
TROUTMAN SANDERS LLP

A T T O R N E Y S A T L A W

401 9TH STREET, N.W. - SUITE 1000

WASHINGTON, D.C. 20004-2134

www.troutmansanders.com

TELEPHONE: 202-274-2950

C. Jonathan Benner
jonathan.benner@troutmansanders.com

Direct Dial: 202-274-2880
Fax: 202-654-5647

March 14, 2007

Via Email

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20024

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:

Enclosed please find the "Reply in Opposition to Petitions for Reconsideration" filed electronically by Defendants in the above-captioned proceeding.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

C. Jonathan Benner/mhh

C. Jonathan Benner

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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.**

**REPLY IN OPPOSITION TO
PETITIONS FOR RECONSIDERATION**

**Richard A. Allen
David M. Endersbee
ZUCKERT, SCOUTT & RASENBERGER, LLP
888 Seventeenth Street, NW
Suite 600
Washington, DC 20006
(202) 298-8660**

Counsel for Matson Navigation Company, Inc.

**C. Jonathan Benner
Leonard L. Fleisig
Michael H. Higgins
TROUTMAN SANDERS LLP
401 Ninth Street, NW
Suite 1000
Washington, DC 20004
(202) 274-2880**

Counsel for Horizon Lines, LLC

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On February 2, 2007, the Board served a decision in Phase II of this proceeding (“Phase II Decision”), which, after thorough consideration, resolved several crucial issues that the parties briefed in 2002, argued before the Board in 2005, and addressed again in supplemental briefs in May and June of 2006. The most significant aspect of the Phase II Decision was the Board’s decision to bifurcate the final phase of this proceeding (“Phase III”). The Board stated that it would examine competition in the Guam trade as a threshold issue, and that if it found effective competition during the relevant time period, then it would dismiss the Government of the Territory of Guam’s (“GovGuam”) complaint on the assumption that Defendants’ rates were reasonable. Applying agency precedent, court decisions, and fundamental principles of rate regulation, the Board determined that the presence of effective competition in the trade would make its examination of Defendants’ actual aggregate rates both unnecessary and inappropriate—in other words, that rates established in a market in which there was effective competition may be presumed to be reasonable.

GovGuam and intervenor Caribbean Shippers' Association ("CSA") have petitioned the Board, pursuant to 49 C.F.R. § 1115.3, to reconsider its bifurcation ruling and other issues resolved in the Phase II Decision.¹ GovGuam mainly attacks the bifurcation decision, and does so through legal arguments and purported authorities that it should have presented at an earlier stage of this proceeding. As such, its grounds for seeking reconsideration are improper. *See, e.g.,* STB Docket No. 42069, *Duke Energy Corp. v. Norfolk Southern Railway Co.*, slip. op. at 20 (Served Oct. 20, 2004) (rejecting as a basis for reconsideration "new arguments that should have been raised in Duke's case-in-chief."); *CSX Corp.—Control and Operating Leases/Agreements—Conrail Inc.*, 3 S.T.B. 764, 783 (1998) (same). CSA, in turn, offers diffuse criticism that unduly broadens the issues before the Board in violation of 49 C.F.R. § 1112.4(a)(2).

Substantively, GovGuam's and CSA's arguments lack merit, and the cases cited by GovGuam are either inapposite or support the Board's decision. In particular, GovGuam's and CSA's attacks on the Board's conclusions with respect to the effect of the Zone of Reasonableness ("ZOR") are incorrect. Additionally, GovGuam's eleventh-hour request for extensive discovery into Defendants' actual rates, costs, vessel arrangements, revenues, and other matters, if granted, would only further delay resolution of this nine year old proceeding. Accordingly, Defendants urge the Board to deny both petitions.

¹ The petitions for reconsideration of GovGuam and CSA are cited, respectively, as "GovGuam Pet." and "CSA Pet."

ARGUMENT

I. GOVGUAM'S PETITION LACKS MERIT AND SHOULD BE DENIED.

A. The Board Properly Decided to First Consider the Issue of Effective Competition.

The Board's decision to examine whether there was effective competition in the Guam trade during the relevant period before addressing the reasonableness of the challenged rates was solidly grounded on Board precedent and judicial decisions. Moreover, the Board's approach is supported by the fundamental principles of rate regulation underlying Constrained Market Pricing ("CMP"), the methodology adopted by the Board for any rate reasonableness inquiry in this proceeding.

GovGuam's petition for reconsideration virtually ignores *CF Industries, Inc. v. Koch Pipeline Co.*, 2 S.T.B. 257 (1997) ("*Koch*"), a very relevant decision that the Board discussed at length in its Phase II Decision. In that case, the Board held that it would not exercise its rate reasonableness jurisdiction over transportation by pipeline if there was effective competition in the market. As in the case of rates in the noncontiguous domestic trades subject to 49 U.S.C. § 13701, pipeline rates are subject only to the general requirement that they be "reasonable." There is no statutory requirement that the Board first determine that the carrier has "market dominance," as with respect to railroad rates. *See* 49 U.S.C. § 10707.

In *Koch*, the Board based its ruling, in part, on 49 U.S.C. § 15503(b)(3), a provision added by the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 ("ICCTA"), which requires the agency to consider "the availability of other economic transportation alternatives" when deciding whether a pipeline rate prescription is necessary. But, more fundamentally, the Board relied upon considerations of "sound regulatory policy" (*Koch*, 2 S.T.B. at 263), since § 15503(b)(3) does not bar the exercise of jurisdiction, as 49 U.S.C. § 10707 does in rail rate cases.

Invoking these considerations, the Board explained that the exercise of rate regulation would be positively harmful in an effectively competitive market:

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.

Id. These same basic principles apply with equal force to the Board's rate regulation in the noncontiguous domestic trades. Also, GovGuam fails to refute the Board's rational decision to construe its statutory mandate to avoid actions that "can only distort the economically efficient rate(s)" and "contravene the policy to promote adequate, economical and efficient transportation, and to encourage sound economic conditions in transportation."

Indeed, these principles are the basis of the CMP guidelines that the Board applies to determine the reasonableness of rail rates and will apply in this case, which are designed to simulate pricing in a competitive market. *See Coal Rates Guidelines, Nationwide*, 1 I.C.C.2d 520, 542-43 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987). The Board applied the same principles in a challenge to motor carrier tariff rates in which a carrier's trustee in bankruptcy attempted to enforce tariff rates that were far in excess of the rates actually negotiated by the carrier and paid by its shippers. *Georgia-Pacific Corp.—Petition for Declaratory Order*, 9 I.C.C.2d 103, 161 (1992), *aff'd sub nom. Oneida Motor Freight, Inc. v. ICC*, 45 F.3d 503 (D.C. Cir. 1995). Applying a market-based approach to the issue, the ICC said: "The key to such an analysis is a determination that, in those instances in which a transportation market is determined by the Commission to be effectively competitive, with no evidence of market failures, all market-based rates are reasonable, and market-based rate and service combinations are indicators of reasonableness."

The Board also correctly found support for bifurcation in court decisions upholding a comparable regulatory policy adopted by the Federal Energy Regulatory Commission (“FERC”) in administering the Federal Power Act and the Natural Gas Act.² In those cases, the courts upheld FERC’s authority to assume certain “market-based rates” (those set by agreement between the regulated entity and its customers) to be “just and reasonable,” and therefore lawful, when they were set in markets found to be effectively competitive by the agency. For example, in *California v. FERC*, 383 F.3d at 1012-1013, the court explained, “The principle justifying this approach as ‘just and reasonable’ is that ‘[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a reasonable return on its investment.’” (quoting from *Texas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990)).³ This analysis persuasively supports the Board’s bifurcation decision.

² *California v. FERC*, 383 F.3d 1006 (9th Cir. 2004); *Louisiana Energy & Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993); *Texas Power Corp. v. FERC*, 908 F.2d 998 (D.C. Cir. 1990).

³ GovGuam’s attempt to distinguish these cases is unconvincing. It argues that the courts in those cases “made clear that a determination that a market is competitive cannot substitute for a determination that rates are reasonable.” GovGuam Pet. at 7. In those cases, however, the courts upheld the FERC’s decision to *assume* that rates were in fact “just and reasonable” if they were agreed to by buyers and sellers in markets found by FERC to be competitive, without engaging in a specific examination of the sellers’ costs, rates of return, etc. and other traditional indicia of reasonableness. In *Elizabethtown Gas Company*, 10 F.3d at 869, for example, the court noted that “FERC authorized Transco in advance ‘to establish and to change’ individually negotiated rates *free of customer challenge under § 4 of the NGA . . .*” (Emphasis supplied). Section 4 of the Natural Gas Act, 15 U.S.C. §717c, establishes the requirement that rates be “just and reasonable.” The court went on in the quoted sentence to say that “the ‘only further regulatory action’ possible under the settlement is the review of Transco’s prices under § 5 of the Act [15 U.S.C. §717d], upon the Commission’s own motion or upon the complaint of a customer that is not a party to the settlement.” *Id.* The references in *Elizabethtown Gas* and the other cited cases to possible further review by FERC simply indicate that FERC, under the specific arrangements at issue, retained the ability to ensure that the markets at issue remained competitive. See, e.g., *California v. FERC*, 383 F.3d at 1014; *Louisiana Energy and Power Authority v. FERC*, 141 F.3d at 370. They do not suggest that FERC would engage in a review of actual market-based rates to determine whether they are “just and reasonable” based on the sellers’ costs and other traditional indicia of reasonableness, since such an exercise would defeat the very purpose of the programs that the courts reviewed and upheld.

GovGuam, however, now claims that bifurcation would be contrary to two Supreme Court decisions, *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), and *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), which it cites for first time in its petition. Yet, both cases are inapposite. *MCI* addressed whether the Federal Communications Commission had the statutory authority to eliminate the statutorily mandated tariff filing requirement for all communications carriers except AT&T, under the guise of its authority to “modify” filing requirements. *FPC v. Texaco* presented essentially the same issue: whether the Federal Power Commission could eliminate statutory filing requirements for a large group of small producers of natural gas. Neither case involved a rate reasonableness determination or the appropriate predicates for such a determination.⁴ Those cases might be relevant if the STB had excused Defendants from filing tariffs, but it did not, and Defendants have always filed tariffs in the Guam trade as the statute requires.⁵

Finally, GovGuam’s argument overlooks the fact that its complaint does not challenge the reasonableness of any specific rate or group of rates, but all of each Defendant’s rates in the aggregate. Thus, whatever force there might be to GovGuam’s argument that a competitive trade can still produce some unreasonable rates, that argument has no application to GovGuam’s complaint. Having decided to attack what the Board has called Defendants’ “rate structures,”

⁴ Indeed, in *FPC v. Texaco*, the FPC said it would continue to regulate the reasonableness of the producers’ rates. See *FPC v. Texaco, Inc.*, 417 U.S. at 384. While the Court expressed the view that “the prevailing price in the marketplace cannot be the final measure of ‘just and reasonable rates’ mandated by the Act,” the reason it gave for that view was that the natural gas market did not enjoy effective competition; it said: “Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were distorting the market price for natural gas.” *Id.* at 397-398. Nothing in the Court’s opinion suggested that an agency may not presume that prices in a market with effective competition are reasonable.

⁵ In contending that the approach the Board has adopted in rail and pipeline cases in deciding to determine first whether there is effective competition in the trade, GovGuam also ignores a significant difference in the approach adopted by the Phase II decision: namely, to place the burden of production and persuasion on the carriers rather than the shippers. Phase II decision at 6.

GovGuam cannot reasonably complain of the Board's decision to determine first whether the structure of the trade is effectively competitive.

B. GovGuam Wrongly Contends that Analysis of Competition Requires Consideration of Defendant's Actual Rates and Costs of Service.

GovGuam also argues for the first time that an analysis of whether the Guam trade was effectively competitive during the relevant period necessarily requires the Board to analyze the Defendants' actual rates, the costs of Defendants' services, and rates of other carriers in other trades in order to determine whether the rates "are grossly disproportionate in relation to costs or rates for comparable services," and thereby to determine "whether the market is functioning as an effective constraint on rates." GovGuam Pet. at 9. To explore those issues, GovGuam proposes extensive and intrusive discovery of Defendants. *Id.* at 10-11.

This argument is wrong and contrary to well-settled precedent. Indeed, the argument, if accepted would completely nullify and negate the very purpose for bifurcating the next phase of the proceeding, as it would make the competition inquiry the same as the ultimate issue of rate reasonableness on the merits. For that reason, the ICC long ago rejected similar arguments by shippers seeking to conflate the market dominance inquiry in rail rate cases with the issue of rate reasonableness. *See, e.g., Westmoreland Coal Sales Co. v. Denver & Rio Grande Western Co.*, 5 I.C.C.2d 751, 753-7567 (1989), *aff'd sub nom. Westmoreland Coal Sales Co. v. ICC*, 902 F.2d 1563 (3rd Cir. 1990).

Defendants' actual rates and rate actions may be relevant to the competition issue as evidence of competitive responses in the market. Additionally, evidence of "[c]ollusive behavior" or "other market distorting behavior" by the carriers, alluded to by GovGuam (GovGuam Pet. at 9), would be relevant to competition. But, evidence concerning the actual

rates in relation to Defendants' cost of service, profits, capital costs, and allegedly comparable rates in other markets are not pertinent to a determination of effective competition in the Guam trade and are not appropriate subjects of discovery in the competition phase of the inquiry. To rule otherwise would effectively nullify the Board's decision to bifurcate the competition issue from the ultimate issue of rate reasonableness.

Furthermore, GovGuam's focus on the carriers' actual rates in relation to their costs of service is not only irrelevant to the issue of the degree of competition in the Guam trade, it is also inappropriate and contrary to the ICC's and the Board's approach to the issue of rate reasonableness in both rail and motor carrier cases. Under the CMP guidelines and the stand-alone-cost test that have been applied in rail rate cases, the Board has made its determinations of reasonableness not on the basis of the defendant carrier's actual costs and investment base but on the basis of the costs of a hypothetical efficient carrier providing the same service. Similarly, when the ICC had jurisdiction to regulate motor carrier rates, it held that "[e]vidence on the cost of the movement will generally not be treated as relevant. One problem with the use of a cost-based approach to define reasonable rates is that, contrary to the statutory directives to encourage efficient operations of motor carriers, such methodologies deprive carriers of an incentive to control their costs." *Georgia-Pacific Corp.*, 9 I.C.C.2d at 161. In affirming this view on reconsideration, the ICC further explained: "The result of [basing rate reasonable determinations on the individual costs and revenues of each carrier] would be that, because carrier costs differ, the same rate for an identical service would be found reasonable when charged by a high-cost carrier but unreasonable when charged by a low cost carrier." *Georgia-Pacific Corp.*, 9 I.C.C.2d

at 813. This observation is particularly pertinent to this case, where the market has been served at all relevant times by at least two carriers.⁶

C. Bifurcation Will Substantially Expedite the Proceeding.

GovGuam also argues for the first time that bifurcating the issue of effective competition from the issue of rate reasonableness will not materially expedite this proceeding in view of the discovery that GovGuam purports to need regarding the carriers actual rates, costs of service, capital costs, revenues, etc. GovGuam Pet. at 11-12. This claim is based entirely on its incorrect contention, discussed above, that a determination whether competition is effective requires a determination whether the actual rates in the trade are reasonable. This is incorrect for the reasons stated. If the next phase of the proceeding is properly limited to the issue of effective competition, then bifurcation is likely to substantially expedite the proceeding.

D. There is No Warrant To Extend the Procedural Schedule to Accommodate GovGuam's Desire To Pursue Discovery Related to the Reasonableness of Defendants' Actual Rates.

There is also no valid basis for GovGuam's contention that the Board should revise the procedural schedule to permit GovGuam additional time to pursue discovery of evidence relevant to competition in the trade. Indeed, we note that GovGuam has had the opportunity to pursue discovery since *day one*, yet has filed no requests.

Moreover, most, if not all of the discovery matters listed on pages 10 and 11 of GovGuam's petition are not relevant to whether there has been effective *competition* in the Guam trade but are instead related to the reasonableness of Defendants' actual rates in relation to the Defendants' costs, profits, vessels deployed, system-wide revenues, confidential shipper

⁶ See also *FPC v. Texaco, Inc.* 417 U.S. at 387, where the Court stated: "That every rate of every natural gas company must be just and reasonable does not require that the cost of each company be ascertained and its rates fixed with respect to its own costs."

contracts, etc. As discussed above, such discovery would be inappropriate in the next phase of the proceeding, and, indeed, would defeat the very purpose of bifurcating the proceeding.

E. The Phase II Decision's Discussion of the ZOR and Its Effect On the Issues in the Case Was Correct and Appropriate.

In the final section of its Petition, GovGuam raises two issues related to the ZOR, which the Board resolved in Part IV of its Phase II Decision. On both issues, GovGuam's arguments lack merit.

First, the Board's discussion of the ZOR was not "premature," as GovGuam claims. On the contrary, it was appropriate, because it provides necessary guidance to the parties in the next phases of the proceeding regarding (1) the relevant period for considering evidence of effective competition and (2) the parameters for determining the reasonableness of Defendants' actual rates should the proceeding extend into that phase. Thus, the decision correctly found that, for the ZOR to have any meaning and effect, the "base rates" that are subject to GovGuam's challenge are necessarily those in effect in September 1996. If the rates during that period are presumptively reasonable because there was effective competition in the trade at that time, then all subsequent rates within the ZOR's permissible future increases are necessarily reasonable by operation of the statute. Thus, the decision's discussion of the ZOR appropriately focused the parties' competitive evidence on the period of September 1996.

Second, GovGuam is wrong that the "ZOR applies only to port-to-port rates and not to intermodal rates." GovGuam Pet. at 14. The Board has previously noted that Defendants' intermodal joint rates are typically constructed by adding the price of motor carriage to an existing port-to-port rate. Phase I Decision at 10. In this intermodal context, the port-to-port "rate" is a "division," which is protected under the plain language of 49 U.S.C. § 13701(d)(1), since the paragraph applies to rates *and* divisions:

For purposes of this section, a rate or *division* of a motor carrier for service in noncontiguous domestic trade or water carrier for port-to-port service in that trade 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.

49 U.S.C. § 13701(d)(1) (emphasis added). GovGuam fails to note the paragraph's use of "division" and thus does not appreciate its implications, which GovGuam's argument, if accepted, would effectively read out of the statute.

II. CSA'S PETITION LACKS MERIT AND SHOULD BE DENIED.

CSA, in comments extraneous to the substance of its petition, offers a number of unsupported assertions about the nature of the noncontiguous domestic trades, including Guam. While Defendants find it unnecessary to address each statement, we contest CSA's observation that "all shippers in the offshore trades are in fact 'captive-shippers'—either of one defendant or the other defendant carrier." CSA Pet. at 3. This remark is akin to the dubious assertion that all rail shippers in the western U.S. that have access to the BNSF Railway Company and the Union Pacific Railroad Company are nevertheless "captive" because they must use one railroad or the other. On the contrary, the Board has specifically noted that the two western Class I carriers compete vigorously against each other, and has *presumed* that two railroads serving a market provide effective competition.⁷ A rail shipper that enjoys dual access hardly lacks effective competition. Defendants submit that shippers in the noncontiguous domestic trade enjoy at least as much competition as rail shippers served by two carriers, and will develop this position in Phase III.

⁷ *Union Pacific Corp.—Control and Merger—Southern Pacific Rail Corp.*, 1 S.T.B. 233, 384-390 (1996), *aff'd sub nom. Western Coal Traffic League v. STB*, 169 F.3d 775, 778-79 (D.C. Cir. 1999).

Defendants also reject CSA's empty assertion that the domestic offshore trades are "at best oligopolies and in fact classic parallel pricing." CSA Pet. at 3. As CSA should know, the U.S. Department of Transportation presented a report to Congress on competition in the noncontiguous domestic trade approximately a year and a half before GovGuam's complaint that reached the opposite conclusion.⁸ The report specifically rejected CSA's position that a concentration of carriers reflects ineffective competition. USDOT Report at I-4. USDOT explained that simply counting carriers and their respective market shares "does not take into account the type of service provided, the degree of competition among established ocean carriers, or the pressure that the threat of entry may exert on the rate-setting practices of the carriers now serving these trades." USDOT Report at I-2. CSA's conclusory musings contribute nothing to the Board's resolution of this case, and, its diffuse ruminations about competition in the domestic offshore trades violate the prohibition of 49 C.F.R. § 1112.4(a)(2) that an intervenor must not unduly broaden the issues raised in the proceeding.⁹

Reduced to its essence, CSA's argument for reconsideration amounts to an assertion that Part IV of the Phase II Decision confers ZOR protection upon Defendants' base rates: "Any attempt by the Board to interpret [49 U.S.C. § 13701(d)(1)] to apply to 'base rates' as is apparently being suggested in the February 2nd Order is inappropriate." CSA Pet. at 6. But, this reading is simply at odds with the plain text of the decision, which offers no such protection to base rates: "Thus, a party *may challenge the base rates* to which the ZOR is applied." Phase II

⁸ See *Competition in the Noncontiguous Domestic Maritime Trades* (USDOT, March 1997) ("USDOT Report").

⁹ Defendants submit that CSA's mischaracterization of the noncontiguous domestic trade fatally undermines its criticism of the Board's decision to apply CMP standards should this case reach that point. Additionally, CSA's objection is obviously premature given that only the Board's application of CMP in practice will establish the merits of the Board's decision. Indeed, CSA's misgivings hardly amount to a showing of material error. Defendants note that the *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985) have evolved in practice over the last twenty years. Defendants believe that the Board has the requisite expertise to adapt the guidelines, as necessary for purposes of this proceeding.

Decision at 12 (emphasis added). The Board’s succinct statement—which utterly and entirely negates the premise of CSA’s petition—follows an equally clear statement that the ZOR insulates only increases “from base rates that themselves are at reasonable levels.” *Id.* Simply put, there is no ambiguity at all in the Board’s decision that needs clarification. The Board did not suddenly extend ZOR protection to untested base rates, and thus, there is no “material error” for purposes of 49 C.F.R. § 1115.3 (or any other grounds for reconsideration). Accordingly, CSA has established neither a basis for clarification, nor for reconsideration. Thus, the Board should categorically reject CSA’s petition.

Defendants submit that CSA’s allegation of material error is a pretext for a collateral attack on another aspect of the Board’s ZOR decision that might limit reparations in this and future water carrier rate cases. Specifically, CSA questions the Board’s statement that the ZOR would apply on a going forward basis to the lawful base rates as of September 10, 1996. Phase II Decision at 13. CSA complains that this decision “simply eviscerates GovGuam’s damage claims.” CSA Pet. at 6. The effect the Board’s interpretation of the ZOR would have on GovGuam’s damage claims is speculative and assumes that GovGuam can devise a rational “damage claim” for a complaint challenging the carriers’ rates in the aggregate. In any event, the Board’s statement was clearly correct and essential to carrying out the Congressional intent of the ZOR. The Board’s decision shows due consideration for the language and intent of 49 U.S.C. § 13701(d)(1) and (d)(4), and for the black-letter principle that damages should not give rise to a windfall. *Platinum Technology, Inc. v. Federal Ins. Co.*, 282 F.3d 927, 932 (7th Cir. 2002). It simply accords the benefit of the ZOR to the Defendants, if maximum lawful rates are ultimately established in this proceeding. As the Board explained, “[h]ad the Carriers known that the aggregate rates they were charging as of September 10, 1996 would be ordered to be

reduced, they presumably would have exercised their right to increase all of their rates by the full amount permitted by the ZOR for succeeding years[.]” Phase II Decision at 13. The Board’s approach incorporates both Congressional intent, and prudent business practices.¹⁰

Because CSA fails to demonstrate either ambiguity or material error in the Board’s Phase II Decision, its petition should be denied.

III. Reconsideration of the Phase II Decision is Unwarranted Even Though It Made Several Rulings and Expressed Apparent Conclusions With Which The Defendants Disagree.

Despite their disagreement with certain aspects of the Phase II Decision, Defendants decided not to pursue reconsideration in the interest of reaching a definitive resolution of this protracted case in the near future. In order to preserve their right to object at a later point, as necessary, Defendants note for the record the following exceptions:

- that the complaint should not be dismissed on the grounds that there is no viable methodology for determining the reasonableness of Defendants’ rates in the aggregate that could lead to meaningful and/or reasonable relief;
- that product and geographic competition would not be considered in connection with the issue of effective competition, regardless of the fact that this issue has not been subject to *any* briefing in this proceeding; and
- that GovGuam would be permitted in Phase III to make a CMP presentation based on the “revenue adequacy” constraint or the “management efficiency” constraint, since these constraints depend upon the unique circumstances of each Defendant, and therefore would be inappropriate to this proceeding.

¹⁰ Moreover, in making the claim that ZOR increases from maximum lawful would “eviscerate” GovGuam’s damages, CSA fails to realize that it is actually supporting Defendants’ position that vigorous competition has held rate levels in check. If Defendants were monopolists, then their rate increases should have far outpaced the cumulative effect of conservative 7.5% ZOR increases. This has not happened; in fact, not only have Defendants not availed themselves of the rates increases authorized by the ZOR, real rates have actually declined, as demonstrated in the USDOT Report, and MARAD’s 2006 study. Plainly, Defendants’ pricing in the Guam trade reflects competitive, rather than monopolistic forces.

Should the Board find that there was not effective competition during the relevant period, Defendants reserve their right to challenge the foregoing issues, the reasonableness of any CMP submission GovGuam may make, and/or any remedial actions it may propose.

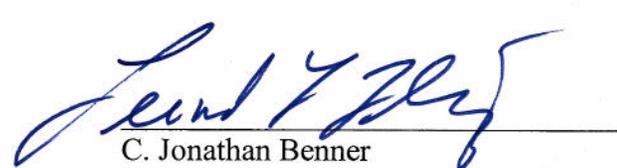
IV. CONCLUSION.

The petitions for reconsideration submitted by GovGuam and CSA should be denied. As an initial matter, neither one establishes that the Board committed material error, as required under 49 C.F.R. § 1115.3. On the contrary, the petitions rely primarily upon arguments that should have been presented earlier in this proceeding, and are therefore invalid as a matter of procedure. Substantively, the arguments offered by GovGuam and CSA lack merit, and, as demonstrated above, do not rebut the Board's decision to bifurcate Phase III, or its resolution of other crucial issues.

Respectfully submitted,


Richard A. Allen
David M. Endersbee
ZUCKERT, SCOUTT & RASENBERGER, LLP
888 Seventeenth Street, NW
Suite 600
Washington, DC 20006
(202) 298-8660

Counsel for Matson Navigation Company, Inc.


C. Jonathan Benner
Leonard L. Fleisig
Michael H. Higgins
TROUTMAN SANDERS LLP
401 Ninth Street, NW
Suite 1000
Washington, DC 20004
(202) 274-2880

Counsel for Horizon Lines, LLC

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2007 a copy of the foregoing "Reply in Opposition to Petitions for Reconsideration" was served **by email** upon:

Edward D. Greenberg
GALLAND KHARASCH GREENBERG
FELLMAN & SWIRSKY, P.C.
1054 Thirty First Street, NW
Washington, DC 20037

Rick A. Rude
Attorney At Law
207 Park Avenue
Suite 103
Falls Church, VA 22046

and **by U.S. Mail** upon:

Bruno Maestri
Norfolk Southern Corporation
1500 K Street NW Suite 375
Washington, DC 20005

Peter J. Shudtz
CSX Corporation
500 Water Street
Jacksonville, FL 32202


Michael H. Higgins