

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 657 (SUB-NO. 1)

MAJOR ISSUES IN RAIL RATE CASES

**REPLY COMMENTS OF
THE GOVERNMENT OF THE TERRITORY OF GUAM**

In accordance with the procedural schedule established in this proceeding, The Government of the Territory of Guam ("GovGuam") is submitting its reply comments with respect to several of the issues that were raised in the Notice of Proposed Rulemaking ("NPRM")

In its opening Comments, GovGuam explained that its interest in this proceeding derived from the possibility that the Board might direct the parties in STB Docket No. WCC-101, *The Government of the Territory of Guam v. SeaLand Service, Inc. and Matson Navigation Company, Inc.* ("WCC-101") to utilize the stand-alone cost ("SAC") test to determine the maximum reasonable rates for the movement of freight between the mainland United States and the Territory of Guam. Citing submissions it had made in WCC-101, GovGuam demonstrated that the Board's current application of SAC would need to be revised in several respects if it was to be utilized as the appropriate methodology for determining maximum reasonable rates in that proceeding.

While the Board has received comments in response to the NPRM from a large number of parties, no Commentor other than GovGuam has addressed the issues raised in the NPRM except as they may relate to establishing maximum reasonable rates in rail

carrier cases. No one except GovGuam has provided any comments as to whether the Percent Reduction Methodology ("PRM") should be used either in WCC-101 or future cases that may involve establishing maximum reasonable rates for water carriers in the domestic offshore trades. Similarly, no party other than GovGuam has addressed the issue of whether the SAC analysis period should be reduced from the standard twenty years to ten years with respect to cases that have already been pending before the agency for an extended period of time. Nonetheless, it is both appropriate and important for the Board to consider the issues raised by GovGuam and establish appropriate guidelines for the conduct of these few, but still important, water carrier maximum rate cases. The complaint in WCC-101 raises significant concerns about the abuse of duopoly pricing power by the incumbent carriers, all of which has lead to a history of grossly excessive pricing of Guam shippers and receivers for a substantial period of time. Hence, the NPRM and two of the issues raised therein are directly relevant to WCC-101.

With respect to the proposal to discontinue the mandated use of PRM, GovGuam has demonstrated that the economics of the Guam trade are substantially different from that of the North American rail markets. Without conceding that the various railroad commenting parties that criticized this particular proposal are correct in their analyses, it appears that one of their primary arguments is that the use of the Maximum Markup Methodology ("MMM") or Maximum Contribution Methodology ("MCM") would contravene demand-based differential pricing principles and prevent them from earning sufficient revenues to make the necessary capital investments. *See, e.g.,* the Joint Comments of Norfolk Southern Railway Company and CSX Transportation, Inc., filed

May 1, 2006 at 6-7; Comments of the Association of American Railroads, filed May 1, 2006 at 3-4, 9-10.

Whatever validity those contentions might have in rail rate cases, the record in WCC-101 and the previous litigation on the same topic at the Federal Maritime Commission conclusively demonstrates that these issues have no relevance with respect to the movement of goods to and from Guam in the domestic offshore trades. To the contrary, it is clear that the water carriers serving Guam are essentially moving freight in two separate markets. One market is comprised of those shippers and receivers in Guam who tender or receive freight that moves to or from other points in the United States, all of whom are subject to duopoly pricing due in large part to the entry barriers created by the Jones Act and the requirement to use U.S. flag vessels. The other completely separate market consists of TransPacific cargo shippers, all of whom are moving cargo in the same vessels serving Guam, that participate in a highly competitive market and who pay substantially lower rates than those of Guam shippers. Hence, allocating excess charges in the domestic off-shore trades to the market bearing that cost will not interfere with differential or Ramsey pricing prerogatives of the carriers serving the TransPacific trades.

Moreover, since the Guam traffic is essentially a pass-by trade that constitutes a very small portion of the overall TransPacific trade, curbing the current excessive pricing of the incumbent carriers will not have any effect on any existing capacity constraints or decisions by the carriers to make additional capital investments in capacity. Instead, those capital investment and capacity decisions are made in response to supply and demand considerations affecting the TransPacific trade, not what may be necessary to serve Guam.

Accordingly, GovGuam continues to believe that if constrained market pricing and the SAC constraint is used in WCC-101 or any future water carrier rate cases in the domestic offshore trade, the complainants should be free to select the appropriate and equitable rate reduction methodology fitting their particular case – whether it be PRM, MCM or MMM – once it has been determined that the aggregate stand-alone revenues exceed the aggregated stand-alone costs.

In its Comments, GovGuam also addressed the issue of whether the SAC analysis period should be shortened. Although an argument can be made for why this may be appropriate in rail SAC cases, GovGuam nonetheless urged that the Board not established a flat rule applicable in all cases in view of the particular fact circumstances that are present in the pending proceeding in WCC-101. Since WCC-101 was initiated by a complaint in September 1998, and since the sought reparations period would extend back another two years, the imposition of a maximum time period of ten years would not even cover the time frame during which WCC-101 would have been pending. And, as a twenty-year analysis means that any cost and volume projections in WCC-101 would be looking less than ten years into the future, the concerns expressed by various commentators about the accuracy of future projections would not be applicable in WCC-101.

For these reasons, GovGuam continues to believe that (1) the Board should permit complainants to utilize, at their option, the Maximum Markup Methodology or the Maximum Contribution Methodology; and (2) the duration of the SAC analysis should be determined on a case-by-case basis and that there should not be any mandatory restriction of this analysis in WCC-101 to an arbitrary 10-year period.

Respectfully Submitted,


By
Edward D. Greenberg

GALLAND, KHARASCH, GREENBERG,
FELLMAN & SWIRSKY, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007

Telephone: 202-342-5277
Facsimile: 202-342-2311

Counsel for The Government of the
Territory of Guam

Dated: May 31, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of May, 2006, served a copy of the foregoing Comments of The Government of the Territory of Guam on the following persons listed below via first-class mail, postage pre-paid:

Whiteside, Terry C
Whiteside & Associates
3203 3Rd Ave N Ste 301
Billings, MT 59101

Moates, G Paul
Sidley Austin Llp
1501 K Street, N.W.
Washington, DC 20005

English, Glenn
Natural Rural Electric Cooperative
Association
4301 Wilson Blvd.
Arlington, VA 22203

Nelson, Michael A.
Arkansas Electriccooperative
Corporation
131 North Street
Dalton, MA 01226

Dowd, Kelvin J
Slover & Loftus
1224 Seventeenth Street Nw
Washington, DC 20036-3003

Leseur, John H
Slover & Loftus
1224 17Th Street N.W.
Washington, DC 20036-3003

Mills, Christopher A
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036-3003

Dimichael, Nicholas J
Thompson Hine Llp
1920 N Street, N.W. Suite 800
Washington, DC 20036

Hemmersbaugh, Paul A
Sidley Austin Llp
1501 K Street Nw
Washington, DC 20005

Schwartz, Mark W
Western Coal Traffic League
1224 Seventeenth Street, N.W.
Washington, DC 20036-3003

Richardson, Alan H.
American Public Power Association
2301 M Street, N.W.
Washington, DC 20037

Pfohl, Peter A
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036-3003

Mcbride, Michael F
Leboeuf Lamb Greene & Macrae
1875 Connecticut Avenue Nw Ste 1200
Washington, DC 20009-5728

Starks, Dennis J
Association Of American Railroads
50 F Street Nw
Washington, DC 20001-1564

Rinn, Louise A
Union Pacific Railroad Company
1400 Douglas Street, Stop 1580
Omaha, NE 68179

Rosen, Jeffrey A
U S Department Of Transportation
400 Seventh Street, S.W.
Washington, DC 20590

Warchot, Louis P
Association Of American Railroad
50 F Street, Nw, Suite 12041
Washington, DC 20001

Cutler Jr, John M
Mccarthy Sweeney Harkaway Pc
2175 K Street Nw Suite 600
Washington, DC 20037

Awan, Mazhar Ali
Transportation Economics
P. O. Box 34
Oakton, VA 22124-0034

O'connor, Tom
Snavey King Majoros O'connor &
Lee Inc
1220 L St Nw Suite 410
Washington, DC 20005

Loftus, C Michael
Slover & Loftus
1224 Seventeenth Street Nw
Washington, DC 20036-3003

Grisso, Michael E
Exec. Director, Alliance For Rail
Competition
101 Constitution Ave., Nw, Suite 800
Washington, DC 20001

Grisso, Michael E
Exec. Director, Alliance For Rail
Competition
101 Constitution Ave., Nw, Suite 800
Washington, DC 20001

Macdougall, Gordon P
1025 Connecticut Avenue, Nw, Suite
919
Washington, DC 20036

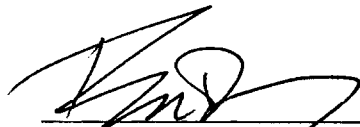
Fitzgerald, John D
Utu, General Chairperson
400 E Evergreen Blvd Ste 217
Vancouver, WA 98660-3264

Smith, Paul Samuel
U.S. Department Of Transportation
4003 Seventh Street, S.W.,C-30
Washington, DC 20590

Larocca, Anthony J.
Step toe & Johnson Llp
1330 Connecticut Avenue N W
Washington, DC 20036-1795

Slover, William
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036-3003

Morgan, Linda J
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, DC 20004



Edward D. Greenberg