1,981 TEUs and the R. J. PFEIFFER with a capacity of 2,229 TEUs. Sea-Land also called Guam on a weekly basis with vessels that had an average capacity of 2,320 TEUs. At the time that Matson entered the Guam trade, approximately 625 containers per week moved from the U.S. West Coast to Guam. Given the combined capacity of the Matson and Sea-Land vessels calling Guam, it is obvious that the trade was overtonnaged. Even when the smallest vessel in the Matson rotation called Guam, it alone could carry over three times the total number of containers carried to Guam from the U.S. mainland.

Today, the amount of cargo for which Matson and CSX Lines ("CSX") compete has dropped to approximately 500 containers per week moving from the U.S. West Coast to Guam and Micronesia, with Matson carrying slightly greater than 50% of the cargo. Of the 500 containers, roughly 400 containers, or 80%, are shipped to a final destination in Guam, while the remaining 20% are transshipped through Guam to destinations in the Commonwealth of the Northern Mariana Islands, the Republic of Palau and the Federated States of Micronesia.

U.S. military shipments account for 21%, or 84 out of 400, of the weekly container shipments whose ultimate destination is Guam. Due to U.S. military policy, this freight is allocated equally between Matson and CSX. Foreign-flag carriers are prohibited from transporting the containers. The non-competitive nature of military cargo drastically reduces the amount of freight for which Matson can compete.

Entry to the Guam trade is easier than entry to the other noncontiguous domestic trades because foreign-built vessels can be used. While APL sold Matson the string of vessels that it previously used to call at Guam, it could call at Guam on its way to Asia with another string of vessels.

Although geographically isolated from the U.S. mainland, Asia, and Australia/New Zealand, carriers from all three of these continents make regular calls at Guam. In addition to the two U.S.-flag carriers currently serving Guam (Matson and CSX), there are also two foreign-flag vessel operators: Kyowa Shipping Co., Ltd. and Kambara Kisen Co., Ltd. (Kambara and Marianas Express Lines, Ltd. provide a combined service.) The foreign-flag carriers call Guam on 21-day and monthly rotations, while Matson and CSX each offer once-a-week service. Since Guam is geographically closer to Asia than it is to the U.S. mainland, these foreign-flag carriers offer very real competition to Matson. The foreign-flag carriers have a combined carriage of

between 40 and 80 containers per week to Guam from Asia and Australia/New Zealand. This represents up to 14% of the total cargo arriving in Guam. Excluding U.S. military shipments, which they are not eligible to carry, the two foreign-flag carriers carry as much as 20% of the commercial cargo shipped to a final destination in Guam.

Matson carries a wide assortment of commodities to the island, including autos, construction materials, machinery, consumer goods, dry and fresh foods and beverages. The foreign-flag carriers are in direct competition with Matson because many of the U.S. products carried by Matson are interchangeable with similar foreign products. In addition, the foreign-flag carriers transport some products that are not available from the U.S. mainland, such as Korean food or autos manufactured in Taiwan. Unscheduled foreign carriers also carry bulk commodity shipments, such as sand, fuel, steel and cement for one-time construction projects and infrastructure.

The small size of the Guam trade makes carriers in the trade especially vulnerable to even slight fluctuations in cargo offerings. Because of the cyclical nature of freight demand, weekly container volumes can fluctuate significantly. Due to the large U.S. military presence on Guam, there is a strong correlation between military activity and freight demand. The carriers are directly affected by any reduction in the military presence on the island.

The Guam economy is also very dependent on tourism, especially tourists from Asia since Guam is much closer to Asia than the U.S. mainland. Japanese tourists alone account for approximately 75% of the tourists that visit Guam. The island is subject to such natural disasters as hurricanes and earthquakes. When one of these events occurs, the decline in visitors to Guam is dramatic. Equally devastating to the tourist industry are manmade disasters, such as the Korean Airlines crash that occurred a few years ago. Since substantially more tourists come to

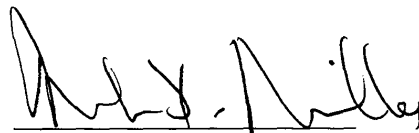
Guam from Asia than the United States, the economic boom experienced by the U.S. mainland did not help Guam tourism. In fact, the depressed Asian economies in 1997 and 1998 and continued weakness in the Japanese economy have accounted for a substantial decrease in tourism. Fewer tourists mean less food, drink and consumer goods shipped to Guam. Fewer tourists also mean that no new hotels are built and, as a result, fewer construction materials are shipped. The terrorist attacks on September 11 hurt tourism worldwide as people tended to stay close to home. Guam was even harder hit than other parts of the world because Asians began avoiding travel to U.S. states and possessions, which they view as potential targets.

The future of economic growth on Guam is uncertain. Since entering the Guam trade, Matson has witnessed a continual decline in the amount of cargo destined for Guam. This coincides with the weakening of certain Asian economies, particularly Japan, and the reduction in the U.S. military presence on Guam. Over the past four years alone, total cargo shipping from the U.S. mainland to destinations in Guam has declined 20%. Military cargo destined to Guam has declined 14% over the same period, while cargo moving through Guam and destined to points beyond has declined 10%.

VERIFICATION

I, Mark D. Miller, verify under penalty of perjury, that the foregoing statement is true and correct. I further certify that I am qualified and authorized to file this statement.

Executed this 18 day of April, 2002.


Mark D. Miller

VERIFIED STATEMENT OF DANIEL DOWNES

My name is Daniel Downes. I am employed as the Director of Marketing for CSX LINES, LLC's ("CSX") Hawaii - Guam Service.

OPERATIONAL INFORMATION, SCHEDULING AND ROTATION OF VESSELS IN THE HAWAII/GUAM SERVICE.

CSX operates five vessels in its service from the mainland to Guam. The five vessels operate on two strings. The first vessel string, designated the Pacific Express Service ("TP1") operates on a fixed weekly schedule with direct sailings from Tacoma every Sunday and Oakland every Wednesday. TP1 string vessels then sail to Honolulu (arriving the following Sunday). Vessels depart Honolulu the following Tuesday and arrive in Guam seven days later. The vessels then depart Guam and sail to Hong Kong and Taiwan before returning to Tacoma. Cargo loaded in the United States for ports beyond Guam in Asia is transported by Maersk-Sea-Land Lines and not by CSX. For example, the M/V CSX RELIANCE, voyage RG127W is scheduled to depart from Tacoma on June 23, 2002 and Oakland on June 26, 2002.¹ The vessel is scheduled to arrive in Honolulu on June 30 and in Guam on July 9, 2002. The M/V CSX RELIANCE is scheduled to depart from Guam on July 10 and will arrive in Hong Kong on July 13, 2002. The vessel will proceed to Kaohsiung, Taiwan on July 15, 2002 and is scheduled to return to Tacoma on July 26, 2002.

The second string designated the California Hawaii Express Service ("CHX") operates on a fixed weekly schedule with sailings from Oakland (every Wednesday) and Long Beach every

Saturday. CHX string vessels arrive in Honolulu every Wednesday where cargo destined for Guam is unloaded and relayed to TP1 string vessels for delivery to Guam and Saipan. The CHX vessel then returns to Oakland. For example, the M/V CSX Navigator voyage 167S is scheduled to depart from Oakland on June 12, and Long Beach on June 15. Cargo destined for Guam will be unloaded from the vessel upon its arrival in Honolulu on June 21, 2001. Subsequently, the Guam cargo will be loaded upon the M/V CSX RELIANCE, voyage RG127W, and track the schedule set out above. After unloading all its cargo in Honolulu, the M/V CSX Navigator will load any cargo destined from Hawaii to the mainland and will sail back to Oakland.

Additionally, CSX purchases space from Matson for CSX cargo moving from Long Beach to Guam. This service, which departs from Long Beach every Wednesday is, designated the mid-week express ("MWX") services. Cargo destined for Guam and Saipan is unloaded in Honolulu and relayed to the next Guam-bound TP1 vessel. CSX neither owns nor operates these vessels. A typical shipment from Long Beach is loaded in Long Beach on Wednesday and arrives in Guam 13 days later. For example, CSX cargo loaded on the M/V EVA, voyage EU171S will depart from Long Beach on June 26 and arrive in Honolulu on June 30, 2002. It will then be relayed to Guam on the M/V CSX RELIANCE, voyage RG127W, and arrive on July 9, 2002.

In each situation described above CSX is required to deal with a differing set of operational and ownership circumstances. In its TP1 string CSX transports cargo directly from the mainland to Guam without relay. Consequently, containers destined for Guam are only loaded and unloaded once from the vessel. This is the cargo equivalent of a direct flight. However, due to the nature of its agreement and chartering relationship with Maersk-Sea-Land

¹ CSX also accepts intermodal cargo from CSX rail and motor terminals throughout the mainland. These points include: Elizabeth, New Jersey; Jacksonville, Florida; Chicago, Illinois; Memphis, Tennessee; New Orleans,

("Maersk Lines"). CSX is only involved in the transportation of cargo to Guam, Saipan, Tinian and Rota. All cargo loaded on TP1 string vessels for non-U.S. destinations are transported by and for the account and expense of Maersk Lines. CSX does not transport cargo beyond Guam except for cargo that is transshipped by barge from Guam to Saipan, Tinian, and Rota..

Cargo moving to Guam on the CHX string is subject to unloading and relay in Honolulu. This is the cargo equivalent of changing planes at hubs in Atlanta, Chicago, or Charlotte. The cargo loaded on CHX string ships are, with the exception of cargo moving under slot charter with Matson to Hawaii, for the account of CSX. CSX is not involved in any long term chartering or vessel sharing agreement with Maersk Lines for vessels sailing between the mainland and Hawaii and back on this string. However, once CHX-string cargo is relayed to a TP1 string vessel for on carriage to Guam, that cargo is commingled with cargo moving subject to the economic and operational factors inherent in CSX's commercial relationship with Maersk Lines.

Cargo moving on the MWX is loaded onto a vessel on the mainland that is neither owned nor operated by CSX. Consequently, the economic factors inherent in the first leg of the voyage are those typically found in a simple slot chartering agreement. However, cargo destined to move beyond Hawaii for Guam is subject to relay on a TP1 string vessel at CSX's terminal in Honolulu.

Consequently, cargo shipped by CSX to Guam is shipped in a number of different ways on vessels that are subject to a wide array of operational and ownership scenarios.

Lastly, and as indicated above, CSX, not unlike most other carriers in the domestic and foreign liner trades have transitioned from a purely port-to-port service to a fully integrated intermodal point-to-point service. CSX accepts container loads of cargo for Guam at many intermodal points in the United States. An indication of the comprehensive nature of CSX's

Louisiana; Houston, Texas, and St. Louis, Missouri.

intermodal service is contained in the exemplar sailing schedules set out in Attachment A to this Statement.

TARIFF AND PRICING INFORMATION

As with any trade, the CSX tariff governing shipments from the United States to Guam contains a wide array of commodities. CSX does, in fact, transport a diverse cargo mix to Guam. A typical vessel will include containers of canned goods (including meats, fruits, and vegetable), snack foods, beverages (soda, beer, and fruit juice), automobiles and Sport Utility Vehicles, appliances, dry goods, building and construction material and household good and personal effects. Given the multitude of U.S.-origin points for cargo moving to Guam each active item in the CSX tariff is likely to reference a range of rates for each commodity depending upon the load point. For example, CSX maintains a port-to-port container rate for canned goods as well as numerous point-to port rates for container loads of canned goods original in, for example, Chicago, Seattle, Kansas City, Oklahoma City, and Cincinnati. Similarly, CSX maintains a multitude of point-to port intermodal rates for many commodities, whether rice, construction materials, lumber and building supplies that moves regularly in the trade or from that point.

Given the ever-changing intermodal locations, changing rail, and local truck rates, and various trade-wide conditions to which any carrier is subject (inconsistent demand, seasonal fluctuations in cargo volume, and economic down and up swings) the CSX lines tariff is consistently changing and evolving. In effect it is a dynamic document that reflects market trends, competition in the trade, sudden demands for space, large-volume cargo offerings and economic changes in general.

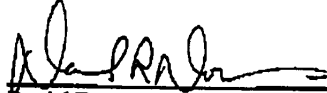
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APR 23 '02 07:37AM SEALAND PAC DIV
Apr-23-02 11:34am From-Troutman Sanders LLP

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F-888


Daniel Downes

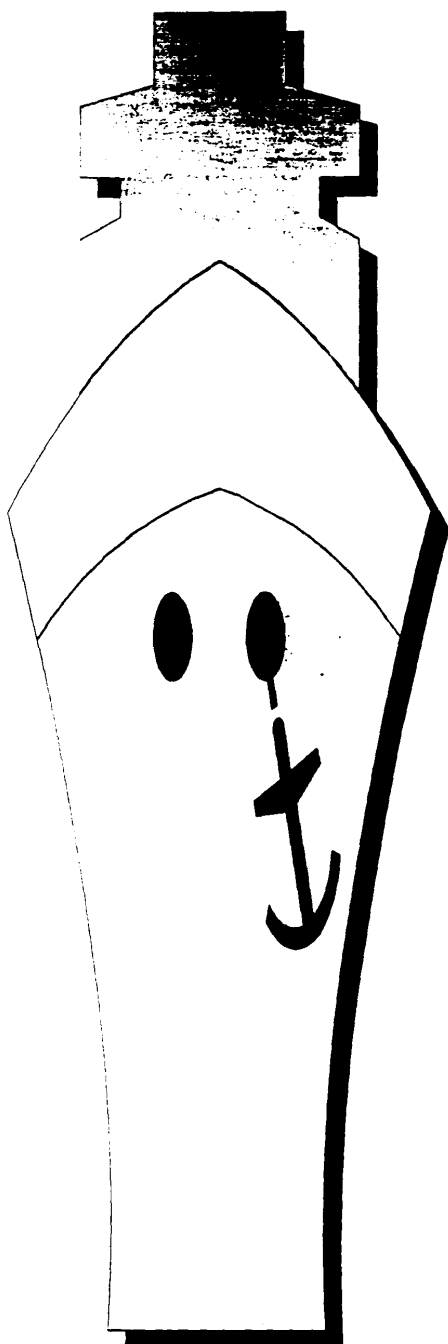
Subscribed and sworn to before me

this 23rd day of April, 2002.


Notary Public

My Commission expires on March 29, 2004





A Report to Congress

Competition in the Noncontiguous Domestic Maritime Trades

U.S. Department of Transportation

March 1997



THE SECRETARY OF TRANSPORTATION

WASHINGTON, D.C. 20590

March 24, 1997

The Honorable John McCain
Chairman, Committee on Commerce,
Science and Transportation
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Section 407 of the Interstate Commerce Commission Termination Act of 1995 requires the Department of Transportation to prepare a report on competition in the noncontiguous domestic maritime trades.

Based on information gathered from a variety of sources, we have concluded that economic and competitive conditions differ significantly in each of the major offshore trades studied (Alaska, Hawaii, Puerto Rico, and Guam). However, our principal conclusion is that there is no need to increase Federal regulatory control over ocean freight rates in the domestic offshore maritime trades. Indeed, we believe that Congress should consider ending tariff filing requirements in the Alaska and Puerto Rico trades. We also believe that the Congress should consider reducing the Zone of Rate Freedom to between 3 percent and 4 percent.

The Department looks forward to working with you to implement the recommendations contained in this report.

An identical letter is being sent to Senator Hollings, Senate Committee on Commerce, Science, and Transportation and Chairman Schuster and Congressman Oberstar, House Committee on Transportation and Infrastructure.

Sincerely,

A handwritten signature in black ink, which appears to read 'Rodney E. Slater', is written over a horizontal line.

Rodney E. Slater

Enclosure



THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

March 24, 1997

The Honorable Bud Shuster
Chairman, Committee on Transportation
and Infrastructure
U.S. House of Representatives
Washington, DC 20515-3001

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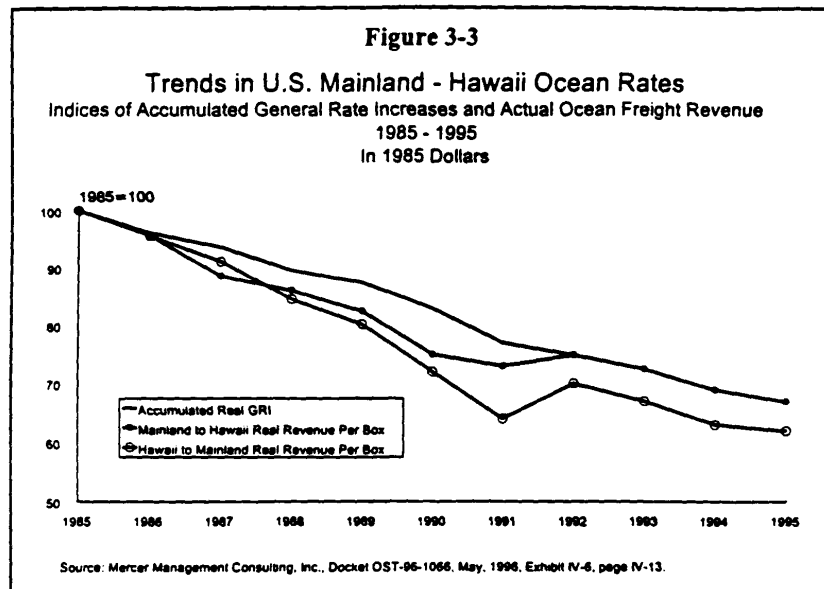
Enclosure

A Report to Congress

**Competition
in the
Noncontiguous
Domestic
Maritime
Trades**

U.S. Department of Transportation

March 1997



2. Guam Trade

Summary:

- Liner service to Guam is limited by the small volume of cargo being transported, a significant directional imbalance in the flow of traffic, and the Territory's distance from the U.S. mainland.
- Liner service from the U.S. mainland is economically viable only if it is offered in conjunction with continuing service to the Far East or as a part of liner service to Hawaii. Carriers serving the Guam trade estimate that only about 25 percent of available capacity is used for cargoes destined for Guam, the remainder being allocated to cargoes destined for Hawaii or the Far East (or remains unused).
- Since 1980 five carriers have entered the trade and four have exited. At any given time, there has generally only been two U.S. flag carriers offering service to Guam from the U.S. mainland.
- Since 1989 ocean carriers serving Guam have filed rates at the ICC/STB although previously they had filed rates with the FMC. An initial decision on competition in the Guam trade conducted by an FMC Administrative Law Judge concluded that the costs of serving the market were high and that ocean freight rates were not unreasonable.

- Since 1990, after taking general inflation into account, average freight rates appear to have declined in the Guam trade.

a. Economy and Trade

Liner shipments from the U.S. mainland to Guam totaled approximately 28,500 FEUs in 1995 (Figure 3-4). Guam receives nearly ten times as much liner cargo -- mainly consumer goods and U.S. Government and military cargoes²⁵ -- from the U.S. mainland than is shipped from Guam to the U.S. mainland.²⁶ (According to the FMC, 40 percent of Guam's total waterborne commerce is with foreign countries.²⁷) Between 1989 to 1995, shipments to Guam from the U.S. mainland increased by nearly one-third. More recently, however, economic growth on Guam has slowed, primarily as a result of an economic recession in Japan and a reduction in the U.S. military presence on the Island.

b. Liner Services

The Guam trade is served by Matson and Sea-Land.²⁸ The total weekly capacity available to shippers for their cargoes is approximately 2,500 FEUs (Table 3-3).²⁹ Guam is over 5,000 miles from the U.S. mainland. There is not enough traffic being shipped to fully utilize the four vessels needed for an ocean carrier to provide direct service on a weekly basis from the U.S. mainland to Guam and then back to the mainland (so-called turn-around service). Consequently, both Matson and Sea-Land provide weekly "passby" service on the way to the Far East after first stopping in Hawaii. To provide this service, Matson uses four vessels acquired from APL plus another containership. Matson books traffic westbound from the U.S. mainland to Hawaii and Guam; these vessels then continue on to the Far East where they transport freight back to the U.S. mainland under an arrangement with APL.³⁰

²⁵ Under the Cargo Preference Act of 1904 [10 U.S.C. 2631 (1994)], U.S. military cargo must move on U.S.-flag ships.

²⁶ Mercer Management Consulting, *op. cit.*, p. III-4.

²⁷ *The Government of Guam, Et Al v. Sea-Land Service, Inc. and American President Lines Ltd.*, Docket No. 89-26, Initial Decision of Administrative Law Judge Dolan, p.28.

²⁸ In 1996, Matson acquired American President Lines' Guam service and six vessels, three of which had been used in the Guam trade.

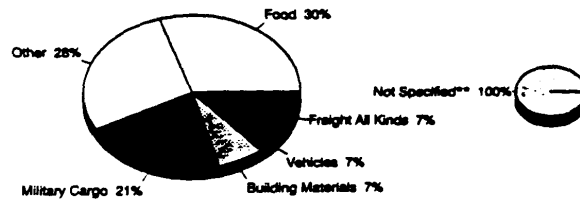
²⁹ Mercer, *op. cit.*, p. III-5.

³⁰ U.S. maritime law permits foreign-built vessels to serve Guam, and APL had employed such vessels in the past. But this option is not possible when the U.S. mainland-Hawaii and the U.S.-mainland Guam trades are served on the same sailing.

Figure 3-4

GUAM-U.S. MAINLAND LINER TRADE

Major Commodities by Direction, 1995



Total From Mainland 28,500 FEU*

Total To Mainland 3,000 FEU*

Source: Mercer Management Consulting

* Forty Foot Equivalent Units (volume measure)

** Comprised primarily of returning military shipments and garments.

Table 3-3

Liner Shipping Services in U.S./Guam Trade - 1996

Carrier	Type of Vessels Operated	Number of Vessels In Service	Average Weekly Capacity (FEUs)	Service Frequency
Matson	Containership	5	1,365	Weekly
Sea-Land	Containership	5	1,170	Weekly
Total		10	2,535	Twice Weekly

Source: Mercer Management Consulting

Only about 25 percent of deployed vessel capacity is used to transport cargoes from the U.S. mainland to Guam. The remaining space is used to transport cargoes destined for Hawaii or the Far East, to haul empty containers back to the Far East, or, as a last resort, remains unutilized. Because the distance between Guam and West Coast ports is approximately 5,100 nautical miles, barge service is not competitive with liner service.

c. Concentration and Competition

Market share estimates for Matson and Sea-Land in the U.S. mainland to Guam trade are not readily available. An industry study, using 1995 data, estimated that for westbound movements, APL had a 52 percent market share and Sea-Land had a 48 percent share; estimated shares for the small volume of traffic moving from Guam to the U.S. mainland were 41 percent and 59 percent, respectively.³¹ In short, concentration is high in the Guam trade.

Since 1972, seven carriers have entered the trade and five have exited (Table 3-4). Sea-Land entered the trade after purchasing five vessels from U.S. Lines. Island Shipping Lines entered the trade in 1986 after purchasing two 130-TEU containerships for \$1.5 million from the Federal government. Island Shipping carried cargo for Lykes Brothers as part of feeder service from Yokohama to Guam and Saipan, but withdrew from the trade in 1987.³²

Table 3-4
Liner Operators in the U.S. Mainland-GUAM Trade
Entries and Exits, 1974-1996

	'74	'75	'76	'77	'78	'79	'80	'81	'82	'83	'84	'85	'86	'87	'88	'89	'90	'91	'92	'93	'94	'95	'96
Sea-Land Services																							
U.S. Lines																							
APL																							
Matson																							
Island Shipping																							
Seabran Lines																							

³¹ Mercer Management Consulting, op. cit., May 1996, p. III-7.

³² Chris Dupin, "Island to Enter Guam Trade," *Journal of Commerce*, March 7, 1986.

Thus, ocean carriers have been able to acquire vessels, port facilities, and the infrastructure services necessary to provide liner service, indicating that entry barriers are not insurmountable. Terminal space at Guam's Port of Apra is publicly owned and available to lease. However, port facilities and channel depths at Guam's Apra Harbor limit vessels to a draft of 35 feet, which means that the harbor cannot accommodate the very large containerhips used by U.S. flag carriers in transpacific service, especially if they are fully loaded.

Liner vessels suitable for Guam trade, and for the other noncontiguous domestic trades, are expected to become more readily available over the next several years, as vessels built in U.S. shipyards with Construction Differential Subsidy reach the end of their statutory economic lives (and thus can be redeployed in the domestic trades). Further, as current Operating Differential Subsidy contracts expire, U.S. flag vessels now deployed in the foreign trades may be redeployed to the domestic trades.

The limited volume of traffic moving in the U.S. mainland to Guam trade makes it difficult for carriers to enter the market, since they can only serve the trade in connection with a transpacific voyage. Since the majority of traffic in the transpacific trade moves eastbound, the westbound Guam trade provides incremental cargoes for U.S. liner companies that are returning to the Far East. Only large, efficient, and well-capitalized firms have the financial and managerial resources necessary to operate successfully in the highly competitive transpacific market.

Until June 1989 there was an authorized liner conference for carriers serving Guam. Under the Guam Rate Agreement, ocean carriers were authorized to discuss and set rates collectively.³³ With the demise of the conference, however, there is no authority for carriers to collectively set rates. Excess capacity in the Guam trade has played a major role in preventing shipping rates from increasing. While only two U.S. flag carriers serve the trade, Guam also receives shipping services from foreign-flag carriers based in Asia and Europe, which provides indirect competition to U.S. flag carriers.

d. Rates in the Guam Trade

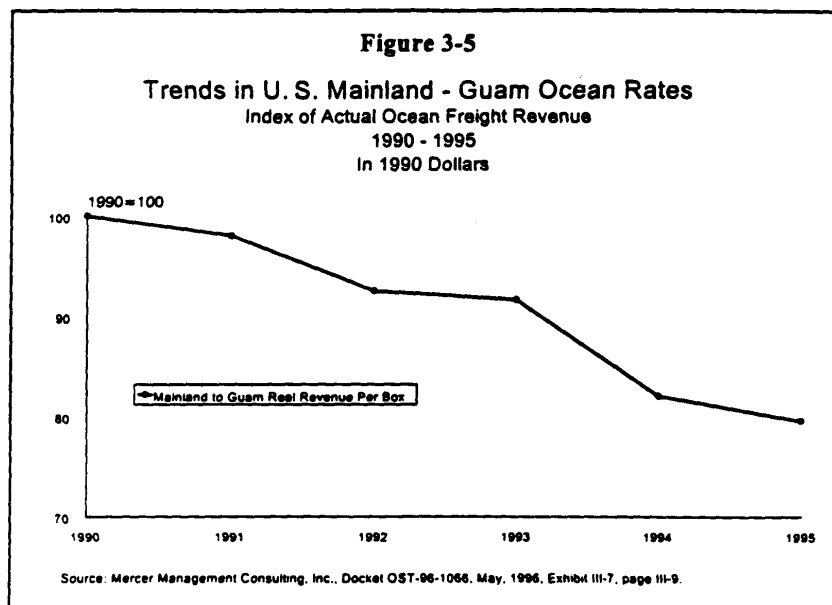
The only FMC investigation of ocean freight rates in the domestic offshore trades in recent years was a complaint brought in 1989 by the Government of Guam -- supported by the U.S. Navy Military Sealift Command and 13 shippers -- against rates charged by APL and Sea-Land, the two U.S. flag carriers operating in the trade during the relevant time period. Recently, however, after a six year investigation, an Administrative Law Judge (ALJ) dismissed this complaint.³⁴

³³ Comments of the Government of Guam, op. cit., p. 11.

³⁴ There was considerable argument during this proceeding about the extent to which the complainant's application of FMC cost-finding methods properly reflected the particular costs of serving Guam on voyages from the U.S. mainland to the Far East -- including the restricted draft of its harbor -- and also about what, if any, rates on international traffic handled by the respondent carriers might be reasonably comparable. In June 1996, the complaint was dismissed in an initial decision by an FMC Administrative Law Judge. Among other points, this decision noted Guam's tourism-driven economic boom during the period at issue, its history of ocean rate stability, the "virtual absence of shipper dissatisfaction," the lack of evidence that any potential traffic had not moved, ready

The case is now before the full FMC, which has yet to rule on whether it will adopt the ALJ's decision or issue its own decision.

No carrier operating in the U.S. mainland Guam trade has proposed a GRI in recent years. Aggregate freight revenue per container for the U.S. mainland to Guam trade (since 1991 APL's and Sea-Land's tariffs have been filed with the ICC/STB) showed a 1995 level of less than 80 percent of the 1990 level, after adjusting for inflation (Figure 3-5). According to one study, this reduction was comparable to the overall rate yield change during that period in the transatlantic container trade and somewhat lower than what occurred in the transpacific trades.³⁵



[footnote ³⁴ continued] availability of foreign-sourced goods, expanding service by foreign-flag liner service operators, and "record evidence ... that foreign-flag operators serving Guam from Asia and Australia -- much shorter voyages than to Guam from the U.S. West Coast -- charge rates that are comparable to or higher than APL's." The decision also noted that with the freight rates that actually existed at the time, if APL were to have used the methodology proposed by the Government of Guam, the calculated rate of return for APL would have swung widely in this period from -5.1 percent in one year to as much as 98 percent in another year. In order to achieve the rates of return acceptable to the Government of Guam, according to the ALJ, the average rate levels for APL would have had to swing considerably from year to year, allowing as much as a 54.9 percent increase in one year followed by two years of required cumulative decline of 27 percent and 37.5 percent. Initial Decision of Administrative Law Judge Dolan, pp. 30, 25, and 26, respectively.

³⁵ Mercer Management Consulting, op. cit., May 1996, p. III-8 and III-9.