



GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRSKY, P.C.

ATTORNEYS AT LAW
CANAL SQUARE 1054 THIRTY-FIRST STREET, NW WASHINGTON, DC 20007-4492
TELEPHONE: 202/342-5200 FACSIMILE: 202/342-5219

RICHARD BAR
STEVEN JOHN FELLMAN[□]
EDWARD D. GREENBERG
DAVID K. MONROE[□]
TROY A. ROLF[□]
STUART M. SCHABES*
DAVID P. STREET[□]
KEITH G. SWIRSKY[□]

KEVIN I. BABITZ[□]
KATHARINE FOSTER MEYER[□]
CHRISTOPHER B. YOUNGER*

ROBERT N. KHARASCH[□]
JOHN CRAIG WELLER^{□□}

*NOT ADMITTED IN DC □NOT ADMITTED IN MD □OF COUNSEL



OTHER OFFICES LOCATED IN:
MARYLAND AND MINNESOTA

GEORGE F. GALLAND (1910-1985)

WRITER'S DIRECT E-MAIL ADDRESS:
EGREENBERG@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER:
202-342-5277

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BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Seventh Floor
Washington, D.C. 20423

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Public Record

**Re: STB Docket No. WCC-101
 Government Of The Territory Of Guam v. Sea Land Service, Inc.,
 American President Lines, Ltd., and Matson Navigation Company,
 Inc.**

Dear Secretary Williams:

On behalf of the Government of the Territory of Guam, and in response to the order of the Board served October 3, 2005, the undersigned will participate in the oral argument that is to be held on November 16, 2005. We have attached an original and fifteen copies of a written summary of the specific points that we will wish to discuss at the oral argument.

If you have any questions concerning this, please do not hesitate to contact me.

Very truly yours,


Edward D. Greenberg

Enclosure

cc: David Konschnik



INTERLAW.

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SUMMARY OF ARGUMENT

GOVERNMENT OF THE TERRITORY OF GUAM

The fundamental point that must be kept in mind in determining the appropriate rate reasonableness standard to be applied in this case is that the nature of the service is unlike anything the Board has ever seen before. Aside from the fact that the Board has never previously been called upon to determine the reasonableness of rates in the domestic offshore trades, it has also never been presented with an example of such clearly excessive pricing on the part of two carriers that purportedly directly compete with each other. Having reviewed this trade, when it had jurisdiction over the service, the Federal Maritime Commission ("FMC") found that the two carriers serving Guam during the period of 1988-90 had overcharged Guam shippers and receivers by approximately 250% each, yielding windfall profits to those two carriers amounting to \$23 million. (See Table 1).

TABLE 1¹

<u>Years</u>	<u>Carrier</u>	<u>Allowable Return</u>	<u>Actual Return</u>	<u>Excess Percentage</u>	<u>Excess Return</u>
1988-90	APL	\$11,322,684	\$28,055,913	247%	\$16,733,229
1988-89	Sealand	\$ 3,747,000	\$ 9,639,000	257%	\$ 6,274,659

Despite the change of operators and the passage of time, Guam shippers remain a severely exploited class. As Table 2 demonstrates, within the past several years Guam residents were paying three times as much for their cargo as shippers in Asia whose cargo moves even further distances on the same vessels in the westbound direction from the United States.

TABLE 2²

<u>Port/Pair</u>	<u>W/B Rate</u>
U-S Guam	\$3,545
Transpacific	\$1,193

¹ Source: FMC Dkt No. 89-26, decision served June 1, 1998, Appendix 10 (28 S.R.R. 252, 290)

² Source: STB Dkt No. WCC-101, Initial Verified Statement of Philip H. Burris, filed April 23, 2002, at 16.

With only 30,000 containers westbound, Guam is a relatively small trade, in which the respondents are protected from outside competition by a number of factors, not the least of which is the Jones Act, which precludes any direct service by foreign competitors. Accordingly, the Government of Guam ("GovGuam") will argue that the respondents' contentions that a market dominance inquiry is either required or appropriate is categorically incorrect. Moreover, as the Board had previously ruled in Docket No. 40131 (Sub-No. 1), *Ashley Creek Phosphate Company v. Chevron Pipeline Company* (decision served August 31, 1990), any dismissal of this action on market dominance grounds would be a denial of due process. No reason exists to burden either the Board or the parties with a lengthy, expensive and irrelevant determination of whether the carriers have market dominance in this service.

With respect to the appropriate methodology to be utilized, GovGuam submits that the Board should adopt the standards and procedures promulgated by the FMC that were applicable to ocean carriers in the domestic offshore trades prior to the effectiveness of 49 U.S.C. § 13701. Those procedures, formerly and commonly referred to as General Order Number 11 ("G.O. 11") established a public utility-type rate of return methodology that was established after a lengthy and exhaustive review by the FMC of the economic and operating characteristics of ocean commerce. Although it would be both appropriate and necessary for the Board to make several modifications in the G.O. 11 methodology in order to reflect the particular characteristics of the Guam trade, those procedures were designed by the federal agency most expert in dealing with ocean common carriers and that historical experience should not be lightly discarded by the Board.

GovGuam will further argue that the Respondent's criticisms of the G.O. 11 process are misguided, that any allocation of unattributable costs under such circumstances necessarily requires judgment calls and that G.O. 11 is a relatively simpler process to use and less speculative than would

be the case for developing a Stand Alone Cost (“SAC”) model since it is based on historical costs.

On the other hand, the use of the Board’s Constrained Market Pricing (“CMP”) guidelines is not mandatory and may not be appropriate in these circumstances. As was the situation with the FMC and G.O. 11, the CMP principles were developed by the Board’s predecessor, the Interstate Commerce Commission, after many years of study of the economics and operations of the rail industry, not the domestic offshore trades. And, the Congressionally mandated directive that the Board take steps to protect and enhance the economic condition of railroads was not extended to the water carriers in this newly Board regulated industry. Moreover, the Board has approved the use of non-CMP procedures in rail cases involving commodities other than coal. There is certainly nothing mandatory in the statute or economic theory that would require the use of CMP here.

Nonetheless, in the event the Board does require the parties to utilize CMP procedures in Phase III of this proceeding, it should allow GovGuam to select which particular methodology would be appropriate at the conclusion of discovery. And, if GovGuam elects to utilize an SAC model to present its affirmative case, it would be appropriate under these circumstances for the Board to formally recognize in its decision on methodology that the Jones Act is a barrier to entry that prohibits potential competition from foreign flag carriers. Similarly, GovGuam should be permitted to develop a model which accurately replicates how these services are actually being performed today (in other words, that the Respondents are serving Guam as a “pass by” deviation in their service to the Far East essentially in a back haul capacity).