SURFACE TRANSPORTATION BOARD
1925 K STREET, N.W.
WASHINGTON, D.C. 20423-0001

IN THE MATTER OF:

GOVERNMENT OF THE TERRITORY OF GUAM,
Complainant,
WCC-101
v.
SEA-LAND SERVICE, INC., AMERICAN PRESIDENT LINE, LTD, AND MATSON NAVIGATION COMPANY, INC.
Defendants.

Wednesday, November 16, 2005
10:00 a.m.

BEFORE:

VICE CHAIRMAN BUTTREY

COMMISSIONER MULVEY

APPEARANCES:

On Behalf of the Complainant:

EDWARD D. GREENBERG, ESQ.
Of: Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C.
1054 31st Street, N.W.
Washington, D.C. 20007
(202)342-5277

DAVID MONROE, ESQ.
Of: Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C.
1054 31st Street, N.W.
Washington, D.C. 20007
(202)342-5277

On Behalf of the Defendants:

On Behalf of Horizon Lines LLC:

C. JONATHAN BENNER, ESQ.
Of: Troutman Sanders L.L.P
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004-2134
(202) 274-2880

On Behalf of Matson Navigation Company, Inc.:

RICHARD A. ALLEN, ESQ.
Of: Zuckert, Scoutt & Rasenberger
888 17th Street, N.W.
Washington, D.C. 20006-3959
(202) 298-8660

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10:02 a.m.

VICE-CHAIR BUTTREY: Well, this hearing will come to order.

Most of you will notice that our Chairman is not here. He will not be here, and he has asked me to read a statement for the record, and then he will also submit a statement for the record, an opening statement. He is ill.

"I regret that I'm unable to attend this oral argument this morning. In my three years here I have never had to miss any official Board matter, and I'm sorry that today needed to be the first. Doctor's orders require that I stay at home to recover from a bout with pneumonia that was diagnosed on Monday.

Despite my absence, I thought it best to proceed with the argument, to continue to move this case forward, and to avoid inconvenience to the parties, some of whom have traveled from out of town to be here today.

Be assured that I will be reviewing the transcript to see how the novel and interesting questions raised by this case are addressed. I am certain that my fellow Commissioners will do a fine job conducting this argument in my absence. I have given a copy of my written opening remarks to Vice Chairman Buttrey, and have asked that it be placed in the

written transcript of this argument."

I also have here a document that is the Chairman's opening statement had he been here. I'd like to provide that for the record as well, which we will do, and see that it gets into the transcript, and we'll proceed with the hearing.

(Whereupon, a copy of the Chairman's opening statement follows:)

"Good morning and thank you for coming. As many of you know, this case has been around for quite some time and I am glad to see it moving forward. This is a unique rate case because it involves the rate reasonableness of shipments in the off-shore domestic trade. Unlike in the rail context where we have established methodologies to address rate reasonableness, we have no set procedures here. Thus, how to address such a rate reasonableness claim is an issue of first impression.

The purpose of this phase of the proceeding and this oral argument is to address what methodology should be used, how it should be applied and whether a lack of competition in the trade should be a prerequisite to any chosen methodology. I understand that the parties intend to address at least two potential methodologies -- the FMC method known as General Order number 11 and the board's constrained market pricing standards. I am also interested in hearing the parties' views on what role the

absence or presence of effective competition may have in this proceeding. I look forward to your presentations this morning."

VICE-CHAIR BUTTREY: Good morning, and thank you for coming. I will be presiding over today's oral argument, due to the Chairman's absence because of illness.

This case is the first of its kind to come before the Board. When the Interstate Commerce Commission was abolished and the Surface Transportation Board was created, the Board was given exclusive jurisdiction over the rates charged by water carriers in the non-contiguous domestic trade, thereby eliminating the divided jurisdiction that existed between the ICC and the Federal Maritime Commission. The non-contiguous domestic trade includes Puerto Rico, U.S. Virgin Islands, Hawaii, Alaska, the Northern Mariana Islands, and Guam.

Before I address the specific issues that are the subject of today's oral argument, I'd like to briefly reiterate the history of this case. In 1998, the Government of Guam filed a complaint challenging the reasonableness of the rates, rules, classifications and practices for all transportation by water provided by the carriers.

The Board adopted a three-step process to resolve the case. Phase I concluded in 2001. The Board's decision in that phase, (1) denied the carrier's motion to dismiss, with the exception of Guam's discrimination

claim, (2) limited recovery of damages to the period beginning September 10, 1996, and (3) ruled that the zone of reasonableness provided a safe harbor for rate increases, but not base rates. The Board also concluded that congressional intent was unclear as to what analytical methodology should be used to resolve this case.

The Board currently uses constrained market pricing for its railroad cases. The FMC, when it had jurisdiction over these cases, applied a distributive cost methodology known as General Order 11.

This oral argument is part of Phase II. In Phase II, we must resolve three major issues. The first issue is whether we will make a preliminary market dominance inquiry, as we have in our railroad rate cases. The second is what type of methodology we should use for water carrier cases, and the third is how we apply the statute's zone of reasonableness provisions, specifically, whether our task is to determine a base rate for 1996 and use that ZOR to test the maximum rates for each year after 1996, or whether we should determine a maximum reasonable rate for the entire period covering 1996 to the present, leaving the ZOR to cap future rate increases after this case is over.

Our typical procedure for oral arguments is to give each party in turn its time to make a presentation. We generally try to hold the questions to the end, although not always. The complainant has been give

30 minutes, and may reserve some of that time for rebuttal if it so desires. The two carriers have been given 30 minutes collectively, and they may divide that time however they wish. The Board members' questions, typically, are asked in rounds of five minutes each.

Our first speaker today is Mr. Edward D. Greenberg for the Complainant, the Government of the Territory of Guam.

Welcome, please proceed.

COMMISSIONER MULVEY: Doug?

VICE-CHAIR BUTTREY: I'm sorry?

COMMISSIONER MULVEY: I have an opening statement also.

VICE-CHAIR BUTTREY: Opening statement.

COMMISSIONER MULVEY: Thank you.

VICE-CHAIR BUTTREY: I'm new at this.

COMMISSIONER MULVEY: What?

VICE-CHAIR BUTTREY: I'm new at this.

COMMISSIONER MULVEY: I also regret that-- Roger could not be here today, and we all wish him well and hope for a speedy recovery and he's back here soon.

Good morning, and let me add my welcome to the panelists and all those attending today's oral argument.

In the year and a half which I've been a member of the board, this is my first public meeting involving non-contiguous water trade. I had some experience in this area when I was with the General Accounting Office, dealing with the Jones Act and the implications of the Jones Act for those places which are served by Jones Act carriers.

This is an area where the issues differ significantly from those that we routinely face in the railroad industry, but our task today is essentially the same. We must work to balance the needs of the shippers to be charged fair and reasonable rates with the needs of the carriers to earn adequate returns. And, as such I'm very much looking forward to hearing from the parties today.

Thank you, Doug.

VICE-CHAIR BUTTREY: You may proceed.

MR. GREENBERG: MR. Vice Chairman, if I may, before we go on the clock what we've done is, we've reserved -- I reserved ten minutes of time for rebuttal, but I thought before we go on the clock, if it was appropriate, I would like to raise one preliminary matter that is somewhat confusing, at least to my client, the Government of Guam, and that is the precise identity of one of the respondents, one of the Defendants, and that is Sealand -- excuse me, Horizon. I confess we were confused, because when this action was initiated it was initiated against Sealand Service -- since then,

apparently, there have been a number of iterations of that company, and the service it provided. It was at one time CSL, it was CSX, and we are certainly not -- we are simply not -- and now it's Horizon Lines LLC.

We are concerned that without a proper explanation of what's going on that the Board will not have -- may not, perhaps, have proper parties before it for the purpose of making affirmative orders, including discovery orders. And so, I was hoping that before we began today, perhaps, we could get that issue resolved and would ask that the Commission, or the Board rather, direct Horizon to provide appropriate explanation of who the parties are, so that in the event it's necessary to amend our complaint, if that be necessary, that we can do so to make sure that all of the parties who were involved throughout this time period are present in this case.

VICE-CHAIR BUTTREY: Was any attempt made by your client to get that resolved before today?

MR. GREENBERG: No, Your Honor. I'll tell you, honestly, that what happened was, in the preparation of this it occurred to me, over the last week, that as I began to try to figure out how the discovery might go in this case, that we might not get an order in discovery that we'd be able to enforce against the proper party. We just didn't know the answer to that.

And so, it was not raised, and I apologize for that.

COMMISSIONER MULVEY: Is Horizon the successor to Sealand? I mean, I know that CSX had Sealand, and then they sold it, was it a sale and Horizon took over Sealand, or how was Horizon formed?

MR. BENNER: Commissioner Mulvey and Mr. Vice Chairman, the Horizon Lines LLC is the carrier subject to your jurisdiction in this proceeding. It's a testament to the longevity of this proceeding, there have been a number of structural changes in the service offered. We'd be glad to submit something for the record and for Mr. Greenberg's edification that traces that genealogy, and that assures him that he's got the right party. We'll undertake to do that.

MR. GREENBERG: Thank you.

COMMISSIONER MULVEY: Is that acceptable?

MR. GREENBERG: That's terrific.

VICE-CHAIR BUTTREY: Okay, you'll be handling that correspondence or whatever between the two of you, and then something will be submitted to the Board for the record, is that the case?

MR. GREENBERG: I think that would be great, yes, thank you.

MR. BENNER: That's acceptable.

VICE-CHAIR BUTTREY: Is that suitable to you?

COMMISSIONER MULVEY: That's suitable to me, yes.

VICE-CHAIR BUTTREY: Okay. All right, we can proceed.

MR. GREENBERG: Okay, thank you.

With your opening statement, you have taken away some of the things I was going to say, give you some of the history in this matter, so I'll move along and not repeat those things you have said.

But, I think, nonetheless, I think it is probably relevant to stress briefly the nature of the trade. We have here our two carriers that serve Guam in what we've called, in our pleadings, the pass-by back haul service engaged, involves trans-Pacific trade. And so there's no mistake about what we are talking about, the trans-Pacific trade is, as everyone is aware I suspect, due to the imbalance of trade between the U.S. and Asia that all the ships that move in the eastbound direction from the trans-Pacific are absolutely full. And, because there's very little going back, they go back primarily empty. And so, the return move is, essentially, a back haul, most of the capacity in these vessels is empty.

There are some containers that are moving to places, and here we are talking about Guam, Hawaii, places in the domestic off-shore trade, and as such because of the Jones Act and a variety of other operational reasons the only carriers that provide service today are just two. It is Matson and Horizon Lines.

It turns out there has always only been two, as far as we have been able to figure out, going back at least 30, perhaps, 40 years, there's only been two carriers moving in that direction, and this is despite the fact that there is enormous excess capacity in the trade. The containers, the ships are virtually empty when they proceed westbound to Guam. And so, despite the fact that there is enormous excess capacity, those ships are basically empty, and so it is truly a back haul service, and I say pass-by, it's because it's very easy to divert the ships, make a modest deviation, and head south from Hawaii before you go to the Pacific, and, perhaps, skip Hawaii entirely, but just head south a little bit in order to hit Guam, and then from Guam drop your cargo off and then proceed to Asia, to wherever it is going, to Hong Kong, Taiwan, China, it doesn't make any difference.

Now, despite the fact that there is enormous excess capacity, typically, you would look at a market where there's excess capacity, you would say, my goodness, the rates must be terrific. And, indeed, they are terrific, but only to the trans-Pacific, to the actual ports in Asia.

In fact, as I pointed out in the summary of argument, and, hopefully, you have copies of that now, that rates on a per container basis, roughly, during the study time here were, roughly, one third for traffic moving all the way to Asia than it is for traffic that stops in Guam. In other words, the rates to Guam on a per container basis are three times higher than

traffic that moves 1,200 miles further.

Now, what's the reason for that? Probably a variety of reasons, but one of the reasons is, certainly, that there is the Jones Act, and part of the reasons, undoubtedly, are historic, but in any event it is a duopoly that currently serves Guam, and it has been serving Guam for a number of years.

Now, this case, of course, began in 1989 before the Federal Maritime Commission, when it had jurisdiction, and the case, at that point, was begun against APL, and against Sealand. And, in a 1998 decision, which, again, I've cited to in our statement here, the FMC, using the GO 11 methodology, determined that the rates being charged Guam shippers were grossly excessive I think is an understatement. As I indicated on this document, that it amounted to $23 million in excess recovery by the two carriers during the three years we are talking about. $23 million, that's in after-tax dollars. On a pre-tax basis, the rates actually paid, that amounts to $40 million, which in a modest calculation works out to, basically, $500 per four-member Guamanian family per year. This is a significant cost.

And so, despite that background, and the fact that the rates have remained relatively constant in terms of the relationship to the trans-Pacific rates since the time of the 1998 decision by the FMC, we have the respondents saying that the Board needs to conduct a market dominance

analysis to make sure that there's effective competition in this trade.

Well, I must say it's -- there are a lot of things one could say about that, of course, and the first is that one of the things I mentioned is that there is, obviously, from the rate structure you can see, that there is no effective constraint on pricing. The second is that the Jones Act, of course, is a barrier to entry by the foreign lines, even assuming the foreign lines wanted to come into the trade. But, there's reasons why, under classic duopoly pricing, they wouldn't come in, and part of the reason is there's not that much traffic in Guam. We are only talking about a market of 3,000 containers a year, sorry, 30,000 a year.

And so, there's not enough traffic out there to warrant bringing a third carrier in, in order to make the investment to serve. So, even if the foreign carriers could come in, it's unlikely under the circumstances.

But, the more basic reason why it's not necessary to do a market dominance analysis in this case is because the statute doesn't require it. The statute is very clear that it requires market dominance analysis only with respect to challenges to rail rates, that's what the statute says. The Defendants have pointed to no basis for providing a market dominance analysis other than to say it would be a nice thing to do. But, the Board considered this some years ago in this exact same issue in another case I handled some years ago in the Ashley Creek case, it's cited in the papers. In

the Ashley Creek case, I believe the Board raised it sua sponte, I don't even think it was raised by the Defendant in the case, but I believe the Board inquired as to whether or not a market dominance analysis was something that ought to be done, and required the parties to brief the issue.

The issue was fully briefed by both sides at that time, and the Board decided that it was not appropriate to do that, for a couple of reasons. One was, the statute didn't require it, which is certainly not the same case as it is with -- which is different than the situation with railroads, and the second thing is, because the statute didn't require it, to require the respondent -- to require the Complainant to go through that, if the Board was to deny, was to find that there was an absence of market dominance, under the circumstances where there was no statutory mandate that it do so, that the Complainant would have been denied due process. And so, the Board, for several reasons, decided that it was inappropriate to do so in non-rail cases. Nothing has changed in all that time.

And so, for the same reasons why the Board rejected that in the Ashley Creek case, it must do so here. But, even without that rationale, as I explained, the rate structure that is so visible and before you demonstrates that to go through an exhaustive, expensive, time-consuming, and burdensome analysis of market dominance in this trade would be simply a wasteful exercise that's going to do very little to move this case along.

You'd spend a lot more money.

At this point, I guess we ought to talk about GO-11, unless there's any questions. I'm not sure how you would like to handle this, whether you would pause for questions.

VICE-CHAIR BUTTREY: We usually do questions at the end.

MR. GREENBERG: Okay, thank you.

Now, it's perfectly obvious that the Board has not had an opportunity or occasion to apply the GO-11 methodology. You haven't done it, but that's not a good reason to reject it, just because it's new.

GO-11 was developed by the FMC over a number of years, it dates back at least to 1964, and it results from a comprehensive and reasoned analysis by the FMC as to the operating characteristics and economic conditions of the ocean trade, of the domestic off-shore trade.

And so, just as the Board spent a great deal of time in the coal rate guidelines and developing constrained market pricing in response to the dictates of the Staggers Act, and determined what was an appropriate methodology to use for railroads, so the FMC did with respect to domestic off-shore carriers. So, despite the fact that the Board is unfamiliar with this methodology, the fact remains that it is the reasoned experience and judgment of the then expert agency that was charged with jurisdiction over

the trade, that did this over a number of years and decided this was the appropriate way that this trade should be regulated.

And, it has been regulated in exactly that way. The Defendants suggest a number of things, but one of the things they suggest is it really is not, as we pointed out in our papers, we use the term tried and true, well, it is tried and true, it's been used in several litigating proceedings which are cited in the papers, and that's not just with respect to the case that Guam brought against the carriers in 1989, but also resulted -- it also dealt with general rate increases that were brought by the carriers. The FMC decided that it was an appropriate methodology to use.

So, it's not just an accounting abstract construct, it is a workable mechanism that determines well what an appropriate rate of return should be, what an appropriate return should be by the carriers with respect to the movements in this trade.

And, in fact, it's not just used by the FMC, it was used also, historically, by the Maritime Administration, the same basic construct is used in determining whether or not the carriers are being over-compensated or being properly compensated with respect to their various subsidy programs that the Maritime Administration administers.

And so, despite the fact that it is new to the Board, it is -- it is certainly not archaic, it has been revised and reviewed by the FMC over a

number of times, the most recent time being 1995, so we are not having to delve back in history to determine, to pull something off dusty bookshelves, this is a viable, workable mechanism that should be used here.

Now, why should it be used here? There's probably a number of reasons why it's appropriate probably in any case involving the domestic off-shore trades, but the primary reason is the fundamental basis of this particular trade, and that is it is the pass-by, back-haul service we are talking about. This is a service that is provided by a vessel, and this vessel moves between the United States and -- excuse me, the Continental United States and then Hawaii, perhaps, it may bypass Hawaii, then it goes to Guam, and then it goes to Asia, and, perhaps, other islands on the way. It makes a number of stops. And, the vessel, in this case as you've seen in the papers, is not owned by a single company, we are not operated by a single company. Indeed, it could be operated by -- it's at least operated by two different carriers for each of these Defendants, and that, in other words, Matson is using a vessel that it receives on a slot charter basis from APL, and Horizon uses vessels that are owned by Sealand. And so, you have multiple operators on the vessel.

And, indeed, there may be other operators on the vessel in addition to those, because of the phenomenon known as vessel sharing agreements that are legal in the trans-Pacific trade. There are a number of

agreements that are filed with the FMC, in which various parties are able to better utilize the space on vessels, so they don't go empty. There's nothing -- I'm not using this as a pejorative term, I'm simply telling you that when we -- even though there is two Defendants in this case, the vessels that are used are used by multiple parties.

And so, what do you do when you have a vessel that goes, not between just two points, as the situation with a railroad, where you are talking about an origin destination moving coal between two places, but instead you have a vessel that goes lots of different places for lots of different parties, some of which is jurisdictional, some of which is not, what do you do with it? You allocate. You have to allocate. You have to allocate the cost. You have to allocate the revenues, and that's what GO-11 does.

The essential essence of the GO-11 procedure is to do allocations, because that is the phenomenon of the steamship line industry. It is very different than anything that exists in the railroad industry. And so, that is what it does.

Now, the carriers don't like that, and they've made a number of arguments why allocation is really very bad, it's arbitrary, it's judgmental. You know, I have not seen a rate case, and I've been involved in a number of them, in which economists didn't suggest that there ought to be adjustments made, judgments have to be made. The Board itself, and the

ICC before it, typically, make a number of substantive judgments.

So, the fact that judgments have to be made doesn't mean that's bad, make reasoned judgments, court sustained reasoned judgments, that's what the process is all about, so a reason to discard this would not be because of some -- because you have to make reasoned judgments.

They say it is inappropriate to use GO-11 because the rate of return, what they call -- what I call rate of return rate making, what they call, I guess, fully distributed cost rate making, is fundamentally flawed. It's economically inappropriate. Nobody in their right mind would ever use it.

This is, I think, something out of Shakespeare, this is a me thinks the lady doth protest too much kind of argument, because, in fact, it is used, it's used often by a number of agencies, including the FMC, Federal Energy Regulatory Commission, the Federal Communications Commission, and virtually every state public utility commission uses public utility rate of return rate making. That the Board has elected to use a different model for railroads does not mean that rate of return, classic rate of return public utility rate making is invalid or economically challenged, it just means it's different. You studied a different trade, a different industry, and so, that's fine, but there's nothing inherently bad about the use of this.

I actually lost track of the time.

So then, I want to -- okay, they also say that the GO-11 is,

as I said before, is not tried and true. The fact is, it is tried and true, and it's been sustained by the courts, and interestingly, there is a case that I would like to single out for your attention, because it bears on a couple of issues, and it's cited in the papers. It's the Matson Navigation case, Matson v. FMC case, which is 959 Fed 2nd 1039, it is discussed in the briefs, but the Defendants contend that this case doesn't really stand for the tried and true proposition, because they didn't technically challenge the use of GO-11. This is a case in which Matson filed for a general rate increase and the FMC turned it down, and Matson challenged that decision in the Court of Appeals.

The Court of Appeals affirmed the FMC's decision in this case, and found clearly that GO-11 was an appropriate methodology, and so there was no problem about that, and it affirmed the Commission's position on a number of things. But interestingly though, one of the things that the court also said was, it had interesting comments to make about the duopoly nature of the pricing practices in the Hawaiian trade, and the fact that just as it is in Guam that it is only served by, essentially, two carriers, and that there is limited entry for a number of reasons, not the least of which is the Jones Act. And, in that case, Matson conceded, and the court cites Matson's concession, that the Jones Act acted as a constraint on entry in the Hawaiian trade.

Well, the fact is no different than it is with the situation

with respect to Guam.

Thank you all, I'll sign off here.

VICE-CHAIR BUTTREY: To atone for my earlier error, will you go first?

COMMISSIONER MULVEY: Sure.

What's the balance of trade, balance of trade between Guam and the contiguous states? It's mostly from the states to Guam?

MR. GREENBERG: It is, it operates, essentially, in a 10:1 ratio. There's, roughly, 30,000 containers in FEU equivalents, that 40-foot equivalents, heading in the westbound direction and 3,000 containers heading in the eastbound direction.

COMMISSIONER MULVEY: So, it is very heavily from the United States to Guam.

MR. GREENBERG: It is.

COMMISSIONER MULVEY: You say the cost is about $500 per family in Guam each year because of the Jones Act-- Do you attribute it to the Jones Act or do you attribute it to the monopoly pricing practice of the carriers?

MR. GREENBERG: It is, I think it's the latter. I mean, the Jones Act is one phenomenon, but I don't think it's the only thing. It is simply that the -- that's how you break down, that's how it would break down

when I mentioned the $40 million figure, that's how you would break down this in terms of -- and I've sort of forgotten now what the amount was, the number of Guamanians, but we went through an elaborate mathematical analysis and it worked out to $500 for a family of four.

COMMISSIONER MULVEY: We did that at the General Accounting Office for the Alaska's impact on from the Jones Act, and we came up with a number of about $300 per person in Alaska. It can raise costs, but, of course, it also has the purpose of to ensuring that the United States has a merchant marine, along with the operating and construction differential subsidies, the Jones Act serves those purposes.

Have you ever proposed repealing the Jones Act, has Guam ever lobbied for that?

MR. GREENBERG: I'll have to look into that. I don't know the answer to that, Commissioner.

COMMISSIONER MULVEY: It does come up once in a while.

MR. GREENBERG: Okay, it has come up, but I don't know the answer.

COMMISSIONER MULVEY: You want us to apply the GO-11 methodology used by the FMC, but Congress was not clear how we determine reasonable rates for water carriers in the non-contiguous domestic

trade. And, traditionally, we allow the shipper the option for determining the approach to deciding reasonable rates and the approach.

However, this is only applied to railroad shippers, and in this case we have a government entity as opposed to a shipper. Is it fair to say that Congress knew the FMC's GO-11 methodology when it transferred jurisdiction of these cases to the Board? And, would that mean that Congress wanted the Board to use constrained market pricing for water carrier cases, since it transferred it to us, and that's our methodology?

MR. GREENBERG: I don't think so, with respect. It's clear that -- and I think the Commission's decision in 2001 indicates, that it was clear that Congress was presumably aware of the fact the case was pending, but I don't think Congress thought much about whether or not -- what methodology should be used. There's certainly nothing in the legislative history that I found that discusses the issue.

I think what Congress was trying to do was eliminate this dichotomy of overlapping jurisdiction, one for which, by the way, I should point out that I'm probably partly responsible for, because I was involved in the cases in 1977 and '78, in which the Court of Appeals in D.C. decided that the ICC had jurisdiction over the intermodal traffic moving in the of domestic off-shore trades. And so, from that is where the problem began.

But, I think that's what Congress was thinking about, not

methodology.

COMMISSIONER MULVEY: Yes, I'm sure our staff will review the legislative history of it to see whether or not we can figure out what the Congress actually meant. Sometimes that's more difficult than it seems.

If we use the GO-11 methodology, would the Board be constrained by the FMC precedent in how we apply that methodology, or do you think the STB should be free to interpret the GO-11 methodology different from how the FMC applied it?

MR. GREENBERG: I think the Board is free to interpret it as it sees appropriate. The Board has an expert staff. They work very complex rate cases. I've worked with them a number of years. They are very bright people. The Commissioners themselves understand the issues. There's nothing that says that GO-11 is a sacrosanct document that has to work in just a single way. The Board can be guided by -- certainly guided by the past and by the procedures that are set out.

COMMISSIONER MULVEY: If I could finish this line of questioning, Doug.

The FMC used a pre-1995 version of GO-11 for its Guam case. However, there are two other versions of GO-11 that the FMC has used since 1995. Are there any reasons why we can't choose amongst the

various versions of GO-11, or are you suggesting we use the 1995 version?

MR. GREENBERG: I think you could choose from any of them that you think is appropriate, and I guess it goes to the question -- the point I was raising about adjustments, just as the parties are free to raise -- I think should be free to suggest adjustments in methodology, certainly they make these suggestions in SAC cases. I think the Board can and does often make adjustments in its methodology. It's fully appropriate to do so.

COMMISSIONER MULVEY: Doug?

VICE-CHAIR BUTTREY: I was just curious, do these two carriers that are here before us today, have to stop in Hawaii anyway for fuel, or whatever, on their way to ports in the Pacific Rim?

MR. GREENBERG: No, Vice Chairman. The decision to stop there or not stop there is an economic decision.

VICE-CHAIR BUTTREY: This allocation methodology you were talking about, is that some type of distance-based pricing methodology? MR. GREENBERG: In part it is. It depends on the nature of the costs you are talking about. The handling costs, for example, costs of stevedoring at either end, and that sort of stuff, is not dependent on the number of miles, it's a flat cost for all containers. And so, that's allocated on a container basis.

But, the vessel costs, the direct operating vessel costs, yes,

GO-11 does apportion those on a distance basis. It uses what I believe is called the FEU mile basis to do so.

VICE-CHAIR BUTTREY: Uh-huh.

MR. GREENBERG: And so, those costs are spread that way.

And then, there's a different allocation that deals with the issue of general administrative costs, the overhead, the system costs, that have to be spread to these particular things. And so, that's done on a slightly different basis.

But, certainly, the vessel movement itself, that's done on a distance basis, the distance that each FEU moves.

VICE-CHAIR BUTTREY: Is it true that the back-haul revenues cross subsidize the service to Guam?

MR. GREENBERG: The back-haul -- I apologize.

VICE-CHAIR BUTTREY: I'm talking about the existing prices that exist today, is it true that the back-haul revenues cross subsidize the revenues charged to provide service to Guam?

MR. GREENBERG: I don't think so. Are you talking about the back-haul revenues from the trans-Pacific?

VICE-CHAIR BUTTREY: Yes.

MR. GREENBERG: Okay.

I would say exactly the opposite. My view is exactly the opposite. Those containers, the trans-Pacific trade is -- there's so much traffic that moves eastbound, that those containers can move back empty, just like a unit train, and be perfectly profitable. This is simply filler cargo that the carriers are able to make a lot of money, simply from the incremental costs of unloading these containers and the additional fuel and labor that's required to make this modest diversion.

So, no, I would not think this is at all a cross subsidy of the trans-Pacific trade, by the trans-Pacific trade. It works the other way.

VICE-CHAIR BUTTREY: If I were an entrepreneur, which at the moment I'm not, but if I were, isn't it true that I could go out and dry lease a vessel, hire an American crew, get an American flag, and provide service in that market just like these two carriers are?

MR. GREENBERG: Yes.

VICE-CHAIR BUTTREY: So, there's really no barrier to entry there.

MR. GREENBERG: Yes, yes, of course there is.

VICE-CHAIR BUTTREY: What is the barrier to entry if I can just go out and lease a vessel, start my own business?

MR. GREENBERG: Well, basically, there's no barrier to entry, because you could do that, and there are other American companies,

steamship lines, that could also apply this trade, but they don't. And, that is because to service this means you also have to -- it's part of the back-haul on the trans-Pacific trade, in order to make Guam attractive it has to -- you have to already be there, you are in the market in trans-Pacific, so you are moving back empty. That's what makes Guam idiosyncratic, it is a very special trade all by itself. And so, if you were to do this on a standby basis, if you were to do this on a stand-alone basis let's say, I hesitate to use that term, but I don't mean anything by it, and --

VICE-CHAIR BUTTREY: You can use it, but we should not.

MR. GREENBERG: Correct, thank you, very well stated -- and you were to go ahead and charter lease a vessel, first of all, you are only talking about 30,000 containers a year, so we are talking about it works out to be for the way it's handled now it's -- that's not a lot of traffic that you could expect to fill.

You would then have to deal with what are you going to back-haul? You only have 10 percent going back. Economically, you couldn't possibly do this, and that's not even to deal with the question of the advantage the incumbents have. They already have the market. They've got the infrastructure there. And so, to break into that market is virtually impossible.

That's why there's only been two carriers historically, and if there was a clever entrepreneur who thought he could make money, it's there for the taking, because you see the rates, but it hasn't happened. There's a reason why it hasn't happened.

VICE-CHAIR BUTTREY: Is it your observation that the two carriers are charging the exact same rates for the exact same service?

MR. GREENBERG: I don't think -- I don't think they are the exact same rates. They are comparable, they are comparable.

And, one of the interesting things about that little spreadsheet that I gave you is, not only are the rates excessive, as demonstrated in the FMC file, but the percentage of excess recovery is virtually identical. They are both approximately 250 percent in excess of the maximum allowable cost. It sort of worked that way over time, and, no, I don't know what the rates are today, in terms of whether they are exactly the same. I think there are modest differences. The carriers have pointed out, there are individual rate entries that are done from time to time.

But, on the whole, in the main, we are talking about a structure where the rates are roughly comparable and they are wildly excessive.

VICE-CHAIR BUTTREY: And, there's no evidence at all anywhere that either one of these two carriers have made any attempt to drive

the other carrier out of the market.

MR. GREENBERG: None that we've seen. Certainly, there's been no -- there's been no rate action to suggest that anything except the present status quo is acceptable, nor would you expect it. I mean, the economic literature would suggest it's a very nice equilibrium these carriers have, and there's no reason, economic reason, for them to do that. They are doing very nicely as it is.

VICE-CHAIR BUTTREY: You are familiar with the statement that if you want to stay a monopoly you need not act like one?

MR. GREENBERG: Yes.

VICE-CHAIR BUTTREY: Are you familiar with that?

MR. GREENBERG: Yes. Yes, and I think it's perfectly true here.

COMMISSIONER MULVEY: I think one of the things that Doug was driving at before was that in the airline industry, for example, we have business travelers paying a very, very high fare, and leisure travelers paying a low fare, and sometimes the business travelers complain that their fares are too high and they are subsidizing leisure travel, to which the airlines respond that, no, actually, it's the opposite, that because we have these revenues and demand from leisure travelers, the airlines actually keep down business fares. I think that was something I would suggest, that the rates to

Guam to some extent, or rather, the low rates elsewhere, keep down even more the rates to Guam. But, that's speculative.

Let me ask you a question about the marketing costs. A key component of ocean shipping costs, are marketing costs. In the case of Guam, I would assume that the marketing costs are particularly high, because there's only two carriers, and a limited amount of ships that can serve Guam.

If you are dealing with the GO-11 pricing, would you be looking at the marketing costs the companies have overall and spreading that over this trade, or would you be focusing specifically on the direct marketing costs that they have vis-à-vis these ships?

MR. GREENBERG: Well, GO-11 would do that, would provide the allocation. So, the way GO-11 works, as I understand it, is that marketing cost is part of the system cost, the overhead, and it gets spread back through the allocation mechanism. And so, in that way, the methodology will allocate a certain amount of marketing for Guam.

COMMISSIONER MULVEY: I know you don't want us to be looking at a market dominance finding, but didn't one of the carriers propose a -- Matson I believe, propose a rate increase and then withdrew it when the other carrier didn't match it? Doesn't that suggest that there's competition between the two?

MR. GREENBERG: Just the margins, just the margins.

This is not to suggest that, you know, I'm not suggesting that there is not some cause and effect in terms of individual rate actions, but only at the margins.

We are talking about rates that are, I mean, so substantially in excess of what the method -- I believe -- I believe any methodology, I don't care whether it's GO-11 or stand-alone cost, any methodology that would be used to determine the maximum reasonable rate, these rates are way beyond that.

And so, to be nibbling for a couple dollars here or there has really no effect in the long run.

COMMISSIONER MULVEY: Are you familiar with the FERC's use of what's called "a light-handed regulation approach" to deciding whether a challenged rate is just and reasonable, and then they look for specific evidence that the market is sufficiently competitive to preclude the exercise of significant market power. Do you think the Board might adopt some of the FERC approaches?

MR. GREENBERG: I think that the FERC approach, I am somewhat familiar with it, is their attempt to establish, by administrative action, something akin to the market dominance provision that was mandated by Congress for railroads.

But, the same answer, I think the same answer is

appropriate with respect to the FERC approach to determining whether or not there is a need for light-handed regulation here, and that is, the facts speak for themselves, that we would go through an exhaustive analysis and spend a lot of time and money, and at the end of the day we'd find out that, goodness gracious, there is no effective competition here.

And, in any event again, this statute does not -- does not authorize the Board to do that. And so, I suggest it's really the same thing as I've answered before as to market dominance.

COMMISSIONER MULVEY: In his opening statement, Doug referred to the zone of great rate reasonableness, and in our 2001 decision we held that the zone of reasonableness creates a safe harbor for the reasonableness of rate increases of no more than 7-1/2 percent above or 10 percent below the previous year's rate. It does not, however, apply to the reasonableness of the base rate.

And so, the question is, should the Board, after determining the appropriate methodology, simply set the reasonableness rate for 1996 and then apply the ZOR to subsequent year, or should we try to determine the maximum rate for the entire period involved in this case, and then have the ZOR determine reasonable rates for the future?

MR. GREENBERG: I think the latter. That's what makes sense to me, because otherwise if you apply the ZOR, if you established a

base rate in 1996, then in five years you'd wipe out -- we'd be back -- we'd wipe out all the savings that were obtained, and that's certainly not what Congress intended.

COMMISSIONER MULVEY: I think the 1996 rate, with a 7-1/2 percent above it compounded over ten years, would double that rate easily.

MR. GREENBERG: Yes, and so, we'd essentially be getting, you know, relief that would have no value.

COMMISSIONER MULVEY: Okay.

Doug?

VICE-CHAIR BUTTREY: I have no further questions.

MR. GREENBERG: Thank you.

VICE-CHAIR BUTTREY: Gentlemen.

MR. ALLEN: Thank you, Vice Chairman Buttrey, Commissioner Mulvey, and my name is Richard Allen, representing Matson Navigation in this case.

I'd like to start addressing some of the points that both of you raised in your questions, which I think are very pertinent points.

The first one Commissioner Mulvey asked about the Jones Act, and I think his questions were very perceptive, because the fact of the matter is, to the extent that Guam is basing its arguments and its case on a

situation that was the result of the Jones Act, what he's really complaining about is the policies that Congress endorsed when it enacted the Jones Act and has maintained the Jones Act.

So, for them to base their case on the situation created by the Jones Act, they are really taking issue with Congress, not with the competitive situation.

The second point Commissioner Mulvey asked, didn't Congress intend to have the Board apply constrained market pricing in this case, we think it clearly did. We argued at length in Phase I of this case in our briefs, and I invite you to look at them, that the legislative history really does demonstrate that Congress intended that the Board, which is taking over the jurisdiction here, would apply its basic rate philosophy and would not apply the public utility type regulation that the FMC used to apply.

Now, the Board, in its decision in 2001, said, you know, it believed that Congress kind of left it up to the Board. You know, I think we might take issue with that, but in any event even if it was up to the Board, to the extent Congress has indicated any view on this matter it then seems to me it would tend towards the Board's rate regulation philosophies and precedents.

Then, Commissioner Mulvey also asked about the GO-11, and Mr. Benner here will explain at greater length why GO-11 would be a

completely inappropriate methodology in this case. First of all, it was established for the purpose of assessing general, across-the-board rate increases. Second of all, it's a cost-based methodology that would result in a very anomalous situation here in the Guam trade particularly. And, it's simply a clearly inappropriate methodology to apply here, we submit.

Commissioner Mulvey, I think, also asked about the FERC's approach to rate regulation, and the way he quoted it, it seems to me the answer is that is the Board's approach, that's the approach the Board has taken in many, many cases, most particularly the Koch pipeline case that we've cited and discussed in our brief, and that's the approach it ought to take here.

And, Commissioner -- Vice Chairman Buttrey raised the question about barriers to entry, again, a very perceptive point. The fact of the matter is, there are no significant barriers to entry in this trade, except the ones that Congress has established through the Jones Act, and if the carriers here were extracting exorbitant monopoly profits an entrepreneur would do exactly what you suggested, and that open entry, really, is what restrains -- is the potential competition, in addition to the actual competition, that exists in this trade.

In any event, Guam in this case, as you know, is not challenging any individual rates of Matson or Horizon, or any set of rates of

the carriers, but is instead challenging all of the rates in the aggregate, even though the hundreds of rates that the carriers charge in this trade vary by as much as eight-fold. Guam's complaint is based on the allegation that the carriers' rates in the aggregate produce revenues that they contend are excessive and they seek reparations based on that claim.

But, this kind of across-the-board challenge to the totality of the carriers' widely varying rates is unprecedented in the annals of the ICC and the STB, and for very good reason, that whatever methodology the Board might decide to apply here, the ultimate determination of whether there's any factual basis for Guam's claims would obviously entail a massive evidentiary undertaking for the parties and the Board.

But, before we ever get to that evidentiary battle, there are several threshold issues that need to be resolved, and we submit that the correct resolution of those issues should lead the Board to deny Guam's complaint without further litigation.

The first and most important is the issue of whether there's any reasonable methodology for determining the reasonableness of the carriers' rates in the aggregate that could provide a reasonable basis for relief to shippers in this case.

Now, in its decision in November of 2001, the Board held that the governing statute did not, "on its face preclude Guam from

challenging the totality of the carriers' rates," but the Board didn't say that Guam could do so. Instead, the Board said, we will determine in Phase II of this proceeding whether there is a reasonable methodology for assessing a rate structure complaint in this case.

Now, Guam, which as the Complainant has the burden, has not shown that there is any reasonable methodology, and we submit that there simply is none for the following reasons. Even if one could develop a test or method for determining the reasonableness of a carrier's total revenues in the trade, in order to be reasonable that methodology would also have to provide some basis for determining a remedy to shippers that is both reasonable and meaningful. Otherwise, the application of that methodology would simply be a pointless and very expensive waste of time.

The fundamental problem in this case is that no determination of the reasonableness of the rates in the aggregate could provide a basis for a reasonable remedy for shippers, and this has been clearly demonstrated, we submit, by the FMC's final decision, most recent decision a few months ago, after 16 years of litigation in the case that Guam brought in 1989 against American President Lines and Horizon's predecessor.

In that case, the FMC made a finding seven years ago concerning the aggregate revenues of APL and Horizon in two years in the

late 1980s, and after seven more years of litigation the FMC finally found that Guam had provided no basis for the issuance of a remedial order and denied the complaint.

Guam has certainly not shown in this case that the -- or in its arguments here today, that the methodology it's urging as GO-11 could serve as the basis for some reasonable remedy to shippers.

When you are dealing in a case like this with rates that vary from $1,600 a container to $14,000 a container, even if the aggregate revenues of the carriers were found to be, by some test, excessive, that would provide no basis for determining whether -- which rates that went into those revenues were reasonable and which were unreasonable. Certainly, many of the rates in a situation like that would be reasonable by any rational methodology, for instance, the very low rates that were specifically negotiated with shippers.

Now, a determination about the reasonableness of the aggregate revenues would have no bearing, no relevance, to determining which rates are reasonable and which rates are unreasonable and, therefore, could not provide any reasonable basis for a remedy for shippers.

So, we, therefore, urge the Board to deny Guam's complaint without further proceeding, on the ground that Guam has simply failed to show that there is a reasonable methodology for assessing its

complaint in this case, and thereby spare the parties and the Board from further wasteful litigation that could not lead to any meaningful conclusion.

The second threshold issue is this, if the Board disagrees with us and says, yes, we think there is a reasonable methodology for assessing the reasonableness of the carriers' aggregate revenues, then we submit that the most appropriate methodology would be one that is consistent with the principles of constrained market pricing, that the board and the ICC has developed over many years in connection with railroad and pipeline cases. The reasons for that are explained more fully in our briefs and in the verifying statement of Mr. John Klick that we've attached to our briefs, but most importantly, those principles are based on the fundamental proposition recognized by the Board and the ICC in many cases, that rate regulation itself is appropriate only when it's been determined that there's an absence of effective competition in a market, and that's consistent with the FERC's approach as well, Commissioner Mulvey.

As the Board said in the Koch pipeline case, Koch pipeline case cited in our briefs, "If the market is effectively competitive, then agency action can only distort the economically efficient rates. Such ill-advised action would contravene the policy to promote economical and efficient transportation, and to encourage sound economic conditions in transportation."

Now, that observation is particularly apt in a market like Guam, which is served by two or more carriers and with very low barriers to entry and exit. In such a case, the risk is particularly high that inappropriate rate regulation would have the effect of distorting efficient rates and causing other adverse consequences.

If, as we submit is the case, there is effective competition, and each carrier's rates are constrained by its competitor, and its competitors, then for an agency to impose artificial rate ceilings would have different effects on the different carriers, with a very likely effect that the least efficient carriers would be driven out of the market, which is partly a pro-competitive result.

So, accordingly, if the Board disagrees with us and says, yes, we think there is a reasonable methodology for assessing rates in the aggregate, then we submit it should bifurcate the remainder of the proceeding in order to first make the threshold determination whether there's effective competition in the Guam trade or whether there was during the relevant period, which we've shown in our briefs is September 10, 1996, that is the only way that the ZOR Could reasonably be applied consistent with the Board's decision in November, 2001.

We submit that it should make that threshold determination before requiring the parties and the Board to embark on a massive evidentiary

undertaking that would be required to determine the facts and the application of whatever methodology the Commission establishes, the Board establishes, to those facts.

Now, Mr. Greenberg has responded to our submission that there needs to be a market dominance threshold determination by saying, well, there's no statutory requirement for that in this trade. Well, that doesn't matter. The Board addressed that very issue in the Koch pipeline case and said, yes, it's true that unlike the rail statute there's no statutory requirement that we first determine that there's effective competitive, but as a matter of fundamental basic rate making policy we should make that determination first, because, as I've quoted, it's simply inappropriate to have rate regulation where there is effective competition.

Now, Mr. Greenberg has also said, well, the Ashley Creek case said you shouldn't bifurcate, well, the Board had said, and we've quoted it in our briefs, that bifurcation to consider market dominance issues first is appropriate when, "there is a substantial doubt as to the competitor's ability in the case to demonstrate market dominance," and that's the FMC Wyoming court case.

And, in the Sierra Pacific Power case versus Union Pacific just a few years ago, the Board did bifurcate and require a determination of market dominance first, and we submit that, again, if you find that there is a

reasonable methodology that's clearly what you should do first, and you should do it because we submit here there's a very strong prima facie case that there is, and always has been, effective competition in the Guam trade. That strong prima facie case is demonstrated first by the fact that Guam has long been served by at least two scheduled carriers from the United States Mainland, and from other scheduled and non-scheduled carriers from the Far East and elsewhere.

Now, Mr. Greenberg is simply wrong when he says that Guam is not served by any other carriers, they are, and in the verifying statements we've put in here, the verified statement of Mark -- the name escapes me right now, but in one of our verified statements it's clearly stated that Guam has been served by two foreign and scheduled carriers, as well as other unscheduled carriers, and this is confirmed by the report -- the study that was done by the Department of Transportation in 1997, where they said Guam is also served by foreign carriers that provide competition to the U.S. carriers.

So, the prima facie case is established by the fact that there are more than two carriers that long served Guam, and by the fact that in ocean shipping the barriers to entry and exit are very low.

Now, in the case of railroads, where the barriers to entry and exit are very high, the Board and the ICC have nevertheless presumed

that having two railroads serving a market provides effective competition, and that presumption is even more warranted in the case of a market like Guam, which is served by more than two carriers, it has relatively low barriers to entry.

That Guam has enjoyed effective competition is also demonstrated by the verified statements of Matson and Horizon witnesses, Peter Wilson, Mark Miller and Daniel Downes, Mark Miller was the witness that I referred to earlier, and these statements explain in detail how Matson and Horizon have vigorously competed for traffic since Matson entered the trade in 1996. Among other things, Mr. Wilson stated, "Since entering the trade in 1996, Matson has taken approximately 3,400 separate rate actions, the vast majority of these have resulted in rate reductions." He also stated that, "Competition is so strong in the Guam trade that Matson must match any rate reductions taken by CSX in order to retain cargo, and similarly CSX is forced to match any 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." And, he gives a number of specific examples of this happening.

Now, effective competition is also shown by the conclusions of the rate study that was done by DoT in 1997, which was mandated by Congress in ICCTA. That study found, among other things,

that excess capacity in the Guam trade has played a major role in preventing shippers from increasing rates. He found that the carrier's freight revenue per container, i.e., their average rates, dropped 20 percent from 1990 to 1995, and it also found that since 1972 there have been seven carriers, seven U.S. carriers, serving Guam in regular service, and since 1972 five of those carriers have left the trade, showing ease of exist, lack of barriers to exit, and that Guam receives service from foreign flag carriers, from Asia and Europe, that provide competition to the U.S. carriers.

Now, Mr. Greenberg made some assertions about rate comparisons with rates to the Far East. There's no basis in the record before this Board for his assertions, and I don't, frankly, know where they come from. I haven't seen the sheet he's referencing. But, it should be obvious to any person who travels by air that rates to major hubs are less than rates to out-of-the-way places. I mean, that's basic economics 101.

Now finally, effective competition in the Guam trade is demonstrated by the testimony of Guam's own expert witness, Mr. Nadel, who cited an instance, and I think Commissioner Mulvey referenced this, when Matson withdrew a proposed general rate increase, it wasn't of the margins, it was a general rate increase, because its competitor declined to make a similar increase and because in Mr. Nadel's words, Matson feared it would "lose significant volumes of its cargo."

Now, this corroborates Mr. Wilson's statement, and it further is a textbook example of effective competition at work. This Board has held that, "There is effective competition when a carrier will lose some or all traffic to other carriers if it raises rates." It's more -- it's almost more than prima facie, it's almost conclusive.

So, in short, because there is a strong prima facie case of effective competition, if the Board finds, again contrary to our submission, that there's a reasonable method for determining aggregate rates, and the reasonableness of it, it should bifurcate the remainder of the case, require the parties to submit evidence on that issue, and then decide whether there was effective competition in the Guam trade in September, 1996, before requiring the parties to submit further evidence.

If it then decides that there wasn't effective competitive it should deny the complaint then and there.

If the Board, at that stage, concludes that there was not effective competition in the Guam trade in 1996, it should then apply the stand-alone cost method to determine the reasonableness of the aggregate rates in effect at that time.

On that issue, I'll -- unless the Board has questions -- I will refer the Board to our briefs and to the statement of Mr. Klick, which discusses it in some detail.

But, for the reasons I have discussed, I submit that the Board should never have occasion to apply the SAC test to the totality of Matson's and Horizon's rates in effect in September, 1996, and that's so because the Board should deny the complaint now on the grounds that Guam has failed to show that there's any reasonable methodology for assessing its complaints, and if the Board doesn't deny it on that ground now it should take evidence on whether there was effective competition at that time, and we submit that that evidence will convince it that there was effective competition and it should dismiss the complaint.

Thank you very much.

MR. BENNER: Thank you, Mr. Vice Chairman.

Could I inquire of the timekeeper, ten minutes, okay.

I think what I can best do to add value to your deliberations at this point is go back and try to catch, as Mr. Allen has done to a large extent, some of these characteristics of this trade, so the context is well understood. I also will spend some time focusing on what we believe to be fatal weaknesses in the FMC's approach to GO-11 application in this kind of case. It had a very robust context, and when it's applied in that context it makes some sense, but this isn't that context.

First of all, just as a clarifying point, we've had a lot of talk about the Jones Act, but it's an important nuance, and by nuance I don't

mean to minimize it, it's an important fact that in Guam what we are shorthanding as the Jones Act is actually a U.S. flag restriction, it is not as is the case in other off-shore trades such as Hawaii, Alaska and Puerto Rico, a U.S. billed requirement, it is merely a U.S. flag requirement, the full-force Jones Act restrictions that you normally encounter is a requirement that you have a U.S. billed, U.S. crewed, U.S. owned vessel. Here we have a U.S. flag requirement, which makes it possible to obtain tonnage on foreign markets, as long as you meet U.S. ownership requirements. And, I think that should be understood as you study this situation.

I also would like to emphasize what Mr. Allen has also stated, that this is not some kind of walled off domestic trade. Guam, because of its geography, is also accessible by foreign competition. There was a great deal of discussion about this, not only in the record that's before you, but in the FMC proceeding, and the answer that I have heard from representatives of Guam over the years about what the impact of this foreign competition is, but you have to understand that we do have -- we are an outpost of America, we do have a taste for American goods, so they try to minimize that point, that Guam does not sit in some kind of hermetic isolation out there in the Pacific, reachable only by the two carriers.

As we say, we think the existence of two carriers, certainly, by Board precedent, is prima facie evidence that there is substantial

competition in this trade. But then you add in the fact that they are -- there's no restriction on foreign carriers serving this particular location from Asia or from anywhere else in the world. Obviously, there's some geographic reasons why you might not find a robust service from Italy or something by sea, but certainly from Asia it's very close by those points.

COMMISSIONER MULVEY: Could I interrupt for one moment?

MR. BENNER: Yes.

COMMISSIONER MULVEY: You don't have the same Jones Act restrictions in the sense you don't have to have the ship constructed in the United States and crewed by U.S. citizens, but it has to be U.S. flagged to serve Guam.

MR. BENNER: That's right.

COMMISSIONER MULVEY: But then you are saying that foreign vessels can serve Guam as well, if they are not U.S. flagged how could they serve Guam? Do you mean, they can serve Guam but they can't serve it to the United States ports?

MR. BENNER: Yeah, precisely, and that's a useful clarification. The foreign flagged vessels, say a vessel calling from Japan, or Taiwan, or Australia, and I believe, certainly, in the -- you'll have to forgive me, over the years I tend to eat alive the FMC and the STB record, but in one

record or another, or both, there's evidence of calls by foreign vessels, and Mr. Allen has referred to that in his presentation. So, I just don't want the Board to be sitting here thinking that there's some kind of barbed wire put around this trade in a maritime sense, that means that it can only be served from the United States by the vessels belonging to these companies or some other companies, it's a much more open trade than that.

COMMISSIONER MULVEY: But, I think in terms of the relevant market being Guam to the U.S., that can only be served by U.S. flagged carriers.

MR. BENNER: Yes, that's right, but then the qualification that I'm trying to make sure is understood is that it's not the full panoply of Jones Act restrictions that might apply in some of these other non-contiguous trades.

Now, one other thing that I think needs to be mentioned is that the characteristics of the outbound cargo to Guam are quite different than the characteristics of the outbound cargo to the Far East. Now, obviously, both carriers are serving Guam, and then going on to Asia and bringing back return cargo, as Mr. Greenberg has indicated, but you must understand that the types of cargo, the profile of cargo going to the Far East tends to be more unfinished goods, lower-rated commodities than the kind of producer goods that go to Guam.

Now, that may be extra record for here, because I do not recall whether that issue has been raised previously. I can say, however, if you look at the FMC record in this proceeding, it's quite evident that at one point Guam did try to sustain a rate comparison element of its complaint before the FMC, and that approach was largely or totally abandoned by the end of the first phase of the FMC proceeding. These rate comparison are invidious because you can't get an apples to apples comparison when you look at the cross section of commodities going to Guam as opposed to those going to the Far East from the United States. On a return run from the Far East to the United States you tend to have high-value products.

This leads to one other point that I think ought to be made. I do not accept facilely Mr. Greenberg's characterization of back-haul, head-haul, as it applies in an economic regulatory context in this trade. There is great dispute about that in the FMC docket. You have two carriers here who have very different operating characteristics, very different patterns of service. My client, Horizon, serves Guam only across Hawaii, Matson, sometimes as I understand it, or at least in the period of the record we are talking about, served Guam direct on some strings. But, whatever that operational reality is, the fact is that there is great dispute from economic witnesses in the FMC hearing about what the head-haul and the back-haul is on this.

You know, frankly, I don't think at this stage of your proceeding it's outcome determinative, but I do not accept, certainly, from Horizon's standpoint, we regard the Hawaii/Guam service as the head-haul on this, and I would like that point well understood.

Then moving quickly to General Order 11, again, because of the constraints of time, I would very much ask you to focus on the verified statement of Dr. Laurence Colby, who also served as our expert witness in the FMC proceeding, joint witness with American President Lines, the other carrier, but the history of General Order 11 is a long one, a venerable one, as Mr. Greenberg indicates, but it had its particular context. The context was, in its last incarnation from 1978 on, the incarnation that we faced at the FMC, that it was designed to help the FMC deal with time constraints put on general rate increase investigations and suspensions, based on statutory amendments that were enacted in the mid '70s. It was largely focused on two-way trades at that time. In the FMC docket, there was testimony from the retired chief economist of the FMC that when he saw GO-11 filing numbers from carriers for Guam they viewed them as having little utility, because of the anomalies of the Guam trade.

It's the very uniqueness of the Guam trade and how it is served, in terms of it being a small part of this much larger complex service that you've heard about from all of us today, where it touches the Far East,

touches Hawaii, comes back with Far East cargo, in our case we are subject -- we do participate in vessel sharing agreements with another carrier on the return traffic, it's precisely that kind of complexity that makes General Order 11 a fully distributed cost methodology that's dependent on infinite numbers of allocations of costs from different service makes it something you should be very wary of here.

In the FMC context, there was a uniform system of accounts that was in place, there were annual filings pursuant to that uniform system of accounts that enabled the Commission to take a proposed general rate increase, compare it quickly within the statutory deadlines to what the last annual filing of the carrier had been, and then meet its requirements under the law to process those proceedings quickly, prior to the 19 -- the Public Law 95475 amendments that put these provisions in place, the FMC was having a terrible time evaluating general rate increases within the suspension periods that they were required to modify, and by the time they'd finish the proceeding all the underlying facts had changed.

So they, essentially, set up this FDC type methodology, it was a bit like those little frames you see at the airport to test whether your carry-on baggage can get on the plane, it was something that was available right there for them to look at against filed papers already in place. You don't have any of that. To pick this thing up root and branch, and transfer it

over to this Board, especially given the work you have done in other modes, I would think would be, not only -- it would be what the FMC has called wasteful and futile in a context of trying to take General Order 11 and apply it down to determinations about commodity rates. I think it would be equally wasteful and futile for you to try to apply it here. We would have a great deal of work to do to make that happen.

Now, my time has expired. Maybe the best thing at this point is to try to answer any questions you might have about this particular aspect.

Again, finally, in addition to Dr. Colby's testimony, which also has a strong list of references to the economic literature, because we do believe that fully distributed cost methodology has been fairly much put on the back burner among thinking economists, and Dr. Colby references that, I would ask you to look at the July FMC order in 8926 that Mr. Allen referred to, because that shows where this kind of thing can end up. That was a very long proceeding, and it is still the subject of litigation by both sides in the Courts of Appeals, and I hope we'll find a better way here. We strongly agree with Matson that some evaluation of competitive conditions in the trade is the best place to start, because we think you'll find a very competitive trade there.

And, I will desist at this point.

Thank you.

VICE-CHAIR BUTTREY: All right.

COMMISSIONER MULVEY: Mainland rate regulation by the Board is in the context of revenue inadequacy, that is, we find that the industry as a whole has inadequate revenues and, therefore, we conduct our analysis of stand-alone costs in that context.

That's not true of the Maritime industry, though, it's not true of the trade to the Far East or to Guam, because these firms are not revenue adequate.

How do you think that would affect our analysis?

MR. ALLEN: Well, was the premise of your question the firms are not revenue adequate?

COMMISSIONER MULVEY: The premise is the firms are revenue adequate.

MR. ALLEN: Well, I don't know. I mean, I don't know what the facts are in that. But, and I'm not sure that is true.

COMMISSIONER MULVEY: We're wrestling with that now, in terms of the railroads, the railroads are approaching revenue adequacy, we don't know whether or not the stand-alone cost method is the one we should continue to utilize.

MR. ALLEN: It is our view, and we've explained this in

our briefs, that revenue adequacy is the one aspect of constrained market pricing that really wouldn't fit in this particular context.

When you are trying to decide whether the rates to Guam, or any particular rates to Guam, are reasonable or unreasonable, it would not be particularly relevant whether Matson or Horizon was revenue adequate on its whole system.

And so, that is one aspect of constrained market pricing that we say doesn't work here.

COMMISSIONER MULVEY: Okay.

Is there any evidence, and this, I suppose, goes to our Guam witness as well as you, is there any evidence of collusion or price leadership that you've been able to tease out? If you have a duopoly there can be competition between the duopolists, and often they are competing in many other markets. However, because there's only two players, there's an ability for one to follow the other. Is there any evidence of price leadership or price follower-ship in the Guam trade?

MR. GREENBERG: Are you directing the question to me?

COMMISSIONER MULVEY: To you, yes..

MR. GREENBERG: I'll have to confess that we are new to this case, we are not that -- I am not that familiar with the FMC record, and I do not know what the evidence is in the record. I apologize.

COMMISSIONER MULVEY: Again, I go back to the point where Matson made as application for attempted increased rates, and it had to withdraw it because it felt that the other carrier was not going to match them.

MR. ALLEN: Yes, Commissioner Mulvey, I would -- I am happy to answer that question by saying, on the contrary, I think the evidence before this Board, on this record, is quite to the contrary, that there is no evidence of price collusion, at least none that is harmful to competitors.

On the contrary, the evidence, as stated by Mr. Wilson, the vast majority of the 3,400 rate actions that Matson has taken since it got into this trade have been rate reductions, and when Matson reduces a rate, yes, it's true, competition requires Horizon to match that rate or lose the traffic, and that happens all the time.

I wouldn't call that, you know, collusive pricing, that's just competition at work, and there is also evidence that APL tried to take a general rate increase in 1994, the other carrier, I guess it was then Sealand, declined to take it, and so APL withdrew it. There's the example that Mr. Nadel referred to, when Matson tried to take a general rate increase, the other carrier wouldn't go along, so Matson withdrew it.

So, I would say that competition is very healthy in this trade.

COMMISSIONER MULVEY: Let's assume that we choose to employ constrained market pricing, with the stand-alone cost method. We currently use the uniform rail costing system to determine variable costs. What would the Board use to determine fixed and variable costs for water carriers engaged in the non-contiguous domestic trade?

MR. ALLEN: I think it would have to -- you would have to develop those issues in the particular case. I think the Complainant would have to put on its evidence of what the variable costs were, and we would respond. It would be complicated issues, but there is no -- there is no existing -- there's no URCS in this trade. So, I think, you know, you'd have to make it up as we go along.

COMMISSIONER MULVEY: Didn't the FMC develop some of these costs? Could we borrow from the record of their evidence, from their approaches in the past?

MR. ALLEN: I don't believe so, but I would defer to my colleague on that.

MR. BENNER: I think you'd have a very awkward fit if you tried to -- because the GO-11 methodology was a full-blown, fully-distributed cost type of accounting system, designed for another context we contend, the fact of the matter is that if you try to plug modules of that into your system you are going to have a real problem.

I think if you send us into Phase III under general guidelines to use constrained market pricing, or stand-alone cost system, and then pre-direct that we have to take elements of that from the FMC, that would be a big problem.

COMMISSIONER MULVEY: Doug, I'm going to have more questions.

VICE-CHAIR BUTTREY: Is there any -- could you enlighten us at all on the issue of how much of this traffic is U.S. military traffic?

MR. ALLEN: I think the testimony in our reply brief by Mr. -- I'm sorry -- Mark Miller, in his statement, he says that it's approximately 21 percent, at least it was in his statement. And, of course, that's traffic that the military allocates between the two carriers, so that's not traffic they can really compete for.

VICE-CHAIR BUTTREY: How much of the traffic that's moving over those lane segments is beyond gateway traffic?

MR. ALLEN: You mean it's gateway that goes to Guam and then elsewhere?

VICE-CHAIR BUTTREY: The actual O and D pair is different from West Coast/Guam.

MR. ALLEN: I think again, Mr. Miller has some figures on

this, and as I recall, something like 10 or 15 percent of the traffic that goes to Guam is then trans-shipped to other places, Micronesia, I think that's correct.

VICE-CHAIR BUTTREY: What about U.S. origin traffic moving along that lane, those lane segments, between the U.S. and Guam?

MR. ALLEN: U.S. origin, how much goes --

VICE-CHAIR BUTTREY: How much of the subject traffic would have an origin destination point someplace other than the West Coast and Guam.

MR. ALLEN: You mean, from Chicago, interior?

VICE-CHAIR BUTTREY: Yes.

MR. ALLEN: I think there is evidence in the record, but, frankly, I can't remember how much of the traffic is what we could call intermodal. A fair amount of the traffic is rail/water, which is exempt from Board jurisdiction, which would be another complicated factor, if we ever get to the evidentiary stage.

MR. BENNER: In the FMC record, although I wouldn't wish it on any of you to have to go that far back, and I can't represent that it has any current validity, there was a considerable jurisdictional dispute about interior point intermodal traffic that was part of the original Guam complaint, and while it certainly was significant, I hope I'm correct, I would undertake to tell you later if I'm wrong, that the bulk of the cargo was West Coast

origin.

VICE-CHAIR BUTTREY: You seem to be saying to us that the complaint, as it stands today, is inadequate to make any kind of determination whatsoever, because it's too general in nature. Is that -- count?

MR. ALLEN: That's a good summary, yes, I would say that's correct.

Now, and I would follow up by saying, you know, if there was any shipper out there who really thought his rates were exorbitant, he's perfectly free to bring a complaint. And, you know, we wouldn't contend that he had to use stand-alone costs, we'd probably agree that some other simpler method would be. But, no shipper has come forward to complain about our rates. Many shippers tell us --

VICE-CHAIR BUTTREY: I'm just curious how you think we would fare in the Court of Appeals if we simply said Guam shippers are not captive, that's the end of the matter.

MR. ALLEN: I think the Court of Appeals would have to affirm it. They are not going to second guess you on a determination like that.

I think you would have to have a further proceeding so that Guam would have an opportunity to present evidence on that, because they

could argue that if you just ruled now we find that there's competition they could have an argument that --

VICE-CHAIR BUTTREY: Your position seems to be, there are two carriers serving the markets over there, so, therefore, they are not captive, and so, therefore, they have no case.

MR. ALLEN: Well, it's our position that that -- the fact that more than two carriers are serving the market should create a strong presumption that they are not captive. I'm not saying you can just -- you should decide that now, I think Guam should have an opportunity to present evidence on that, but there's certainly a strong prima facie case of that.

MR. BENNER: And, given that that's what we consider to be that strong prima facie case, based on your own precedent in other modes, in terms of the activity of these two carriers, we feel strongly that that should be the focus of the next phase, if there's a next phase.

VICE-CHAIR BUTTREY: What would happen if both carriers decided, we don't like this market anymore, we can't make any money here, we are out of here, we are not going to serve this market anymore, so you just stop serving the market entirely, and nobody else steps up to the plate to serve the market?

MR. ALLEN: That would be a serious problem for Guam.

VICE-CHAIR BUTTREY: What happens then?

MR. ALLEN: That would be a very serious problem for Guam, and it would be a very serious problem for Guam if the Board's decision in this case forced one of the carriers out of the trade, then they'd be left with the other one. I don't think they would like that.

MR. BENNER: Had the FMC decision not ended the way it did, with a finding of no damages, you might have faced the situation where one carrier would have been forced out because of the application of GO-11 principles to forcing carriers to operate at different rates in a trade where you can't have rate dis-equilibrium and still get cargo.

COMMISSIONER MULVEY: Let me follow up on this issue again. You said that there's more than two carriers in the market, foreign carriers are also in the market. My understanding is, the market is Guam to contiguous U.S., is that correct? That's the market we are talking about, or are we talking about some other market where it could be Guam to the U.S., via Asia, for example, or via Australia?

MR. ALLEN: Well, we would contend that for competitive purposes the relevant market is not simply Guam to the U.S., that for competitive purposes competition from other sources is highly relevant. So, that would be our view.

COMMISSIONER MULVEY: You mean competition for the goods made in the U.S. to Guam, which is the direction of the traffic,

competition from goods made in China to Guam would be competitive, correct?

MR. ALLEN: Competition from --

COMMISSIONER MULVEY: Or Japan.

MR. ALLEN: -- from for gasoline from China would be competitive with competition for gasoline from the United States.

COMMISSIONER MULVEY: Okay.

MR. ALLEN: And, many, many other products, automobiles.

COMMISSIONER MULVEY: So then, the market then that you are defining is traffic to and from Guam, as opposed to traffic between Guam and the contiguous United States, correct?

MR. ALLEN: That's what we would say.

COMMISSIONER MULVEY: Would you agree that that's the relevant market or is the relevant market, in your view, the contiguous U.S. to Guam?

MR. GREENBERG: It is clearly, it is U.S. to Guam.

COMMISSIONER MULVEY: So, one of the things we need to determine is what the market is that we are dealing with, in terms of what the competitive situation is.

MR. BENNER: Commissioner Mulvey, if I could interject.

You know, Mr. Greenberg can cast his client's complaint as he sees fit, but the reason that this accessibility by Guam to other carriers is important is that it affects the overall competitive conditions in the trade. It's a contestability issue, in terms of what's going on. They claim that you have, essentially, a monopoly with two heads on it that's distorting market conditions in Guam. We contend that we can't do that, one, because we are competing with each other, and, two, because nothing would move if we price -- if we act in our pricing decisions without regard to the fact that there is, indeed, a foreign access to this market for contestable goods.

COMMISSIONER MULVEY: My understanding in railroad cases, the Board at one point did take into account geographic and foreign competition, as well as product competition, but I think we've since changed our view on that, with regard to the railroads,I supposed its still open with regard to water carriers.

Let me ask another question with regard to the reparations issue, and that is, if, indeed, we were to rule that rates were unreasonable, and reparations should be made, how would you go about, compensating shippers for excess charges, because the statute says that if the Board finds the rates excessive then the carriers must return those amounts, plus interest to shippers.

But, clearly, the Government of Guam is not the shipper,

there may be a shippers, who were harmed but there are not being represented. How would you go about making reparations to shippers, especially those who are no longer in business?

MR. GREENBERG: At the moment I don't actually have an answer for you, because I think it's a very good question, but I think it's premature.

One of the things that I'm hearing from my colleagues on the other side is that there's confusion, I believe, with respect to whether or not the case should be dismissed because there's no methodology, or because there's no remedy. And, they are saying that there's no remedy that's appropriate.

Well, I think we are not there yet. It cannot be a viable principle of law that suggest that there is a harm that cannot be recompensed. It just doesn't exist.

We'll find an appropriate remedy, you know, when it is appropriate time, when we find that there is a liability, but we are not there yet.

COMMISSIONER MULVEY: Well, I wondered about the chicken and egg part of that, in other words, should we go to the trouble of finding that there is a harm for which we have no remedy before defining whether or not there's a remedy that could be applied once we find the harm?

MR. GREENBERG: Well, you raise an excellent question, and that's why we are in the Court of Appeals with the FMC decision. The FMC has found that there is a gross harm, but they've made it impossible for that harm to be resolved.

It simply cannot work that way. I just reject that principle.

MR. BENNER: Commissioner Mulvey, may I -- with your lead, I dispute Mr. Greenberg's characterization of what the FMC has found. The FMC found that when you apply General Order 11 to this kind of complaint, as Guam asked it to do, and which the FMC found it had the right to do under -- because of the breadth of the FMC complaint procedures under Section 22 of the Act, you put the numbers in, you grind them up, and this is what comes out the other side.

But, you do not find in that FMC decision anything approaching, and Mr. Greenberg can characterize it as gross harm, that's not the FMC's decision, that's Mr. Greenberg's verbiage.

COMMISSIONER MULVEY: Well, presuming that we found that the rates were unreasonable, and that harm was done, and that we could quantify the harm, would it be fair to simply compensate the Government of Guam, which could take the monies and invest it in its port, et cetera, as a fair way of compensating for the harm, or must it be given to the shippers?

MR. ALLEN: I don't believe so, Your Honor. I think the statute contemplates and requires that any remedy has to be remedy to the shippers for the harm done. It has to be some reasonable -- it has to have some reasonable relationship between a finding that the rates are unreasonable, particular rates are unreasonable, and the remedy that's provided to the person who is harmed by that unreasonable rate.

A remedy, the kind of remedies that Guam has suggested really make no sense, but your basic question is really an important and fundamental one, and it really illustrates our point, that to be -- you can -- theoretically, you can devise a method for assessing or testing the rates in the aggregate, but in order for that to be reasonable there has to -- it has to be able to lead to some reasonable remedy. And, it simply doesn't here in this case, and it can't, and it's very revealing that Mr. Greenberg has admitted that he doesn't have any answer to your question. There is no answer to your question, and it would just -- as the FMC proceeding has demonstrated, it would be a complete waste of time to have us go theoretically determine, you know, rates in the aggregate if it can't lead to any meaningful remedy.

MR. GREENBERG: Commissioner Mulvey, if I may, I would like to just follow up on something that Mr. Allen just said, and that is, I think he is, with due respect, I think he has misquoted the statute, because that is not what the statute says. It says, upon complaint from any

governmental agency or authority, and upon a finding or violation of subsection A, the Board shall make such orders as are just and shall require the carrier to return, to the extent practicable, to shippers all amounts due.

That goes to the question before, I did not say that I had no idea, I just said it's not an appropriate time to fashion a remedy. I do believe that there is going to be a remedy that is appropriate, and it may well be that your suggestion that maybe Guam should invest in the infrastructure in order to facilitate, that may be an answer, but we are not there yet.

But, clearly, in my view, there has got to be, and I think the statute provides for a remedy, even though Guam is not a shipper.

MR. ALLEN: Again, I would just reiterate that the statute requires that there be a reasonable relationship between the violation, the unreasonable rate, and the remedy. We submit that any kind of remedy that the Board imposed, that simply required us to spend money to build hospitals in Guam, or, you know, for any other public good, would not be permitted by the statute. There has to be a relationship between the remedy and the shippers who were harmed.

And, requiring us to fund port development would not reasonably do that, because some shippers who have been enjoying reasonable rates for the last 20 years would get a windfall, they'd unduly benefit, and the shippers who'd actually been paying, hypothetically,

unreasonable rates, wouldn't be compensated enough. So, it would be a completely irrational remedy, and I don't agree with my good friend that, you know, it must be that where there's a harm there's a remedy, that's not a principle of law that I'm aware of.

COMMISSIONER MULVEY: I have another clarification point. The calculations of the excess charges are based on the total revenues which -- the carriers received?

MR. GREENBERG: Yes.

COMMISSIONER MULVEY: And, would that include revenues from contract rates, as well as from tariff rates, or is it just tariff rates?

MR. GREENBERG: Good question.

COMMISSIONER MULVEY: You mentioned that some of these shippers have very, good contract rates. What percentage of the traffic is moving under contract as opposed to under tariff. What are we really dealing with here?

MR. ALLEN: I'm not sure.

MR. GREENBERG: Commissioner Mulvey, I will provide you with an answer, and I'll send you a letter, but I believe, and it's something to check, I believe that the answer is, it related to tariff traffic only.

COMMISSIONER MULVEY: It's only tariff traffic.

MR. GREENBERG: I believe so, but I will confirm that and I'll get back to you.

COMMISSIONER MULVEY: Well, that would make sense, but-- I just didn't know with the revenues, that if you had access to their total revenue information then it might include both contract and tariff revenues. I just didn't know how it was kept.

MR. BENNER: In the FMC context, if we were back in the FMC in the thrilling days of yesteryear of GO-11, we would -- it would exclude revenues from non-jurisdictional activity.

COMMISSIONER MULVEY: So, it's only tariff revenues then,-- is that what you are saying, it would be only tariff revenues, or you are not sure?

MR. GREENBERG: I can't get my mind around how you would do it here. This is my problem. I have a great deal of difficulty answering that question, because I don't know how you take that structure and transplant it over here.

I don't know, is the short answer.

COMMISSIONER MULVEY: Doug, back to you.

VICE-CHAIR BUTTREY: Is it true that there's virtually no Guam Pacific Rim traffic on these vessels?

MR. BENNER: Again, and I don't want to abuse the state

of the record, I think if you look at the FMC record, which is a matter of public access, you'll find that most of what leaves Guam that is arguably Guam origin is empty containers.

VICE-CHAIR BUTTREY: No revenue traffic, just empty containers?

MR. BENNER: Well, I can't say no, but I think it's relatively no.

VICE-CHAIR BUTTREY: I go back to my point earlier --

MR. BENNER: There might be household goods or personally-owned vehicles, things like that, that are coming back in containers, but as a proportion of whatever segment of this complex system you want to look at, it's probably very small.

VICE-CHAIR BUTTREY: -- just to go back to my original point earlier, that it seems that there may be evidence that the only reason the rates that apply to Guam are as low as they are is because they are being cross-subsidized by the lucrative Pacific Rim/U.S. trade, which is the back-haul.

MR. BENNER: Yes, I mean, that's certainly our perception of our world that we operate in.

VICE-CHAIR BUTTREY: I have nothing further.

COMMISSIONER MULVEY: I have a couple of question

to left. As you know, Section 13701 does not explicitly require any finding of market dominance in order to trigger a rate reasonableness inquiry, but you believe the Board should follow our railroad procedures and look at market dominance.

If we do so, should the Board apply the 180 percent revenue to variable cost ratio, as we do for railroads, and why or why not would that be appropriate?

MR. ALLEN: I don't think that would be appropriate. It's a good question that I haven't given a lot of thought to, but, you know, Congress established that 180 revenue to cost variable ratio, just as kind of a bright line jurisdictional floor.

COMMISSIONER MULVEY: Yes.

MR. ALLEN: But, without any -- but, without any implication that it was the test of whether or not there was market dominance in the trade. And, I believe that there are many Board and STB decisions that say, you know, the 180 percent doesn't necessarily mean that there is or isn't market dominance.

COMMISSIONER MULVEY: No, it is a fine line. The question, of course, is what would we use to determine market dominance? It we look simply the existence of two carriers, andwe said that was the determining, factor then no market dominance because there was two carriers

Game over.

MR. ALLEN: Well, the test the Board has used for that is the one I quoted, which is that there is effective competition when a carrier cannot raise his rates without losing some or all of his traffic. That's kind of the basic economic test that the Board uses.

COMMISSIONER MULVEY: But, of course, in the case of railroads, we normally start out with only a single railroad.

MR. ALLEN: Yes.

COMMISSIONER MULVEY: Okay.

MR. ALLEN: Right.

COMMISSIONER MULVEY: You also prefer the Board use constrained market pricing in determining reasonable rates, and, specifically, you've argued for us to use a stand-alone cost method.

Aside from the issue of market dominance, could the Board use any of the other three restraints on pricing, revenue adequacy, management efficiency, or phasing, to determine reasonable rates?

MR. ALLEN: Well, as I say, I think revenue adequacy is not really appropriate here. The other -- well, phasing, I guess phasing, theoretically, you know if we go down the road and find that the rates were unreasonable, then I think maybe you would have a phasing issue.

COMMISSIONER MULVEY: Uh-huh.

MR. ALLEN: But, and in terms of market management efficiency, I don't think management efficiency, the Board has ever suggested that management efficiency standing alone is something you can determine whether or not a rate is reasonable.

COMMISSIONER MULVEY: We usually allow the shipper to choose the methodology for setting reasonable rates. Why do you feel we should now accept the preference of the carriers as opposed to the shippers, as we do in the railroads?

MR. ALLEN: Well, I think it's important to say that it's my understanding that you allow shippers in stand-alone cost cases to select their own model of the hypothetical carrier.

COMMISSIONER MULVEY: Yes.

MR. ALLEN: But, you don't give shippers the option of whether or not to use stand-alone cost in a major rate case. And, likewise, I would say that if you are, you know, decide that there's some methodology here that should be used, it ought to be stand-alone costing.

COMMISSIONER MULVEY: I will say that I do think that this is a very, complicated issue, and if we do go ahead and do this analysis, the complexities of the shipping industry I think are such that it will provide a great challenge to our staff. They are a very, competent staff, but the issues of common cost and joint cost in this industry, and the nature of the

administrative costs and their importance to this determining pricing will be an interesting challenge for our staff, and I wish them luck.

That's all I have, Doug. Anything for you?

VICE-CHAIR BUTTREY: I have no further questions, and the hearing is ended.

COMMISSIONER MULVEY: Thank you for coming.

VICE-CHAIR BUTTREY: Commissioner --

COMMISSIONER MULVEY: Oh, I'm sorry.

VICE-CHAIR BUTTREY: I'm advised that there was ten minutes reserved for rebuttal.

COMMISSIONER MULVEY: Reserved for rebuttal, I'm sorry.

VICE-CHAIR BUTTREY: And, we were about to cut off the opportunity for rebuttal, which we should not do.

MR. GREENBERG: I promise not to use all ten minutes, and given the way the conversation and dialogue has gone, I think a lot of what I was going to cover has already been discussed.

I actually just have a couple of points that I'd like to make, and that is, the conversation that you had, I believe it was with Mr. Benner, he got into a brief discussion about why this is a contestable market. And, I would again just direct your attention to the decision in the D.C. Circuit in

Matson v. FMC, 959 Fed 2nd, 1039, and, particularly, at page 1048, I just want to read a very brief excerpt. It says that, "Matson does not challenge the Commission's conclusion that there are substantial regulatory barriers that preclude easy access to the trade by carriers operating ODS (operating different subsidy vessels)." And, it goes on and talks a little bit about contestability, and it says, and they say that Matson concedes. The Commission concluded that the Hawaii trade is not a contestable market.

So, I mean, as the situation is with respect to Hawaii, the same thing is true here. I mean, it's simply not a contestable market, simply because there are two carriers.

And, the question of, when I was talking before about the level of rates, and the fact that there are individual rate actions, it is simply not an economic fact that simply because one carrier may desist from taking some rate action because it fears it's going to lose business means that there is effective competition, if the level of rates is established at excessive levels. And so, that doesn't mean that there is effective competition, simply because these guys worry about whether they are going to lose a couple of containers, if they charge 250 percent of excessive reasonable cost, as opposed to 275 percent, or 235 percent. If the rate is excessive, there is not effective competition, and that's the situation that we have.

Now, the last thing I want to mention is, goes to the

question of an SAC model, and the point you've raised, Commissioner Mulvey, which is that the shipper has the right to select the type of model it uses. I want to make sure that if in the event you decide that you want to proceed on the SAC basis, that that principle is stated in full in that decision. That's important to us, and it's important to us for a significant reason, because of the nature of what I'll use the term idiosyncratic nature here of this particular trade. We are not using -- they are not using their own vessels, by and large, there is lots of different parties on board these vessels. And so, we need to be able to replicate the way the service is actually provided, and not be stuck with the model they would like us to use, which is a back and forth model that goes back and forth between the United States and Guam. That's not the way the traffic is handled. It's important that you keep that in mind, in my opinion, respectfully you do that.

And, that's about it. I thank you very much for your time.

VICE-CHAIR BUTTREY: Thank you.

If there's nothing further, we stand adjourned.

(Whereupon, the above-entitled matter was concluded at 11:55 a.m.)