

FRANCHISE FEE CALCULATIONS OF FORT SUMTER TOURS, INC.

OVERSIGHT HEARING

BEFORE THE
SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC
LANDS
OF THE

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

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OVERSIGHT HEARING ON FRANCHISE FEE CALCULATIONS OF FORT SUMTER TOURS, INC.

THURSDAY, JULY 1, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL PARKS
AND PUBLIC LANDS,
COMMITTEE ON RESOURCES,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:59 a.m., in Room 1324, Longworth House Office Building, Hon. James Hansen [chairman of the Subcommittee] presiding.

STATEMENT OF HON. JAMES HANSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. HANSEN. Good morning, and welcome to the oversight hearing today.

I am glad to see the Director has recovered from his illness and with us. We appreciate your presence.

The purpose of this oversight hearing is to examine the franchise fee imposed by the National Park Service on Fort Sumter Tours, Inc., a small family-owned concessionaire that provides tour boat transportation to and from Fort Sumter National Monument in South Carolina.

In 1992, the Park Service nearly tripled Fort Sumter's franchise fee from 4.25 to 12 percent. This has had a direct negative economic consequence at Fort Sumter Tours. They tried to find out from the Park Service why this had happened.

However, the Park Service refused to give Fort Sumter Tours the information they needed to understand the drastic rise in the franchise fee. Thus began a continuing confrontation between Fort Sumter Tours and the Park Service, and which has led us to convene this oversight hearing today.

After recently reviewing the material, I cannot understand why the Park Service is so reluctant to give it to Fort Sumter Tours. In my opinion, it is riddled with major errors, it grossly overstates the profitability of this concession. As we hear testimony today, I believe this will become clear.

The Park Service has never admitted to Fort Sumter Tours that errors were committed in calculating the franchise fee, and an absolute refusal by the Park Service to discuss the merits of the miscalculated franchise fee.

I want to make a point here: This oversight may be seen by some as an inappropriate function of the Subcommittee; that is, as some sort of private relief rather than centered on an issue of policy. But would disagree with this opinion. In fact, subjects like this one is the reason we have oversight hearings. It is a question of making sure the Federal Government, and in this case the National Park Service, does not trample on the rights of our citizens.

It is a question of the Federal Government following its own policies and guidelines, and it is a question of whether the Federal Government can possibly ever admit its own mistakes, correct those mistakes, and then move forward toward reasonable solutions.

One other point: It is fairly easy for Federal bureaucrats in Washington to decide from afar how things are going to be for people around the country. However, it is quite another thing for those same bureaucrats to understand that the decisions they make and the mistakes that they may make can be devastating to hard-working Americans trying to make a living. I believe that this is what we have here today. And it is not to be taken lightly.

Be that as it may, I was hopeful that the hearing would never occur. By this means, that I held a meeting in my office some months ago with the Director, the Solicitor's Office, Fort Sumter Tours, and other Members of Congress, Mr. Sanford, and Mr. Spence, imploring the Park Service to take another look at this situation and resolve it to the satisfaction of both parties.

I stated at the time that the Subcommittee would hold an oversight hearing if the problems with the franchise fee were not resolved. Obviously, the Park Service did not take my suggestion very seriously because we are here today.

It is my understanding that, following this meeting, the Park Service asked Fort Sumter Tours for an offer. Fort Sumter responded, and the Park Service essentially said Fort Sumter's offer is no offer to them, apparently, to sit down and attempt to hammer this out on the merits of the fee and discuss how it was calculated.

I am disappointed that nothing came of this. However, I am quite willing to have this oversight in order to expedite getting this thing resolved in a fair and equitable and honest way.

I would like to welcome our witnesses here today, and I would now recognize the gentleman from Puerto Rico if he was here. Because he isn't, I will turn to the gentleman from Tennessee for any opening comments he may have.

Mr. DUNCAN. Well, I have no formal opening statement, Mr. Chairman. I agree with you that it is unusual for us to hold a hearing on a dispute like this. And I am disappointed, like you, that the Park Service did not work this out in some fair and reasonable manner. But I suppose we can ask some questions about that at the appropriate time.

Thank you very much.

Mr. HANSEN. I thank the gentleman from Tennessee.

I ask unanimous consent that the letter from Congressman Floyd Spence be included in the record, and also the letter from Senator Ernest Hollings be included in the record.

Mr. HANSEN. I won't go through the entire thing, but I would like to point out that Floyd Spence has a great personal knowledge of

this issue, and he says, "I am familiar with the ongoing dispute involving franchise fees at Fort Sumter. In the interest of Fort Sumter Tours, and the National Park Service and the visitors to Fort Sumter, this matter needs to be resolved. If errors were made in the calculation of this franchise fee, then the errors should be corrected."

Senator Hollings says, "As you know, by statutory law, all park concessionaires are required to pay a franchise fee based upon a percentage of their gross receipts. It is my understanding that in 1992 the Park Service unilaterally attempted to increase the franchise fee from 4.25 percent to 12 percent, and a dispute has existed ever since.

"This increase was based upon a franchise fee analysis prepared by the National Park Service which the Tours claims to be inconsistent with the Park Service guidelines that existed at the time. While I have limited knowledge of the merits, I do believe if errors were made, they need to be corrected."

And it talks about the relationship that we should have between the Park Service and our concessionaires, and as many of you know, that is a major issue with this Committee.

And last year, we passed a new concessionaires bill. And this is an ongoing issue which we have.

The gentleman from Nevada, we appreciate your presence here. Do you have any opening comments before we start?

Mr. GIBBONS. No, Mr. Chairman. I welcome our witnesses and the panel here today to hear this very important issue, and I know how it is important for all of our tourists today to be—as well as those people that offer services at our parks—to be afforded the right treatment under the law, and I look forward to your leadership here today.

Mr. HANSEN. I thank the gentleman.

Our first witness will be our colleague from South Carolina, Mark Sanford. Mark actually represents that area. And we will now turn the time to you.

STATEMENT OF HON. MARK SANFORD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. SANFORD. I thank you, Mr. Chairman, and I thank you. Mr. Duncan, Mr. Gibbons, for the chance to testify before the Subcommittee. And I would say I wanted to come by here simply because for me it would be an honor to introduce Mr. Campsen and his family, and, frankly, his enterprise. And I say that because if I was to pull down one word about this family, I would say honorable.

Now here is what I am getting at by that: My roots go very deep with this family. Chip and I overlapped for a year of college. He was actually at our family farm the night that my dad died. I spent the better part of 20 years on hunting and fishing trips throughout the woods and waters of the Low Country with Chip.

And the net of that is, as we all know, markets are efficient. And if you are going over to somebody else's house and they are coming over to yours, sooner or later you get that phrase from somebody that says, oh, you are going over to so and so's house; I heard this about them. And you go on to hear some horror story.

And yet over the many years that I have been with this family, I have never heard one of those stories. So I would say “honorable” would be a description of the family. But I would say that there is even a simpler word that describes this family, and that is the word “integrity.”

In other words, there is a match between what they say they are going to do and what they do. There is a match between what they say they are about and what they are about.

And I think that this goes to the heart of this issue of the enterprise, Fort Sumter Tours, because each of us is stewards for the Federal Government. I think that, you know, for most people, their experience with the Federal Government is basically derived from an experience with the National Park Service, but oftentimes with a concessionaire tie-in with the Park Service.

So each of us, as fiduciaries for the Federal Government, want to have in place people who have integrity—in other words, that there is a match between what they talk about doing and what they do. And this isn’t important just in general in terms of that being, of wanting to have good stewards represent the face of the Federal Government, but it is also, frankly, important to a lot of folks back home.

Sure, it is important to a lot of tourists who visit Charleston, but it is important just because a lot of people back home, when somebody comes in from out of town, they say, well, you know, that first shot was fired out at Fort Sumter, I’d like to go on out there, and we go on out there. And for 364 days out of the year, three times a day, Fort Sumter Tours runs a boat out there.

And there is nothing more important than the word “integrity” in that service, because, again, somebody’s experience at Fort Sumter is, in large part, driven by, you know, were the toilets clean on the boat getting to and from Fort Sumter, did the boat, in fact, leave on time?

In other words, this issue of integrity goes to the heart of what a concessionaire ought to be about, and if not only recognized by folks back home or by me, but, frankly, by the Park Service itself.

Now I have here a copy of an unsolicited letter to Mr. Campsen, who had received it some time ago from the National Park Service. And it reads as follow: “His reputation for quality of service is matched by few concessions in the National Park Service and exceeded by none. His operation in Charleston has always been characterized by excellence and a concern for our visitors and the people who live in the city.”

I think that that is one part of what we are dealing with, the issue of integrity and the importance of that in a concessionaire. The other issue is what you correctly highlighted, Mr. Chairman, and that is there is a whole lot bigger issue than having to do with the Campsens, Fort Sumter Tours, Fort Sumter itself, and that is the issue of concessions.

To me, this is very important because, you know, last year, when we had that concession bill, I voted for it. In fact, I had talked to Chip Campsen. Chip didn’t think it was a good idea. He said, “Mark, I think it is going to be a problem if somebody has to get two different tickets, one ticket for Fort Sumter, one ticket to go to Fort Sumter.”

I said, "Chip, I am going to vote against you. I think you are wrong on this because if you can isolate costs, in other words, you can say, what does it cost to do these different functions tied to or from getting, let's say, to a park, then if you can isolate that costs, and if private enterprise can do it less expensively than the Federal Government, then we ought to make more options for that being the case because as a conservative I don't want to grow the Federal Government."

And yet, what is going on here sends precisely the wrong signal in terms of trying to grow more private enterprise and more concessions through our park system. When you have a 300 percent increase in the middle of contract period, there is no worse signal to future concessionaires, and that to me, more than the right number or the wrong number, that to me is what this issue is all about, and that is, if a concessionaire has a contract with our Federal Government, the government not breaking that contract in the middle of the contract period.

I would just ask us to remember that we have three branches of government up here for a very good reason, and that is, our Founding Fathers wanted a slow and meticulous system that would basically, you know, keep anybody from doing anything too fast. And I would just beg of the Park Service to really look at this very closely because I think we are dealing with an issue far, far greater than the Fort Sumter issue itself.

And I would yield back the balance of my time. I thank you for letting me come before you, Mr. Chairman.

Mr. HANSEN. We thank you.

Questions for Mark Sanford, our colleague from North Carolina? The gentleman from Tennessee is recognized.

Mr. DUNCAN. I have just one question, Mark. I wasn't clear. Who wrote that real positive letter that you quoted from and when was that?

Mr. SANFORD. I don't have the date on that. I would suspect Mr. Campsen could give you the dates on that, because it was from the Park Service.

Mr. DUNCAN. It was from the Park Service?

Mr. SANFORD. Yes, sir.

Mr. DUNCAN. All right. Thank you.

Mr. SANFORD. Thank you.

Mr. HANSEN. The gentleman from Nevada.

Mr. GIBBONS. Mr. Sanford, I have not been to Fort Sumter, and I hope someday to have the privilege and the honor of visiting there, and I am not familiar with all the other concessionaires that are in the Park Service. Have the other concessionaires—are there other concessionaires in that Park area for the visitors there?

Mr. SANFORD. Yes. In fact, if you go on up a little bit north, there are a couple of islands that are owned and, for instance, there is a concessionaire that runs, again not to Fort Sumter but runs out to one of these coastal islands. It is a little bit north of the Charleston community. That is one that I immediately know of. And I suspect that there are others. But those are the ones that immediately jump to mind.

Mr. GIBBONS. Has there been any effort to talk to that concessionaire with regard to an increase in the franchise fee, similar—

in other words, a 300 percent increase in their fees that would be commensurate with the fees increase that we are talking about in this matter?

Mr. SANFORD. I have not done so. That is something worth doing. And I would be glad to have my office do just that.

Mr. GIBBONS. Well, maybe we can ask the Park Service, when they come, whether or not they have increased——

Mr. SANFORD. And in fairness to the Park Service, that is a not a national park that the other concession runs. So it may be run through a different branch of government.

Mr. GIBBONS. All right. But then so as far as we know, this is the only concessionaire at Fort Sumter that has had a 300 percent fee increase in the middle of the contract?

Mr. SANFORD. To the best of my knowledge, yes, sir.

Mr. GIBBONS. Thank you, Mr. Chairman.

Mr. HANSEN. We thank our colleague. Mr. Sanford. Would you like to join us up on the dais?

Mr. SANFORD. Unfortunately, I have got a markup on OPEC, and I have to run in that direction.

Mr. HANSEN. Well, I understand. Thank you very much for your time.

Mr. SANFORD. Thank you.

Mr. HANSEN. We will call our panel up. We are pleased to have Robert Stanton, the Director of National Park Service with us; also, George Campsen, president of Fort Sumter Tours, and David E. Jackson, a certified public accountant.

If those three gentlemen would like to come up, we would appreciate it.

And, Mr. Director, if you have somebody you want at your shoulder there, that is fine. Just bring them up, too.

Mr. STANTON. Yes. Thank you very much, Mr. Chairman. I am accompanied by Mr. Cohen of our Solicitor's Office, and Mr. Bob Hyde, who is a financial analyst with the National Park Service in our Division of Concession Management.

Mr. HANSEN. Okay. Well, we will turn to you, Mr. Stanton. And you have got the floor.

STATEMENT OF ROBERT STANTON, DIRECTOR, NATIONAL PARK SERVICE; ACCOMPANIED BY MR. COHEN, SOLICITOR'S OFFICE; ROBERT HYDE, FINANCIAL ANALYST, DIVISION OF CONCESSION MANAGEMENT

Mr. STANTON. Thank you, Mr. Chairman, and members of the Committee, for the opportunity to appear before you and to discuss certain issues surrounding the reconsideration of the franchise fees for Fort Sumter Tours, Incorporated.

Mr. Chairman and members of the Committee, I submit at the beginning of my testimony, I have been advised by our Solicitor's Office to make the following statement:

I am here today to answer questions and respond to comments concerning the franchise fee reconsideration for Fort Sumter Tours, Incorporated. You have assured me and my staff that this hearing will not be covering any of the issues in litigation between Fort Sumter Tours and the National Park Service.

I appreciate this, and certainly in keeping with this agreement, I would like to make clear that the National Park Service is not reconsidering the established franchise fees for Fort Sumter Tours. Accordingly, any statements, discussions, description, or assessments concerning the Fort Sumter franchise fee that I may make before you today do not and will not constitute a review of, a reconsideration of, or a new decision in any nature regarding the established franchise fee.

Furthermore, I note that the various calculations that we might discuss here today have been upheld in four different court proceedings, including the Fourth Circuit Court of Appeals, as lawful and not an arbitrary nor capricious.

Any statement that I may make before you today, Mr. Chairman and this Committee, to the effect that a particular calculation could be done other ways, does not in any manner suggest, admit, or otherwise imply that the decision made by the National Park Service in this process was arbitrary, capricious, or otherwise unlawful.

Now, in addition, I note that as part of this hearing, Mr. Chairman, you and the Committee have requested significant financial information on Fort Sumter Tours. Some of this information is proprietary or confidential. But because of Fort Sumter Tours participation in today's hearing, we assume that the release of this information is agreeable by the concessionaire under law 18 USC 1905. And I would hope, Mr. Chairman, that you would advise it is appropriate that this information be available on the concessionaire's financial status.

This matter is certainly an essentially money dispute on a business contract. And if I may, I would like to elaborate. The contract was entered into by the National Park Service and Fort Sumter Tours in 18—pardon me, in 1986 and expires in the year 2000. The contract grants for Fort Sumter Tours the exclusive opportunity to transport by tour boat visitors from Charleston, South Carolina, to Fort Sumter National Monument for Fort Sumter current annual visitation of approximately 230,000 visitors per year.

Ninety-nine percent of these visitors travel to Fort Sumter on boats operated by Fort Sumter Tours. Fort Sumter Tours charges visitors \$10.50 for adults. The gross receipts for 1998 were \$2,471,938. The contract requires Fort Sumter Tours to remit 12 percent of the gross receipts to the United States for the privilege of serving on an exclusive basis anyone wishing to visit Fort Sumter through the use of their boat.

Fort Sumter Tours' 15-year contract was entered into under the Concession Policy Act of 1965. The contracts governed by the Concession Policy Act were not subject to meaningful competition because existing concessionaires enjoy preference over outside business.

These preferential rights often precluded market forces from affecting franchise fees. Under the Concession Policy Act, the National Park Service was required to include in concession contracts of more than five years in duration, provision provided for reconsideration of the contract franchise fees at least every five years.

Since 1979, the National Park Service concession contracts have provided that the contract-established franchise fees may be ad-

justed, up or down, every five years at the request of either the concessionaire or the National Park Service.

The provision provides that if the National Park Service and the concessionaire do not agree upon an adjusted franchise fee within a specified period, the concessionaire may appeal to the Secretary his position as to an appropriate franchise fee. And the concessionaire may choose to invoke arbitrary—pardon me, advisory arbitration proceeding in this process.

Any fee resulting from a reconsideration either up or down must be consistent with the probable value of the privilege by the contract based upon a reasonable opportunity, a reasonable opportunity for net profit in relation to both gross receipts and capital investment.

The standard was set by Congress in the Concession Policy Act that I referenced earlier. The standard is protection for both the concessionaire and the taxpayers.

Briefly, it is important to review the history of this provision and its application. Since 1979, several hundred franchise-fee consideration periods have occurred under existing NPS contracts. In many of these instances, neither the Park Service nor the concessionaire sought changes either up or down to the franchise fee.

In a number of other instances, when either the Park Service or the concessionaire sought a franchise fee reconsideration, both the National Park Service and the concessionaire were able to arrive at a mutually acceptable agreements as to the appropriate franchise fee.

In four instances recently, concessionaires have chose to invoke the advisory arbitrary process established in the contract to resolve proposed franchise fees. In one of these situations, the matter was settled. In the remaining three, the National Park Service and concessionaire participated in the arbitration proceeding, and the Secretary made a final decision, taking into consideration results of the arbitration.

In each of these instances, the franchise fees were increased. However, in each of these cases, concessionaires accepted the final decision of the Secretary and the higher franchise fee became part of the contract without judicial challenge. All these concessions remain profitable in business today.

In no cases, except in one that is the focus of today's hearing, has a concessionaire challenged the legality of the process of the executed contract. In no cases, except the one before us today, has a concessionaire refused to negotiate the appropriate franchise fee.

In this case, Fort Sumter Tours chose to litigate the issues before the courts. The courts have uniformly upheld the legality of the reconsideration provision and the basis of our decision.

The National Park Service has a system for establishing franchise fees. In 1980, the National Park Service was repeatedly criticized by Congress, by the General Accounting Office of Congress, by the Inspector General's Office of the Department of Interior, and others in terms of a need to take a more critical look at the establishment and reconsideration of franchise fees.

We took these criticisms seriously and have now ensure a more rigorous implementation of the system. This implementation is fair

to the concessionaire, fair to the National Park Service, and certainly fair to the taxpayer.

In performing the reconsideration analysis, the National Park Service compares the financial record of the concession to its counterparts in the industry to assist in determining the probably value of the contract.

When the Fort Sumter Tours were initially executed, the fee was designated 4.25 percent of gross revenue. However, a franchise fee analysis performed in 1991 showed that the probably value of these privileges warranted a fee of 12 percent. This analysis compared the financial records and the business opportunity of Fort Sumter to those similarly situated businesses using statistics generated by Dun and Bradstreet.

We understand that it has been reported to the Committee that the National Park Service took into account non-concession revenues for calculating the profit of Fort Sumter Tours makes under this concession contract. While there was one technical error in the original franchise fee, that may suggest that this income was taken into account as we described to you in the letter of December 8th. This income was not taken into account in the final determination, nor did it affect the final determination.

A complete review of the financial analysis shows that the 12 percent fee was determined solely on the basis of the revenue associated with the concession contract and a proper allocation of cost associated both with the concession and with the non-concession business. It is not disputed that in 1992 that Fort Sumter Tours was notified of the proposed franchise fees reconsideration and that it had contractual right to seek advisory arbitration over its reconsidered fee. As detailed in the letter of December 5, 1998, to you, Mr. Chairman, and the Committee, we advised that the litigation has since pursued. The United States Government has prevailed in every phase of this litigation.

I want to close and underscore the fact that we remain, however, receptive to resolving this dispute. We have asked the United States Attorney's Office to be open to any reasonable settlement offer by Fort Sumter Tours. To date, Fort Sumter Tours has not participated in any substantive discussions with respect to settlement of this dispute.

Mr. Chairman and members of the Committee, this concludes my prepared remarks with respect to the background on the reconsideration of the franchise fee for Fort Sumter Tours, Incorporated. Along with my colleague, Mr. Ed Cohen and Mr. Bob Hyde, we will be more than happy to respond to any questions or comments on the part of you, Mr. Chairman, and members of the Committee.

Thank you again for this opportunity.

[The prepared statement of Mr. Stanton follows:]

STATEMENT OF ROBERT STANTON, DIRECTOR, NATIONAL PARK SERVICE

Thank you for the opportunity to discuss with you certain issues surrounding the reconsideration of the franchise fee of Fort Sumter Tours, Incorporated. As I begin my testimony, I have been advised by the Solicitor's Office to make the following statement:

I am here today to answer your questions concerning the franchise fee reconsideration for Fort Sumter Tours. You have assured me and my staff that this hearing will not be covering any of the issues in litigation between Fort Sumter

Tours and the National Park Service. I appreciate this and in keeping with this agreement I would like to make clear that the National Park Service is not reconsidering the established franchise fee for Fort Sumter Tours. Any statements, discussions, descriptions or assessments concerning the Fort Sumter franchise fee that I may make before you today do not and will not constitute a review of, a reconsideration of, or a new decision of any nature regarding the established franchise fee. Furthermore, I note that the various calculations that we discuss here today have been upheld in four different court proceedings, including the 4th Circuit Court of Appeals, as lawful, and neither arbitrary nor capricious. Any statement that I may make before you today to the effect that a particular calculation could be done another way does not in any manner suggest, admit, or otherwise imply that the decisions made by the National Park Service in this process were arbitrary, capricious or otherwise unlawful.

In addition, I note that, as part of this hearing, you have requested significant financial information of Fort Sumter Tours. Some of this information is proprietary or confidential. Because of Fort Sumter Tours participation in today's hearing, we are assuming that the release of this information is agreed to by the concessioner under law, including 18 U.S.C. 1905. Please advise us if the concessioner believes otherwise.

This matter is essentially a money dispute under a business contract. The contract was entered into by the National Park Service and Fort Sumter Tours in 1986, and expires in 2000. The contract grants Fort Sumter Tours the exclusive opportunity to transport by tour boat visitors from Charleston, South Carolina, to Fort Sumter National Monument. Fort Sumter's current annual visitation is approximately 230,000 visitors per year. Ninety nine percent of the visitors travel to Fort Sumter on boats operated by Fort Sumter Tours. Fort Sumter Tours charges visitors \$10 per adult visitor. The business' gross receipts for 1998 were \$2,471,938. The contract requires Fort Sumter Tours to remit 12 percent of the contract's gross receipts to the United States for the privilege of serving, on an exclusive basis, anyone wishing to visit Fort Sumter.

Fort Sumter Tours' 15-year contract was entered into under the Concessions Policy Act of 1965. The contracts governed by the Concessions Policy Act were not subjected to meaningful competition because existing concessioners enjoyed preferences over outside businesses. These preferential rights often precluded market forces from affecting franchise fees.

Under the Concessions Policy Act, NPS was required to include in concessions contracts of more than five years in duration a provision providing for the reconsideration of the contract's franchise fee at least every five years. Since 1979, NPS concession contracts have provided that the contract's established franchise fee may be adjusted, up or down, every five years, at the request of either the concessioner or the NPS. The provision provides that if the NPS and the concessioner do not agree upon an adjusted franchise fee within a specified period, the concessioner may appeal to the Secretary its position as to an appropriate franchise fee, and the concessioner may choose to invoke advisory arbitration proceedings in this process. Any fee resulting from a reconsideration, either up or down, must be consistent with the probable value of the privileges granted by the contract, based upon a reasonable opportunity for net profit in relation to both gross receipts and capital invested. This standard was set by Congress in the Concessions Policy Act. The standard protects both the concessioner and the taxpayer.

It is important to review the history of this provision. It is also important to discuss with you the implementation of this provision.

Since 1979, several hundred franchise fee reconsideration periods have occurred under existing NPS concession contracts. In many of these instances, neither the NPS nor the concessioner sought changes, either up or down, to the franchise fee. In numerous other instances, when either the NPS or the concessioner sought a franchise fee reconsideration, both the NPS and the concessioner were able to arrive at a mutually acceptable agreement as to the appropriate franchise fee.

In four (4) instances, concessioners have chosen to invoke the advisory arbitration process established in the contract to resolve a proposed franchise fee increase. In one of these situations, the matter was settled. In the remaining three, the NPS and the concessioner participated in the arbitration proceedings, and the Secretary made a final decision, taking into consideration the results of the arbitration. In each of these three instances, the franchise fee was increased. However, in each of these cases, the concessioner accepted the final decision of the Secretary, and the higher franchise fee became part of the contract without judicial challenge. All of these concessioners remain profitably in business today.

In no case, except the one that is the focus of today's hearing, has a concessioner challenged the legality of the process of the executed contract. In no case, except

the one before us today, has a concessioner refused to negotiate the appropriate franchise fee. In this case, Fort Sumter Tours chose to litigate the issues before the courts. The courts have uniformly upheld the legality of the reconsideration provision, and the basis for our decision.

This concessioner is not being treated differently from other concessioners. This concessioner has not been treated unfairly.

The National Park Service has a system for establishing franchise fees. In the 1980s, the National Park Service was repeatedly criticized by numerous reports from both the Inspector General's Office of the Department of the Interior and the General Accounting Office for its implementation of this system.

The National Park Service took these criticisms seriously. We have now ensured a more rigorous implementation of our system. This implementation is fair to the concessioner, fair to the National Park Service, and fair to the taxpayer. In those cases when this has resulted in increased franchise fees, we note that the concessioners operating under these contracts continue to operate profitably. We have no shortage of individuals and companies that are willing to do business in our National Parks under this system.

In performing the reconsideration analysis, the National Park Service compares the financial records of a concessioner to its counterparts in the industry to assist in determining the probable value of the contract.

When the Fort Sumter Tours contract was initially executed, the fee was designated as 4.25 percent of gross revenue. However, a franchise fee analysis performed in 1991 showed that the probable value of these privileges warranted a fee of 12 percent. This analysis compared the financial records and the business opportunity of Fort Sumter Tours, Inc. to those of similarly situated businesses, using industry statistics generated by Dun and Bradstreet. We understand that it has been reported to the Committee that the National Park Service took into account non-concession revenue when calculating the profit that Fort Sumter Tours makes under this concessions contract. While there was one technical error in the original financial analysis that may suggest that this income was taken into account, as we described to you in our letter of December 5, 1998, this income was not taken into account in the final fee determination, nor did it affect this determination. A complete review of the financial analysis shows that the 12 percent fee was determined solely on the basis of the revenue associated with the concessions contract, and a proper allocation of costs associated with both the concession and the non-concession businesses.

It is not disputed that in 1992, Fort Sumter Tours was notified of the proposed franchise fee reconsideration, and that it had a contractual right to seek advisory arbitration over this reconsidered fee. Fort Sumter Tours chose not to engage in negotiations with the National Park Service, or in advisory arbitration. Fort Sumter Tours instead chose to sue the United States over the reconsidered fee. As is detailed in my letter to you, of December 5, 1998 (attached to this testimony), Mr. Chairman, this matter has been in litigation ever since. And, the United States has prevailed at every phase of this litigation.

We remain, however, receptive to resolving this dispute. We have asked the United States Attorney's Office to be open to any reasonable settlement offer made by Fort Sumter Tours. To date, Fort Sumter Tours has refused to participate meaningfully in any settlement discussions.

This concludes my testimony. I would be happy to answer any of your questions.

Attachment



United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

L58 (0120)

DEC -5 1998

Honorable James V. Hansen
Chairman, Subcommittee on National Parks
and Public Lands
Committee on Resources
House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This is in further response to your letter of September 18, 1998, concerning the circumstances of Fort Sumter Tours, Inc.'s (FST's) ongoing litigation against the United States regarding FST's franchise fee. We regret the delay in response as mentioned in your letter of November 30, 1998. However, as several of the issues your letter raises are in litigation in Fort Sumter Tours, Inc. v. Babbitt, C.A. No. 97-0293, now pending before the United States Court of Appeals for the District of Columbia Circuit, National Park Service (NPS) was obliged to consult with the United States Department of Justice in the preparation of our response.

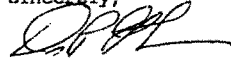
Particularly, you are concerned by the 1993 decision of the NPS, upheld after repeated judicial challenge, to raise FST's franchise fee from 4.25 percent of gross receipts to 12 percent of gross receipts. Your letter poses a number of questions concerning the history of this matter and the basis for the actions of NPS.

Enclosed is a detailed report responding to your questions.

Since there has been interest expressed by many of the committees that have jurisdiction over the NPS, a copy of this letter and its attached report is being sent to the Chairman and ranking Members of the House Resources Committee and its Subcommittee on National Parks and Public Lands, the Senate Energy and Natural Resources Committee and its Subcommittee on National Parks, Historic Preservation and Recreation and the House and Senate Interior Appropriation Subcommittees.

Your continued interest in and support of the programs of the National Park Service is greatly appreciated.

Sincerely,



Robert Stanton
Director

Enclosure

cc: Mr. Don Young
Chairman, Committee on Resources
House of Representatives

Mr. George Miller
Ranking Minority Members
Committee on Resources
House of Representatives

Mr. Eni F.H. Faleomavaega
Ranking Minority Member
Subcommittee on National Parks
and Public Lands
Committee on Resources
House of Representatives

Mr. Frank Murkowski
Chairman, Committee on Energy
and Natural Resources
United States Senate

Mr. Dale Bumpers
Ranking Minority Member
Committee on Energy and Natural Resources
United States Senate

Mr. Craig Thomas
Chairman, Subcommittee on National Parks,
Historic Preservation, and Recreation
Committee on Energy and Natural Resources
United States Senate

Mr. Jeff Bingaman
Ranking Minority Member
Subcommittee on National Parks, Historic
Preservation and Recreation
Committee on Energy and Natural Resources
United States Senate

Mr. Ralph Regula
Chairman, Subcommittee on Interior and Related Agencies
Committee on Appropriations
House of Representatives

Mr. Sidney R. Yates
Ranking Minority Member
Subcommittee on Interior and Related Agencies
Committee on Appropriations
House of Representatives

Mr. Slade Gorton
Chairman, Subcommittee on
Interior and Related Agencies,
Committee on Appropriations
United States Senate

Mr. Robert Byrd
Ranking Minority Member
Subcommittee on Interior and Related Agencies
Committee on Appropriations
United States Senate

December 4, 1998

**REPORT AND RESPONSE TO QUESTIONS REGARDING THE
FORT SUMTER TOURS FRANCHISE FEE LITIGATION**

I. Litigation Background.

Fort Sumter Tours, Inc. (FST) is a National Park Service (NPS) concessioner which has an exclusive NPS tour boat concession contract to provide for a term of 15 years visitor access to Fort Sumter National Monument, Charleston, South Carolina. Fort Sumter's current annual visitation is approximately 230,000. 99% of the visitors travel to Fort Sumter on FST tour boats.

FST has been in litigation against the United States almost continuously since 1993. The underlying assertion of the litigation is FST's allegation that NPS unlawfully implemented section 3 of the Concessions Policies Act of 1965, 16 U.S.C. 20b(d). Under this statute, NPS concession contracts of more than five years in duration must contain a provision providing for reconsideration of the contract's franchise fee at least every five years.

Pursuant to this requirement, NPS concession contracts since 1979 have provided that the contract's established franchise fee may be adjusted, up or down, after every fifth year of the contract, at the request of either the concessioner or NPS. In the event that NPS and the concessioner do not agree upon an adjusted franchise fee within specified periods, the contract provides that the concessioner may appeal to the Secretary its position as to an appropriate franchise fee and the concessioner may choose to invoke advisory arbitration proceedings in this process.

The fee resulting from an upwards or downwards fee adjustment under NPS concession contracts is to be consistent with the probable value of the privileges granted by the contract, based upon a reasonable opportunity for net profit in relation to both gross receipts and capital invested. This standard is set by the Concessions Policies Act.

Since 1979, several hundred franchise fee adjustment periods have occurred under NPS concession contracts containing the equivalent provision of section 9(e) of FST's concession contract. In the very large majority of these instances, neither NPS nor the concessioner sought a franchise fee adjustment. In almost all other instances, when either NPS or the concessioner sought a franchise fee adjustment, a mutually acceptable agreement was reached.

In only four instances has a concessioner chosen to request advisory arbitration to resolve a proposed franchise fee increase. In one of these situations, the matter was settled. In the remaining three, the Secretary made a final decision on a franchise

fee adjustment after taking into consideration the results of the arbitration proceedings. In each of these three instances, the concessioner's franchise fee was substantially increased. However, in each of these cases, the concessioner accepted the final decision of the Secretary and the higher franchise fee became part of the contract without judicial challenge. These concessioners all remain profitably in business.

FST's concession contract is for the period of approximately fifteen years, from June 13, 1986, through December 31, 2000. Its initial franchise fee was 4.25% of FST's gross receipts.

When FST was advised that NPS wished to increase its franchise fee to 12% of gross receipts commencing with the second five year period of its contract (June 13, 1991 - June 12, 1996), FST chose to sue NPS rather than seek agreement on a changed fee or undertake advisory arbitration in an appeal to the Secretary.

Ultimately, both the United States District Court in Charleston, South Carolina, in 1994, and the United States Court of Appeals for the Fourth Circuit, in 1995, upheld in all respects the validity of the franchise fee adjustment clause set forth in FST's concession contract. Both courts also upheld the validity of the 12% franchise fee proposed by NPS. Fort Sumter Tours, Inc. v. Babbitt, 66 F. 3d 1324 (4th Cir. 1995) (referred to in this report as "FST I").

When it lost FST I on appeal in the Fourth Circuit, FST petitioned for review by the Supreme Court. The Supreme Court denied certiorari on May 28, 1996.

The United States Appeals Court for the Fourth Circuit in FST I stated:

In summary, section 9(e) of the FST contract is a completely appropriate contractual provision under the CPA [Concessions Policies Act] in that it provides for modification of fees through a reasoned process, and does not vest NPS unbridled authority; at the same time, section 9(e) guarantees that the parties will not reach a stalemate when a fee adjustment is sought.

During the entire period of the FST I litigation, FST refused to pay the established 12% franchise fee. NPS during this period voluntarily refrained from terminating FST's concession contract for failure to pay the established 12% franchise fee.

In the spring of 1996, while FST's petition for certiorari in FST I was pending before the Supreme Court, the Government agreed to review additional information to be provided by FST for the purpose of possibly initiating settlement discussions in FST I (then pending before the Supreme Court).

The Government's consideration of this possibility was solely in the interest of FST. The Government had established the validity of section 9(e) of the FST contract and the NPS proposed adjustment of the contract's franchise fee to 12% in FST I at both the trial and appellate level. There was no realistic possibility that the Supreme Court would grant certiorari in FST I.

On May 10, 1996, NPS met with FST officials in Washington, D.C., for the purpose described above. At the meeting FST presented NPS with a franchise fee "Critique" dated March 15, 1996. After the May 10, 1996, meeting, NPS determined that an on-site visit and further meeting with FST officials would be appropriate. The visit was scheduled for June 5-7. However, on May 28, 1996, the Supreme Court denied FST's petition for certiorari, thereby apparently precluding any further possibility of the government settling FST I.

The Government nonetheless concluded that the review of FST documents for the purpose of possible initiation of settlement discussions could continue. This was because, as a technical matter, the FST I case was still alive. Under Supreme Court Rule 44.2, FST had twenty-five days from May 28, 1996, to petition for a rehearing of the denial of certiorari.

Accordingly, the June 5-7 scheduled site visit and a further meeting with FST officials took place. Subsequently, the Government determined not to initiate settlement discussions in FST I. By letter of July 1, 1996, the United States Attorney's Office advised FST that the Government did not choose to enter into settlement discussions in FST I.

By letter of June 14, 1996, FST requested, pursuant to section 9(e) of its contract, that its 12% franchise fee be reconsidered and reduced to 4.25% for the contract's third five year period (June 13, 1996 - December 31, 2000). However, while seeking to reduce the 12% franchise fee for this period of its contract, FST, even after the Supreme Court had refused to hear its appeal, still continued to refuse to pay its established 12% franchise fee for the second five year period of the contract.

No agreement was reached by FST and NPS as to a franchise fee adjustment for the third five year period of the contract within 120 days from June 13, 1996. Accordingly, FST had the option under section 9(e) of its contract to appeal the matter to the Secretary by November 11, 1996, and, if FST chose, to invoke advisory arbitration proceedings. FST did not take these actions. Accordingly, the reconsideration of the FST franchise fee for the third five year period of the FST contract expired as of November 11, 1996, without an adjustment of the fee.

The Government made a further effort to reach a compromise with FST prior to initiating contract termination proceedings for FST's

continuing failure to pay its established franchise fee. In the fall of 1996, NPS and Solicitor's Office officials met with officials of the Department of Justice in Washington, D.C., to seek authority to offer a debt compromise proposal to FST on behalf of the Department of Justice. This unusual authority was granted to NPS. On December 10, 1996, NPS officials met with FST and offered, subject to approval by the Department of Justice, to reduce substantially FST's then current franchise fee debt.

At that point in time, FST owed the United States approximately \$800,000 in unpaid franchise fees and approximately \$190,000 in interest and penalties. The Government offered:

- (1) to waive all the penalties and interest;
- (2) to allow FST up to three years to pay the debt;
- (3) to utilize the debt payments to finance improvements at Dockside II, thereby enhancing the new terminus for FST's Charleston operations; and
- (4) to consider any reasonable counter-offer that FST may choose to make.

The Government was under no compulsion to make this additional effort at settlement of the FST franchise fee dispute. In fact, as described, the government went to extraordinary lengths to even be in a position to make the proposal.

By letter of December 31, 1996, FST rejected this settlement offer, proposing instead only a franchise fee increase from 4.25% to 5% from 1991 through 1996, and 6% thereafter, as opposed to the 12% franchise fee to which the Government was entitled.

By letter of January 21, 1997, more than three years after the 12% franchise fee was lawfully established, NPS gave notice to FST that its concession contract would be terminated for its continuing failure to pay the established franchise fee.

In response, FST on February 11, 1997, filed a new lawsuit, this time in the United States District Court for the District of Columbia. Fort Sumter Tours, Inc. v. Babbitt, C.A. No. 97-00293 ("FST II"). Remarkably, the first count of this new lawsuit was based on the fact that the Government had considered the possibility of initiating settlement discussions in FST I. FST introduced a very imaginative argument in FST II, suggesting that the Government's review of FST's franchise fee critique constituted a new decision as to FST's franchise fee which FST could challenge in a new court.

In addition, FST claimed (even though FST was continuing to refuse to pay the established 12% franchise fee) that an alleged NPS

refusal to agree to reduce the 12% franchise fee to 4.25% for the third five year period of its contract constituted a breach of contract by NPS. FST requested the court to reduce the established 12% franchise fee to 4.25% for this period, or, in the alternative, to order NPS to continue the reconsideration process in accordance with the provisions of section 9(e) of its contract.

In this connection, NPS, as of the February 11, 1997, filing of FST II, had made no final determination as to the disposition of the franchise fee reconsideration for the third five year period of the FST contract. By letter of March 31, 1997, NPS advised FST, for the reasons described above, that the fee reconsideration process for the third five year period had expired as of November 11, 1996, without a change to the 12% fee.

In response to FST II, NPS voluntarily extended the then pending FST contract termination proceedings and the Government voluntarily consented to mediation with FST over the matters at issue in the suit.

During the course of this mediation, the Government proposed to settle FST II by offering:

(1) to negotiate the franchise fee debt owed by FST for the second five year period of its contract (June 13, 1991, - June 12, 1996) under Department of Justice debt collection procedures (i.e., to negotiate a payment schedule and possible reduction of interest and penalties on the debt); and

(2) to continue the reconsideration of FST's franchise fee with respect to the third five year period of its contract (June 13, 1996 - December 31, 2000) through the negotiation and arbitration procedures set forth in section 9(e) of the FST contract.

This latter offer was made even though, as stated, NPS considered that FST was not legally entitled to further reconsideration of its franchise fee for this period.¹

If this settlement had been achieved, the negotiations and possible

¹ This element of the Government's settlement offer, if effectuated, would have provided FST with the complete alternative relief it sought from the court in FST II regarding the third five year period of the contract. In other words, the Government offered by way of settlement to waive fully its legal position regarding the expiration of the reconsideration process for the third five year period of FST's contract and to continue the reconsideration for that period in due course under the provisions of section 9(e).

arbitration called for by the Government's settlement proposal may have led to a substantial reduction of the debt FST owed for the second five year period of the FST contract, and, possibly, a reduction of FST's 12% franchise fee for the third five year period.

However, the settlement proposed by the Government was not achieved. The mediation process was terminated by mutual consent of the parties and the court proceeded to consider the merits of FST II.

On August 31, 1998, the United States District Court for the District of Columbia upheld the position of the Government on all counts of the suit. The court held:

- (1) that the review of FST documents in the spring of 1996 was not subject to legal challenge as it was only for the purpose of possibly initiating settlement discussions in FST I; and
- (2) that FST, through its own inaction, had failed to pursue properly the reconsideration of its 12% franchise fee for the third five year period of its contract.

On October 26, 1998, FST appealed this decision to the United States Court of Appeals for the District of Columbia Circuit where the matter is currently pending.

As of the date of this report, FST continues to refuse to pay its lawfully established 12% franchise fee.

II. Response to the Subcommittee's Questions.

A. In General.

First, many of the Subcommittee's questions stem from the fact, as discussed above, that FST chose to litigate the validity of the franchise fee proposed by NPS rather than seek agreement on an adjusted fee or undertake advisory arbitration in an appeal to the Secretary. FST for this reason maintained in FST I that it did not have an opportunity to contest the NPS decision on a new franchise fee. However, this is not true. The district court held in FST I that FST "had sufficient notice and opportunity to rebut the financial analysis employed by NPS before the increased franchise fee became a final agency action." FST I (district court) at p. 7.

Second, NPS, in providing these responses to the Subcommittee for its governmental purposes, has not and is not reconsidering, reviewing, or otherwise in any manner making any new decision of any nature regarding FST's 12% franchise fee which was lawfully established in 1993 and remains in full force and effect.

Finally, to understand the type of analysis NPS undertakes in franchise fee determinations, it is necessary to understand the NPS statutory charge under the Concessions Policies Act with regard to franchise fees.

The NPS responsibility under the Concessions Policies Act is to establish franchise fees as follows:

Franchise fees, however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for net profit in relation to both gross receipts and capital invested.

16 U.S.C. section 20b(d).

Under this provision, NPS must seek to establish franchise fees based upon the "probable value" of the privileges granted by the contract. The actual financial results of a given concession operation, although important in making such a determination, necessarily are not dispositive of the probable value of the contract. For example, a particular concessioner may operate inefficiently, thereby realizing little or no net income. Another concessioner may operate efficiently, thereby realizing high net income. However, from the perspective of determining the probable value of the contract, NPS generally considers, subject to appropriate adjustments respecting particular circumstances, that the expenses of the operation will approximate the median for the industry in question.

In this connection, many concessioners operate under an NPS concession contract and conduct "outside", i.e., non-concession business, utilizing the same physical assets for both activities and pro-rating expenses among the business activities. FST is one such concessioner as it has an "outside" charter service, harbor tour and dinner cruise business. In order to establish the true profitability of the concession portion of FST's business activities, NPS must ascertain that the apportionment of expenses among the businesses, including respective utilization of capital assets, is done appropriately.

Accepting only actual financial results of a concession operation as reported by the concessioner would result in franchise fee anomalies and could result in inefficient concessioners obtaining a low franchise fee and efficient concessioners obtaining a higher franchise fee. NPS does not consider that such a result would be fair or consistent with the intentions of the Concessions Policies Act.

The necessity to make adjustments to concessioner financial information for probable value purposes is equally valid with

respect to a number of other financial factors attributable to a particular concessioner's operations. Several of these are discussed further below in response to specific Subcommittee questions regarding FST's franchise fee.

B. Response to Specific Questions.

Question 1.

Is it true that NPS has never given FST the statistical data on which the franchise fee increase was based? If so, what is the reason for withholding this essential information? If a concessioner is to pay a fee increase based on this data, why should the concessioner not see it?

Response.

The statistical data in question are contained in, as expressly identified by FST in its 1993 FOIA request to NPS, the Dun & Bradstreet Industry Norms publication for the years 1985 through 1989, and the Robert Morris Associates 1990 Annual Sales Studies publication. These publications were not provided to FST by NPS because they were copyrighted materials, readily available to FST.² The propriety of NPS not providing these copyrighted materials to FST was upheld by the Department of the Interior in response to an FST FOIA appeal and by the courts in FST I.

² The Fourth Circuit Court of Appeals noted: "NPS contends, and FST does not dispute, that both the Morris Studies and the D&B norms are copyrighted publications that are available from the organizations which issue them." FST I at (Emphasis added.)

In addition, the court stated:

We note, as well, that it is unlikely that, had FST obtained the reports from the relevant organizations, NPS would have objected to the inclusion of the reports in the record before the court, since statistics from some older version of the D & B Norms has already been included in the record as part of NPS-48. In fact, a stipulation filed with the district court on October 20, 1993, reflects that FST had supplemented the administrative record before the court on at least one occasion, with NPS's consent.

FST I (appellate court), footnote 6.

Question 2.

If there are any legal impediments to sharing the data with the concessioner, please describe all the efforts the NPS has made to overcome those impediments? If, for example, there are copyright problems, have you attempted to negotiate with the copyright holder?

Response.

The fact that the requested publications are copyrighted imposed a legal impediment to NPS providing copies of the publications to FST. NPS did not attempt to negotiate with the copyright holders on FST's behalf as the publications were available for sale to FST by the copyright holders.

Question 3.

FST prepared a document entitled "Critique of the National Park Service's Franchise Fee Analysis Regarding Fort Sumter Tours, Inc., a National Park Service Concessioner," revised version dated March 15, 1996. Did FST provide a copy of this document to the NPS? If so, please describe for us what NPS did with this critique. Who reviewed it? Was any analysis ever carried out to see if the criticisms in the critique were in fact accurate?

Response.

FST provided a copy of its critique to NPS. It was reviewed by the Government for the purpose of possibly initiating settlement discussions in FST I. The NPS officials that reviewed the document included Mr. Robert G. Hyde, Financial Analyst, and Mr. Robert Yearout, Concessions Program Manager. As part of this review, Mr. Hyde travelled to Charleston and met with FST officials. NPS discussed the results of its review with the Office of the Solicitor and the United States Attorney's Office, Charleston, South Carolina.

Question 4.

Who made the final decision not to reduce the fee after FST furnished the Critique to the NPS? Who was consulted on that decision?

Response.

No decision (or even consideration of such a decision) was made by the Government in 1996 regarding the reduction of the FST 12% franchise fee which had been duly established by NPS in 1993. The only decision made by the Government in 1996 was

a decision not to initiate settlement discussions in FST I. That decision was made by the United States Attorney's Office, Charleston, South Carolina, by letter of July 1, 1996.

Question 5.

Did the NPS ever answer in writing to the errors identified in that Critique? If so, please provide us with a copy of that response.

Response.

No. As stated above, the results of the NPS review were discussed with counsel in FST I.

Question 6.

If no response on the errors identified in the Critique was ever given, please provide the Subcommittee with that response at this time. Please do not give litigation or legal reasons for not responding on the merits. We are particularly interested in your answers to these criticisms:

Response.

The following information responds to the questions posed by the Subcommittee regarding the NPS 1992 franchise fee analysis. However, please note that in providing these responses to the Subcommittee for its governmental purposes, NPS has not and is not reconsidering, reviewing or otherwise in any manner making any new decision of any nature regarding FST's lawfully established 12% franchise fee which remains in full force and effect.

a. The small size and lack of reliability of the statistical data.

In the view of NPS, there exists no credible means to establish the "probable value" of the privileges granted by a concession contract without comparing the returns of the concession operation to industry profitability and other financial norms. In the absence of Congress establishing by law the rate of return of concession operations, the establishment of an opportunity to make a profit has to take into account comparative industry expectations.

NPS uses the most statistically reliable data available for a given franchise fee situation. In addition, NPS by no means mechanistically uses statistical data to arrive at a franchise fee. Rather, it takes into account the statistical data, including its relative reliability,

along with a number of other factors, in arriving at a franchise fee.

In the instance of the 1992 financial analysis which led to the establishment of a 12% franchise fee for FST, NPS took into due account the limitations of the most comprehensive data available, Dun and Bradstreet's Industry Norms. Under Dun & Bradstreet's water industry categories, the category most similar to FST's operations, ferry service (SCI code 4482) was not utilized because of the relatively small sample base of this category. The next closest category, local water transportation (SIC4459/4489) had a significantly larger sample base. This category was discussed in the 1993 NPS franchise fee study. However, the study did not in fact recommend a fee based on comparisons to this category. Rather, NPS utilized for the most part another water industry category, water transportation (SIC 4400), which has a much larger sample base.

b. The lack of justification for assuming away equity.

As discussed above, franchise fee analyses are performed to establish the probable value of the privileges granted by a concession contract, requiring adjustment for analysis purposes of specific features of the business choices a particular concessioner makes in performing under the terms of a concession contract.

A specific concessioner may decide to fund the business by equity, debt or, as in most cases, a combination of the two. Since these decisions affect the profitability return ratios used for comparison purposes, especially if at either of the funding extremes, NPS franchise fee analyses adjust the debt and equity ratio of a specific concessioner to an industry "average" for probable value comparison purposes. Interest expense is also adjusted accordingly so that the comparison with the industry is fair.

Similarly, non-concession assets or assets carried on the company books but which are not used for the concession are also eliminated so that the resulting assets are those that are necessary for the contracted operation. Otherwise, there would be a dilution of earnings with respect to investment if the earnings on these non-concession assets is less than what is earned from the concession operations. It was on this basis that the equity adjustment contained in NPS's 1992 FST franchise fee analysis was made.

c. the failure to account for taxes FST's owners had to pay because of subchapter S accounting.

The probable value of the privileges granted by a concession contract is the same irrespective of the type of business structure a concessioner wishes to form and the resulting federal income tax consequences. There is no NPS requirement that FST structure itself as a Sub-S corporation. If the tax status of the concession entity had to be taken into account in establishing franchise fees, there would be a different franchise fee established for the same contract depending on the tax status of the concessioner (individual, partnership, C corporation, Sub S corporation, etc.). Such a result would be inconsistent with the requirements of the Concessions Policies Act and standard financial analysis of the value of a business.

- d. the reason for the NPS's claim that FST should have paid only \$1 million for a new boat when FST in fact paid over \$1.4 million.

NPS's 1992 financial analysis did not claim that FST should have paid only \$1 million for a new boat. Rather, it pointed out that FST did not purchase a boat at all but leased it from a related party. As such, its asset value was not carried on FST's books, and NPS chose to set an asset value of \$1 million for the boat for probable value comparison purposes. Please see the response to Question 9 which discusses in detail the \$1 million asset value figure.

- e. the basis for the NPS's claim that the lease transaction for the boat was not an arm's length transaction and the assumption that FST paid too much.

The basis in the 1992 analysis for considering that the lease transaction was other than an arms length transaction was the fact, as expressly stated in FST's 1988 financial report, that FST leased the boat from a limited partnership, the general partner of which was FST itself. The 1992 analysis did not state that too much was paid for the boat. Rather, the analysis states that the lease arrangement resulted in lower earnings than would have occurred under an outright purchase of the boat and treated the boat as a capital asset of FST with a \$1 million value. Please see the response to question 9 which discusses in detail the \$1 million asset value figure.

- f. the NPS's inclusion of non-concession income with concessions income.

A supplementary spreadsheet contained in the 1992 analysis included non-concession income but also included all non-concession expenses (for 1986). However, the 1992 NPS franchise fee determination worksheet (page 6 of the analysis, the final worksheet under which the 12% franchise fee was

actually calculated) eliminated all of the \$195,603 of other income reported on the FST income statements.

- g. the NPS's disallowance of a portion of FST's officer's salaries.

The 1992 franchise fee analysis made an adjustment for officer's salaries based on the fact that the size of FST's officer's salaries, averaging over 20% of gross for the 5 years studied, compared to an industry median of 10% in the water transportation industry as reported by the 1990 Robert Morris studies. Such an adjustment is required for probable value comparison purposes as discussed above. If the FST officer's salaries had been lower than industry norms, NPS would have made a concomitant adjustment to the ultimate benefit of FST.

- h. the NPS's assumption that FST could distribute to its owners the cash on the year-end financial statements.

The 1992 analysis did not assume that FST could distribute to its owners the cash shown on year-end financial statements. Rather, NPS treated FST's retained earnings as equity consistent with standard financial analysis practice.

Question 7.

Is it true that in making adjustments to a concessioner's audited financial statements for purposes of a fee calculation, the NPS is supposed to make field studies? If so, please describe the field studies conducted in connection with the FST franchise fee increase.

Response.

There is no requirement that NPS conduct field studies in considering adjustments to a concessioner's audited financial statements for the purposes of probable value comparisons.

Question 8.

In disallowing the officers's salaries, did the NPS conduct a field study or any interviews? What information did the NPS possess that gave an indication of what the proper pay should be for someone who performs such duties?

Response.

No field studies or interviews with FST were conducted regarding officer's salaries in connection with the 1992

analysis. Please refer to the response to Question 6 g as to the basis of this adjustment.

Question 9.

In disallowing a significant part of the purchase price of the new boat, what information did the NPS rely upon? Did the NPS contact boat yards to ascertain what a fair price would be? Did the NPS ask for FST's records of the boats acquisition? Did the NPS try to find out if, for example, FST had put the boat out for bid?

Response.

The NPS 1992 analysis did not disallow a part of the purchase price of the new boat. Rather, as discussed above, the new boat was purchased by a related party and leased to FST. In these circumstances, for probable value comparison purposes only, the 1992 analysis set an asset value for the boat at \$1 million and treated the boat as an FST asset (as opposed to establishing a fair market value lease expense of a boat sufficient to carry out the operations required by the NPS concession contract).

The \$1 million asset value figure was based on a prior NPS estimate of the cost of a new boat necessary to fulfill the contract's requirements. It was not based on additional independent information as to the cost of a new boat necessary to fulfill the contract's requirements nor did NPS inquire as to whether FST had put the boat out for bid.

The \$1 million figure was consistent with the \$1.4 million reportedly paid for the actual boat purchased by the related party multiplied by 70 per cent. 70 per cent was the percentage of operational expenses FST itself attributed to usage of the boat in the conduct of concession operations, as opposed to operational expenses (30%) related to usage of the boat in other FST activities not conducted pursuant to the FST concession contract (and therefore not subject to the franchise fee, e.g., charters, harbor tours and dinner cruises).

If the entire \$1.4 million figure were treated as an FST asset, even though it is used in part for non-concession purposes, FST's profitability (Return on Equity) from its concession operations would have been significantly understated for probable value comparison purposes.

In this connection, the new FST boat is equipped (perhaps at a significant additional cost) for the conduct of dinner cruises which are not conducted pursuant to the FST concession contract. The actual purchase or lease cost of the FST boat,

accordingly, may be misleading (in this and perhaps other respects) for probable value determination purposes. Probable value determinations necessarily consider investment in equipment sufficient to carry out the terms of the contract, not investment in equipment necessary to carry out external business activities of a concessioner.

Question 10.

In disallowing some of the costs of the boat's lease, what information did the NPS rely upon? Did the NPS try to ascertain from lessors what a fair lease arrangement would be for such a boat? Did the NPS ask for or review the records of the lease? Is it the NPS's position that a lease is not an appropriate method for a concessioner to acquire a capital asset?

Response.

Please refer to the response to Question 9 with respect to the first two sentences of this question. With respect to the third, NPS did not ask to review the records of the lease, but, FST could have made these records available to NPS had it chosen to do so. As stated by the court in FST I, FST "had sufficient notice and opportunity to rebut the financial analysis employed by NPS before the increased franchise fee became a final agency action." FST I (district court) at p. 7. With regard to the fourth sentence, it is not NPS's position that a lease is an inappropriate method for a concessioner to acquire a capital asset.

Question 11.

In assuming that FST could distribute the cash shown on the year-end statements, did the NPS try to ascertain why that cash was on the records? Did the NPS ask FST what if anything it intended to do with the cash?

Response.

The 1992 analysis did not assume that FST could distribute to its owners the cash shown on year-end financial statements. Rather, NPS treated FST's retained earnings as equity consistent with standard financial analysis practice. NPS, in developing the 1992 analysis, did not seek to ascertain from FST why the cash was on its records nor did it ask FST what, if anything, it intended to do with the cash.

Question 12.

Is it true that the NPS refused to reconsider the franchise fee increase in 1996 after it was given the Critique prepared by FST? If so, why not? We are not interested in the legal or litigation reasons, but only why the NPS did not give consideration to the merits of the errors that FST identified.

Response.

The Government reviewed the Critique for the purposes of possibly initiating settlement discussions in FST I as described in response to Questions 3, 4, 5, and 6 above. No reconsideration of the fee was undertaken by NPS as the fee reconsideration process for the second five year period of FST's contract was concluded in 1993.

Question 13.

What is the NPS's policy on how to respond when a concessioner brings errors in a franchise fee determination to the NPS's attention? Is it the NPS's policy that such errors will be corrected? If that is not the policy, please explain. If it is the policy, please explain why that was not done with FST.

Response.

In the large majority of occasions when a franchise fee reconsideration has been possible under NPS concession contracts, neither NPS nor the concessioner sought a change in the fee. On those occasions where NPS sought a fee increase, nearly all were resolved by mutual agreement pursuant to the procedures set forth in the contract. If this process fails, advisory arbitration in an appeal to the Secretary is available at the request of the concessioner.

This process provides the concessioner with full opportunity to bring to NPS's attention any errors it may have made in its determination of a proposed franchise fee. NPS does not recall another occasion where a concessioner sought to point out errors after a franchise fee adjustment was completed under these procedures.

NPS has no policy or procedure permitting a franchise fee adjustment to be reconsidered after a final decision has been made on the adjustment. However, as described above, the Government in 1996 did undertake an after-the-fact review of additional information provided by FST for purposes of possibly initiating settlement discussions in FST I.

In addition, as noted above, the court in FST I stated that FST had "sufficient notice and opportunity to rebut the financial analysis employed by NPS before the increased

franchise fee became a final agency action." FST I (district court) at p. 7.

Question 14.

Is it the NPS's position after consideration of FST's criticisms that a franchise fee of 12% of gross receipts is in fact on the merits the fair and proper fee for the second five year period? If so, please give us your reasons.

Response.

NPS provides the following response to this question posed by the Subcommittee. However, please note that in providing this response to the Subcommittee for its governmental purposes, NPS has not and is not reconsidering, reviewing, or otherwise in any manner making any new decision of any nature regarding FST's 12% franchise fee which was lawfully established in 1993 and remains in full force and effect.

With this limitation in mind, NPS considers that FST's 12% franchise fee for the second five year period of FST's contract represented a fair and proper fee (although, possibly, the fee could have been higher). The reason for this view is that NPS considers that the established 12% franchise fee for this time period was consistent with the probable value of the privileges granted by FST's contract taking into account an opportunity for net profit both in relation to gross receipts and capital invested.

Question 15.

Is it true that the NPS refused to reduce FST's franchise fee for the third five year period? If so, please tell us if because of FST's oversight the NPS did not know what FST's position was? Did the NPS lack enough information at that point to conduct a fair and impartial franchise fee analysis of what the franchise fee should be for the final five year period? If so, did anyone contact FST to request that information?

Response.

NPS did not refuse to reduce FST's franchise fee for the third five year period of its contract. Rather, FST did not pursue a franchise fee reduction for that period in accordance with the requirements of its contract. The court so held in FST II. However, as discussed above, the Government offered, as a means to settle FST II, to reopen the contract's reconsideration process under the terms of section 9(e) for the third five year period.

Question 16.

Is it the NPS's position that it is fair to refuse to consider a reduction in a franchise fee simply because the concessioner fails to perform some ministerial action?

Response.

FST's failure to pursue a reconsideration of its fee for the third five year period of its contract in accordance with the terms of its contract was a material failure by FST as held by the court in FST II. Again, however, the Government offered to reconsider the franchise fee for the third five year period under the terms of section 9(e) of FST's contract as a means to settle FST II. In any event, NPS would not refuse to consider an otherwise lawful reduction in a franchise fee because of the failure of a concessioner to take an action that has no effect on the rights and liabilities of the parties to a concession contract. FST's failure to pursue a reconsideration of its fee for the third year period was not such a failure.

Question 17.

Is it NPS's position that not a single one of FST's criticisms is in fact meritorious? If so, please give us your explanation. If this is not the case, why shouldn't the NPS correct the errors.

Response.

NPS provides the following response to this question posed by the Subcommittee. However, please note that, in providing this response to the Subcommittee for its governmental purposes, NPS has not and is not reconsidering, reviewing, or otherwise in any manner making any new decision of any nature regarding FST's 12% franchise fee which was lawfully established in 1993 and which remains in full force and effect.

With this limitation in mind, the NPS response to Question 6 discusses in detail the criticisms noted in the Subcommittee's letter and NPS's assessment of their merit. NPS considers that none of the criticisms has sufficient merit to suggest that the 12% franchise fee established in 1993 is not consistent with the probable value of the privileges granted by FST's taking into account an opportunity for net profit both in relation to gross receipts and capital invested.

Question 18.

Is it the NPS's position that a franchise fee of 12% of gross receipts is in fact on the merits the fair and proper fee for the third five year period? That is, are you satisfied that if NPS had conducted a franchise fee analysis based upon the most current and accurate information, that analysis would have produced a franchise fee of 12% of gross receipts for the third and final five year period of the contract? If so, please give us your reasons.

Response.

The NPS provides the following response to this question posed by the Subcommittee. However, please note that in providing this response to the Subcommittee for its governmental purposes, NPS has not and is not reconsidering, reviewing or otherwise in any manner making any new decision of any nature regarding FST's 12% franchise fee which was lawfully established in 1993 and remains in full force and effect.

With this limitation in mind, NPS considers that FST's established 12% franchise fee for the third five year period of FST's contract represents a fair and proper franchise fee (although, possibly, the fee could be higher). The reason for this view is that NPS considers that the established 12% franchise fee is consistent with the probable value of the privileges granted by FST's contract taking into account an opportunity for net profit both in relation to gross receipts and capital invested. NPS considers that if it had undertaken a new analysis of the FST franchise fee with regard to the third five year period of the FST contract, that analysis would have supported a franchise fee of at least 12%.

Please note, however, that the Government, for the purposes of settlement of FST II, offered to reopen the franchise fee reconsideration process for the third five year period of the contract under the terms of section 9(e).

Mr. HANSEN. Thank you, Director Stanton.

As you folks know, we have no control over what happens on the floor. And those two lights at the back mean that we have a vote on that we have to run on a rule. We will try to get back as soon as we can, and we will stand in recess till then.

[Recess.]

Mr. HANSEN. The Committee will come to order.

Staff tells me that, Mr. Director, that you have to leave here at 12:30. Is that correct?

Mr. STANTON. In deference to you, Mr. Chairman, I will be flexible on that.

Mr. HANSEN. I would like to have you hear the testimony of the other witnesses. So, how long is your testimony going to be, Mr. Campsen?

Mr. CAMPSSEN. Mr. Chairman, five minutes is the allotted time, and I will be within five minutes.

Mr. HANSEN. Well, we are being generous today. We may give you seven or eight minutes, if that is what you need.

Mr. CAMPSSEN. Thank you, sir.

Mr. HANSEN. Okay. And Mr. Jackson?

Mr. JACKSON. I would hope to finish mine in five minutes as well.

Mr. HANSEN. Well, then we have got about 43 minutes. So, Mr. Campsen, why don't we turn to you, and then we will question all three of you and we'll complete our testimony.

Mr. Campsen, you have the floor.

STATEMENT OF GEORGE CAMPSSEN, PRESIDENT, FORT SUMTER TOURS, INC.

Mr. CAMPSSEN. Thank you, Mr. Chairman, gentlemen of the Committee. My name is George Campsen. I am president of Fort Sumter Tours. Now Fort Sumter National Monument in Charleston is accessible only by boat, and in 1961, the Park Service was publicly seeking a private concessionaire, to begin public boat transportation out to the Fort.

Out of five competing proposals, we were selected. And with money borrowed from a local bank, we acquired the vessels and so forth, and enthusiastically became involved with our government in business. We viewed it as a partnership, with the Park Service being the senior partner.

We are family-owned and -operated. And over the years, my wife and I and our four children, as they grew older, all worked to make this concession successful, and working in complete harmony with local park officials. We build and developed a highly reputable service, and visitation steadily increased.

Now, in the mid-1980's, the service recognized that a second mainland docking facility and a larger vessel was really necessary and desirable at Fort Sumter. The estimated cost to the concessionaire would be at least \$1 million.

Now, Mr. Chairman and gentlemen, we are a small, relatively speaking, we are a very small concessionaire, with annual gross income approximately at that time of \$1.4 million. But we recognized that this expansion desired by the Service was really needed.

And to facilitate private financing of these needs, the Service offered a 15-year contract so that you could borrow money from a bank and show them how you were going to be able to pay off the loan.

And they issued a prospectus and published it widely seeking proposals from all interested parties. But no one else was interested. So we borrowed more money, and we agreed to make the investments, and we did make the investments. And this 15-year, current 15-year contract was executed in 1986.

As you know, all concessionaires pay a franchise fee based upon the "probable value" of your particular contract privileges. At that time, the Service valued our privileges at the rate of 4.25 percent of our gross receipts. Now even though this was a 1 percentage increase over our contract that we had at that time, we nevertheless thought it was reasonable. And we agree to it.

But we were shocked and dismayed that after the first five years of this 15-year contract, we were advised that the Service had reconsidered the probable value of these same contract privileges, but we were shocked and dismayed because the Service informed us that these same privileges had somehow increased in value to 12 percent.

We were shocked because the scope of our privileges had not changed one bit. We were really shocked, Mr. Chairman, because the franchise fee analysis, developed by a bureaucrat in the Washington office of the Service, contained serious mistakes. These are the same mistakes that are plaguing us and threatening to destroy us today, the mistakes that we have pointed out in this franchise fee analysis.

We prepared a professionally-developed critique highlighting these mistakes, and in good faith we requested an opportunity to present them to appropriate officials of the National Park Service. This we did in 1996. We said, "Gentlemen, here are the mistakes that were made in this franchise fee calculation. Here are the consequences of these mistakes. We don't deserve this kind of treatment. These things are clear errors. Won't you please reconsider your position and correct them?" They listened, but they refused to budge.

Now, these mistakes in this franchise fee analysis, they create the illusion that our small concession is more profitable than it actually is. We have demonstrated that in figures, in positions which the Park Service really does not contradict.

Please, please understand that we are not attempting to avoid paying a properly calculated fee. What we are seeking, gentlemen, is relief from paying a fee based upon an analysis that contains obvious mistakes, which are very, very destructive to our small business.

Now, we are all imperfect human beings, and we all make mistakes. Certainly, we have made mistakes. But what we can't understand is why in the world our own government, which I love and respect, cannot admit to some obvious mistakes and correct them.

The principles of our small company, gentlemen, and our 44 employees have been living in job peril for almost seven years. It has been a costly and unwarranted nightmare. We are mystified why the United States of America behaves in this fashion.

We have always provided outstanding service at Fort Sumter. And the Park Service admits this. We have done nothing to deserve this type of treatment. And please, in the interest of all, please help resolve this matter on its true merits.

I thank you for your consideration. I shall be happy to answer any questions.

[The prepared statement of Mr. Campsen follows:]

**PREPARED TESTIMONY OF GEORGE E. CAMPSER, JR.
 PRESIDENT OF FORT SUMTER TOURS, INC.
 CHARLESTON, SOUTH CAROLINA
 BEFORE THE SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC LANDS
 COMMITTEE ON RESOURCES
 UNITED STATES HOUSE OF REPRESENTATIVES
 JUNE 22, 1999**

Good morning, Mr. Chairman and members of the Subcommittee. I am George Campsen, Jr. I am the President of Fort Sumter Tours, Inc. (FST), and have held this office since 1961. I am accompanied today by my son, George E. Campsen III, known as Chip, by David Jackson, who is Fort Sumter Tours's independent auditor and will also offer testimony, and by Peter Dickson, our counsel.

Let me begin by expressing the heartfelt thanks of the owners and employees of Fort Sumter Tours for holding this hearing. For nearly seven years we have been living a nightmare as the National Park Service has brought the full resources of the United States Government to bear on an ill-considered effort to charge our company a franchise fee that would literally put us out of business. We are very grateful that the Subcommittee has undertaken to try to get to the bottom of this.

Let me also take this opportunity to express our appreciation to Representatives Floyd Spence and Mark Sanford, and to Senator Fritz Hollings for all that they have done on our behalf. It is very encouraging to know that our Senators and Congressmen are determined to see that the laws are executed with intelligence and integrity, and to take appropriate measures when they are not.

WHY ARE WE HERE? BECAUSE THE NATIONAL PARK SERVICE PERSISTS IN TRYING TO CHARGE FORT SUMTER TOURS AN EXCESSIVE FRANCHISE FEE BASED ON OBVIOUS MISTAKES

Mr. Chairman, we are here because our company has been embroiled in a dispute with the National Park Service over the proper franchise fee that our company should pay for the privileges of furnishing boat transportation between Fort Sumter National Monument, the Municipal Marina in Charleston and Patriots Point in Mount Pleasant, S.C. This dispute has gone on far too long and has taken a terrible toll on me, my family, and the conscientious and hard-working employees of FST. In 1992, the NPS stunned us by deciding to nearly triple our franchise fee, from 4.25 % to 12 % of gross receipts. There can be no real dispute that this decision was based on numerous mistakes, including incorrect assumptions about our business, the use of data that courts have universally condemned and simple accounting mistakes. Despite these manifest mistakes, the government has persisted in its determination to charge us this flawed fee, has resorted to clever litigation strategy to prevent the courts from reviewing the full record of the decision, and has even threatened to terminate our franchise. Every fair and impartial person who has examined the complete basis for the NPS's decision has concluded that the agency made any number of

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mistakes.

Despite this, Mr. Chairman, the NPS will not negotiate on the merits, will not admit to its mistakes, will not even tell this Subcommittee whether or not our criticisms are correct, and to this day has never shared with us, any court, or anyone else the statistical data on which it based its calculations.

Mr. Chairman, I am profoundly discouraged that my government would treat my company and its employees in this manner. We have done nothing to deserve this. For six years now I have been utterly baffled at why the NPS would do this. I simply don't understand it. Why can't they admit to their mistakes? Why won't they engage in a substantive discussion of the merits of this fee?

**FORT SUMTER TOURS HAS BEEN AN EXEMPLARY CONCESSIONER SINCE 1962
AND HAS ALWAYS BEEN HIGHLY REGARDED BY THE NPS**

FST has provided boat transportation services to Fort Sumter National Monument visitors since 1962. We also provide visitors with associated food, beverage and souvenir sales. Today, FST employs 44 full-time employees and up to 20 seasonal employees, and operates three passenger vessels. We have provided these services under a series of concession contracts with the NPS. The most recent of these contracts was executed in 1986 and is for a period of fifteen years. I have included a copy of this contract with my testimony.

Let me tell you a little bit about this company and how it came to be. I graduated from college in 1951 and entered active duty in the Air Force, in which I served until 1953. I finished law school in two years and entered private practice on graduation, taking every and any matter that came my way, no matter how small. I served in the South Carolina State Legislature from 1958 to 1964. I chaired a special committee that undertook a comprehensive revision of South Carolina's criminal code, and I chaired the Tourist Promotion Committee. I was also instrumental in the establishment of the state's Department of Parks, Recreation and Tourism.

Mr. Chairman, FST is an old fashioned enterprise that is fast disappearing from our national parks: a family owned and operated business dedicated not to the bottom line but to providing National Park Service visitors the very best in service and comfort at a regulated reasonable price.

I started Fort Sumter Tours almost by accident. In 1961, I was exploring building a fishing pier in Charleston Harbor and establishing a boat service to carry people out to it from the City of Charleston. I noticed that the boats would pass directly by Fort Sumter National Monument. When I went to see the Superintendent about getting NPS permission to drop passengers off at the fort, he told me that the NPS had just put out a Prospectus seeking proposals to operate a franchise for passenger service to the fort. Four other operators and I submitted proposals, and mine was

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selected.

Well, I had no money. I borrowed from a bank and commissioned the construction of the "General Beauregard," our first vessel, at a cost of about \$44,000. It began service on January 1, 1962 and had a capacity of 190 passengers. A sister vessel, the "Major Anderson," began service in 1963 at a cost of about \$60,000. The first "General Beauregard" was sold in 1970 and replaced by the current "General Beauregard," which cost about \$165,000 and has a capacity of 311 passengers.

The early years of FST were an adventure. I had to personally guarantee every loan or note the company needed, as I have done ever since. For quite some time I was paid nothing for my efforts. My mother kept the financial books and records for many years. Operating a passenger boat service requires large amounts of capital, constant repair and maintenance and dedicated and knowledgeable employees. Operating a passenger boat service at the highest levels of care, as we have always done, is even more demanding. I have sold tickets and performed office work, and done just about anything that had to be done except significant maintenance and repairs. Until recently I held a 100 ton Captain's License.

As the Subcommittee knows, the NPS pervasively regulates and controls our concession operations. Among more important aspects of this regulation is that the NPS controls our rates for travel and prices for food, beverages and souvenirs, primarily by comparing them to rates and prices charged for comparable services and items not subject to government regulation. The NPS controls the type of vessels that we use as well as other equipment. The NPS controls what food, beverage and souvenir items we can offer for sale. The NPS controls our hours of operations, the number of trips that we can take each day and the number of passengers that can be taken on each trip. The NPS reviews our advertising and marketing. The NPS can inspect our facilities. In fact, the NPS can, if it wishes, compel us to discipline an employee. We also have to submit detailed audited financial information on a regular basis to the NPS.

In addition, concessions contract comes at a significant loss of flexibility and ability to cope with setbacks and downturns, anticipated or not. For example, the federal government shutdown last fall cost us approximately \$70,000, no small sum for a business of our size. We were expected to remain ready to resume service on very short notice. All of our costs continue to come due, but our revenues were slashed. We were called at 9:00 one morning and were told to resume service at 1:00 that afternoon.

The NPS expects, and rightfully so, that visitors to the Monument be treated with respect and care. The NPS expects that the vessels used to transport its visitors be well-built to a high degree of safety and reliability. The NPS expects that the vessels, the staff, food and beverages and other amenities and all aspects of the concessioner's operations should make a positive contribution to the visitors' experience.

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According to section 5 of the 1986 Contract, FST is to maintain a "high standard of physical appearance, operations, repair and maintenance." We do just that. Under the Operating Plan which is a part of the 1986 Contract, FST must provide service "which is consistent with the highest standards of safety and maintenance, and which promotes visitor understanding and appreciation of the Park [sic]." The detailed requirements are very specific as to items such as repainting, cleaning, inspections, safety, navigation, and the provision of interpretive services such as a recording that plays while the boat is in transit. We meet these high standards.

The NPS has never seriously questioned FST's service, professionalism, safety and contribution to the monument's visitors. As the Subcommittee also knows, FST is annually evaluated by the NPS on a wide ranging set of very detailed criteria, both with respect to our operations and maintenance and with respect to our contract compliance. These detailed criteria are tough and cover the most minor items, but FST has never considered them to be anything but the starting point for our own evaluation of how well we perform. I am proud to say that every year without exception the NPS has given FST the highest possible rating for both operations and contract compliance.

In the mid 1980's, it was obvious that our dock space at the City Marina was becoming squeezed and alternative access to the fort was going to become a necessity. The construction of the Scarborough Bridge took about a third of the available parking space. The NPS and FST agreed that expansion elsewhere was a necessity if FSNM visitors were to be properly served.

I brought to the NPS's attention the possibility of serving the fort from Patriots Point, a naval museum which is administered by a state authority. Patriots Point is about six miles east of the center of Charleston and is about the same distance from the fort as the center of the city. The aircraft carrier "Yorktown" is located at Patriots Point. In 1985, the NPS agreed that service should be provided not just from Charleston but also from the Patriots Point Naval Museum in Mount Pleasant, S.C. They also concluded that this new service, combined with proposed changes in the existing service to Charleston, would require one vessel in addition to the two then used by FST to provide service between Charleston and the fort. FST agreed with the NPS's analysis.

The NPS also concluded that the new vessel would cost over \$1 million. FST's then existing contract with the NPS was set to expire in 1988. That simply did not give us adequate security to reflect an investment of that risk and size, and so we explored a new contract with the NPS. The NPS as is its practice published a notice giving the parameters of what this new contract would involve, and it invited other interested parties to express an interest in competing for this new service. No one responded to the NPS's invitation.

Thus, FST and the NPS negotiated the new 1986 Contract. The NPS wanted FST to make a substantial new investment and assume substantially greater risks, and FST needed a long term contract to have some assurance that we could recover that investment and have the opportunity to be fairly paid for the costs of the new investment and the risks involved.

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Under our previous contract, FST was paying a franchise fee of 3.25% of gross receipts. Thus, FST made a considerable sacrifice in giving up the last two years of that contract at the lower fee rate. As I said, under this contract, the term was for fifteen years, and it contained the unusual language providing for reconsideration of the fee every five years.

Let me emphasize that when FST entered into the 1986 Contract, the NPS had an entirely different interpretation of what was supposed to happen at the periodic franchise fee reconsideration. In prior years the NPS did not attempt to exercise any right to impose a new franchise fee on an unwilling concessioner, which is what it does now. Rather, the NPS viewed this provision as the opportunity for the concessioner and the NPS to negotiate and agree upon a revised fee in light of changes in the circumstances. That was the NPS interpretation at the time FST entered into the 1986 Contract, and our willingness to take the new risks and obligations of the contract was based on this understanding. Just after the 1986 Contract was entered into, the NPS changed its policy and took the position that it did indeed have the legal right to unilaterally increase a franchise fee, even if the concessioner objected.

And of course, as you know, in 1998, Congress amended the law to eliminate these periodic reconsiderations unless there is a significant change in the privileges granted by the franchise.

FST would certainly have not agreed to undertake all of these new risks if it had known that the NPS would a short time later change its interpretation and insist on the open-ended unilateral right to revise the franchise fee. FST is not a large company, does not have large reserves of cash against such eventualities and would have viewed that change in NPS policy as significant new risk. Events have certainly proved that to be the case.

FST's willingness to continue as an NPS concessioner and to assume the new risks and obligations was also based on the governing statute and the provisions of the contract. The Concessions Policy Act says that the NPS must implement the statute "in a manner consistent with a reasonable opportunity for the concessioner to realize a profit on his operation as a whole commensurate with the capital invested and the obligations assumed." 16 U.S.C. § 20b(b). This command is also in our contract in the preamble, and in section 3(a)(1) and section 3(a)(2).

The Act also says that franchise fees "shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for net profit in relation to both gross receipts and capital invested." 16 U.S.C. § 20b(d). This command is also in our contract in section 9(e) in relation to the franchise fee reconsideration. The Act also says that in setting franchise fees, "revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates."

Finally the 1986 Contract contains some special language that does not appear in the

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normal concessions contract, to induce us to make the needed investments and to properly reflect the new risks involved. The contract acknowledges that it "involves a substantial investment of capital and the assumption of the risk of operating loss, [and] it is therefore proper, in consideration of the obligations assumed hereunder and as an inducement to capital, that the Concessioner be given assurance of security of such investment and of a reasonable opportunity to make a profit."

These provisions of the law and the 1986 Contract were of vital importance to us in deciding to execute the contract and assume its significant new risks. We would not have agreed to the contract without them.

I had to personally negotiate with the Patriots Point Authority for the dock space and operating rights, and FST had to agree to construct its own dock and passenger service facilities.

The acquisition of the "Spirit of Charleston" was done with the full knowledge and approval of the NPS. The construction of the vessel was handled in a professional manner. We retained a J.P. Hargrove, a naval architect in Florida, to design the vessel and to solicit bids for its construction. As I recall, a total of five bids were received, and we selected the one recommended by the architect. The design and plans for this vessel were reviewed by the NPS, specifically by then-Superintendent Brien Varnadore and Leonard Hall, the Chief of Concessions Operation in the Southeast Regional Office of the NPS.

In order to obtain the best possible financing for this expensive acquisition, we determined to set up a partnership to acquire the vessel and lease it to FST. FST is the general partner and I am the limited partner, and each owns 50% of the partnership. In order to obtain the financing for the acquisition, both FST and I had to guarantee the financing. This meant that I would be personally responsible for the debt, all of it, if FST or the partnership could not make the loan payments.

The NPS approved this acquisition arrangement, including the identity of the partners, before we finalized it. I spoke to Mr. Hall about it, and his response was a statement to the effect that leases were a familiar form of equipment acquisition for NPS concessioners. He said that his primary concern was to get the boat into operation so that visitors could enjoy the improved service. The lease payments are a fair payment for a lease of this type, and I have never seen anything from the NPS that ever suggested otherwise. So far as I know, they never even bothered to look at comparable leases. For five years we have had our operating plan reviewed and for five years we have sent our audited financial statements to the NPS, and we have never heard any objection to this arrangement until proposal to increase the franchise fee.

Of course, in real life, things do not always go as anticipated. The builder ran into difficulties and design changes had to be made. The final price was \$1.4 million. I have no reason to believe that we overpaid for this vessel, and I believe that the final price was a fair price;

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there were certainly no hidden profits for me, FST, our lender, the builder, the architect or anyone else. I was told and believe that the builder lost a substantial amount of money on the contract.

But we simply accepted this cost overrun as a fact of life and did what we do best: served our customers, the visitors to Fort Sumter National Monument.

Then out of the blue, we were told in 1991 that the NPS wanted to raise our franchise fee. In August 1991, the Washington office of the NPS prepared a draft analysis for FST's franchise fee. This draft made a number of erroneous adjustments to the audited financial information submitted to the NPS, and using data that was supposed to approximate industry profitability, concluded that the fee should be increased to 12% of gross receipts

We have been trying since then to show the NPS that this is wrong, but we are running out of options.

**IF FORT SUMTER TOURS IS COMPELLED TO PAY THE WRONGLY CALCULATED
FRANCHISE FEE, IT WILL WIPE OUT OUR PROFIT AND DESTROY THIS COMPANY
AS A GOING CONCERN**

If we are required to pay the franchise fee at the 12% of gross receipts level, it will wipe out nearly all of FST's concessions profits for the balance of the 1986 Contract. A few years' data should suffice to illustrate.

In 1992, according to our audited financial statements submitted the NPS, we paid a fee of \$82,222 and realized net concessions income before taxes of \$165,847. If the fee had been 12% of gross receipts, we would have paid an additional \$148,239 and had a net concessions income of just \$17,608.

In 1993, according to our audited financial statements submitted the NPS, we paid a fee of \$83,695 and realized net concessions income before taxes of \$151,273. If the fee had been 12% of gross receipts, we would have paid an additional \$150,924 and had a net concessions income of just \$349.

In 1994, according to our audited financial statements submitted the NPS, we paid a fee of \$85,967 and realized net concessions income before taxes of \$185,085. If the fee had been 12% of gross receipts, we would have paid an additional \$155,068 and had a net concessions income of just \$30,017.

And in 1995, according to our audited financial statements submitted the NPS, we paid a fee of \$85,967 and realized net concessions income before taxes, and before accounting for the contingency that we would have to pay the NPS's higher fee going back to 1991, of \$274,347. If the fee had been 12% of gross receipts, we would have paid an additional \$155,358 and had a

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net concessions income of just \$118,989. Since we had to book a contingency of \$687,840 for the higher franchise fee, FST had a concessions loss for the year of \$413,493.

This cuts deeply. As a result of the unjustified increase in our franchise fee and the direct impact on our *real world* profitability (as opposed to the imaginary construction of the NPS), FST has suspended the payment of dividends except to the extent necessary for its owners to pay federal income taxes on the Subchapter S portions on their income.

For the four year period 1992 through 1995, then, we would have at the NPS's higher fee realized a total of just \$166,963 of net concessions income before taxes on concession revenues of \$7,865,659. The average over those four years would have been \$41,741 of net concessions income before taxes on \$1,966,415 of concessions revenues. These are pitifully inadequate returns by any measure.

The proposed increase in the franchise fee would therefore cause FST extraordinary harm. The NPS can "adjust" FST's financial statements all that it wants, but that will not alter the nature of FST's real obligations. Just because the NPS says that its imaginary new boat should cost \$1 million does not give FST the ability to go back to the builder and demand a \$400,000 refund for the "Spirit of Charleston." Just because the NPS wipes out \$350,000 of FST equity - capital - does not mean that FST can in reality cope with a lesser amount of capital or should now be satisfied with a return on the lesser amount of equity.

FORT SUMTER TOURS TRIED TO OBTAIN REDRESS AT THE NPS AND IN THE COURTS, BUT THE GOVERNMENT'S LITIGATION STRATEGY DEFEATED US, AND NO COURT HAS EVER REVIEWED THE MERITS OF THIS FEE ON THE FULL RECORD

Mr. Chairman, I know that you do not want this hearing to cover the litigation. But a brief review of our efforts is needed, because it is important for the Subcommittee to understand that we have tried very hard to get relief in the courts, and it has been very expensive for us.

When we received the government's proposal to increase the fee and the draft franchise fee analysis, we were, as I said, stunned. In trying to understand how the NPS could have arrived at so harsh a conclusion, it became apparent to us that much of this draft decision was based upon so-called industry statistics, such as Dun & Bradstreet data and Robert Morris Associates data. So we asked the NPS for copies of this data. They refused. We made a Freedom of Information Act request for the data. They refused. We filed a FOIA appeal, which remains pending to this day. In the meantime, all sides agreed that negotiations on the pending analysis would be held in abeyance until we resolved the FOIA appeal.

I have said that we all make mistakes, and in retrospect, I made a mistake at this point. We should have presented the NPS with as much information as we could muster to show that

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their fee analysis was incorrect, but we made the decision to hold off on that until we could get at the industry data. In that way, we would not be presenting our case to the NPS on a piecemeal basis. Was that a wise choice? I certainly thought so at the time. But I was wrong.

Events swiftly proved that, because the NPS simply decided one day to go ahead and make the fee increase decision final, without waiting for the FOIA appeal. They gave us thirty days. Mr. Chairman, to present whatever information we wanted. Of course, we were taken by surprise and thirty days is hardly enough time to catalog and explain the errors, as a glance at the attachments to my testimony will confirm.

Because we understood immediately the harm that the NPS's proposed higher fee would cause, we sought a declaration from the Federal District Court in Charleston that the NPS lacked the legal authority to unilaterally impose this increase. The suit was filed on April 21, 1993.

All we sought was a declaration of the parties' rights as to the NPS's legal authority to impose the fee increase. However, we were outsmarted by the NPS's clever litigation tactics. The NPS declared the fee increase final and asked the court to convert the case into a judicial review of the arbitrariness and capriciousness of the agency's decision. As you can tell from the sequence of events, this caught us without giving us a chance to present our case to the agency, and an arbitrary and capricious review is based on the record before the agency, not on the basis of new evidence offered in the court.

We asked the court to compel the NPS to file the industry data with the court. For reasons that I will never understand, the court denied that request.

On February 3, 1994, the District Court, based solely on the record as it then stood, ruled that the NPS did have the requisite legal authority to impose the franchise fee increase and that the record as it then stood did not show that the increase in question was an arbitrary exercise of the Secretary's discretion. The Court said that FST had not offered any evidence to the NPS to show the arbitrariness of the NPS's adjustments. The United States Court of Appeals affirmed the District Court's decision. That Court also said that FST had not offered any evidence to show the arbitrariness of the NPS's adjustments. The United States Supreme Court declined to hear the appeal.

While the case was pending on appeal, we then undertook to persuade the NPS of the many errors in its franchise fee analysis that I have described above.

That effort failed, and in December 1996, two NPS officials came down to Charleston to present a settlement offer. I responded with a counter-offer, hoping that negotiations would now get underway. Instead, the NPS wrote to FST on January 21, 1997, and said that unless FST paid the difference between the 4.25% and 12% franchise fees going back to June 16, 1993, plus interest and penalties, an amount totaling at least \$1,034,088.45, our concession contract with the

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NPS would be terminated as of February 28, 1997. Even in this letter, I would note, the NPS says "Fort Sumter Tours has provided good service to the public over many years."

We thus had no choice but to ask the Federal court in the District of Columbia to enjoin the termination pending a review of our claim that the NPS's refusal to reduce the fee after we brought the mistakes to their attention was arbitrary and capricious. In response to the court's prodding, the NPS agreed to withdraw its termination threat. The NPS asserted that it didn't reconsider our fee and so there was nothing to review, and the court agreed. That case is pending on appeal.

So I want the Subcommittee to know that we have tried every reasonable avenue that we could find. This is our last resort.

FORT SUMTER TOURS PRESENTED THE NATIONAL PARK SERVICE WITH A VERY DETAILED ANALYSIS OF THE NPS'S ERRORS IN THE FRANCHISE FEE CALCULATION

While our court challenge end was pending, we began to prepare an extensive factual critique of the NPS's decision. On March 15, 1996, FST requested that the NPS reconsider its decision to increase the franchise fee. In support of this request, FST submitted an extensive Critique demonstrating the errors in the original franchise fee determination. This Critique was developed over a period of several months and included the reports of two experts in statistical analysis. Both of them panned the NPS's data as wholly unreliable.

On May 10, 1993, my son and I had an extensive meeting in Washington, D.C. with several NPS officials. We set forth at length the errors in the NPS's franchise fee analysis. In addition, we presented a document which showed that according to NPS's own guidelines (NPS-48) the proper level of franchise fee for FST was the 4.25% that was in the 1986 Contract.

On June 5 through 7, 1996, Robert Hyde, the Financial Analyst who had prepared the NPS's Franchise Fee Analysis made a visit to Charleston, South Carolina. We understood that the purpose of the visit was to review matters concerning FST's request for reconsideration of the franchise fee. Mr. Hyde visited the offices of FST and met with FST officials. He asked a number of questions and was given everything he asked for.

We were of course greatly disappointed to receive a letter from the government on July 1, 1996, stating that they were not going to reduce the fee despite all the mistakes we had pointed out to them. Not at that time or any time since then has the government ever responded to the merits of our criticisms.

THE MISTAKES IN THE NPS'S FRANCHISE FE CALCULATION ARE NUMEROUS AND SERIOUS

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Let me turn now, Mr. Chairman, to a discussion of these mistakes that the NPS made in calculating our fee. You will come to appreciate how serious these mistakes are, and how utterly wrong-headed it would be for our company to pay a franchise fee based on an analysis so riddled with errors.

To some extent, there will be some overlap between my testimony and that of Mr. Jackson, the independent auditor for Fort Sumter Tours.

WHAT MUST THE NPS DO BEFORE IT CAN DISREGARD OR ADJUST THE FIGURES IN FST'S AUDITED FINANCIAL STATEMENTS?

In setting the franchise fee for FST, the NPS disregarded numerous figures in FST's audited financial statements. There has never been any dispute that the audited figures themselves are accurate.

A. **What the NPS is supposed to do:** NPS-48 sets forth some basic and common sense requirements that the NPS must follow if it chooses to disregard a concessioner's audited financial statements in setting a franchise fee.

1. NPS-48 first requires that the audited financial reports be scrutinized and any errors or mistakes identified as they are filed each year. (Ch. 24, Pages 6-9.) No questions were ever raised about the accuracy of FST's financial statements.

2. "[A]ny known changes that are unique to the concessioner should be kept in mind and approximated in the financial presentation." (Ch. 24, page 15.)

3. Adjustments to major expense categories can be made by comparison to industry statistics only "when such statistics are available." (Ch. 24, page 17.) Thus, if the available industry statistics are in fact unavailable because they are not valid, these statistics cannot be used.

4. "In making adjustments to reported net profits, it appears that the best source of comparison are industry statistics, where they are available."

5. Adjustments to expense categories can be made only if they cannot "be explained by the operating situation or complexities of the concessioner." (Ch. 24, page 17)(emphasis added).

6. "Keeping in mind that industry means and averages are not absolutes but rather statistical descriptions of a limited sample, every effort must be made to allow reasonable expenses given the specific operating conditions" of the concession. (Ch. 24,

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Exhibit 3, page 1)(emphasis added).

7. "Any adjustments made to operating or administrative expenses because of observed differences with industry statistics must be made with caution." (Ch. 24, Exhibit 3, page 1)(emphasis added).

8. "Field observation will be especially important in judging management performance because of the lack of an effective quantitative measure." (Ch. 24, Exhibit 3, page 1)(emphasis added).

9. If considering an adjustment to payments made to a concessioner's owners, "[o]f particular importance is the value of the services being provided and the corresponding payment." (Ch. 24, Exhibit 3, page 2)(emphasis added).

10. Any NPS adjustment "must be fully explained (dollar for dollar)". (Ch. 24, Exhibit 3, page 1)(emphasis added).

B. **What the NPS did instead:** The NPS ignored every one of these requirements. As we set forth in the detailed papers that follow, the NPS made numerous adjustments to FST's figures, every one of which overstated FST's actual profitability and was therefore used to justify a punitive franchise fee. No examination of "the operating situation or complexities of the concessioner" was undertaken; no "field observation" was made before the decisions were finalized; no comparison was made of the "value of the services being provided" by FST's officers. Instead, the NPS made the adjustments based on a very mechanical application of very unreliable industry statistics or unwarranted speculation, or both.

C. **The effect of these mistakes was:** to vastly overstate FST's supposed profitability.

D. **What does the NPS say about this?** In its answers to the Subcommittee, the NPS makes no effort to defend a number of its mistakes, and offers poor rationales for the rest. These are discussed at greater length below. But as a general matter we note that the NPS says that there is "no requirement that NPS conduct field studies in considering adjustments to a concessioner's audited financial statements. (page 13.) A simple examination of the quoted portions of NPS-48 shows this to be false.

Had the NPS just followed its own procedures, most if not all of the mistakes would have been avoided.

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MISTAKE NUMBER 1: THE NPS INCLUDED NON-CONCESSION INCOME IN ITS THRESHOLD DECISION ON WHETHER A FRANCHISE FEE ADJUSTMENT WAS EVEN WARRANTED

The first thing that the NPS does is to make a decision as to whether or not a franchise fee adjustment is even warranted. The NPS made a bad mistake on this step.

What the Park Service is supposed to do is compare concession net income with concession gross receipts, assets and equity. It then determine concession profitability; then it compares that concession profitability with "industry norms" for return on equity, return on gross and return on assets. Five year averages are used in this estimation.

But the NPS included FST's non-concession income for four of the five years in question. Thus, the NPS compared FST's concession and non-concession income with only concession receipts, assets and equity.

The effect of this mistake was nothing short of disastrous. Our average concession-only income was \$246,268. Therefore, the NPS overstated FST's net concession income by over 80%. The NPS added in \$195,603 of non-concession gross income. This vastly overstates FST's supposed concession profitability.

If the NPS had not made this mistake, Mr. Chairman, it would have concluded that FST's concessions profitability was in the third quartile of what it said were comparable companies.

Under the NPS's own guidelines, then, had the NPS faithfully and accurately calculated these amount, no franchise fee adjustment would have been authorized.

This conclusion holds even if FST accepts as accurate all of the NPS's other unwarranted adjustments to FST's audited financial statements. These unwarranted adjustments are discussed in depth below. Needless to say, if these adjustments had not been made, the NPS would have had an even stronger basis for concluding that no change in the franchise fee was authorized.

The Subcommittee's letter of December 5, 1998 asked the NPS if this criticism was true, and in my opinion, Mr. Chairman, they tried to fool you. They wanted you to think that they had eliminated the harm from this mistake by trying to make you think that they had also added non-concession expenses. But you'll note that they said they did this only "(for 1986)." In other words, it didn't include the non-concession expenses for any of the other four years. In any event, adding in non-concession expenses doesn't eliminate the problem or alter the outcome. Even net income from non-concession operations will overstate our earnings from concessions.

The NPS thus implicitly admits this mistake, but refuses to correct it.

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MISTAKE NUMBER 2: THE NPS CALCULATED THE WRONG MAXIMUM FEE: THE CORRECT MAXIMUM FEE WOULD HAVE BEEN 8.7%

Another part of threshold analysis performed by the NPS is to calculate the maximum fee. By the agency's own guideline, in NPS-48, the maximum fee is supposed to be no more than 50% of average net concession income before taxes and franchise fee. The NPS then takes this amount and divides it by concession gross receipts to derive the maximum percentage for the franchise fee.

But the NPS made the same mistake here because it used the same non-concession income figures. Instead of using the \$246,268 in net concession income, the NPS added in \$195,603 of non-concession gross income and said that FST's "net income" was \$441,871. This again vastly overstated FST's supposed concession profitability. As a result, the NPS calculated FST's maximum permissible fee at 16.6% of gross receipts.

If the NPS had correctly performed these calculations, the NPS would have concluded that FST's correct maximum fee would have been only 8.7% of gross receipts. Again, this holds even if FST accepts all of the NPS's unwarranted adjustments to FST's audited financial statements.

This is a very significant mistake. Remember that ultimately the NPS decided that FST could bear a franchise fee of 12% of gross receipts. Thus, the fee established by the NPS exceeded the agency's own stated maximum.

The NPS has no defense to this mistake.

MISTAKE NUMBER 3: THE NPS USED INDUSTRY DATA IN A MANNER UNANIMOUSLY CONDEMNED BY THE COURTS

Throughout its franchise fee analysis, the NPS used Dun & Bradstreet (*D&B Industry Norms*) and Robert Morris Associates industry data (*RMA Statement Studies*). Since the NPS refused to ever give us the information they used, we are still at a loss to understand precisely what they did. And they have given the Subcommittee an answer that is squarely at odds with what their own franchise fee analysis says.

The franchise fee analysis says in plain English that they used data from industry SIC code 4489, which is "Water Transportation, Not Elsewhere Classified. As I said, we have never been given this data. In its letter to the Subcommittee dated December 5, 1999, the NPS makes the claim that they didn't use this SIC code but another one, SIC code 4400. That is the first time this claim has ever been made. And please note that they don't show any workpapers or data to support this claim.

When we asked two statistics experts to review this analysis and help us understand how the NPS could have gotten it so wrong, they told us, among other things, that this particular SIC

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code didn't exist for three of the five years the NPS was supposedly studying. So they tried to extrapolate what SIC codes might have been used, and completed their studies. Their conclusions are spelled out at length in the Critique, but let me give you some of them here.

The samples were far too small. There are approximately 3,000 passenger vessel companies in the United States. The *RMA Statement Studies* had a sample of just *ten* companies, and the NPS used only one year's data. The *D&B Industry Norms* for SIC code 4489 had sample sizes of 16 in 1988 data and 56 in 1989 data. These are all much too small for any permissible inferences to be drawn.

The samples were not randomly selected. For both sets of data, the samples are "self-selected" in that each collects data voluntarily sent by businesses. This too makes the data suspect and unusable for statistical purposes. It is a fundamental tenet of statistics that if one is to use a sample to represent the universe of a population, the sample must be randomly drawn.

The SIC code collects data from too wide a range of businesses with different operating characteristics. The mere title of the classification, "Water Transportation of Passengers, Not Elsewhere Classified" amply suggests the grab-bag nature of this grouping. It lumps together operations such as FST with swamp buggy operators, water taxis and excursion boat operators. Other than the fact they all operate boats to make money, they have little or nothing in common.

The data voluntarily submitted and collected are not prepared according to uniform criteria. Thus, the studies do not know if cash or accrual accounting has been used, if depreciation methods are comparable, and the like. There is no way of knowing what reports, if any, in the group were audited. The data are not comparable.

The results show a high degree of variability, which indicates unreliability. In fact, as one expert pointed out, in the *D&B Industry Norms* one third of the businesses operated at a loss. This degree of variability is usually taken as an indication of unreliability.

The conclusions of one of the experts, Dr. Mark Hartley, are worth quoting at length:

In fact, no statistically valid inferences regarding the population of businesses, or any particular business, comprising SIC code 4489 or its predecessor(s) can be drawn from the median and quartile data reported in the D&B Industry Norms or the RMA Statement Studies.

* * *

Drawing any such inferences from the D&B Industry Norms or the RMA Statement Studies data violates fundamental principles of statistics, and constitutes a misuse of the data.

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* * *

The NPS's methodology in the FFA is *statistically invalid*, and *no confidence whatsoever may reasonably be placed* in its conclusion that a 12% franchise fee should result in FST's anticipated profitability approximating the median for the industry FST is a participant in.

Our other expert, Dr. Robert Andrews, was highly critical of the data and the way in which the NPS used it. Among other things, he said:

[T]he real problem is that the underlying franchise fee revision process is ill-conceived.

The statistical procedures ... used to establish industry norms are totally inadequate to provide accurate values for a particular SIC Code. These provide rough guidelines at best and are not accurate enough to be used as absolute truth the way they are in NPS-48.

In addition, the authors of both sets of data specifically warn that the data *cannot be used as the NPS used them*. The *RMA Statement Studies* contains this disclaimer at the beginning:

RMA recommends that Statement Studies data be regarded *only as general guidelines and not as absolute industry norms*. There are several reasons why the data may not be fully representative of a given industry:

- (1) The financial statements used in the *Statement Studies* are *not selected by any random or statistically reliable method*. RMA member banks voluntarily submit the raw data they have available each year, with these being the only constraints: (a) The fiscal year-ends of the companies reported may not be from April 1 through June 29, and (b) their total assets must be less than \$250 million.
- (2) Many companies have varied product lines; however, the *Statement Studies* categorize them by their primary product Standard Industrial Classification (SIC) number only.
- (3) *Some of our industry samples are rather small in relation to the total number of firms in a given industry. A relatively small sample can increase the chances that some of our composites do not fully represent an industry.*
- (4) There is the chance that *an extreme statement can be present in a sample, causing a disproportionate influence on the industry composite*. This is particularly true in a relatively small sample.
- (5) Companies within the same industry may *differ in their method of operations* which

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in turn can directly influence their financial statements. Since they are included in our sample, too, *these statements can significantly affect our composite calculations.*

- (6) Other considerations that can result in *variations among different companies engaged in the same general line of business* are different labor markets; geographical location; different accounting methods; quality of products handled; sources and methods of financing; and terms of sale.

For these reasons, RMA does not recommend the *Statement Studies* figures be considered as absolute norms for a given industry. Rather the figures should be used only as general guidelines and in addition to the other methods of financial analysis. *RMA makes no claim as to the representativeness of the figures printed in this book.*

It is hard to imagine a more forceful statement that the data is not to be used as the NPS used it.

The authors of the *D&B Industry Norms* also caution against their indiscriminate use. Each subscriber to the *D&B Industry Norms* must sign a contract that includes the following provision:

The subscriber acknowledges that *D&B does not*, and could not for the fees charged hereunder, *guarantee or warrant the correctness, completeness, currentness, merchantability or fitness for a particular purpose* of the information. Such information usually is not the product of an independent investigation prompted by each subscriber's inquiry but is updated and revised on a periodic basis.

A similar caveat is provided with each written report that D&B provides its clients, which states:

This report . . . contains information compiled from sources *which Dun & Bradstreet, Inc. does not control and whose information, unless otherwise indicated in this report, has not been verified* . . . Dun & Bradstreet, Inc. . . . does not guarantee the accuracy, completeness, or timeliness of the information provided.

I have addressed this at length for a reason. Our courts have uniformly condemned the use of industry statistics in this manner.

This is not the place for an extended discussion of the cases. But examples of such decisions are Walter O. Boswell Memorial Hospital v. Heckler, 749 F.2d 788 (D.C. Cir. 1984) and Walter O. Boswell Memorial Hospital v. Heckler, 628 F.Supp. 1121 (D. D.C 1985); Humans of Aurora v. Heckler, 753 F.2d 1579 (10th Cir. 1985); Almay v. Califano, 569 F.2d 674 (D.C. Cir. 1978); American Iron and Steel Institute v. O.S.H.A., 939 F.2d 975 (D.C. Cir. 1991); Association of Oil Pipelines v. F.E.R.C., 83 F.3d 1424 (D.C. Cir. 1996); N.R.D.C. v.

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Herrington 768 F.2d 1355, 1387 (D.C. Cir. 1985). For example, in American Iron and Steel Institute v. Q.S.H.A., the court condemned the use of a Dun & Bradstreet report which relied upon a sample of 25% of the industry concerned, a proportion staggeringly higher than was present in any study used by the NPS here.

It seems to me that the NPS knows this just as well as we do, and that this is the real reason they didn't want to share this data with us and went to such lengths to keep it out of court.

MISTAKE NUMBER 5: THE NPS CREATED A WHOLLY FICTITIOUS TRANSACTION INSTEAD OF USING THE REAL NUMBERS FOR FORT SUMTER TOURS' ACQUISITION OF ITS NEW VESSEL

As I have already testified, the very basis for the new contract was that the NPS wanted FST to commit to a very risky investment by acquiring an expensive new vessel and new docking facilities. Everyone knew that this vessel would likely cost at least \$1 million, and that is a big step for a company with a highly seasonal business and annual gross revenues of perhaps \$1.4 million at that time. As I have also testified, the boat ended up costing \$1.4 million and was acquired in a lease approved by the NPS.

But the franchise fee analysis made a mockery out of this. They said they would only show a boat value of \$1 million and that they would show it as a purchase and not a lease. The only reason given for this was that this was a "related party" transaction. There was no effort to look at the company's records, no effort made to see if this was a fair lease transaction, nothing of any kind. The NPS just threw away \$400,000 of price that we had to pay. The implication, which is insulting to me, is that this was some sort of sweetheart deal. Nothing could be further from the truth as any objective examination of real world situations would have shown. But the NPS doesn't seem to be interested in facts.

According to NPS-48, if an adjustment is to be made to such audited figures, the NPS must undertake "a search for overstated or understated expenses and for evidence of good or poor management. Field observation will be especially important because of the lack of an effective quantitative measure." (Emphasis added.) NPS-48 also cautions that "every attempt must be made to allow reasonable expenses given the specific operating conditions of the authorization." Finally, NPS-48 further provides that "[a]ny adjustments made to operating or administrative expenses because of observed differences with industry statistics must be made with caution."

None of this was done here. The NPS admits that it did not conduct any field studies, did not try to ascertain if this was a fair price, did not examine the "specific operating conditions," and did not try to ascertain whether the lease payments were in fact comparable to a garden-variety market-based transaction. If the NPS had bothered to investigate the true facts, it could not have and would not have found anything wrong.

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The NPS simply disregarded the actual transaction and invented a wholly imaginary one. Instead of the transaction as it was in fact accomplished, *and will in fact burden our real income statements and balance sheets for years to come*, the NPS assumed that we purchased a cheaper boat and paid for it with a combination of \$400,000 down payment from our equity and a \$600,000 loan at 10% interest over ten years. There is no explanation for why this form was chosen. In addition, the FFA inaccurately booked the transaction.

The effect of the manipulation is to drastically overstate our profitability, by disallowing \$70,000 of annual expenses. This resulted in an imaginary increase in net income of \$70,000 a year.

The NPS improperly booked its imaginary transaction. The NPS assumed a price of \$1 million, financed with a \$400,000 payment and a \$600,000 ten year note. It booked \$70,000 in lower expenses and higher income to reflect these assumptions (add \$173,000 in decreased vessel rent, subtract \$55,556 in annual depreciation, subtract \$48,000 in annual "interest," equals \$69,444). However, it failed to make the conforming adjustments required by Generally Accepted Accounting Principles (GAAP).

GAAP dictates that every event requires two entries. The FFA failed to list on its imaginary books the value of the imaginary purchase *as an asset*. According to GAAP, if FST had purchased this imaginary vessel in the manner imagined by the FFA, its net assets should have increased by \$600,000 (\$1,000,000 asset value less \$400,000 payment).

Each year under the imaginary ten year loan, FST would be paying down principal. The FFA does not reflect this. Since the imaginary purchase was assumed to have taken place in 1986, this meant that five years of principal payments would have taken place, and FST's equity would have accordingly increased. The FFA made no accounting for this. The "loan" payments shown on the worksheet are interest only.

Had the NPS acknowledged its error, it would have meant that FST was entitled to higher revenues for a proper return on its equity. If we take the terms of the NPS's imaginary loan (\$600,000, ten years, 10% interest; Exhibit B, page 5), we can illustrate the effect. At the end of the five year period, in fact, these payments of principal for the imaginary transaction would by my calculation at the end of five years have produced \$227,000 in payments of principal.

Total interest paid:	\$248,926
Total principal paid:	226,816
Balance remaining:	373,184

Thus, at the reconsideration date used by the FFA, FST's equity should have increased by

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\$227,000, and it would have been entitled to a return on that equity.

I know that these issues are not that easy to follow. But let me sum them up in a simple manner.

The NPS took \$400,000 off the real price of the vessel, changed the depreciation, changed a lease into a purchase and denied approximately \$227,000 in increased equity that even its own imaginary transaction would have produced.

In its answers to the Subcommittee's questions the NPS now claims that the adjustment is "consistent with" the fact that the boat is also used (after normal hours) for non-concession operations, about 30% of its operating hours. The NPS thus appears to be arguing that even if the boat did cost \$1.4 million, the NPS could have "assumed away" 30% of its capital cost and still derived the \$1 million figure. The NPS speculates without any examination at all that the boat was "equipped (at perhaps a significant additional cost") for non-concession operations.

But this after-the-fact rationale has no more integrity than the original. Allocations of operating costs have nothing to do with the fair allocation of the boat's capital or acquisition cost, as the NPS itself elsewhere admits. No one disputes that the operating expenses are fairly allocated between concession and non-concession operations. But the NPS itself says that the correct policy should be that the NPS will accept "investment in equipment sufficient to carry out the terms of the contract, not investment in equipment necessary to carry out external business activities." (Page 15.) The NPS also says that a concessioner's balance sheet should include assets "that are necessary for the contracted operation." In fact, had the NPS bothered to look, it would have found that only one small galley (perhaps costing at most \$50,000) is more intensively used for non-concession operations; in every other respect the boat is built as if used only for concession operations.

So the new excuse is no more defensible than the old one.

MISTAKE NUMBER 6: THE NPS DISALLOWED A LARGE PORTION OF OFFICERS' SALARIES IN VIOLATION OF ITS OWN GUIDELINES

FST is a family-owned and operated business. All members of the family are "officers," but all perform numerous "non-officer" functions. They work hard and are paid salaries in line with industry pay for such duties.

NPS-48 makes it very clear that the NPS is supposed to tread carefully in this area. It says that in considering an adjustment to payments made to a concessioner's owners, "[o]f particular importance is the value of the services being provided and the corresponding payment." (Ch. 24, Exhibit 3, page 2)(emphasis added).

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Nothing of the kind was done here. Instead, the NPS simply used a Robert Morris study, based on one year's data from just ten companies, to disallow \$167,000 of officers salaries -- over 53 % of the total salaries. This, of course, overstated out profitability by disallowing legitimate expenses.

This thoughtless action wounded me deeply. The notion that we do not do an honest day's work for what we are paid is very offensive to me. No one who knows me or my family at all would ever dream of making such an accusation. I would hazard, for example, that FST's officers are paid less than the NPS officials making these kinds of decisions far from the field.

In its answers to the Subcommittee, the NPS asserts that its adjustment based on the Robert Morris "is required" for a franchise fee analysis. (Page 13.) Even if valid industry statistics were available, which they are not, the portion of NPS-48 quoted above shows this assertion is simply not true. What is "required" by the agency's own guideline is a "comparison of the value of the services" to the payments made, "caution" in the use of industry statistics, "field observation" and "every effort" to allow reasonable expenses.

The NPS's "justification" thus is based on a clear misstatement of its own requirements; no field observation was conducted to ascertain if the agency's speculation was in fact justified.

MISTAKE NUMBER 7: THE NPS DISALLOWED A LARGE PORTION OF FST'S EQUITY AND DIDN'T EVEN PROPERLY BOOK IT

"Equity" and "debt" are the two primary forms of capital invested in a company. Equity is the capital of the owners that is invested in the business, and debt is usually a loan to the company. Of course capital is not free. A business pays dividends at its discretion to equity holders, but must make regular payments on any loans. NPS-48 recognizes that in setting franchise fees owners are entitled to a return on their invested equity.

The NPS assumed away some \$350,000 of FST's equity. The only reason given originally was a cryptic note that this was done "to approximate industry." We can only assume that one of those invalid industry studies was used to do this, but we don't know for sure.

NPS-48 says that concessioners with low debt (as is the case with FST) will show on their audited financial statements profitability that appears to be overstated, and thus recognizes that any adjustment should benefit the concessioner. In effect, a concessioner that has low debt deserves credit for that fact. But the NPS did just the opposite: it simply used invalid industry statistics and assumed away \$350,000 of FST's hard-earned equity.

By doing this, the NPS overstated FST's actual profitability by assuming that its owners did not need to earn any return on the \$350,000 in equity that was assumed away. And Mr.

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Chairman, the NPS has never offered a principled defense on the merits of this decision.

The NPS proceeded to compound its errors by failing to observe the simplest of accounting rules when it booked this "adjustment." The NPS said that it was adjusting FST's equity to "approximate industry." It said it was adjusting FST's debt-equity ratio. But that's not what it did.

If the NPS had any idea of how to apply simple accounting rules, it would have subtracted \$350,000 of FST's equity account and added that same \$350,000 to FST's debt account. It would then have had to add to FST's annual expenses the debt service -- regular loan payments -- that the properly booked \$350,000 of debt would have required.

Instead, the NPS just took away the \$350,000 from FST's actual equity but did not add that amount to FST's debt, and did not add any debt service. So what the NPS actually did was unjustifiably reduce FST's capitalization. The NPS has never claimed that FST was overcapitalized and there was never any justification for such a claim, but that is how the NPS booked its "equity adjustment."

This mistake, a mistake of fundamental accounting, seriously understated our real need for capital, and seriously understated FST's legitimate cost of capital, by subtracting the \$350,000 in equity but not making the required corresponding adjustment of adding that amount to FST's debt. Had the NPS understood simple accounting rules, it would have given FST credit for approximately \$28,000-\$30,000 in annual debt service on the \$350,000 that was "adjusted" from equity to debt.

The NPS has never at any time or in any forum ever offered a defense to this.

MISTAKE NUMBER 8: THE NPS WRONGLY ASSUMED THAT FST COULD SIMPLY DISTRIBUTE OUT CASH ON ITS BOOKS -- APPARENTLY TO COMPENSATE FOR ALL THE "ADJUSTMENTS" THAT THE NPS

Our low season is from November to close to the end of March. During this time, we lose money. Park visits fall off considerably, yet we must continue to pay our fixed costs and keep our experienced and valuable employees on the payroll.

In addition, the low season gives us the chance to perform the extensive maintenance and repair that any heavily used vessel must receive on a regular basis. Each of our vessels is taken out of service each winter, sent to a commercial boatyard and dry-docked for repainting and all sorts of other maintenance and repair. This is very expensive.

The combination of low sales and the heavy maintenance and repair costs incurred each winter means that FST at a minimum needs at least \$525,000 to tide it through until March. Thus,

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while on our financial statements we always have substantial funds in hand as of December 31 of each year, most of those funds are already "spent" in the sense that we will need them to get through until the visits pick up again in the spring, and to keep our vessels in the condition that the NPS demands. These amounts are in addition to normal working capital, and in addition to trying to accumulate the \$1 million that we would need for the new Dockside II project.

The NPS's franchise fee analysis simply assumed that the owners of FST could treat themselves to a windfall by raiding the company coffers and taking all that cash. This is what they said"

The balance sheet ... eliminates much of the cash carried on the books by allowing distributions to the owners. [Page 2 of the narrative.]

"Eliminating" this "cash," which is equity, means that FST would not be allowed to earn a return on it. In effect, the NPS treated this as an interest-free loan from FST's owners to the company. The notion that this was just loose cash betrays a chilling lack of familiarity with our company's seasonal and maintenance-intensive operations.

In its December 5 letter to the Subcommittee, the NPS resorted to denying the obvious. The NPS claimed that it "did not assume that FST could distribute to its owners cash shown on year-end financial statements." Page 13. The NPS claimed that it treated retained earnings as equity. The language I quoted above shows that this denial is simply not credible. The NPS didn't treat this cash as equity - which would have allowed us a return - it "eliminate[d]" that cash.

MISTAKE NUMBER 9: THE NPS WRONGLY DENIED FST THE OPPORTUNITY TO RENEGOTIATE THE FRANCHISE FEE FOR THE THIRD AND FINAL FIVE YEAR PERIOD OF THE

Finally, Mr. Chairman, the NPS is using the power of the government to force us to continue to pay this wrong franchise not just for the second five years of our fifteen year contract but also for the final five years as well.

The 1986 Contract provides in section 9(c) that either party may request that the franchise fee be reconsidered for a succeeding five year period. This request must be made within sixty days after the end of the preceding five-year period. The Contract provides that

In the event that the Secretary and the Concessioner cannot agree upon an adjustment of the franchise fees within 120 days from the date of the request for renegotiation as made by either party, the position of the Concessioner must be reduced to writing within 30 days therefrom and submitted to the Secretary for a determination of appropriate fees ...

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There is no dispute that on June 14, I wrote to the NPS and validly invoked this provision, requesting that the franchise fee be reconsidered for the third five-year period. Specifically, I requested that the fee be reduced to the previous level of 4.25% of gross receipts. The letter specified that FST's position was based upon the materials previously submitted earlier in 1996 requesting a reconsideration of the franchise fee for the second five-year period. The NPS responded with a letter stating that the request had been received and that FST would be contacted for a meeting in September. No such meeting or any other agency action took place.

As I have testified before, on January 21, 1997, the NPS wrote to FST, stating that it would terminate FST's current concessions contract effective February 28, 1997, unless FST paid over \$1 million in back fee increases, plus penalties and interest. FST then brought the suit on appeal here, seeking to restrain the threatened termination.

In answering FST's motion for a temporary restraining order and preliminary injunction, the NPS took the position that the portion of the suit seeking relief on the third five year period was *premature, as no decision had yet been made*. The NPS said that "neither party has taken final action" for that period. According to the NPS, "there has been no decision on this matter." At oral argument on FST's motion for a preliminary injunction on March 18, 1997, the Assistant U.S. Attorney said:

There has been *no final agency decision*. And, ultimately, the rate may not be 12 percent for the last five-year period of the contract.

So nothing has been done.

My understanding ... is that they will make a decision as to the third five-year term of the contract by March 31 and would agree to do so ...

The NPS's agency counsel went even further. He said

[a]nd the next five years, they still -- there has been no final administrative decision. *That is still totally open. And it could well be that the process will result in exactly what they are seeking.*

Assuming that the NPS counsel were not deceiving the court, the italicized language meant that as of March 18, 1997, there was still a realistic possibility that FST's franchise fee for the final five-year period could be reduced, perhaps to the requested 4.25% of gross receipts.

However, the NPS's final decision as conveyed in a letter dated March 31, 1997, completely contradicted these representations to the court. According to this letter, the parties did not come to an agreement on the franchise fee for the third five years by 120 days after the request for reconsideration, or October, 12, 1996. The NPS says that FST was then obligated,

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to but failed to, "reduce its position to writing" during the thirty-day period beginning on October 12 and ending November 11, 1996. Since FST's June 16 request had identified the concessioner's position and specifically incorporated the materials furnished earlier that year, there was no need for FST to send in yet another duplicate copy of the same material. According to the NPS, however, since FST had failed to "reduce its position to writing" *within* that thirty day period, "the reconsideration of the contract's 12% franchise fee for the period from June 14, 1996, concluded as of November 11, 1996, without an adjustment to the contract's 12% franchise fee which remains in effect."

Mr. Chairman, I concede that the District Court upheld the NPS on this, but I hasten to add that we have appealed that decision and the Court of Appeals just denied the government's motion to affirm the lower court. But litigation issues aside, I hope that the Subcommittee will agree that it is not right to "trap" a concessioner and saddle it with an incorrect franchise fee just because we didn't put our materials in a copy machine and resend them.

It's not as if the NPS was in any doubt as to our position. Our materials told them all that they needed to know, as you can judge for yourself.

The truth undoubtedly lies elsewhere. The NPS had successfully kept the very basis of its decision -- the corrupted industry statistics -- from the District Court in Charleston, and was now attempting to preclude judicial review of its reconsideration. But no such obstacles existed for the third five year period of the contract. If a reviewing court were to reach the merits of the franchise fee decision as it applied to the third period, that court would therefore be forced to confront the numerous errors the agency made in the original decision. And thus the agency's recalcitrance in refusing to correct serious errors and insisting on charging an inflated fee based on those mistakes would be exposed.

The NPS's interpretation of Section 9(e) was patently made in bad faith. To begin with, if the NPS interpretation had any validity at all, the NPS would have offered it long before the March 31 letter formally asserting this position. This was hardly a novel issue for the NPS, as the language in question is contained in the NPS's standard concession contract, and is therefore contained in hundreds of contracts across the country. The NPS would not have made such statements to the lower court as it did on March 18, 1997, to the effect that, for example, "ultimately, the rate may not be 12 percent for the last five-year period of the contract," or "the next five years, they still -- there has been no final administrative decision. *That is still totally open. And it could well be that the process will result in exactly what they are seeking.*" These representations are clearly inconsistent with a theory that the reconsideration process for the third five years had in fact ended in November 1996, four months earlier. The NPS has never claimed that it suffered any prejudice from the absence of a duplicate copy, nor would such a claim be plausible. The parties had engaged in no negotiations and FST's position has never changed. If the NPS intended for a drastic forfeiture to follow from a merely clerical act, an unreasonable interpretation of the existing language, it had every opportunity to "make that meaning clear" in

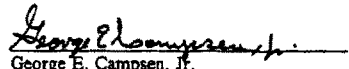
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drafting this contract.

The most reasonable reading of this language is that the concessioner's position must be reduced to writing before those 30 days have expired. FST's position was reduced to writing -- and certainly well understood by the NPS -- well before the expiration of the thirty days.

CONCLUSION

In conclusion, Mr. Chairman, let me again express the thanks of Fort Sumter Tours for this opportunity to educate the Subcommittee on a serious injustice. I would be happy to answer any questions that the Subcommittee might have or to provide any additional information for the record.


George E. Campsen, Jr.
President and Founder of Fort Sumter Tours

Mr. HANSEN. Thank you, Mr. Campsen.

Now, Mr. Jackson, we will turn to you sir.

Mr. INSLEE. Mr. Chair? Mr. Chair?

Mr. HANSEN. Sorry.

Mr. INSLEE. I am sorry. Could I interrupt just for a moment? I need to go over to the floor, and I have one question I would love to ask. Would you permit me to ask the witnesses that question?

Mr. HANSEN. Surely, I will recognize you for one question. Is that what—

Mr. INSLEE. Yes, just one.

Mr. HANSEN. Sure, go right ahead.

Mr. INSLEE. I appreciate the Chair's indulgence. I am sorry I won't be able to stay. I have to excuse myself to go to the floor.

I just wanted to ask Mr. Stanton a question. I have talked to these folks about this situation, and I am not an expert on this obviously, but I wanted to—they relayed a concern to me about a disagreement. Disagreements are human. All people in contractual relationships get into disagreements, not too irregularly. They described their concern to me as much, not—obviously they are concerned by the disagreement, but they said that they couldn't get the Park Service to sit down with them to explain the Park Service's rationale or logic or analytical system in devising this. And they had asked the Park Service for that information the Park Service based their numbers on, basically, and that the Park Service was unwilling to share that with them.

And I thought that was a little surprising. I would think in this context that each side would sort of share their model or their analysis with the other so that each could poke holes in it, basically, and everybody could put their cards on the table and have a good argument.

I just want to, would like you to comment. Is their characterization accurate? Or is there a misunderstanding? Or do we need to improve that sort of showing each other's cards?

Mr. STANTON. Appreciate the question, and I will attempt to be brief in response, and I also would ask Mr. Cohen to comment because I would reference the present status.

As mentioned in my testimony, that as a condition or provision within the concession contract there was to be, or could be, a reconsideration of the franchise fees five years after the first five years of the contract, that would involve the National Park Service conducting a financial analysis of the concessionaire, providing a financial report on which we based the financial analysis, and then communicating with the concessionaire and see whether there was any difference or problem with that.

As that process was underway, there was not any major substantive discussion prior to the concessionaire filing a suit, arguing that the franchise fee calculation by the Park Service, although preliminary at that stage, was totally off base, if you will.

Consequently, as we entered into discussion with the courts or the Justice Department, there was some limitation in terms of how we could interact unilaterally with the concessionaire. And I will ask Mr. Cohen to just comment on what those procedures that were applied in that instance.

Mr. COHEN. Thank you, Mr. Director. Let me just expand for a moment. The contract itself specifies a process for the reconsideration of a fee. And it indicates that every five years either party may seek an adjustment up or down. In this case, in the first five-year period, the Park Service sought an adjustment up.

The normal process in this is for the Park Service to put its cards on the table and for there to ensue an informal give-and-take, just as you described. That did not occur. In the normal case—in the normal case—there is an opportunity, if the concessionaire does not agree with the decision of the Park Service, to appeal it to the Secretary. That did not occur.

In that same process, there is an opportunity for the concessionaire to seek voluntary arbitration. That did not occur in this case. It did not occur because the concessionaire made the decision, for whatever reason, and is certainly free to make that decision, to go directly to court.

So the normal opportunity, where the differing figures in this process, and this is not a precise process because you are trying to reconstruct a marketplace circumstance, which is an artificial situation because you don't have competition.

So the purpose of the informal process is to have that give-and-take that didn't happen here. It is unfortunate that it didn't happen here. But it wasn't just once that it didn't happen. It didn't happen the second five-year period either. And we can have discussions as to why it did or didn't happen the second five-year period, but I can tell you that when the second five-year period was appealed to District Court, the government offered the opportunity to go back and start the process over again in mediation. And that did not occur.

So I think there is a record that demonstrates that our process envisions exactly what you have described. It just hasn't been employed here. And I don't think it is a coincidence that the only situation where a franchise fee reconsideration has ended up in court is the only situation where the process that I have just described did not occur.

Mr. INSLEE. Thank you. And I will read your testimony for the remainder of the hearing. I need to excuse myself. Thank you very much.

Mr. HANSEN. I don't want to hold this up, but I think the gentleman from Washington asked quite an interesting question there. Let me just quickly ask this one to pick up on what he said: When they asked for information from the Park Service before going to court, was it forthcoming from the Park Service?

Mr. Campsen, do you want to respond to that?

Mr. CAMPSER. Mr. Chairman, I would defer to my legal adviser, Mr. Dickson.

Mr. HANSEN. I don't want to get you all tied up in legalistics here. Remember, you are not in court here. We don't even have a contempt charge.

Mr. Stanton?

Mr. DICKSON. There is a simple answer to the question, Mr. Chairman, and you will note that neither the Director nor his attorney gave Mr. Inslee a direct answer to his question. The answer

to the question is the information was not turned over. To this day, it has not been turned over.

Mr. HANSEN. I guess I just assumed—and I don't want to belabor this; I want to get to Mr. Jackson here—but I assumed why they didn't go through the procedure, and maybe I am on a false assumption, I don't know, was because they were asking for information that wasn't given to them.

Mr. DICKSON. That is correct.

Mr. HANSEN. And that is the reason that they circumvented the process, if I understand this right? Keep in mind, I don't have a dog in this fight. I am just trying to figure out what happened.

Mr. DICKSON. What happened was, the draft franchise fee analysis was prepared and was given over to Fort Sumter Tours. It was obvious that a number of decisions had been made based on industry statistics, such as Dun and Bradstreet numbers. But Fort Sumter Tours said, can we have this information, please. The Park Service said, no, you cannot. And so, I don't know how you are supposed to negotiate with somebody if you don't understand the basis on which the decision was made.

They filed a Freedom of Information Act appeal, and that was denied. And for the year that this process of trying to get the data went on, all parties agreed that access to this data was withdrawn.

Then, in April of 1993, the Park Service changed its mind and said, "We are done. Here is your franchise fee. It is over."

Mr. HANSEN. We have some interesting rules of discovery here, haven't we?

Mr. Jackson, let's turn to you, sir.

STATEMENT OF DAVID E. JACKSON, CERTIFIED PUBLIC ACCOUNTANT

Mr. JACKSON. Good morning, Mr. Chairman and honorable member of the Subcommittee. First, I want to thank you for allowing me to testify this morning.

Mr. Chairman, I am here because my firm has served as the independent auditors of Fort Sumter Tours since 1995. They asked me to review a franchise fee analysis, which had been prepared by the Park Service from the information which had been extracted from its audited financial statements. Mr. Chairman, my review revealed that this analysis contains numerous mistakes that fall into three categories of errors.

First, there are errors which violate Park Service guidelines. Second, there are errors in the application of generally accepted accounting principles. And third, there are errors resulting from a lack of understanding as to how a small, family-owned business operates.

Because of these mistakes, Fort Sumter Tours will incur over a hundred thousands dollars a year in additional franchise fees due to the false conclusions derived from this analysis. Mr. Chairman, this represents a significant amount of money to Fort Sumter Tours because it is a small, family-owned business, and during this period of time, its gross receipts was only \$1.4 million.

Basically, the Park Service went through four steps in this analysis. First, it calculated the company's average annual concession profit. Next, it made some financial adjustments. Third, it cal-

culated some financial ratios. And then finally, it compared these ratios with what it claimed are industry standards to determine if a franchise fee increase was justified.

I have an exhibit which is captioned, "The Wrong Way: What the Park Service Did," which presents the conclusions derived by the Park Service from these four steps. This is worksheet four, which is in their analysis. Mr. Chairman, I would like to present four mistakes of the types of errors that I found in the analysis.

The first two mistakes are violations of Park Service guidelines. The first mistake is the Park Service included over \$195,000 of non-concession income in the calculation of concession net profits. It is a clear violation of its guidelines.

I don't understand why this income was included because it was clearly identified in the analysis. This mistake represents almost 50 percent of the concession profit that the Park service claims Fort Sumter Tours earned. This one mistake invalidates the ratio comparisons contained in the analysis and eliminates the justification for a fee increase. It is a very serious mistake.

The second mistake is a byproduct of the first mistake, because including the incorrect income in the calculation of the maximum allowable fee is to cause this to be overstated. The maximum allowable fee, without this income, is only 8.7 percent, not the 15.6 percent that the Park Service claimed in the analysis. Because of this mistake, the Park Service increased Fort Sumter's franchise fee rate to 12 percent, which is significantly greater than 8.7 percent. And it is again a clear violation of their guidelines.

We have an exhibit which is captioned "The First Correction," taking out the non-concession income, which presents the conclusions which would have been derived if this income had been removed. Again, these are very serious mistakes.

The next mistake results from errors in the application of generally accepted accounting principles as it related to an adjustment to capitalize a vessel that was leased by the company from a related partnership. This vessel, as Mr. Campsen indicated earlier, was the basis for the 15-year new contract that the company was granted in 1986. This adjustment should not have been made because it had already been properly reported and recorded in the company's audited financial statements. This mistake caused the concession profit to be overstated by \$70,000—another serious mistake which invalidates the ratio comparisons.

The final mistake that I want to present clearly demonstrates a lack of understanding by the Park Service as to how a family business operates. Without an investigation of the type of duties performed, the Park Service reduced officer salaries by \$163,000. Mr. Chairman, it is very common, for all family members working in a small business, to be named as officers. In fact, Fort Sumter Tours officers perform numerous non-officer functions.

And they are compensated in line with the industry pay for the duties performed. Again, the Park Service made no attempt to gain an understanding of the actual duties being performed. And this adjustment should not have been made—another serious mistake which invalidates the ratio comparisons.

To summarize, Mr. Chairman, in my opinion, this analysis contains mistakes totaling over \$428,000 in the calculation of Fort

Sumter Tours' concession profits. These serious mistakes represent almost one-third of the company's total gross revenue of \$1.4 million.

If these mistakes are corrected—and we have an exhibit which is captioned, "What the Park Service Was Supposed to Do"—the conclusions would have been that there was no fee increase justified.

Thank you, Mr. Chairman. This concludes my prepared remarks. And I also will be happy to answer questions of the Subcommittee. [The prepared statement of Mr. Jackson follows:]

STATEMENT OF DAVID E. JACKSON, CPA

Because my firm has served as the outside independent auditors of Fort Sumter Tours, Inc. (FST) since 1995, I was asked to review a Franchise Fee Analysis (FFA) dated February 27, 1992, which had been prepared by the National Park Service (NPS). To formulate a reasonable basis for my opinion, I familiarized myself with the Concession Policy Act, Public Law 89-249 and NPS-48 as they relate to calculating franchise fees. My review revealed that this analysis contains numerous mistakes that fall into three categories of errors which include violations of the NPS's guidelines for the preparation of franchise fee analysis, improper applications of Generally Accepted Accounting Principles (GAAP), and a lack of understanding of how a small family business operates. If these mistakes are not corrected, it will cost FST over \$100,000 a year in additional franchise fees because of the faulty conclusions derived from this analysis which served as the basis for a recommended franchise fee increase from 4.25 percent to 12 percent of gross revenue from concession operations. This represents a significant sum of money to FST because it is a small family owned business whose average annual gross revenue from its concession operations as calculated by the NPS in this analysis was only \$1.4 million a year.

In general, to prepare this analysis, the NPS extracted financial information from the audited financial statements of FST for the five year period 1986 through 1990. From this information, the NPS calculated the average annual profit generated by the company from its concession operations, made certain financial adjustments, and then calculated three financial ratios. These three financial ratios are Return of Gross Revenue (ROG), Return on Equity (ROE) and Return on Assets (ROA). Return is defined as the net profits after income taxes generated by the company from its concession operations. This net income is the numerator in each of the profitability measures utilized by the NPS. The denominators are gross concession revenue for ROG, average equity for ROE, and average assets for ROA. After calculating the financial ratios, the NPS then compares them to some industry standards for similar companies to determine if the operating results fall within an acceptable range. If the ratios are acceptable, no franchise fee increase is warranted. In this instance, because of the erroneous adjustments contained in the analysis, the NPS decided to increase the existing franchise fee rate. In the following paragraphs, I will present examples of the types of mistakes contained in the analysis.

Mistakes/Omissions Which Violate NPS Guidelines

This first mistake made by the NPS in this analysis was the inclusion of non-concession income of \$195,603 in the calculation of the profit FST was generating from its concession operations. This income was clearly identified in the analysis as other non-concession income. Its inclusion is an indisputable violation of its own guidelines. NPS-48 clearly states that financial reports should reflect only in-park operations and should not include income or expenses of other non-concession operations or business of a concessioner's organization. This error represents almost 50 percent of the concession profit calculated by the NPS in the analysis. This one mistake completely invalidates the entire ratio analysis comparisons contained in the document because as previously stated "Return" means the net profits from concession operations. It also eliminates the justification for a fee increase because if this error were corrected, the financial ratios of FST would fall within the acceptable industry standards. (See Exhibit 1 for calculations.)

NPS guidelines state that the maximum franchise fee should not be greater than 50 percent of the concessioner's pre-tax and pre-franchise profit. The purpose of this calculation is not to set the fee, but to establish the maximum fee NPS may impose. NPS calculated FST's maximum permissible fee at 15.6 percent. If the above error (including non-concession income in this maximum fee calculation) is corrected, the

maximum permissible franchise fee would be 8.7 percent not the 15.6 percent fee calculated by NPS. The recommended 12 percent franchise imposed by the NPS on the company is greater than the correct maximum allowable fee and is another violation of its guidelines. (See Exhibit 1 for calculations.)

NPS's worksheet found on page 6 of the analysis contains numerous mistakes which affect the conclusions which were supposed to be derived from the information presented. In the column which presents the average amounts with a 4.25 percent franchise fee, several errors can be found. First, as mentioned above, the reported amounts include other income of \$195,603 from non-concession sources. In addition, the income taxes of \$36,330 presented in this column is incorrect. In the calculation of this average from the information extracted from FST's audited financial statements, NPS failed to consider that no income taxes were included for two out of the five years presented. In 1989, FST elected under allowable Internal Revenue Codes to be taxed as an "S" corporation. Under these regulations, the taxable income of the company is reported on the individual income tax returns of its shareholders. A provision for income taxes should have been included for these two years in the determination of the true net income the company earned from its concession operations. Again, this caused the reported profit to be overstated which would have also caused the financial ratios to be overstated. The titles for the other columns presented are very misleading. The column descriptions contain which new franchise fees are included in its presentation. However, in each instance, the heading amounts did not agree with the actual calculated amount of the franchise fee used in the column. For example, the actual fee rate used in the column designated as including a 12 percent rate was actually only 10.3 percent. This misrepresents the results contained in the worksheet and the conclusions which can be derived from them. As discussed in more detail below, NPS failed to include the effects of a capitalization adjustment relating to a vessel when calculating ROE and ROA in this worksheet. Again, this caused these profitability measures to be overstated. (See Exhibit 2 for calculations.)

NPS guidelines also permit making positive adjustments which might be beneficial to a concessioner. This is a recognition that a mature company is likely to have fully depreciated assets and little debt which would make it appear more profitable in a comparison with a relatively new business because its depreciation and interest expense deductions would not be as large. NPS failed to make any adjustments in the calculation of the financial ratios even though FST is a mature company with significant fully depreciated assets and very little debt.

Mistakes in the Application of Generally Accepted Accounting Principles

Material errors were made in a capitalization adjustment by NPS relating to a vessel which was leased to FST by a partnership in which it was a 50 percent partner. This acquisition is the single largest financial transaction ever undertaken by the company. In addition, the purchase of this boat was the basis for the NPS granting FST a new 15 year contract in 1986. This adjustment should not have been made because this lease had already been recorded and properly reported in accordance with GAAP in the audited financial statements of the company. This incorrect adjustment caused the concession profit to be overstated by \$70,000 in the analysis. Again, the "Return" portion of the financial ratio calculations were overstated and the underlying profitability measures were overstated because of this error.

Even if you agree with the premise that the adjustment should be made, and I don't because it is not in accordance with GAAP, NPS incorrectly used a cost of \$1 million and debt of \$600,000 in the capitalization adjustments. I also prepare the income tax returns for the partnership which owns this vessel and it cost over \$1.4 million and the debt incurred in its purchase was \$1.3 million. There was no explanation given in the analysis to support the use of the wrong amounts and I can think of no basis under GAAP for the use of incorrect dollar amounts. The use of the wrong amounts caused the concession profit to be overstated by \$56,000 because both depreciation and interest expenses would be understated. Once again, the "Return" portion of the financial ratio calculations were overstated and so were the underlying profitability measures. In addition, the company was deprived of the right to earn a return on \$400,000 of its assets. To compound this mistake, when the profitability ratios of ROA and ROE were calculated, the related capitalized value and equity were ignored. Again, this caused these two profitability ratios to be overstated (See Exhibit 2 for calculations)

Another mistake in the application of GAAP occurred when NPS assumed away \$347,700 of the company's equity. The only reason given in the analysis was that this was done "to approximate industry." Equity and debt are the two primary sources of capital utilized by a company. Capital is the amount invested by the owners of the company and debt is a loan to the company. Neither are free because an

owner wants a return on his investment, usually in the form of a dividend, and interest must be paid on a loan. NPS guidelines recognizes that in setting franchise fees, owners are entitled to a return on their invested capital. As previously mentioned, an adjustment should be made to reflect the fact that a company has low debt because retained capital is being used to finance the operations of the business. I can think of no place in GAAP when you can just assume away equity of a business and that is what was done with this adjustment. By assuming away this equity, the profitability measure of ROE was overstated in the analysis.

If you agree with the premise that this adjustment was correct, and I do not, NPS should have increased the debt of the company by the same \$347,700. In addition, an adjustment should have been made to the concession profit for the interest which would be due on this loan. Again, by not making this adjustment, the "Return" in the profitability measures of ROG, ROA and ROE would have been overstated and the resulting calculations incorrect.

Lack of Understanding of How a Small Business Operates

NPS clearly demonstrated a lack of understanding of how a small family owned business operates when officer salaries were reduced by \$162,762 without any investigation of what type of duties were being performed by the officers of the company. It is common practice for all family members who work in the business to be named an officer of their company. Their birthright not their actual duties is the reason for them being elected as officers. The officers of FST perform many non-officer duties and are compensated in line with industry pay for these duties. The NPS made no attempt to gain an understanding of the actual duties of the officers and this adjustment should not have been made. Again this resulted in the concession profit to be overstated which caused the "Return" in the profitability ratios to be overstated and invalidates their calculations.

Conclusion

In my opinion, this analysis contains mistakes totaling over \$428,000 in the determination of FST's concession profits. These errors represent almost one third of the average gross revenue of \$1.4 million it derived from its concession operations. These mistakes invalidate the financial ratio comparisons contained in the analysis and eliminates the NPS's basis for the fee increase.

This concludes my prepared testimony. I will be happy to answer any questions from the Subcommittee.

Fort Sumter Tours, Inc.
Franchise Fee Worksheets 3 & 4
Exhibit 1

The purpose of Exhibit 1 is to compare the profitability ratios computed by NPS in the analysis with the returns which would have been reported if the non-concession income of \$195,603 had not been incorrectly included in the calculation of the profit earned by FST from its concession operations. The exhibit also presents the correct amounts of Equity and Assets which should have been used in the ratio calculations of ROE & ROA. NPS had failed to include the effect of its vessel capitalization adjustment in the totals used for these calculations.

One of the conclusions that can be derived from this comparison is that the maximum franchise fee allowable under NPS guidelines should be 8.7%, not the 15.6% reported by NPS in the analysis.

Another conclusion that can be derived from this exhibit is that these corrections drastically reduce the financial returns of FST and eliminate the justification for a fee increase.

Fort Sumter Tours, Inc.
Franchise Fee Worksheet # 3 & #4 Comparison Without Non-Concession Income (NCI)

Exhibit 1

	As Originally Reported	Without NCI Of \$195,603	
Franchise Fee Worksheet 3: Reported Statistics and Adjustments			
IIIa Adjustments To Income			
Officer Salaries	162,742	162,742	
Vessel Rent	173,812	173,812	
Depreciation	(55,556)	(55,556)	
Interest	(48,000)	(48,000)	
Total	<u>232,998</u>	<u>232,998</u>	
IIIb Adjustment to Equity	<u>(347,700)</u>	<u>(347,700)</u>	
IIIc Adjustment to Assets	<u>17,924</u>	<u>17,924</u>	
Worksheet 4: Fee Determination			
I. Adjusted Income			
Ave % Franchise Fee	58.368	58.368	Correct
Ave Income Before Taxes	150,504	(45,099)	Return
Income Adjustments From W/S # 3	<u>232,998</u>	<u>232,998</u>	Calculations
Total Income Before Taxes & FF	441,870	248,287	248,287
Less Franchise Fee			<u>(58,368)</u>
Income Before Taxes			187,899
Estimated Income Taxes	<u>(183,011)</u>	<u>(102,004)</u>	<u>(77,828)</u>
Adjusted Income After Taxes	<u>258,859</u>	<u>144,283</u>	<u>110,071</u>
New Returns (Before Franchise Fees)			
On Gross Receipts	18.3%	10.2%	7.8% Gross = 1,416,766
On Equity	41.5%	23.1%	17.6% Equity = 624,000
On Assets	20.8%	11.6%	8.8% Assets = 1,244,000
Returns Based on Net Income After Taxes Adjusted For Vessel Capitalization			
On Equity	25.3%	14.1%	10.7% Equity = 1,024,000
On Assets	12.5%	6.9%	5.3% Assets = 2,077,332
Maximum Fee Guideline (1/2 of Income Before Taxes and Franchise Fee Divided By Gross Receipts)			
II. Maximum Fee Guideline	<u>15.5%</u>	<u>8.7%</u>	
III. Fee Determination: Based on Comparison With Industry Returns (Statistical Quartiles)			
As Originally Reported			
Gross	-0.50	3.2	8.70 ✓
Equity	-13.3	5.7	35.0 ✓
Assets	-2.9	4.7	11.6 ✓
As Corrected For Removal Of Non-Concession Income And After Taxes			
Gross	-0.50	3.2	8.70 ✓
Equity	-13.3	5.7	35.0 ✓
Assets	-2.9	4.7	11.6 ✓

Fort Sumter Tours, Inc.
Financial Summary-With New Fees Inserted-For Comparison With Industry Statistics
Exhibit 2

The main purpose of Exhibit 2 is to demonstrate that the profitability measures of ROE and ROA at various franchise fee rates were incorrectly calculated by NPS in the analysis because of the failure to consider the effects on Equity and Assets produced in the vessel capitalization adjustment.

Another purpose of Exhibit 2 is to disclose the misleading nature of the franchise fee amounts contained in the heading of the various columns.

The main conclusion derived from Exhibit 2 is that the profitability ratios of ROE and ROA presented in the analysis were incorrect and greatly overstated.

Fort Sumter Tours, Inc.
Financial Fee Summary With New Franchise Fees Inserted
Exhibit 3

The purpose of Exhibit 3 is to present profitability measures for franchise fee rates ranging from 4.25% to 5.5%.

The conclusion that can be derived from Exhibit 3 is that the profitability measures are within the acceptable range even with the disputed financial adjustments made by NPS.

Exhibit 3

FoL Sunter Tours, Inc.
Franchise Fee Summary With New Franchise Fees Included

	Franchise Fee %	As Reported	4.25% With Adjustments	4.50% With Adjustments	5.00% With Adjustments	5.50% With Adjustments
Gross Receipts		1,418,766	1,418,766	1,418,766	1,418,766	1,418,766
Cost of Sales		112,346	112,346	112,346	112,346	112,346
Gross Profit		1,306,420	1,306,420	1,306,420	1,306,420	1,306,420
Direct Sales		245,300	245,300	245,300	245,300	245,300
Operating Supplies		22,402	22,402	22,402	22,402	22,402
Repairs & Maint		60,257	60,257	60,257	60,257	60,257
Utilities		0	0	0	0	0
Vehicle Expenses		42,210	42,210	42,210	42,210	42,210
Commissions		0	0	0	0	0
Other Franch		15,074	15,074	15,074	15,074	15,074
Total Direct		385,143	385,143	385,143	385,143	385,143
Office Salaries		304,419	141,677	141,677	141,677	141,677
Other Salaries		110,005	110,005	110,005	110,005	110,005
Advertising		54,231	54,231	54,231	54,231	54,231
Auditing Fee		11,507	11,507	11,507	11,507	11,507
Franchise Fee		18,760	18,760	18,760	18,760	18,760
Travel Training		18,760	18,760	18,760	18,760	18,760
Travel		12,859	12,859	12,859	12,859	12,859
Other Admin		637,316	474,634	474,634	474,634	474,634
Insurance		14,160	14,160	14,160	14,160	14,160
Depreciation		44,559	100,114	100,114	100,114	100,114
Interest		1,639	49,639	49,639	49,639	49,639
Other Fixed		32,869	32,869	32,869	32,869	32,869
Total Fixed		97,462	197,462	197,462	197,462	197,462
Building Use Fee		894	894	894	894	894
Percentage Fee		56,369	60,213	63,754	70,639	77,622
Total Franchise Fee		59,262	61,107	64,648	71,732	78,516
Other Income		186,803	0	0	0	0
Income Before Taxes		150,503	186,064	182,513	175,429	168,345
Income Taxes		36,330	61,496	59,997	57,016	54,029
Net Income		114,173	124,568	122,516	118,411	114,306
Return on Equity		11.7%	12.2%	12.0%	11.6%	11.2%
Return on Assets		9.3%	6.0%	5.8%	5.7%	5.5%
Equity =		971,700	1,024,000	1,024,000	1,024,000	1,024,000
Assets =		1,286,078	2,077,332	2,077,332	2,077,332	2,077,332
Return on Gross Receipts		8.1%	1.8%	0.6%	0.4%	0.1%

Fort Sumter Tours, Inc.
Financial Fee Summary With New Franchise Fees Inserted
Exhibit 4

The purpose of Exhibit 4 is to present a comparison between the financial results if the disputed financial adjustments are included with the results which would occur if no adjustments were made and a 12% franchise fee is employed.

The conclusion derived from Exhibit 4 is that if the disputed adjustments are eliminated, a 12% franchise fee would produce disastrous financial results for FST.

Fort Sumter Tours, Inc.
Financial Fee Summary With New Franchise Fees Inserted

Exhibit 4

Franchise Fee %	12.0% Adjusted	12.0% No Adjustments
Gross Receipts	1,416,766	1,416,766
Cost of Sales	112,346	112,346
Gross Profit	1,304,420	1,304,420
Direct Salaries	245,200	245,200
Operating Supplies	22,402	22,402
Repairs & Maint	60,257	60,257
Utilities	0	0
Vehicle Expense	42,210	42,210
Commissions	0	0
Other Direct	15,074	188,886
Total Direct	385,143	558,955
Officers' Salaries	141,677	304,419
Other Salaries	110,005	110,005
Advertising	54,231	54,231
Auditing Fee	11,507	11,507
Profit Sharing	18,760	18,760
Travel	9,780	9,780
Other Admin	128,674	128,674
Total Admin	474,634	637,376
Insurance	14,160	14,160
Depreciation	100,114	44,559
Interest	49,839	1,839
Other Fixed	33,369	33,369
Total Fixed	197,482	93,927
Building Use Fee	894	894
Percentage Fee	170,012	170,012
Total Franchise Fee	170,906	170,906
Other Income	0	0
Income Before Taxes	76,255	(156,744)
Income Taxes	16,924	0
Net Income (Loss)	59,331	(156,744)
Return on Equity	9.5%	-16.1%
Return on Assets	4.8%	-12.8%
Equity =	624,000	971,700
Assets =	1,244,000	1,226,076
Return on Gross Receipts	4.2%	-11.1%

Mr. HANSEN. Thank you. We have copies of these charts here in our hands. Does the Park Service have these charts?

Would you get—you can take those down, if you would, please. But, would somebody get the Park Service these charts? I would like to have them there. Would you get those and get those to the Park Service? I would like a response from those.

And while we are doing that, Mr. Gibbons, we will turn to you, sir.

Mr. GIBBONS. Thank you very much, Mr. Chairman. And I appreciate the Director of the National Park Service being here today on this issue. And I know that a lot of these decisions probably you have been briefed on, some of which were not your decisions, and I certainly appreciate that as well.

But I noticed in your testimony, which was obviously written by counsel, to be very legalistic in your approach to this whole matter. It also states throughout the whole tenure of this thing that the Fort Sumter Tours did not go to arbitration, did not seek an alternative method of resolving this dispute and seek some sort of arbitration, which you think is some middle ground? Is that what you are saying to them? Or is there something else that you are implying by the fact that they didn't go to an arbitration?

Mr. STANTON. That is a process that is outlined in the concession contract.

Mr. GIBBONS. Well, I know what the process says. But if you go to arbitration, what I am saying is, do you believe in your heart, in your mind, that if they went to arbitration there would be some middle ground between the 12 percent and the original franchise fee that was adjusted.

I know the guy sitting next to you is probably advising you on this, but what do you think? Is there room in there for change?

Mr. STANTON. It is difficult to speculate if there would have been any change. In looking at what the past practices have been in those cases that gone to arbitration, it certainly gives an opportunity for the two principal parties, that being the Park Service and the concessionaire to mutually review the differences of opinion and come out with, hopefully, a mutually accepted adjustment in the franchise fees.

Mr. GIBBONS. Mr. Stanton, that is a wonderful answer to a yes-or-no question, and I appreciate it. My question is, having looked at the information that has now been presented to you and has been presented before this Committee, do you believe that the Park Service made a mistake and are they willing to correct it?

Mr. STANTON. I don't believe that we made a mistake. As I mentioned in response to the three points that the previous speaker made with respect to the inclusion of outside income, which was in fact included in the initial analysis, and I commented on that in my testimony, that error was corrected. And consequently, in the final computation, it was not included.

With respect to the calculation of the value of the boat and also the adjustment in the Director's income, I would ask that our financial analyst, Mr. Bob Hyde, comment briefly on that.

Mr. GIBBONS. Well, Mr. Stanton, let me also say that I am looking at testimony, page 5, and it says that "while there was one technical error"—what was that technical error?

Mr. STANTON. The technical error was the inclusion of the non-concession income in the first preliminary analysis, and that was corrected.

Mr. GIBBONS. Now in assessing Fort Sumter Tours' profitability, the Park Service did include non-concession income. Is that not true?

Mr. STANTON. In the initial or the preliminary analysis, and that was detected and it was corrected. And in the final computation, no non-concession related income was included in the final computation.

Mr. GIBBONS. You mean no non-concession-related income was included? You said no concession-related.

Mr. STANTON. Non-concession, non-concession.

Mr. GIBBONS. Well, does that mean that the Park Service for the first five years of Fort Sumter Tours income profitability was overstated, in your calculation?

Mr. STANTON. I could not—

Mr. HYDE. If I may?

Mr. HANSEN. Please identify yourself for the record, please, sir.

Mr. HYDE. My name is Robert Hyde. I am the financial analyst who performed the analysis. There is a two-step process in reviewing—

Mr. GIBBONS. Well, let me just say, the process—the question asked, does that say that the tour service's income in the first five years was overstated, according to the Park Service's calculation—if what the Director has already said, that there was a mistake in the technical addition of non-concession profit in that, so the answer would be?

Mr. HYDE. It was overstated in the initial part of the analysis, but it was corrected in the latter part of the analysis where the fee was set. Page 5 is where it was carried, and page 6 it was eliminated properly.

Mr. GIBBONS. Well, then, if you don't take it out in the beginning, I mean, that would adjust the idea of whether or not, or state the idea of whether or not an increase in the fee was even warranted. Is that not true?

Mr. HYDE. There is a part where you are looking at the original fee, and yes, it would be overstated at that point, but then—

Mr. GIBBONS. And that would go to the basis of whether or not justification of a fee increase was needed?

Mr. HYDE. At that stage, there is no franchise fee applied to the concessionaire's results, proper results. And the process then applies the fee at the point where the new fees, the prospective new fees are applied. It did not include any non-concession income.

Mr. GIBBONS. Let me go over here to the CPA for the person. He is just sitting on pins and needles waiting to answer these very questions. And I would like to ask you, if you have a different opinion of the questions I have asked, and whether or not—

Mr. JACKSON. Yes, I have a very different opinion.

Mr. GIBBONS. Would you go ahead and tell us what your opinion is on this matter?

Mr. JACKSON. The inclusion of the \$195,000 greatly overstated the profitability, which caused these three ratios, return on gross, return on equity, return on assets, to be greatly overstated. So then

when they looked at the ratios they calculated, and compared them to their industry statistics, how could they compare them properly, they were overstated. The first part—that is the first error.

Then the second one is very critical too. The inclusion of this income caused the maximum allowable fee to be overstated. I mean, it wasn't 15.6 percent. It was 8.7. They, because of the errors, set a rate at 12 percent. We shouldn't even be talking about 12 percent, we should be talking at most at 8.7 percent.

Mr. GIBBONS. Excuse me. Your belief is that, by the inclusion of the mistaken inclusion of the non-concession profit in the original five-year contract term, caused the erroneous consideration of warranting a fee increase?

Mr. JACKSON. Yes, sir. Exactly.

Mr. GIBBONS. Thank you, Mr. Chairman.

Mr. HANSEN. The gentleman from Nevada brought up some very interesting points here I would kind of like to square in my own mind and see if we got this right.

It seems like they did include non-concession fees. If you did, calculating the maximum franchise fee, if we figured this right that you could charge, the National Park Service guideline 48 says that the maximum fee you can charge is 50 percent of the pre-franchise tax and pre-tax income, if I am reading your guidelines right. Is that right?

Mr. JACKSON. That's correct.

Mr. HANSEN. Well, that is on chapter 24, page 18. So you used the figure \$441,871, and, Mr. Jackson, you correct me if I am wrong on this because I could be. Well, in fact, that includes \$195,603 of non-concession income. Is that right?

Mr. JACKSON. That's correct.

Mr. HANSEN. So, if that premise is right, we go to guideline 48, then the fee would have been 8.7 percent. Is that right?

Mr. JACKSON. Yes, sir. That is correct.

Mr. HANSEN. Better than 12 percent.

Mr. JACKSON. The maximum allowable fee. Now that is not necessarily the fee that—

Mr. HANSEN. Well, I am going by their guidelines here.

Mr. JACKSON. The guideline is for the maximum allowable fee, not necessarily what the fee should be.

Mr. HANSEN. Mr. Stanton, would you like to—am I figuring this wrong?

I would have Mr. Hyde comment.

Mr. HYDE. You are correct, sir. The maximum is overstated in the analysis, using the overstated figure on page 5. That is correct.

Mr. HANSEN. So that would have been—what I just said would be a correct statement, and the fee would have been 8.7 percent, rather than 12 percent, if all these assumptions are correct?

Mr. HYDE. That is correct. The maximum guideline as a preliminary analysis would be 8.7 percent.

Mr. HANSEN. I see. Well, that is interesting.

Mr. Stanton, I guess we could debate this thing for a long time regarding what procedure should have been followed. Your colleague mentioned to Mr. Inslee that they didn't follow this procedure. They claim that you didn't give them the information. And

so what is the use of going into arbitration. We don't know what the other side is going to say.

Having been part of arbitration when I used to work for a large insurance company, you know, we didn't go in blind. We walked in and all three parties pretty well knew what was going on when we walked in there. And we were kind of stuck with the results. And you are kind of a river boat gambler when you do that, but I guess that is one of the things you do.

Following that, if I heard the gentleman correctly, he said the next thing they do is the Secretary would make a decision. Does that follow arbitration? Or is that before arbitration?

Mr. STANTON. That would follow arbitration.

Mr. HANSEN. So the final arbitrator, if they choose to go that route, would be the Secretary?

Mr. STANTON. That is correct.

Mr. HANSEN. So you start out, they can appeal—then go from appeal to arbitration to the secretary?

Mr. STANTON. That is correct.

Mr. HANSEN. But in this case, and their contention is because they didn't have the information so they didn't feel comfortable doing that, they went straight to court, which was what, Federal District Court?

Mr. STANTON. Federal District Court.

Mr. HANSEN. And, in the Federal District Court, they in effect—you prevailed. Is that correct?

Mr. STANTON. The Federal Government prevailed. That is correct.

Mr. HANSEN. And this was then appealed?

Mr. STANTON. It was appealed.

Mr. HANSEN. And you prevailed again?

Mr. STANTON. Prevailed again.

Mr. HANSEN. On what grounds? Could you tell me?

Mr. STANTON. As I understand that the court held that the process employed by the National Park Service was proper, and that our calculation, that we had given adequate notice to the concessionaire with respect to reconsideration of the franchise fees, and that the Park Service had the authority to adjust the franchise fees from 4.25 to 12 percent.

Mr. HANSEN. Mr. Stanton, as you may recall in my office, Mr. Campsen and his son and their counsel argued that it wasn't discussed, that the franchise fee wasn't brought up in court, and that the merits of the franchise fee was not as issue. Is that a correct statement?

Mr. STANTON. That is not my understanding, Mr. Chairman.

Mr. GIBBONS. Mr. Chairman?

Mr. HANSEN. Excuse me. Who has got the floor here?

Mr. GIBBONS. I was going to ask you to yield for a second on a question like this because it seems to me what we should have is the court decision before us because I am under the standing, understanding, reading Director Stanton's testimony, the only issue that was brought before the court was whether or not the Park Service had the right to adjust the fee, which is part of the contract, and secondly, the calculation of the fee was not at issue in that decision.

I find nowhere in the decision does it talk about the merit or the correctness of the calculation of the fee. So maybe we should have the actual court decision before us.

Mr. STANTON. If you would please, Mr. Chairman?

Mr. HANSEN. Excuse me, go ahead, sir.

Mr. STANTON. I wanted to provide for the record a copy of the court decision. And the court did address the calculation of the franchise fee.

Mr. HANSEN. That would certainly be helpful for us as far as this oversight hearing goes.

[The information follows:]

Mr. COHEN. Mr. Chairman?

Mr. Campsen—oh, excuse me. I am sorry. Go ahead.

Mr. COHEN. I just wanted to read from the Fourth Circuit opinion: "FST raises what it believes are three errors in NPS's calculation of 12 percent franchise fee in the instant case." And then they proceed to analyze the three errors that were raised and discussed.

And we will provide this for the record.

Mr. HANSEN. Well, thank you. We appreciate having that.

Hang on a minute.

Mr. Campsen, your testimony is always interesting. You started this business in 1961?

Mr. CAMPSSEN. Yes, sir.

Mr. HANSEN. And the theory behind this is a lot of folks would like to be ferried out to Fort Sumter to see it and, I assume, you started buying vessels, as you pointed out, advertised your business, people would come to wherever your vessels were tied up. And you would then take them out.

Tell us, go through that operation a little bit, would you, just for the benefit of the Committee? What you do, in other words.

Mr. CAMPSSEN. Yes, sir. Fort Sumter National Monument was not created until 1948, and there was no concession operations going on at Fort Sumter. There was no concession boats taking people out there. The Park Service wanted to start public boat transportation out to the Fort, and they sought people, interested people, to do that.

We were one of five proposals. And we were evaluated, and we were selected. I went to the local banks, and I borrowed sufficient money to get the first boat in operation. And we started operating, carrying people to the Fort on January the 1st, 1962. And we have been doing that since. We borrowed money. I always personally guaranteed the note.

Mr. Chairman, I don't come from a rich family. As a very young man, I really didn't have any money, but I guaranteed the note, and the banker trusted me. We have always paid back everything we ever borrowed, and our credit standing is good. But that is how we got started.

And I had some cousins who were involved in operating shrimp boats around Charleston, very, very fine, honorable people who knew all about boats. They helped me to get started, and none of us made any money at all or drew any income from Fort Sumter Tours.

It was a wing and prayer and a hope that we would be able to build a business that made some sense economically, and we

worked very closely with the local Park Service officials. We have always got the highest ratings possible. We did the advertising. We did the promotion. And visitation started increasing.

It got to the point where I could even start having a little profit from Fort Sumter Tours. But we grew and we expanded, and we went into doing things other than Fort Sumter, like conducting harbor tours around Charleston Harbor. The boat did not stop at the Fort.

Some people are really not interested in going to the Fort. And we also expanded by using our boats for special charters, people want to charter a boat for any number of reasons. Churches want to charter the boats, private businesses, and so forth. We charter those at night.

Mr. HANSEN. Mr. Campsen, if I may interrupt you, we are going to lose this Director in a minute.

Let me just ask you, how many boats or ships do you have? Being an old Navy man—

Mr. CAMPSSEN. We have three.

Mr. HANSEN. Three? How many people do they hold?

Mr. CAMPSSEN. We have three. One is the Spirit of Charleston, which has been described and talked about here. That boat was built down in Louisiana. We had a naval architect design the boat. That boat was—plans and specifications were approved by the local Park Service people, as we were developing to be used to carry people over to Fort Sumter. And at night, this boat is used to carry people on dinner excursions.

We had a different crew come in, and the boat is transformed from daytime operation to nighttime operation. And we do that to make as much money as we can to pay for the boat and pay for the people who work for us.

We have 44 people, and we have a payroll that we have to meet, of course, meet every Friday.

Mr. HANSEN. Yes. How long does it take to get from the Harbor to Fort Sumter?

Mr. CAMPSSEN. It takes 30 minutes from our landing facility to get out to Fort Sumter, 30 minutes.

Mr. HANSEN. And, Mr. Campsen, before we lose our time here, I don't know that—we are not mediators here, we are just trying to resolve some of these things. I would like to ask the Director this question: Have you ever considered the National Park Service going back and recalculating. I remember many times with a new battery of folks, not that the others haven't done a good job, and taking another look at it.

And on your side of the issue, Mr. Campsen, you figure if you were given the opportunity to go to arbitration, would you do it?

Mr. CAMPSSEN. Well, yes, sir, provided it was binding arbitration. Let me say this, Mr. Chairman: We have proposed to the Park Service that we would be willing to submit the correctness of this franchise fee calculation to an independent accounting firm, like Ernst and Young or someone that we don't have any real control over that are nationally recognized, and ask them to—tell the Service, here is where we think this was an error based upon the guidelines of the Park Service in existence at the time.

And we would be bound by that. And we would pay for that analysis. We proposed that to the Park Service, and they didn't react to it at all. They didn't refuse or accept. They just acted like they didn't receive it.

But, yes sir, to answer your question, if we had an opportunity to go to binding arbitration, we would agree to that.

However, please understand that our small company since 1992 has been incurring enormous expenses, enormous expenses trying to correct the NPS's mistakes and miscalculations. I don't know. There has got to be an end to this sometime, because we are going bankrupt one or two ways. Either we are going bankrupt fighting this 12 percent calculation, or we are going bankrupt when they impose it and make us pay it. And so we are in between a rock and a hard place, Mr. Chairman, if you will.

The expense of attorneys and other consultants and time and frustration has been enormous. So, yes, sir, we want to end this. We want to come to some arrangement whereby a proper calculation of our fee is finally obtained.

Mr. HANSEN. I appreciate that, Mr. Campsen. I am just sitting here trying to figure out a way to resolve an issue.

Mr. CAMPSER. I understand.

Mr. HANSEN. And it seems to me that if there was a way, and I don't understand all the procedures and what is in statutory law here, I am just kind of off the top of my head. If we could—way we could put arbitration together and we live with the results, that is one way we have been in the past.

Another thing, of course, is that we look to the Park Service. Maybe they will take another look at this, come up with some other folks to do that. I have seen judges order people to do that, saying you go in and put some new folks in there and take another look at this thing and see if it was done right, and then come back. So, that is another remedy that may be there.

Mr. Gibbons, maybe you would like to comment?

Mr. GIBBONS. Well, I thank the gentleman, and I know that his leadership is appreciated on this issue because it is an important issue, not just for the Park Service but for the future of 40-some employees who are sitting out there worried about their income.

I mean, their income depends upon the success of this operation. It doesn't necessarily equate to the same payroll check that the Federal bureaucrats get every Friday without worry about whether or not the lights are going to come on, or somebody is going to pay the tax and do this.

And I would just simply like to reiterate that if the calculations, according to the accountants for the Park Service that we have gone over are correct, and, Mr. Chairman, I think you put it very correctly that we are looking at somewhere around \$246,000—\$242,000, excuse me, \$246,260 is the calculation, and that would put it in the 8.7 percent maximum cap, compared to the 12 percent.

I would think the Park Service has to realize right away that there is at least a conceding point right there to go to some kind of negotiating position. And I would hope the Park Service realizes that it is not all one way.

And some days the Park Service has to give in when they are wrong as well. And from what I have heard, Mr. Chairman, I think

the Park Service did have a technical error and should be willing to work with the gentleman as well.

Mr. HANSEN. Just as the gentleman points out in just this hearing we have had, the Park Service has pointed out that it should have been 8.7 on this if we take those fees, which is substantial.

Mr. GIBBONS. Well, Mr. Chairman, that is the maximum. And then we have to start with somewhere between where they were originally and then the maximum cap of 8.7, not the 12 percent.

Mr. HANSEN. That is all predicated on if we accept these assumptions, which apparently we do in this case.

Well, I know, Mr. Stanton, you are here three-and-half minutes overtime.

Mr. STANTON. That's fine. Mr. Chairman, Mr. Gibbons, again, I appreciate the opportunity. Let me make a couple of comments, if I may.

One is with respect to Mr. Campsen's assessment of the relationship with the National Park Service. I concur wholeheartedly. It has been an excellent partnership. The services that Mr. Campsen and the Fort Sumter Tours, Incorporated have provided over the years have been valuable service benefiting thousands and thousands of visitors to Fort Sumter and Fort Moultrie. And it is a value, their partnership is a value of service that they provide to the public.

That is not the question that is before us today. So I don't want any comments that I make diminish the quality of services that the concessionaire has provided. It has been satisfactory, indeed, outstanding over the years.

Secondly, as I indicated in my testimony, is that we have asked the district attorney—rather, the U.S. Attorney's Office to be open, receptive to any proposal or suggestions from the concessionaire in hopes that we can move towards a resolution of this as soon as possible. And we are committed to working again with the U.S. Attorney to resolve the suit and move to a different level of work.

Mr. HANSEN. I appreciate that, Mr. Director, and I appreciate you being here.

We are sitting scratching our heads, like you folks, on how is this resolved. It seems to me there are a couple of things that logical, reasonable people could sit down and get it done, and then we wouldn't have to go through all this expense, time, and effort.

And that is one of the reasons you have arbitration; that is one of the reasons we have other things that don't get it wrong to all you lawyers out there, but sometimes I think the only guy that wins on this thing is counsel. No disrespect, Counselor.

Mr. DICKSON. None taken, sir.

Mr. HANSEN. But having seen a lot of money go out and having signed a lot of those checks, I can tell you that—anyway, with that said, we will take it under advisement as the Committee and see if there is a legislative remedy. We would like to get this over with. Frankly, I think, of my 10 terms on this Committee, the biggest thorn in our flesh is always the fight with concessionaires, Park Service, other folks. And as the Director aptly pointed out, concessionaires are integral and an important part of the Park Service.

And there has been a good relationship here for years, I hate to see this blow up. I know it is an extremely important thing to the

folks who want to see this very interesting historical place. So if we could do anything in our power to help this thing out, we want to do it and bring this to a reasonable and amicable solution.

And unless Mr. Gibbons wants to add anything to that, we will——

Mr. DICKSON. Mr. Chairman, may I——

Mr. HANSEN. Counselor.

Mr. DICKSON. I simply wish to express the deep appreciation of Fort Sumter Tours for this hearing. It is obvious to us, I believe that after several trips to the courthouse and numerous statements by the Park Service that there was never anything wrong with this franchise fee analysis, it took this oversight hearing and your efforts to get them to concede that the fee should never have gone above 8.7 percent, not from the very beginning. And we are very, very grateful to you for that.

Mr. HANSEN. Well, we thank you for that, and Mr. Director, again we apologize. We have held you eight minutes over, and I know the Vice President is over there and that is probably where you are supposed to be, and so am I.

But I wanted to have this hearing. And let me thank all of you for being here, and this will conclude this oversight hearing.

[Whereupon, at 12:38 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows.]

FILED

FEB 3 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

W. A. BIRCH, C
DISTRICT

FORT SUMTER TOURS, INC.)	CIVIL ACTION # 2:93-0918-1AJ
)	
Petitioner,)	
)	
-v-)	
)	
BRUCE BABBITT, SECRETARY,)	ORDER
DEPARTMENT OF THE INTERIOR,)	
an agency of the federal)	
government,)	
)	
Respondent.)	

This action is before the court upon the petition of Fort Sumter Tours, Inc. for the interpretation of its concession contract with the respondent. Upon agreement of the parties, this non-jury action was presented in the format of an appellate argument, and both parties have fully briefed the issues. Oral arguments were presented to this court on January 5, 1994.

FACTS

Under the Concessions Policy Act ("CPA"), 16 U.S.C. §§ 20 through 20g, the Secretary of the Interior is responsible for the oversight of national parks and monuments such as Fort Sumter National Monument, and the National Park Service is tasked with carrying out the operation of these parks and monuments. Fort Sumter Tours, Inc. ("FST" or "concessioner") has provided public transportation to the Fort Sumter National Monument under contract with the National Park Service ("NPS" or "government") for the past 32 years. As part of its

agreement with the NPS, the concessioner FST has made significant capital expenditures in order to carry out its duties of transporting tourists to Fort Sumter. These capital expenditures included the acquisition of an additional vessel, the "Spirit of Charleston" for which FST paid \$1.4 million, and the construction of an additional docking facility at Patriot's Point for \$154,000. These two particular items were acquired when NPS decided to offer tours from Patriot's Point in addition to those originating from the City Marina. FST negotiated the current contract with NPS when this additional route was proposed.

This current contract between the parties was executed on June 13, 1986 and is in effect through December 31, 2000. This contract necessarily covers an extended time period in order to facilitate the financing of the above noted capital expenditures by the concessioner. The portion of this contract at issue is section 9(e), which provides that while the franchise fee was set at 4.25% of FST's annual gross receipts, at five-year intervals during the term of the contract, the franchise fee percentage may be reconsidered. From 1986 to 1991 that percentage was 4.25%, and the NPS determined that the fee should be increased to 12% for the period June 1991 to June 1996. To illustrate the significance of this change, FST points out that in 1992 the franchise fee at 4.25% totalled \$82,222. The fee for that same year at the proposed rate of 12% amounts to \$229,531.44.

The concession contract provides that NPS must indicate its intent to reconsider the franchise fee within 60 days after the expiration of each five-year period in the term of the contract. NPS sent a letter to FST indicating its intention to "renegotiate" the franchise fee on June 20, 1991, eight days after expiration of the first five-year period. See Administrative Record at Tab C. On March 16, 1992, NPS informed FST of the proposed fee increase to 12%. *Id.* at Tab H. FST asserted its objection to the proposed increase by letter to NPS on March 24, 1992. *Id.* at Tab I. In a letter dated May 15, 1992, NPS acknowledged FST's objection, and stated that "[t]he conclusion [from their analysis] is that the fair value of the privileges granted by the contract is, in fact, 12 percent of the annual gross receipts. Unless you can substantiate your belief that the current value of these privileges is, in fact, 4.25 percent of the gross revenues, we cannot accept your conclusions." *Id.* at Tab M. On April 14, 1993, FST stated in a letter to NPS that "we believe it is in our mutual interest to seek a declaration of rights by the courts on this critical issue. Such a declaration will provide all interests with certainty of their rights and duties regarding the renegotiation of franchise fees at this point and in the future." *Id.* at Tab S. In its letter dated April 15, 1993, NPS outlined the objection procedure for FST to follow according to section 9(e) of the concession contract: "[P]lease state to us in writing your objections to

this proposed fee. Please include in your response your preferred method of resolving our dispute [Y]ou can either request the Secretary . . . to determine the appropriate fee, or you can request the establishment of an arbitration panel to recommend to the Secretary an appropriate fee." Administrative Record at Tab T. Instead of following this procedure, FST chose to file a declaratory judgment action in this court on April 21, 1993. By letter dated June 16, 1993, NPS noted that FST bypassed the advisory arbitration process, and stated that its final decision was to increase the fee to 12%. Id. at Tab V.

FST's argument is essentially three-prong: First, that NPS had no statutory authority under the CPA to adjust the franchise fee percentage through section 9(e) of the contract. Next, FST argues that if NPS did have that authority under the CPA, section 9(e) of the contract cannot be enforced because it conflicts with section 9(a) of the contract. Third, FST contends that even if the NPS had authority and section 9(e) of the contract is valid, the government failed to justify the increase by substantial evidence regarding the profits earned by FST. In its petition, FST seeks an order by this court declaring that neither the CPA nor the contract authorize the NPS to increase the franchise fee as proposed. In the alternative, FST seeks a declaration that FST waived its right to reconsider the franchise fee by failing to satisfy the notice requirement as stated in the contract.

NPS counters that under both the concession contract and the CPA it has discretion 'reevaluate the franchise fee percentage every five years. Further, it contends that the plain language of the contract does not require a change in the scope of the contract in order for the Secretary of the Interior to establish a new percentage. Additionally, NPS points out that if the concessioner disagrees with the Secretary's determination of the fee, there are appellate remedies under the Administrative Procedure Act ("APA"), with reversal for arbitrary and capricious acts by the Secretary.

DISCUSSION

This court has jurisdiction over this petition under the APA by virtue of the fact that FST does not seek money damages in its petition. 5 U.S.C. § 702 ("An action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States"). See Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272, 1278 n.12 (10th Cir. 1991). "The claim of violation of plaintiff [FST's] rights under the statute and regulations, and the parallel contract provisions, comes within federal question jurisdiction of the district court under 28 U.S.C. § 1331 for review of the challenged agency action." Id. at 1279 (citing Bell v. New Jersey, 461 U.S. 773, 777-78 n.3, 103 S. Ct. 2187, 2190 n.3 (1983)). "There is appropriate federal question jurisdiction

under § 1331 to adjudicate the plaintiff's federal claims here of violation by the defendant of the Concessions Policy Act of 1965, 16 U.S.C. § 20 et seq.; regulations promulgated under that Act, 36 C.F.R. §§ 51.1-51.7 (1989); and the plaintiff's claim premised on its contract with NPC [sic], a federal agency--a federal question itself. Hamilton Stores, 925 F.2d at 1279 (citing United States v. Allegheny County, 322 U.S. 174, 183, 64 S. Ct. 908, 913 (1944)).

The decision of the Secretary of the Interior to increase the franchise fee imposed upon FST became a "final agency action" under section 10(c) of the APA, 5 U.S.C. § 704, when NPS sent a letter indicating its final decision to FST on June 16, 1993. See Fort Sumter Tours, Inc. v. Andrus, 564 F.2d 1119, 1123 (4th Cir. 1977) (affirming an injunction which FST sought against the Secretary of the Interior for failure to accord FST the full measure of its statutory right to renew an earlier concession contract).

Regarding the procedural posture of this action, it was originally filed as a declaratory judgment action, and is now before this court as an administrative appeal of the Secretary of the Interior's final agency action to raise the franchise fee. The declaratory judgment action was filed on April 21, 1993, prior to the time that the decision became a final agency action by letter dated June 16, 1993. Appeals of agency decisions may be heard only after they become final agency actions. 5 U.S.C. § 704.

Because of the procedural posture of this action, this court must ensure that the petitioner was not deprived of its opportunity to present an alternative proposal to the analysis which led NPS to increase the franchise fee. It is of paramount importance that litigants have a full and fair opportunity to present their arguments prior to the final agency action. In the present case, however, FST had sufficient notice and opportunity to rebut the financial analysis employed by NPS before the increased franchise fee became a final agency action. FST chose to challenge the action of NPS from the standpoint of statutory and contractual authority. This court will thus review the authority of the Secretary of the Interior and NPS under the CPA and the concession contract. If such authority exists to increase the franchise fee, this court shall then proceed to review the agency's decision under the "arbitrary and capricious" standard of review. Under such a review, this court is bound by the Administrative Record which reflects the information available to the respondents at the time of the final agency action.

This court must ascertain whether the Secretary's decision constituted an abuse of the discretion which he was authorized under the CPA and under the concession contract. The review of this final agency action is to be conducted in accordance with APA § 10(c):

The actions of the Secretary of the

Interior and his delegates are reviewed in accordance with the Administrative Procedure Act, 5 U.S.C. § 706. Administrative decisions must be upheld unless 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A). The scope of judicial review under this standard is narrow, and the Court is not permitted to substitute its own judgment for that of the administrative decision-maker. The relevant inquiry is whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made."

Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 624 (W.D. Wash. 1991) (case citations omitted).

I. STATUTORY AUTHORITY

"This Court must inquire whether the Secretary and his delegates have properly discharged their duties under the [Concessions Policy Act] and appropriate administrative regulations." *Id.* The relevant internal policy provisions in the present case are the Concessions Management Guidelines, known as "NPS-48," which set forth the procedures for the NPS to analyze the profits made by concessioners such as FST. This analysis then serves as the basis for any adjustment of the franchise fee at five-year intervals during the term of the contract at issue. The Concessions Policy Act, 16 U.S.C. §§ 20 through 20g ("CPA"), provides:

(b) The Secretary shall exercise his authority in a manner consistent with a reasonable opportunity for the concessioner to realize a profit on his operation as a whole commensurate with

the capital invested and the obligations assumed.

(d) Franchise fees, however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for net profit in relation to both gross receipts and capital invested. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates. Appropriate provisions shall be made for reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time.

16 U.S.C. § 20b(b) and (d).

In its first argument FST claims that under the current contract and the CPA, the NPS only has authority to impose such an increase upon agreement of the parties or a change in the scope of the contract privileges or obligations. FST contends that under 16 U.S.C. § 20b(d) noted above, the "probable value to the concessioner of the privileges granted by the particular contract or permit involved" would only change if there was a change in the scope of the contract. FST states that an example of such a change would be if NPS suddenly informed FST that it would be required to provide boat transportation for tours to nearby Fort Moultrie in addition to the tours to Fort Sumter. Such a change might require FST to obtain an additional vessel, and make other capital expenditures similar to the construction of the

landing dock at Patriot's Point. That change would have a substantial impact on FST's profitability, and a franchise fee adjustment would likely be appropriate. Under the present facts, FST maintains that because it neither agreed to the 12% fee nor had a change in the scope of its concession contract, NPS cannot carry out this franchise fee adjustment.

This court's attention is drawn to 16 U.S.C. § 20b(d), quoted in the above discussion, which states that "[c]onsideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates." Thus, while revenue to the government is "subordinate to the primary objectives" of the CPA, this provision provides authority for the Secretary of the Interior to at least consider its own operating expenses and revenue requirements when it considers the adjustment of franchise fees to be paid by its concessioners. This section provides an indication that this subsection was not enacted solely for the benefit of the concessioner. The franchise fee may be increased or decreased, so long as the concessioners are given a reasonable opportunity to make a profit and the monuments and parks are well preserved and open to the public. FST argues that there must be a change in the scope of the contract before the Secretary of the Interior may raise the franchise fee. This argument presumes that there is no other basis upon which the fee may be increased. The statute merely

provides that the franchise fee may be adjusted so long as NPS ensures that "the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates" are not overshadowed by efforts to increase its own revenues. If such an increase in franchise fee revenues is necessary to cover operating expenses of parks and monuments, for example, the primary and subordinate objectives of the CPA will not be in conflict.

FST contends that the main goal of the CPA was to promote the efficient operation of national parks and monuments by encouraging private investment by concessioners. Further, FST argues that allowing the NPS to drastically reduce the profitability of the concessioner by increasing franchise fees while a contract is in effect would directly conflict with the goal of encouraging long-term capital financing by concessioners. Without this stability over the life of a concession contract, the concessioners will experience great difficulty in obtaining loans for these capital investments.

This argument has strong policy appeal, but this court finds that under the CPA and the concession contract, the Secretary of the Interior has discretion to adjust the level of the franchise fee set forth in the concession contract, so long as the concessioner is afforded a reasonable opportunity to make a profit. As noted above, "[t]he scope of judicial review under this standard is narrow, and the Court is not permitted to substitute its own judgment for that of the

administrative decision-maker." Northern Spotted Owl v. Luian, supra, 758 F. Supp. at 624.

FST specifically objected to the procedure the NPS employed to determine the proper percentage of the franchise fee. The NPS-48 guidelines rely on statistics to determine fees based upon "average profitability" in the concession industry. FST argues that calculation of fees in this way violates the CPA, and that by applying this regulation, NPS is illegally attempting to control FST's profitability. It is undisputed that in order to reassess the percentage of the franchise fee, financial analysts for the NPS made certain adjustments to the financial records of FST to determine FST's annual profits. It appears that there were two expense items of special concern to the analysts: the salaries paid to officers, and the method in which FST listed its expenses for a tour boat "Spirit of Charleston." The government explains that officers' salaries are routinely subjected to a higher level of scrutiny than other expenses, because high salary expenses could be employed to disguise the amount of profits made by concessioners. Additionally, the government analysts determined that profits could be more accurately ascertained by a straight purchase and installment expense method rather than the method employed by FST, which involved a lease agreement with a limited partnership.

The government contends that FST did not properly preserve this issue for consideration by this court. It

contends that while FST may have objected to the fee increase when it was proposed by NPS, FST did not provide an alternative analysis for the Secretary of the Interior to consider prior to making his final determination. Without this alternative analysis, the government argues that the financial analysis performed by NPS must be accepted by this court as a factual matter. FST contends that it was not required to offer an alternate analysis in order to preserve its objection to the resulting increase in franchise fees.

In its review of this decision, this court is bound to consider only the administrative record, which consists of the information available to the decisionmaker at the time of the final agency action. According to Burlington Truck Lines v. United States, 371 U.S. 156, 168-69, 83 S. Ct. 239, 246 (1962), "[t]he courts may not accept appellate counsel's post hoc rationalizations for agency action; . . . an agency's discretionary order [may only] be upheld, if at all, on the same basis articulated in the order by the agency itself" For this reason, this court cannot consider any alternative analyses unless they were brought before the decisionmaker at the time of the final agency action. This same reasoning was applied in an earlier order in this action, filed September 3, 1993, in which this court granted the government's protective order against discovery.

The relevant inquiry in the analysis of the final agency action is whether the agency "considered the relevant factors

and articulated a rational connection between the facts found and the choice made." Northern Spotted Owl v. Lujan, *supra*, 758 F. Supp. at 624. Thus, in the instant case, the inquiry is whether the procedure outlined in NPS-48 appears to be a rational method of determining profit levels for the purpose of franchise fee assessment. "The scope of judicial review under this standard is narrow, and the Court is not permitted to substitute its own judgment for that of the administrative decision-maker." *Id.*

Under this standard of review, this court finds that the procedure followed by the NPS under NPS-48 is neither arbitrary nor capricious, and that it is a rational method to determine the actual profits made by FST. As NPS pointed out, to evaluate the proper level of the franchise fee, certain expense items on the financial records of concessioners are adjusted by financial analysts to account for potential manipulation of the profit levels. Further, in its analysis of the concessioner's profitability, the NPS utilizes information on profits from statistical averages within the industry. The statistical average profit margin within the concessions industry is not necessarily a truly accurate representation of the annual profits made by individual concessioners. Each year individual concessioners encounter a variety of factors which may have a dramatic effect on their annual profits. However, this court finds that such adjustments and the use of industry averages are a rational

method for the government to measure profits and avoid the injustice of according lower franchise fees to concessioners with accounting methods which disguise profits. The propriety of FST's accounting for expenses and profits is not at issue here. Rather, this court merely finds that the procedures employed by the government analysts were rational and neither arbitrary nor capricious. It is not irrational for the NPS to utilize industry expense and profit averages as the basis to assess an individual concessioner's reasonable opportunity to make a profit. FST argues that because the NPS-48 method determines the proper franchise fee percentage depending upon the relationship of the concessioner's profit to the average profit in the industry, this method acts as a disincentive for concessioners to operate in a profitable manner. However, the requirement of the NPS is to afford concessioners a reasonable opportunity to make a profit, while ensuring that the national monuments are operational and well maintained. It is neither irrational nor unreasonable for the NPS to review industry data in order to determine franchise fees which "shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved." 16 U.S.C. § 20b(d). The Secretary of the Interior did not abuse his discretion by determining that a 12½ franchise fee struck the proper balance between FST's opportunity to earn a reasonable profit and the subordinate consideration of revenue to maintain the monument.

II. THE CONCESSION CONTRACT

The second argument set forth by FST is that section 9(a) of the concession contract is unenforceable because it directly conflicts with section 9(a), and that NPS cannot modify the contract by raising the franchise fee without supporting that modification with additional consideration to FST.

According to FST, section 9(e) of the contract, which provides for reconsideration of the franchise fee at five-year intervals, is in direct conflict with section 9(a)(2) of the contract, which provides that the franchise fee is 4.25% for the 15 year term of the contract. FST concludes that these two sections can operate together only if this court finds that a change in the franchise fee must be accompanied by a change in the rights and obligations under the contract.

As petitioner set forth in its Amended Brief at p. 10, according to section 9(e) of the concession contract, "[t]he Secretary [shall determine] appropriate fees consistent with . . . the probable value to the concessioner of the privileges granted by the contract based on a reasonable opportunity for a profit in relation to both gross receipts and capital invested. . . ." Further, "[t]he written determination of the Secretary as to franchise fees shall be final and conclusive upon the parties hereto."

As stated by then-District Judge Russell, "[i]t is the duty of Courts, not to write contracts, but to enforce them,

giving their language its 'plain, ordinary and popular sense.'" Heaton v. State Farm Mutual Automobile Ins. Co., 278 F. Supp. 725, 727 (D.S.C.) aff'd, 398 F.2d 824 (4th Cir. 1968). This court finds that NPS had contractual authority to reconsider and adjust the franchise fee to be paid by FST. In a plain reading of the concession contract, section 9(e) is an adequate expression of the parties' intent to make the franchise fee of subsection 9(a) subject to reconsideration.

Regarding the lack of additional consideration by NPS in support of the change in the franchise fee, the government points to the Uniform Commercial Code provisions on sales of goods, arguing that when a contract term is left to be specified in the future, the resulting term shall be in good faith and commercially reasonable. U.C.C. §§ 2-305(2); 2-311(1). See also James J. White and Robert S. Summers, Uniform Commercial Code §§ 3-5 & 3-7 (3d ed. 1988). It does appear that the Secretary of the Interior's discretion to determine the franchise fee over the objection of the concessioner is contrary to a traditional formulation of a contract as an "exchange of risks." Id. However, this contract is not one for the sale of goods. Thus, while this analogy to a sale of goods contract is persuasive, references to Article 2 of the Uniform Commercial Code are generally inapplicable.

It appears that the parties to the present concession contract agreed to leave the franchise fee open to

reconsideration in order to allow either party to escape from what it felt to be an unreasonable franchise fee. The concession contract in the instant case clearly states that NPS must afford the concessioner a reasonable opportunity to make a profit, and that the franchise fee is to be based upon the probable value of the concession to FST. It further appears to this court that the NPS-48 procedures employed by the Secretary of the Interior in adjusting the franchise fee were neither arbitrary nor capricious, and were performed in accordance with the contract section 9(e). The contract does not provide a guaranteed minimum profit for the concessioner, nor does it set a limit on maximum profits from the concession. So long as NPS does not apply an arbitrary or capricious analysis when it determines that the concessioner has a reasonable opportunity to make a profit, NPS has upheld its part of the agreement. The contract contains no discussion of additional consideration or changing the franchise fee only upon a change in the scope of duties of either party.

Plaintiffs point to City of Spartanburg v. Spartan Villa, 253 S.E.2d 501 (S.C. 1978) for the proposition that the government cannot increase fees unilaterally after those fees were set in contract, unless the obligation for additional fees was supported by some new consideration. This case is distinguishable from the case at bar, however, because in Spartan Villa, the city agreed in contract to a set fee that

must be paid for water service; the city subsequently enacted an ordinance which raised this fee. There was no provision in the contract for a periodic review or adjustment of the fee as there is in the present case. As the court stated, "[t]here was no reservation that the [sewer] tap was temporary or that the fee was only partial payment." *Id.* at 502. Spartan Villas later received a letter from the city indicating that the permission to use the sewer service was only temporary. The court found that the parties had agreed prior to that letter that the permission was not temporary, and that the city must furnish sewer service for the original amount paid by Spartan Villas.

It is beyond dispute that "past consideration is no consideration." Richard A. Lord, 4 Williston on Contracts § 8:9 at 207-09 (4th ed. 1992). The original contract in Spartan Villa did not express an intention or expectation that the fee would be subject to modification within the term of the contract. For that reason, a unilateral increase in fees without a prior agreement as to fee reconsideration was improper in that case. In the present case, however, the unambiguous language of the contract sets forth procedures for periodic reconsideration and possible adjustment of the franchise fee.

III. NOTICE

NPS sent a letter to FST on June 20, 1991, eight days

after the end of the first five-year period of the contract, which advised that NPS was considering a "renegotiation" of the franchise fee. See Administrative Record at Tab C. Later, on March 16, 1992, NPS sent another letter to FST indicating that their analysis resulted in a proposed franchise fee of 12%. Id. at Tab H. This court finds that the letter of June 20, 1991 was sufficient to put FST on notice of the action by NPS, and that FST was thereby afforded adequate time to respond and otherwise defend against the proposed reconsideration of the franchise fee.

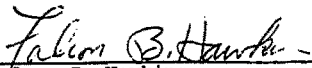
CONCLUSION

Fort Sumter Tours, Inc. entered into the present concession contract with the understanding that while its concession activity is to be strictly regulated by the National Park Service, they would nonetheless be given a reasonable opportunity to make a profit on concession activity. The contract clearly states that at five-year intervals during the term of the contract, the amount of the franchise fee is subject to reconsideration. So long as NPS continues to provide a reasonable opportunity for FST to earn a profit, there is sufficient consideration to allow NPS to reconsider the amount of the franchise fee. The procedures that NPS followed in this reconsideration were neither arbitrary nor capricious, and the resulting franchise fee is not so excessive as to preclude a reasonable opportunity for

FST to earn a profit from its concession. For the foregoing reasons, it is

ORDERED, that the petition filed on November 15, 1993, in which Fort Sumter Tours, Inc. seeks an interpretation of this concession contract that would disallow the National Park Service's increase of the franchise fee to 12%, be, and it is hereby, denied. The Secretary of the Interior's final agency action which increased the franchise fee is hereby affirmed.

IT IS SO ORDERED.


Falcon B. Hawkins,
United States District Judge

Charleston, S.C.

February 3rd, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORT SUMTER TOURS, INC.)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 97-293-LFO
)	
BRUCE BABBITT, Secretary of the Interior,)	
et al.)	
)	
Defendants.)	

FILED

AUG 31 1998

Clerk, U.S. District Court
District of Columbia

MEMORANDUM

Since 1962, plaintiff has provided passenger service to the Fort Sumter National Monument, located on an island off the coast of Charleston, South Carolina, under a series of concession contracts with the National Park Service.¹ The contract now in effect (the "Contract") was executed in June 1986 and is set to expire on December 31, 2000. That Contract requires plaintiff to pay a given percentage of its annual gross receipts to the Secretary of the Interior ("Secretary") as a "franchise fee."

Citing a provision of the Contract that permits periodic reconsideration of the franchise fee, the Park Service notified plaintiff in 1991 that it intended to raise the franchise fee from 4.25% to 12% of plaintiff's annual gross receipts. In response, plaintiff filed a lawsuit in the United States District Court for the District of South Carolina seeking a declaration that the Park Service lacked authority unilaterally to increase the franchise fee. The district court ruled that the Park Service has authority to increase the franchise fee, and rejected plaintiff's challenge to the

¹ Concessions contracts are governed by the National Park System Concessions Policy Act ("CPA"), 16 U.S.C. §§ 20-20g, which authorizes the Secretary of the Interior to contract with private companies to provide services to visitors to the National Park System.

determination of the 12% fee. The United States Court of Appeals for the Fourth Circuit affirmed the district court's ruling in 1995, and the United States Supreme Court denied plaintiff's petition for a writ of certiorari in 1996. During its protracted legal challenge to the fee increase, plaintiff continued to pay the 4.25% franchise fee to the Park Service.

In early 1996, undeterred by its defeat, plaintiff submitted to the Park Service a report that purported to show flaws in the Park Service's 1991 calculation of the 12% franchise fee. The Park Service did not reduce the fee, but rather notified plaintiff on January 21, 1997 that the Contract would be terminated on February 28, 1997 unless plaintiff paid more than \$1 million in back fees, penalties, and interest.¹

On February 11, 1997, plaintiff filed a complaint with this Court challenging the Park Service's refusal in 1996 to reduce the 12% franchise fee. Plaintiff subsequently moved for a preliminary injunction to restrain the Park Service from terminating the Contract, and the Park Service moved to dismiss the complaint. A hearing on plaintiff's motion for a preliminary injunction was held March 18, 1997. By consent of the parties, the matter was referred to mediation shortly thereafter, but that effort was ultimately unsuccessful.

An Order of November 4, 1997 denied plaintiff's motion for a preliminary injunction as both premature and moot, based on oral representations of the parties that no notice of contract termination was currently pending. The Order granted defendants' motion to dismiss with respect to Counts Six, Seven, Eight, Ten, Eleven, and Twelve of the Complaint, and advised the parties that with respect to the remaining counts (One, Two, Three, Four, Five, and Nine),

¹ After Plaintiff filed this lawsuit, the Park Service agreed to extend the termination date of the contract from February 28, 1997 to March 31, 1997.

defendants' motion to dismiss would be treated as a motion for summary judgment. Pursuant to Rule 12(b), both parties were given an opportunity to present any further material "made pertinent to such a motion by Rule 56"; plaintiff filed a brief in opposition on November 14, 1997, and defendant replied on November 25, 1997. Argument on the summary judgment motion was heard on December 2, 1997.

For reasons set forth below, summary judgment must be granted to defendants on all remaining counts.

I.

A.

Analysis of plaintiff's complaint requires a review of the lengthy dispute that underlies it. Under the original Contract, plaintiff was required to pay a franchise fee to the Secretary in the amount of 4.25% of its annual gross receipts. The Contract permits "reconsideration" of plaintiff's franchise fee at five-year intervals. Section 9(e) of the Contract provides:

Within sixty (60) days after the end of each 5-year period of this contract or as otherwise specified, at the instance of either party hereto, the amount and character of the franchise fees provided for in this section may be reconsidered. Such request shall be made in writing within 60 days after the end of the applicable contract year but cannot be made before the end of such year. In the event that the Secretary and the Concessioner cannot agree upon an adjustment of the franchise fees within 120 days from the date of the request for renegotiation as made by either party, the position of the Concessioner must be reduced to writing within 30 days therefrom and submitted to the Secretary for a determination of appropriate fees If desired by the Concessioner, an advisory arbitration panel will be established . . . for the purpose of recommending to the Secretary appropriate franchise fees. . . . The written determination of the Secretary as to franchise fees shall be final and conclusive upon the parties hereto.

Contract, § 9(e) (emphasis added).

After the first five-year period of the Contract had expired, the Park Service notified plaintiff in writing that it was reconsidering the franchise fee for the second five-year period ("1991 Period"). Pursuant to an agency guideline known as "Park Service-48,"³ the Park Service began its reconsideration of plaintiff's franchise fee for the 1991 Period by considering financial reports submitted by plaintiff for 1986 through 1990. Plaintiff submitted information concerning its lease of a boat called the "Spirit of Charleston." Finding that the lease was "not an arm's length transaction and has resulted in lower earnings than would have occurred under an outright purchase of the boat," the Park Service decided to treat the transaction as a sale rather than a lease. Also, finding that plaintiff's corporate officers were overpaid relative to benchmarks for

³ Park Service-48 establishes a formula for calculating concessioner franchise fees:

[t]he appropriate franchise fee for concessioners shall be determined by first comparing the concessioner's profitability against the profitability of similar industries. The concessioner's reported statistics may be adjusted to reflect the value realized by the concessioner. Any known future changes in the financial condition of the operation should be taken into account.

In order to protect the investments and efforts of the parties involved, a minimum and maximum fee shall be determined thus establishing fee limits. A fee will be determined within these limits that produces a reasonable level of profitability consistent with the risk undertaken by the concessioner.

As a final test, the impact of this fee should be reviewed to ensure that it is not at a level which will interfere with the concessioner's reasonable opportunity for a profit. Additionally, it should not interfere with the concessioner's ability to charge comparable rates or impact on Park Service objectives of preserving and protecting park resources.

....

The final fee determination is based on this comparison of the concessioner's returns with similar outside returns.

the water transportation industry, as reflected in a 1990 report published by Robert Morris Associates (the "Morris Report"), the Park Service adjusted their salaries to match the industry median.

Using this adjusted financial information, the Park Service arrived at a minimum and maximum franchise fee, as required by Park Service-43, and calculated a tentative franchise fee of 12%. The Park Service then considered the Dun & Bradstreet ("D & B") Industry Norms for the water transportation industry, and concluded that plaintiff could afford to pay the 12% fee and still earn a profit above the median returns for the industry. On March 16, 1992, the Park Service informed plaintiff that it had determined the appropriate franchise fee to be 12%, and that such fee would be effective dating back to June 13, 1991, the beginning of the 1991 Period.⁴

B.

Plaintiff objected in writing to the 12% fee on March 24, 1992. On April 14, 1993, plaintiff informed the Park Service that it did not want to negotiate the issue of the fee increase, but that it wanted a court to declare the rights of the parties. Plaintiff wrote the Park Service that "[s]uch a declaration will provide all interests with certainty of their rights and duties regarding the renegotiation of the franchise fees at this point and in the future."

⁴ Section 9(e) of the Contract provides that:

The written determination of the Secretary as to franchise fees shall be final and conclusive upon the parties hereto. Any new fees established will be retroactive to the commencement of the applicable period for which notice of reconsideration is given and be effective for the remaining term of the contract unless subsequent negotiations establish yet a different franchise rate.

The next day, the Park Service reminded plaintiff of the Contract's provision for arbitration in the event the parties are unable to agree on a franchise fee. Plaintiff chose to forego arbitration and filed a declaratory judgment action in the South Carolina district court on April 21, 1993. On June 16, 1993, the Park Service wrote to plaintiff and explained that in light of plaintiff's choice not to arbitrate, it had made a final agency decision to increase the franchise fee to 12%. This final agency decision transformed the character of the pending district court litigation from a declaratory judgment action to "an administrative appeal of the Secretary of the Interior's final agency action to raise the franchise fee." Fort Sumter Tours, Inc. v. Babbitt, No. 93-918; Mem. Or. at 6 (D.S.C. Feb. 3, 1994) ("Fort Sumter Tours I").

The district court first evaluated whether the Park Service had the authority to increase the franchise fee. It concluded that "under the CPA and the concession contract, the Secretary of the Interior has discretion to adjust the level of the franchise fee set forth in the concession contract, so long as the concessioner is afforded a reasonable opportunity to make a profit." Fort Sumter Tours I at 11. The court then analyzed the procedure by which the Park Service calculated the 12% franchise fee.⁵ It found that the Park Service's calculation under Park Service-48 was neither arbitrary nor capricious, and that the procedures set forth in Park Service-48 were rational. Id. at 14. Concluding that the 12% franchise fee was "not so excessive as to preclude a reasonable opportunity for [plaintiff] to earn a profit from its concession," the district

⁵ Noting that plaintiff had not objected to the Park Service's calculation of the franchise fee before the Park Service, the court declined to consider any alternative analyses that plaintiff had not raised before the Park Service. Fort Sumter Tours I at 13 (citing Burlington Truck Lines v. United States, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action; . . . an agency's discretionary order [may only] be upheld, if at all, on the same basis articulated in the order by the agency itself . . .")).

court affirmed the Secretary's "final agency action which increased the franchise fee." *Id.* at 21. The district court denied plaintiff's subsequent motion for reconsideration.

On appeal to the United States Court of Appeals for the Fourth Circuit, plaintiff renewed its statutory and contractual challenge to the increased franchise fee. Conducting a *de novo* review, the court of appeals affirmed the district court's conclusion that the Park Service had the statutory and contractual authority to increase the franchise fee. Fort Sumter Tours, Inc. v. Babbitt, 66 F.3d 1324, 1329-1333 (4th Cir. 1995) ("Fort Sumter Tours II"). The Fourth Circuit also considered plaintiff's challenge to the calculation of the fee. Fort Sumter Tours II at 1333-35. Applying the Administrative Procedure Act's "arbitrary and capricious" standard of review, 5 U.S.C. § 706, the court concluded that the Park Service's treatment of the "Spirit of Charleston" transaction was "clearly supported by the facts in the record, and was not arbitrary or capricious." *Id.* at 1335.

The court then evaluated the Park Service's use of the Morris Report and the D & B Industry Norms as industry standards. Finding the Park Service's use of industry expense and profit averages to be "entirely appropriate," the court of appeals concluded that plaintiff had not met its burden of establishing that the reports themselves were inaccurate, or that the industries analyzed in those reports were not comparable to plaintiff's industry. *Id.* at 1336-37. Concluding that plaintiff had produced no evidence of arbitrary or capricious actions on the part of the Park Service, the Fourth Circuit affirmed the district court in all respects. *Id.* at 1337. The Fourth Circuit subsequently rejected plaintiff's petition for rehearing and suggestion for rehearing in banc, and the Supreme Court rejected plaintiff's petition for a writ of certiorari. Fort Sumter Tours, Inc. v. Babbitt, 517 U.S. 1220 (1996).

C.

In March 1996 — approximately two and one half months before the Supreme Court denied plaintiff's certiorari petition — plaintiff's president, George Campsen, Jr., approached Robert Yearout, Concessions Program Manager of the Park Service, at a meeting of the National Park Hospitality Association in Washington, D.C. Campsen broached the issue of the pending litigation with Yearout, who had been in charge of the Park Service's internal administration of the case. Stating that he considered the Fourth Circuit's decision to be erroneous, Campsen asked Yearout if the Park Service would be willing to engage in a discussion about the case.

The parties dispute what happened next. Yearout contends that he informed Campsen that, because the matter was still pending, the Park Service could not take any action without the approval of the United States Department of Justice. Decl. of Robert Yearout at ¶ 6. Campsen states that Yearout simply told him that he would be happy to look at any information Campsen wished to present. Decl. of George Campsen, Jr. at ¶ 5. In any event, shortly after the meeting Campsen wrote Yearout that "I am encouraged and appreciate your willingness to explore the opportunity for some 'common ground' resolution." Attached to the March 15, 1996 letter was a document titled "Critique of the National Park Service's Franchise Fee Analysis Regarding Fort Sumter Tours, Inc., a National Park Service Concessioner" ("Critique"), which Campsen indicated would demonstrate the "fatally flawed" analysis that led to the Park Service's calculation of the 12% franchise fee in 1993. *See* Defs.' Ex. 5.

With the approval of the Justice Department, on May 10, 1996 plaintiff's representatives met with a group of Park Service officials, which included Yearout, agency counsel for the Park Service, and a Park Service financial analyst. Again, the parties dispute what happened at that

meeting. According to defendants, agency counsel made it clear that the Park Service was accepting information from plaintiff for a single limited purpose: to determine whether it should recommend that the Department of Justice settle the pending litigation. *See* Yearout Decl. at ¶¶ 8-12; Decl. of Lars A. Hanslin at ¶¶ 3-7; Decl. of Robert G. Hyde at ¶¶ 3-6. Further, according to defendants, plaintiff's representatives acknowledged that the Critique would be considered for that purpose alone. *Id.* In support of their position, defendants offer a May 15, 1996 letter from agency counsel to Campsen stating:

The Service will consider, in consultation with appropriate officials of the Department of Justice, the information you provided at the meeting.

Because of the continuing litigation between Fort Sumter Tours and the National Park Service, any further correspondence on this matter will come from John Douglas, Assistant United States Attorney. As I am sure you appreciate, the National Park Service, because of the litigation, is not in a position to directly respond to the concerns you have raised.

Letter from Hanslin to Campsen, Jr. of 5/15/96, Pl.'s Ex. C.

Plaintiff denies that agency counsel ever explained that the Park Service was considering the Critique for the limited purpose of deciding whether to recommend that the Justice Department pursue settlement negotiations. Plaintiff's representatives add that they would have objected to this explanation if it had been made. *Resp. Decl. of George Campsen, Jr. at ¶¶ 13-17.*

The Supreme Court denied plaintiff's certiorari petition on May 28, 1996. On July 1, 1996, shortly after expiration of the period in which plaintiff could petition the Supreme Court for a rehearing of the denial, *see* Decl. of John H. Douglas at ¶ 5, Assistant U.S. Attorney John Douglas sent a letter to plaintiff's counsel stating:

As you no doubt know, the responsible officials at the Park Service have recently engaged in a thorough review of the franchise fees that were at issue in the above

litigation, at the instigation of your client, with a view toward potential settlement. This review was undertaken with the full agreement and cooperation of the Justice Department. After due consideration of both the merits of your client's contentions and the procedural posture of the case, we have concluded that settlement would not be in the interests of the United States. I would emphasize that this decision was based both upon the review of the apparent fairness of the franchise fees imposed and the fact that the Supreme Court has denied the writ of certiorari which you had sought.

Letter from Douglas to Infinger of 7/1/96, Defs.' Ex. 16.

Meanwhile, June 13, 1996 marked the end of the 1991 Period of the Contract. On June 14, plaintiff wrote to John Tucker, Superintendent of the Fort Sumter National Monument, and requested, pursuant to section 9(e) of the Contract, reconsideration of the franchise fee for the third and final five-year period of the Contract (the "1996 Period"). The Superintendent responded that:

[W]e would be pleased to meet with you to discuss your proposal in relation to the probable value of the contract. We would propose a meeting in late September at which our respective positions would be discussed.

I will get back to you in a few weeks to discuss a meeting date.

Letter from Tucker to Campsen, Jr. of 8/1/96, Pl.'s Ex. D. No further correspondence concerning the 1996 Period occurred, and no meeting was held.

With respect to the 1991 Period, however, the Park Service presented a debt compromise proposal to plaintiff in December 1996. In the "interest of prompt resolution," the Park Service offered to waive approximately \$190,000 in penalties and interest and allow plaintiff three years to satisfy the arrearage payment of approximately \$340,000. The Park Service informed plaintiff that if it did not agree to those terms, the Justice Department would initiate collection

proceedings against it, and the Contract would be terminated. See Letter from Campsen, Jr. to Yearout of 12/31/96, Defs.' Ex. 17, at 1-2.

In response, plaintiff stated that "we again urge the Service to set aside the 12% fee calculation in the Franchise Fee Analysis dated February 27, 1992," adding that "[w]e continue to believe this is justified upon the new evidentiary material we furnished in the recent reconsideration process." *Id.* at 2. Stressing its own financial inability to make the requested arrearage payments, plaintiff made a "counter-offer" to the Park Service under which it would pay arrearage fees based on a rate of 5% of gross receipts retroactive to June 14, 1991 and a 6% franchise fee from January 1, 1997 until the Contract expires on December 31, 2000. *Id.* at 2-3.

On January 21, 1997 the Park Service rejected plaintiff's offer and demanded payment of \$1,034,088.45 in franchise fees, penalties, and interest. The Park Service stated that it would terminate the Contract if such payments were not made by February 28, 1997. Letter from Galvin to Campsen, Jr. of 1/21/97, Defs.' Ex. 18. On February 11, 1997, plaintiff filed this lawsuit, seeking to enjoin the Park Service from terminating the Contract and to obtain various forms of declaratory relief. The complaint alleges violations of the Administrative Procedure Act and breaches of contract.

In response to plaintiff's June 14, 1996 request for reconsideration of the 1996 Period fee, on March 31, 1997 the Park Service advised plaintiff that the period for reconsideration had expired on November 11, 1996. Letter from Galvin to Campsen, Jr. of 3/31/97, Pl.'s Opp. to Mot. for Summ. J. Ex. A. at 1. Referring to Section 9(e) of the Contract, the Park Service stated:

As we did not come to agreement upon an adjustment of the franchise fee by October 12, 1996, 120 days after June 14, 1996, you had 30 days from that date, to November 11, 1996, to reduce your position to writing and to submit it to the

Secretary for a determination of an appropriate fee for the period commencing June 14, 1996. This you did not do. Likewise, you did not request that advisory arbitration be initiated in connection with your request for reconsideration of the contract's 12% franchise fee.

In these circumstances, the reconsideration of the contract's 12% franchise fee for the period from June 14, 1996, concluded as of November 11, 1996, without an adjustment to the contract's 12% franchise fee which remains in effect.

Id.

II.

Counts One, Two, Three, Four, Five, and Nine of the complaint are brought under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"). Plaintiff does not directly challenge the Park Service's original 1993 decision to increase the franchise fee, a challenge that was adjudicated by the United States District Court in South Carolina and affirmed by the Fourth Circuit. Rather, plaintiff's present APA claims are based on (1) the Park Service's "reconsideration" of the fee for the 1991 Period during May and June 1996, and (2) the subsequent refusal of the Park Service to reduce the fee for the 1996 Period. Plaintiff argues that these "agency actions" violated the APA because they were arbitrary and capricious and an abuse of agency discretion.

A.

Counts One through Five of the complaint are based on the Park Service's alleged reconsideration, in the summer of 1996, of the franchise fee for the 1991 Period, and its subsequent refusal — communicated by the July 1, 1996 letter from AUSA Douglas — to reduce

the fee.⁶ Defendants dispute that a reconsideration took place, and argue that the Douglas letter merely communicated the decision of the United States not to settle plaintiff's lawsuit.

An agency's refusal to reconsider a previous determination is subject to only limited judicial review. ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 279-80 (1987); see also 5 U.S.C. § 701(a)(2). However,

[i]f for any reason the agency reopens a matter and, after reconsideration, issues a new and final order, that order is reviewable on its merits, even though the agency merely reaffirms its original decision.

Sandra Corp. v. Magaw, 111 F.3d 162, 167 (D.C. Cir. 1997) (citations omitted). If the Park Service did not reopen the issue of the 12% franchise fee for reconsideration in 1996, and then reaffirm its previous decision, there is no final agency action for this Court to review under the APA. See 5 U.S.C. § 702. The Park Service acknowledges that it reviewed the Critique submitted by plaintiff, but claims it considered the information for the limited purpose of evaluating whether to recommend that the Justice Department pursue settlement of the then-pending litigation. While disputing the nature of the May 10, 1996 meeting, plaintiff does not contest defendants' assertion that the Department of Justice has sole authority to settle lawsuits on behalf of the United States, and that such settlement decisions are not reviewable under the APA. Thus, the viability of plaintiff's claims depend on whether the events that transpired between the May 10, 1996 meeting and the July 1, 1996 Douglas letter constituted a

⁶ Count One concerns "use of invalid statistical data without adjustments for faults"; Count Two concerns "invalid and unsupported adjustments to [Fort Sumter Tours] financial data"; Count Three concerns "failure to allow opportunity to earn a profit commensurate with risks and capital invested"; Count Four concerns "setting franchise fee based on impermissible objective of maximizing revenue to the government"; and Count Five concerns "use of invalid [Park Service-48] without prior publication for notice and comment required by the [APA]."

reconsideration and subsequent reaffirmation of the Park Service's 1993 decision to raise the franchise fee to 12%.

While the parties present different versions of those events, their factual disputes are not material to the resolution of defendants' motion for summary judgment. In Sendra Corp., our Court of Appeals held that it is the agency's characterization that determines whether a previously decided matter has been "reopened":

That the agency discusses the merits at length when it denies a request for reconsideration does not necessarily mean the agency has reopened the proceedings. For formal agency adjudications, an agency order stating only that it is denying reconsideration is conclusive, so long as the agency has not altered its original decision. Courts will not, in other words, look behind the agency's formal disposition of the reconsideration request to see whether the agency "in fact" reopened its original decision (and thus rendered a new final order). There is a corollary to this rule. Only "when the agency has clearly stated or otherwise demonstrated," that it has reopened the proceeding will the resulting agency decision be considered a new final order subject to judicial review under the usual standards. These principles of administrative law have no less force in informal adjudications. . . . Thus, unless the agency clearly states or indicates that it has reopened the matter, its refusal of a request for reconsideration will be treated as simply that.

Sendra Corp., 111 F.3d at 167 (citations omitted).

The July 1, 1996 letter from AUSA Douglas letter states that "the responsible officials at the Park Service have recently engaged in a thorough review of the franchise fees that were at issue in the above litigation . . . with a view toward potential settlement." Defs.' Ex. 16 (emphasis added). The Douglas letter continues that "[a]fter due consideration of both the merits of [plaintiff's] contentions and the procedural posture of the case, we have concluded that settlement would not be in the interests of the United States." *Id.* (emphasis added). An earlier letter from counsel for the Park Service, written just one week after the May 10 meeting, states

the Service's intention to "consider, in consultation with appropriate officials of the Department of Justice, the information you provided at the meeting"; it further states that "the National Park Service, because of the litigation, is not in a position to directly respond to the concerns you have raised." Letter from Hanslin to Campsen, Jr. of 5/15/96, Pl.'s Ex. C at 1 (emphasis added). Both of these letters — the Douglas letter explicitly, the Hanslin letter implicitly — indicate that the Park Service accepted and reviewed plaintiff's Critique for purposes of discussing a possible settlement of plaintiff's lawsuit, rather than reopening the 1993 decision that raised the franchise fee to 12%.

As discussed above, plaintiff contests the recollections of defendants' representatives that agency counsel clearly indicated that the May 10 meeting was for purposes of settlement review only. However, plaintiff's evidence at best suggests that the purpose of the May 10, 1996 meeting was ambiguous. Nowhere, either in the declarations of its officials or the correspondence between plaintiff and the Park Service, has plaintiff pointed to a "clear" statement or demonstration, as required by Sendra Corp., that the Park Service reopened and reconsidered its decision concerning the 12% franchise fee. Plaintiff has submitted evidence that it believed that the Park Service was reconsidering the 1993 franchise fee. But Plaintiff's impression that the Park Service was considering that information for one purpose does not effectively challenge the Park Service's claims that it considered the information for another purpose.

Thus, under Sendra Corp., the Park Service's 1996 actions with respect to the 12% franchise fee for the 1991 Period were not of the "final agency" variety that would make them reviewable by this Court under the APA. Plaintiff contends that the Court cannot reach this

conclusion without reviewing "the administrative record." But plaintiff has not established what documents, beyond those already offered by defendants in their motion to dismiss, would comprise the "administrative record" of what was — viewed in the terms most favorable to plaintiff — an informal agency adjudication. See Sandra Corp., 111 F.3d at 167. The correspondence from the Park Service and the Department of Justice to the plaintiff is sufficient to establish that the agency did not clearly reopen its 1993 decision on the franchise fee. Accordingly, summary judgment is granted to defendants on Counts One through Five of the complaint.

B.

Count Nine of the complaint raises a different claim: that the Park Service violated the APA by failing to reconsider and reduce the franchise fee for the 1996 Period. In contrast to the informal manner in which plaintiff attempted to achieve reconsideration of the fee for the 1991 Period, on June 14, 1996 plaintiff wrote the Superintendent of the Fort Sumter National Monument and formally requested that the amount of the franchise fee for the Contract's third five-year period be reconsidered, as contemplated by Section 9(e) of the Contract. Letter from Campsen, Jr. to Turner of 6/14/96, Pl.'s Ex. D. On August 1, 1996, the Superintendent responded that "we would be pleased to meet with you to discuss your proposal in relation to the probable value of the contract. We would propose a meeting in late September at which our respective positions would be discussed." Letter from Tucker to Campsen, Jr. of 8/1/96, Pl.'s Ex. D. No further correspondence was sent from either party until after commencement of this litigation.

By letter of March 31, 1997, the Park Service's Acting Director expressed his belief that plaintiff effectively waived its right to reconsideration of the fee for the 1996 Period by failing to comply with the procedures for reconsideration outlined in Section 9(e) of the Contract. Letter from Galvin to Campsen, Jr. of 3/31/97, Pl.'s Opp. to Mot. for Summ. J. Ex. A at 1. The plain language of Section 9(e) supports the Park Service's interpretation:

Within sixty (60) days after the end of each 5-year period of this contract or as otherwise specified, at the instance of either party hereto, the amount and character of the franchise fees provided for in this section may be reconsidered. Such request shall be made in writing within 60 days after the end of the applicable contract year but cannot be made before the end of such year. In the event that the Secretary and the Concessioner cannot agree upon an adjustment of the franchise fees within 120 days from the date of the request for renegotiation as made by either party, the position of the Concessioner must be reduced to writing within 30 days therefrom and submitted to the Secretary for a determination of appropriate fees

Plaintiff initiated the Section 9(e) reconsideration process through its June 14, 1996 request, but failed to reduce its position to writing and re-submit it to the Park Service within 150 days (120 plus 30) of that initial request.

Plaintiff contends that it "reduced its position to writing on June 14, 1996, and that position has never changed." Pl.'s Opp. at 15. It further argues that the Contract "does not say that the position has to be again reduced to writing and resubmitted after the 120 day period." *Id.* On the contrary, the language of Section 9(e) includes reference to two separate writings: a written request initiating the reconsideration process, and a written summary of the concessioner's position to be submitted sometime after 120 days, but no more than 150 days after the original request, assuming that the parties do not resolve the issue earlier.

Because plaintiff did not submit its request for reconsideration of the 1996 Period franchise fee in accordance with Section 9(e), the Park Service cannot be said to have denied its request. Hence, there is no "final agency action" subject to review under the APA; summary judgment is therefore granted to defendants on Count Nine.

IV.

The Order of November 4, 1997 dismissed Counts Six, Seven, Eight, Ten, Eleven, and Twelve of the complaint "for reasons explained in a Memorandum to be filed." Those reasons are outlined below.

A.

Counts Six and Twelve seem to invoke the Administrative Procedure Act by alleging "arbitrary and capricious" conduct on the part of the Park Service. In Count Six, plaintiff alleges that "[t]he threats made by [the Park Service] to terminate [plaintiff's] 1986 Contract are arbitrary, capricious, illegal and unjustified so long as [plaintiff] is pursuing its rights of review and appeal." But such "threats" do not constitute reviewable final agency action under the APA, nor are they alleged to violate any statutes or regulations. Further, in light of the Fourth Circuit's ruling that it had the authority to increase the franchise fee to 12%, the Park Service had every right to demand appropriate payment under the Contract.

Plaintiff asserts in Count Twelve that the Park Service "should" waive interest, penalties, and costs when requests for reconsideration or review are pending, or "when it is against equity and good conscience to impose such burdens and not in the interests of the United States." This

count also fails to allege that the Park Service violated any specific statutory requirement when it refused to waive such costs.

For the foregoing reasons, Counts Six and Twelve are dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. See *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (“[I]f as a matter of law ‘it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,’ a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one”).

B.

Counts Seven, Eight, and Ten allege that the Park Service breached the Contract by: (1) thwarting plaintiff’s alleged contractual right to earn a profit (Count Seven); (2) threatening to terminate the Contract (Count Eight); and (3) refusing to reconsider the amount of the franchise fee for the third five-year period of the Contract (Count Ten).

Count Seven raises the claim that the Park Service’s “decision after reconsideration and after review of [plaintiff’s] new evidence to increase the franchise fee to 12% of gross receipts” was a breach of the Contract.⁷ This count is barred by the doctrines of issue and claim preclusion: The Fourth Circuit has already decided that the Park Service was contractually authorized to increase the franchise fee in 1993. *Fort Sumter Tours II*, 66 F.3d 1324, 1332-33

⁷ Count Seven alleges that the Park Service decided to “increase” the franchise fee in 1996. But elsewhere in its own complaint, plaintiff alleges that the Park Service at most denied its request for a reduction of the fee — quite a different thing than actually “increasing” it. See Counts One through Five, which refer to the Park Service’s “arbitrary and capricious denial of reduction upon reconsideration.”

(4th Cir. 1995). Under these doctrines, "a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been finally decided." *Bailey v. Dildario*, 925 F. Supp. 801, 810 (D.D.C. 1995) (Greene, J.).

In 1993, plaintiff had the contractual right to challenge the calculation of the franchise fee and submit the matter to an arbitrator. Plaintiff made a strategic decision: It chose to give up that right and instead sue defendants in the South Carolina district court. As a consequence of that decision, the district court refused to consider plaintiff's alternative analyses, but confined its decision to the administrative record. After noting its concern that litigants must have "a full and fair opportunity to present their arguments prior to the final agency action," the district court concluded that plaintiff "had sufficient notice and opportunity to rebut the financial analysis employed by [the Park Service] before the increased franchise fee became a final agency action." *Fort Sumter Tours*, at 7. See also *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254-55 (D.C. Cir. 1992) ("Preclusion cannot be avoided simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first.") (quoting Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction* § 4426 at 141 (1981)).

---Plaintiff argues that the first judgment does not have preclusive effect here because plaintiff "did not have an adequate opportunity to litigate the facts that form the basis of the reconsideration request." Pl.'s Opp. to Mot. for Summ. J. at 15. It bases this assertion on the South Carolina District Court's denial of its request to obtain certain documents from the Park Service in discovery. But plaintiff had an opportunity to litigate these issues; the district court heard its motion to compel and ruled on it. Even if the South Carolina district court was wrong

to deny plaintiff's discovery requests — as plaintiff urges — this Court may not revisit that decision here. Count Seven is thus barred by the doctrines of issue and claim preclusion.⁴

Plaintiff's next contractual claim, raised in Count Eight, charges that the Park Service breached the Contract by threatening to terminate it in 1996. Plaintiff does not specify what provision of the Contract was breached by the Park Service's threatened termination; it states only that the Park Service violated its duty (of unspecified source) "to bargain, interpret and perform the [C]ontract in good faith." Complaint ¶ 112-13. Unless that duty can be found somewhere in the Contract, violation of that duty cannot serve as the basis for its breach. See Washington Bancorporation v. Said, 812 F. Supp. 1256, 1272-73 (D.D.C. 1993) (Lamberth, J.) (holding that when plaintiff states that defendant breached the contract, but "nowhere cites to any aspect of the contract which he breached," there is no cause of action stated, even taking the complaint in its most favorable light, and the breach of contract claims must be dismissed, with prejudice, under Rule 12(b)(6)).

Plaintiff's final claim for breach of contract, raised in Count Ten, alleges that the Park Service breached the Contract when it "refus[ed] to reconsider" the franchise fee for the 1996 Period of the Contract. As explained above, Section 9(e) of the Contract governs requests for reconsideration, and plaintiff failed to satisfy its provisions. Tellingly, Count Ten makes no reference to Section 9(e), but cites instead to the Park Service's alleged duty to "bargain, interpret

⁴ Plaintiff suggests that because issue and claim preclusion are affirmative defenses, the Court should not consider them when deciding defendants' 12(b)(6) motion, which is intended to test the sufficiency of the complaint. However, because the Court acts as an appellate court when reviewing agency determinations, because the "entire case on review is a question of law and only a question of law," and "because a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993).

and perform the [C]ontract in good faith." Plaintiff, again, has failed to state a claim for breach of contract.

For the foregoing reasons, Counts Seven, Eight, and Ten of the Complaint are dismissed for failure to state a claim upon which relief may be granted.

C.

In Count Eleven, plaintiff charges defendants with depriving it of its property without payment of just compensation in violation of the Fifth Amendment. Plaintiff did not raise this claim in connection with the Fourth Circuit litigation, but it could have. Accordingly, this claim is barred by the doctrines of claim and issue preclusion, *see Bailey*, 925 F. Supp. at 810, and is therefore dismissed for failure to state a claim upon which relief can be granted.

An accompanying Order implements the decisions announced herein.

Date: *August 23, 1998* *Lucius F. Oberdorfer*
UNITED STATES DISTRICT JUDGE

**National Park Service Mistakes in Calculating a 12% Franchise Fee
for Fort Sumter Tours, Inc.
January 7, 1999**

This is a brief highlight of mistakes made by the National Park Service (NPS) in increasing Fort Sumter Tours Inc.'s (FST) concession franchise fee from 4.25% to 12%. All of these errors are documented and discussed in detail in two documents entitled "Critique of the National Park Service Franchise Fee Analysis Regarding Fort Sumter Tours, Inc., a National Park Service Concessioner", and "An Analysis of the Appropriate Franchise Fee For Fort Sumter Tours, Inc." previously delivered to NPS.

I. Background

Statutory law provides that the amount of franchise fees shall be determined by considering the "probable value" to the concessioner of the particular contract privileges, which is defined as the opportunity for net profits in relation to gross receipts and capital invested.

FST is a small NPS concessioner with gross concession revenue slightly over \$2 million per year. Pursuant to a concessions contract it provides boat transportation to Fort Sumter National Monument in Charleston Harbor, South Carolina. FST also engages in non-concession businesses such as dinner cruises, harbor tours and charters. In 1992, five years into its 15 year concessions contract, NPS unilaterally increased FST's franchise fee from 4.25% to 12%, roughly the maximum permitted under its guidelines. In calculating the franchise fee NPS is suppose to follow procedures set forth in NPS-48, an agency guideline.

The stated goal of the increase was to limit the profitability of FST's to approximately the median for businesses classified under SIC code 4489 in the *Dunn & Bradstreet Industry Norms* (D&B). To justify the increase NPS generated a flawed Franchise Fee Analysis (FFA) that:

- A. In calculating profitability generated by the concession contract privileges, added net income from other sources unrelated to the concessions contract and even assumed that a large portion of such other income was earned without expenses. Naturally this greatly overstated profitability earned from the concession privileges.
- B. Made several unfounded adjustments to FST's financial statements;
- C. Neglected to make adjustments required by NPS-48 that would benefit FST;
- D. Used hypothetical rather than actual financial statements; and,
- D. Used statistically invalid information and procedures.

Without exception each of these actions had the effect of making FST's concession appear more profitable than it actually is.

II. NPS's Two Step Method of Calculating the Franchise Fee

In setting the 12 % franchise fee NPS performed a two step process. Step 1 was a threshold analysis where NPS made adjustments to FST's financial statements, compared the concession's profitability to the D&B data,

and wrongfully concluded a fee increase was authorized under its NPS-48 guideline.¹ In Step 2 NPS constructed a hypothetical proforma analysis to arrive at the actual fee increase.

III. Mistakes in Step 1 Profitability Calculations

In answering the threshold question of whether a fee increase was authorized, NPS made two serious errors in the way it calculated profitability of the concession. If only these two errors had not occurred, the entire process would have terminated, and no fee increase would have even been authorized pursuant to NPS guideline NPS-48.

A. NPS included \$195,000 of other non-concession net income in concluding the concession was too profitable. The non-concession net income included dividend and interest income, and net income from FST's dinner cruise, harbor tour and charter businesses. This grossly overstated the profitability of the concession by taking the irrational position that both concession and non-concession net income was derived from concession gross receipts, and is a violation of Chapter 24, Sections A and D of NPS-48.

- NPS should have calculated Return on Gross Receipts for the Concession like this:

$$ROG = \text{Net Income (concession only)} \div \text{Gross Receipts (concession only)}$$

- But it actually calculated Return on Gross Receipts for the Concession like this:

$$ROG = \text{Net Income (concession} + \text{non-concession)} \div \text{Gross Receipts (concession only)}$$

By combining net income from concession and non-concession sources, NPS grossly overstated profitability from the concession contract privileges.

B. For 2 of the 5 years analyzed, NPS did not allow FST any expense for income tax liability generated from its business operations. Obviously this greatly inflated profitability.

IV. Mistakes in Step 1 Adjustments to FST's Financial Statements

In addition to the two serious mistakes in the way it calculated profitability of the concession - while still addressing the Step 1 threshold question of whether a fee increase was authorized - NPS made serious mistakes in the adjustments it made to FST's financial statements. These adjustments increased FST's apparent net income by over \$230,000, decreased its assets by over \$400,000 and decreased its equity by over \$450,000 - thus making Return on Assets (ROA), Return on Equity (ROE) and Return on Gross Receipts (ROG) appear higher than actual.

A. Reconstituted a vessel lease, which was approved by NPS when entered into, as a purchase. NPS assumed the vessel cost \$1 million and carried \$500,000 of debt, though it knew the actual debt to be \$1.3 million and the cost to be approximately \$1.4 million. This adjustment increased FST's apparent net income by reducing debt service. But NPS failed to make required balance sheet increases to FST's assets and equity to account for the assumed purchase, which would have worked to FST's benefit by reducing ROA and ROE.

¹The measures used for profitability were Return on Assets (ROA = Net Income ÷ Assets), Return on Equity (ROE = Net Income ÷ Equity) and Return on Gross receipts (ROG = Net Income ÷ Gross Receipts).

B. Deducted \$350,000 of FST's equity with no explanation or authority. By reducing equity this adjustment increased FST's ROE.

C. Deducted \$160,000 of officer salaries on the basis of a statistically invalid sample of only 10 unidentified companies. This adjustment was made even though FST's officer salaries were actually within the range considered acceptable by NPS-48. It increased apparent profitability by inflating net income.

D. Failed to make required adjustments for FST's fully depreciated assets and low interest expense. These adjustments, required by Exhibit 3 of NPS-48, would have benefited FST by increasing assets and decreasing net income, thereby reducing FST's ROA.

V. NPS Used a Hypothetical Balance Sheet in the Step 2 Proforma Analysis

Having made serious mistakes in the Step 1 threshold question of whether a fee increase would be authorized, NPS proceeded to Step 2 where it made further mistakes in setting the actual fee increase. In constructing a hypothetical proforma and concluding FST could support a 12% fee, NPS used a fictitious balance sheet that adjusted away over \$1.6 million of assets, \$600,000 of equity and \$540,000 of debt. The effect was to significantly increase FST's apparent profitability, and erroneously conclude FST could support a 12% franchise fee.

VI. Statistical Invalidity of NPS's Use of Industry Data

Both in Step 1 and Step 2, NPS used data from D&B and a Robert Morris Associates (RMA) publication to set profitability targets and reduce officer salaries. Problems with the NPS's use of the data include:

- The use of non-random samples;
- Small sample sizes;
- The use of data that is not subject to statistical validity testing;
- Wide fluctuations in the data used;
- Disregard of publishers' warnings that the data used was statistically unreliable³;
- Wide variations in the business types classified under the SIC code used; and,
- Lack of standardized accounting methods in compiling the data.

Ph.D. Professors of Statistics at the College of Charleston and Virginia Commonwealth University concluded NPS's methods, "violate fundamental principles of statistics, and constitute a misuse of the data." Also, "The NPS's methodology . . . is statistically invalid, and no confidence whatsoever may reasonably be placed in its conclusions".

³Robert Morris Associates warned its information, "is not selected by any random or statistically reliable method". D&B warned it, "does not, and could not...guarantee or warrant the correctness, completeness or currentness of the information".

VII. Conclusion

A. As demonstrated above, ~~if NPS had not imposed the fiction that both concession and non-concession net income was derived from concession operations, it would have concluded in Step 1 of the Franchise Fee Analysis that no fee increase was authorized.~~

B. ~~Correcting just two of NPS's most blatant errors in its Step 2 proforma analysis demonstrates the current 4.25% franchise fee is appropriate according to the it's own methodology.~~ If the NPS had (1) used FST's actual balance sheet as the proforma starting point rather than a fictitious one, and (2) properly accounted for the boot lease it reconstituted as a purchase, its own methodology would have concluded the existing 4.25% franchise fee is appropriate.

RETURN MEASURES FOR FORT SUMTER TOURS, 1988 - 1990

RETURN MEASURE	1st Quartile	2nd Quartile Threshold	Median	3rd Quartile Threshold	4th Quartile
D&B Industry Return on Gross Receipts (ROG)		0.5%	3.2%	6.7%	
Actual ROG (Concession Only) @ 4.25%	-3.2%				
Adjusted ROG (Concession Only) @ 4.25%			7.8%		
NPS ROG (Adjusted + Non-concession Income) @ 4.25%					18.3%
D&B Industry Return on Equity (ROE)		-13.3%	8.7%	38.6%	
Actual ROE (Concession Only) @ 4.25%			-4.6%		
Adjusted ROE (Concession Only) @ 4.25%			17.6%		41.5%
NPS ROE (Adjusted + Non-concession Income) @ 4.25%					
D&B Industry Return on Assets (ROA)		3.5%	4.7%	11.6%	
Actual ROA (Concession Only) @ 4.25%	-3.7%				
Adjusted ROA (Concession Only) @ 4.25%			8.6%		20.5%
NPS ROA (Adjusted + Non-concession Income) @ 4.25%					

Notes:

1. Actual return measures are calculated using actual financial statement figures for FST's concession operation.
2. Adjusted return measures are calculated using financial statement figures, as adjusted by NPS. For example, NPS adjusted net income up by \$232,996; and adjusted equity down by \$347,700.
3. NPS return measures are calculated by using financial statement figures, as adjusted by NPS, plus including non-concession gross profit. For example, NPS ROG was calculated as follows: $ROG = (\text{Concession Net Income} + \text{Non-concession Gross Profit}) / \text{Concession-only Gross Receipts}$.

NPS FRANCHISE FEE ANALYSIS

2-27-92

&

SOUTHEAST REGIONAL NPS

CRITIQUE THEREOF

FRANCHISE FEE ANALYSIS

**FORT SUMTER TOURS, INC
FORT SUMTER NATIONAL MONUMENT**

**NATIONAL PARK SERVICE
CONCESSIONS DIVISION
FINANCE BRANCH**

FEBRUARY 1992

Prepared Robert L. Hale 2/27/92
Financial Analyst



Franchise Fee Analysis

Fort Sumter Tours, Inc.

Fort Sumter Tours, Inc. provides ferry service to Ft. Sumter from downtown Charleston Harbor and from Patriots Point Naval Museum in Mt. Pleasant. The service is authorized pursuant to a 15 year contract which also provides for the sale of limited refreshments and souvenirs. The current franchise fee is 4.25 percent of gross receipts and is required to be reconsidered between June 13, 1991 and July 12, 1991. The concessioner was notified by letter of June 20, 1991, of the intent of the NPS to reconsider the franchise fee.

In addition to concession activities, Fort Sumter Tours, Inc., is the general partner in a limited partnership which leases the vessel "Spirit of Charleston" to the concession for use in providing ferry service to the Monument. This boat is also used by Fort Sumter Tours, Inc., for charter and dinner cruise operations in the Charleston Harbor ("outside" operations) which are not part of the concession activities. This dual use of the vessel requires prorations of various operating, administrative, and fixed expenses in order to isolate the financial results of the concession.

The first three pages of the attached worksheets present a summary of the activity and results reported by the concessioner for the years 1986 through 1990, the first 5 years of the contract. The balance sheet summary on page 1 reflects the entire corporation and, thus, includes the assets and related equity and liabilities for the "outside" activities. The income statement on page 2 has been modified to reflect, as far as possible, the concession results. As such, the results from the "outside" operations are included as Other Income in the years 1987 through 1990. Unfortunately, the concessioner only prorated direct expenses in 1986 and so the summary for that year includes the administrative and fixed expense portions of the "outside" operations.

It should be noted that the concession portion has reported a loss over the 5 years studied while the "outside" operations have been very profitable. Upon review, the concessioner's prorations do not appear to adequately reflect the proper breakdown of expenses between concession and non-concession operations. However, for the purposes of this preliminary analysis and subject to further discussions with the concessioner, we have decided to accept the prorations as presented.

While adjustments were not made to prorations per se, other adjustments were made to more properly reflect the probable value of the authorization. The large officer salaries reported by the Fort Sumter Tours, Inc., which have been prorated 85 percent to the concession portion of the operation, has resulted in a significant adverse impact on profitability. For instance, in recent years, the president has taken a salary of roughly \$200,000 even though it is understood his day-to-day activity is limited. As a result, this analysis limits officer salaries to 10 percent of gross receipts, approximately the median of the water transportation industry reported by Robert Morris for 1989, in its 1990 Annual

Statement Studies. The adjustments are presented on page 5 of the attachments.

Another series of adjustments have been made concerning the lease of the newest boat from the limited partnership, brought into service in 1986. The lease is not an arms length transaction and has resulted in lower earnings than would have occurred under an outright purchase of the boat. For the purposes of this analysis, the lease payments have been eliminated in favor of a capital expenditure of \$1 million in 1986 with a straight line depreciation over 18 years, the estimated life of the boat. Debt of \$600,000 is assumed to have been undertaken to finance the purchase.

As a result of these adjustments, the profitability of the ferry service is such that a franchise fee of 12 percent, roughly the maximum under our guidelines, would still allow a profit in excess of the median returns for the water transportation industry (SIC 4489) reported by Dun & Bradstreet in its Industry Norms for the years 1985 through 1989. As such, the fee of 12 percent represents the probable value of the authorization. Page 6 shows the results of various franchise fees on the adjusted returns of the concessioner.

In order to take a closer look at this conclusion, a separate presentation has been prepared which presents the results of each of the first 5 years of operation, as adjusted, and a projection of the remaining 10 years under the 12 percent fee. Although the analysis found it necessary for the concessioner to borrow only \$500,000 in 1986 for the boat, no other adjustment to the equity was attempted. As such, the equity represents essentially all of the investment in the business at the end of the contract as the debt would have been paid off in 10 years. The profits and dividends for both the remaining 10 years and over the entire contract support the 12 percent fee. The internal rate of return (IRR) reflecting the dividends paid as compared to the original equity investment calculates to 19.5 percent.

Please note that the 1986 income statement has been reworked to take the same prorations used by the concessioner in later years. The balance sheet reflects the fact that the older boats are essentially depreciated and eliminates much of the cash carried on the books by allowing distributions to the owners. As discussed above, only officer salaries of 10 percent of gross were allowed. Although a strict analysis might have required a proration of the assets between the concession and "outside" operations, that is not reflected here. This has the effect of understating the return on assets and equity.

As an alternative to a 12 percent fee, a combination of higher fee and lower visitor rates should be investigated. This would serve the visiting public better as the comparability analysis of a transportation service is always somewhat uncertain. In any event, discussions with the concessioner need to occur concerning their accounting practices and the assumptions in this analysis.

Fort Sutter Tours, Inc.

5 YEAR FINANCIAL SUMMARY: 1986 - 1990

FORM 001 Page 1

CONTRACT NUMBER CC-5076-6-0002
 CONTRACT TERM 12-Jun-86 TO 31-Mar-2000
 FRANCHISE FEE 930 % Percentage Fee
 Building Use Fee

RECONSIDERATION DATE:
 Sixty days after June 12, 1991

BALANCE SHEET	1990	1989	1988	1987	1986	AVERAGE						
Cash & Securities	1,016,686	57.43	967,217	44.85	517,033	43.25	486,791	47.82	436,157	51.43	607,177	49.31
Inventory	28,817	1.05	31,084	2.35	0	0.00	0	0.00	0	0.00	12,062	1.02
Other Current Assets	23,238	3.08	76,009	4.18	115,688	9.78	90,088	8.92	89,643	10.15	85,329	7.02
CURRENT ASSETS	1,068,741	62.15	1,074,310	53.25	632,721	52.98	376,879	56.75	345,800	61.58	704,568	57.35
Deprec Fixed Assets	1,020,948	57.86	811,852	42.75	814,161	68.05	632,343	62.88	528,864	59.65	761,477	62.15
Less Accum Depr	(372,002)	-32.43	(323,648)	-33.35	(310,039)	-42.68	(438,900)	-42.65	(390,753)	-44.05	(491,870)	-40.15
Net Fixed Assets	648,946	25.43	488,204	25.25	504,122	25.48	193,443	20.23	138,111	15.60	270,406	22.15
Construction	110,077	4.25	68,610	3.65	44,383	3.75	16,699	1.72	42,369	4.85	56,420	4.65
Land	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00
FIXED ASSETS	559,040	31.65	556,814	29.65	548,505	29.13	210,141	21.95	180,479	20.35	326,826	26.75
OTHER ASSETS	110,621	6.35	269,960	21.25	215,888	18.05	215,888	21.45	161,050	18.25	194,481	15.95
TOTAL ASSETS	1,764,372	100.00	1,872,094	100.00	1,197,124	100.00	1,006,866	100.00	867,329	100.00	1,226,876	100.00
Current Liabilities	230,634	13.15	111,879	6.00	188,085	15.75	162,862	16.15	118,608	13.65	162,252	13.25
LT Liabilities	343,168	21.72	0	0.00	0	0.00	48,018	4.80	37,434	4.32	92,124	7.55
OTAL LIABILITIES	613,802	34.72	111,879	6.00	188,085	15.75	202,080	20.15	156,042	17.97	254,376	20.75
Capital	32,000	1.80	32,000	2.25	32,000	2.75	32,000	3.25	32,000	3.65	32,000	2.65
Retained Earnings	1,120,570	63.43	1,120,834	60.75	977,039	81.65	772,786	76.85	699,278	78.85	939,700	76.65
EQUITY	1,152,570	65.23	1,152,834	61.25	1,009,039	84.35	804,786	79.95	731,278	84.45	971,700	79.35
LIAB & EQUITY	1,764,372	100.00	1,872,094	100.00	1,197,124	100.00	1,006,866	100.00	867,329	100.00	1,226,876	100.00
Additions	305,654		48,682		199,832		125,757		109,160		157,697	
Dividends/Share Off	0		2,867		15,000		10,000		4,500		5,313	
Net Cash by Oper Act	0		132,356		no		no		no		no	
Net Inc in Cash	0		48,954		no		no		no		no	
Inc in M&A Capital	no		no		0		(19,334)		(43,419)			
Average Equity	1,156,697		1,084,902		906,914		768,853		692,636		921,840	
Average Assets	1,519,333		1,254,989		1,101,996		967,894		826,602		1,125,627	

VTE BUNKER TOWNS, INC.		5 YEAR FINANCIAL SUMMARY: 1986 - 1990					FOBL001	Page 2
INCOME STATEMENT	1990	1989	1988	1987	1986	AVERAGE		
GROSS RECEIPTS	1,335,036 100.0%	1,387,351 100.0%	1,545,112 100.0%	1,379,956 100.0%	1,436,376 100.0%	1,416,766 100.0%		
RETURNS	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%		
NET SALES	1,335,036 100.0%	1,387,351 100.0%	1,545,112 100.0%	1,379,956 100.0%	1,436,376 100.0%	1,416,766 100.0%		
COST OF SALES	103,571 7.8%	123,181 8.9%	108,597 7.0%	116,635 8.5%	109,746 7.6%	112,346 7.9%		
GROSS PROFIT	1,231,465 92.2%	1,264,170 91.1%	1,436,516 93.0%	1,263,321 91.5%	1,326,630 92.4%	1,304,420 92.1%		
Direct Salaries	290,898 21.8%	245,852 17.7%	248,876 16.1%	239,044 17.3%	281,329 19.6%	245,200 17.3%		
Operating Supplies	34,301 2.7%	36,508 2.6%	20,165 1.3%	13,951 1.0%	7,084 0.5%	22,402 1.6%		
Repair & Maint	69,858 5.2%	48,743 3.5%	45,048 2.9%	77,883 5.6%	39,981 2.8%	60,257 4.3%		
Utilities	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%		
Vehicle Expense	39,273 2.9%	27,731 2.0%	35,279 2.3%	37,857 2.7%	71,709 5.0%	42,310 3.0%		
Commissions	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%		
Other Direct	189,547 14.2%	219,350 15.8%	208,751 13.5%	208,148 14.3%	126,815 8.8%	188,864 13.3%		
TOTAL DIRECT	629,677 48.9%	546,184 40.8%	548,119 36.8%	567,835 41.3%	446,918 32.5%	534,953 39.5%		
Officers' Salaries	350,643 26.3%	384,482 27.7%	338,996 21.9%	225,748 16.4%	221,316 15.4%	306,419 21.9%		
Other Salaries	39,448 2.9%	99,564 7.2%	101,709 6.6%	113,541 8.2%	152,542 10.6%	110,005 7.8%		
Advertising	30,198 2.3%	39,799 2.8%	34,564 2.3%	51,286 3.7%	99,256 6.9%	54,231 3.9%		
Auditing Fee	4,936 0.4%	3,930 0.4%	3,085 0.4%	13,818 1.0%	26,848 1.9%	11,507 0.8%		
Profit Sharing	12,535 0.9%	12,080 0.9%	20,820 1.3%	26,800 1.9%	25,000 1.7%	18,760 1.3%		
Travel	11,041 0.8%	10,848 0.8%	13,510 0.9%	5,540 0.4%	7,943 0.6%	9,780 0.7%		
Other Admin	80,354 6.0%	68,795 5.0%	78,214 5.1%	90,459 6.6%	325,346 22.7%	128,674 9.1%		
TOTAL ADMIN	579,044 43.4%	619,388 44.6%	614,956 39.8%	524,304 38.0%	854,366 59.5%	637,376 45.0%		
Insurance	13,964 1.0%	9,795 0.7%	11,898 0.8%	16,818 1.2%	18,315 1.3%	14,160 1.0%		
Depreciation	43,272 3.2%	44,044 3.2%	56,712 3.7%	36,211 2.6%	46,554 3.2%	44,539 3.1%		
Interest	2,379 0.2%	0 0.0%	1,459 0.1%	1,037 0.2%	2,329 0.2%	1,859 0.1%		
Not Filed	51,431 3.9%	56,433 4.1%	34,823 2.3%	20,254 1.5%	3,946 0.3%	33,269 2.4%		
TOTAL FIXED	111,048 8.3%	110,270 7.9%	104,872 6.9%	78,292 5.7%	69,133 4.8%	92,927 6.6%		
Building Use Fee	930 0.1%	930 0.1%	930 0.1%	930 0.1%	769 0.1%	896 0.1%		
Percentage Fee	54,739 4.1%	58,962 4.3%	48,667 3.2%	54,648 4.0%	51,856 3.6%	54,368 3.9%		
Other Fee	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%		
TOTAL FRAM FEE	57,669 4.3%	59,892 4.3%	49,597 3.3%	59,578 4.3%	52,575 3.7%	59,262 4.2%		
Other Income	25,951 1.9%	23,409 1.7%	12,478 0.8%	1,831 0.1%	48,324 3.4%	22,449 1.6%		
Non-Concession	157,226 11.8%	207,395 14.9%	233,343 15.2%	97,298 7.0%	166,400 11.7%	173,154 12.2%		
OTHER INCOME	183,177 13.7%	230,804 16.7%	245,821 16.1%	99,129 7.2%	214,724 15.1%	195,603 13.9%		
INC DEF INCOME TAXES	41,164 3.1%	148,576 10.7%	329,993 21.4%	132,331 9.6%	108,460 7.6%	150,506 10.6%		
INCOME TAXES	0 0.0%	0 0.0%	113,008 7.3%	50,909 3.6%	18,481 1.3%	34,330 2.4%		
NET INCOME	41,164 3.1%	148,576 10.7%	216,995 14.0%	86,331 6.2%	81,889 5.7%	114,173 8.1%		
RETURN ON AVG EQUITY	3.6%	12.7%	23.9%	19.7%	11.8%	12.4%		

Fort Sumter Tours, Inc.		1986 - 1990						FOBU001		Page 3	
OPERATING STATISTICS											
	1990		1989		1988		1987		1986		
TRANSPORTATION	1,138,833	85.3%	1,165,733	86.0%	1,333,419	86.3%	1,171,676	86.9%	1,250,135	83.6%	
Direct Labor	270,494	23.8%	224,582	19.3%	228,147	17.1%	218,991	18.7%	182,997	14.6%	
Oper Suppl	15,911	1.4%	26,508	2.1%	30,165	2.3%	13,951	1.2%	7,084	0.6%	
Maintenance	40,477	3.6%	48,743	4.2%	45,048	3.4%	77,633	6.6%	99,981	8.0%	
Fuel	39,273	3.4%	27,731	2.4%	35,279	2.6%	37,037	3.2%	71,709	5.7%	
FOOD SERVICE	84,193	6.3%	79,539	5.7%	81,938	5.3%	83,869	6.1%	75,447	5.2%	
COS	40,113	47.6%	41,658	52.4%	34,914	42.8%	43,243	51.6%	44,243	58.6%	
SOUVENIRS	112,448	8.4%	142,077	10.2%	130,139	8.4%	124,609	9.0%	110,135	8.7%	
COS	63,458	56.4%	81,523	57.4%	73,683	56.6%	73,392	59.0%	65,681	59.6%	
Direct Labor	20,404	18.1%	21,582	15.2%	20,729	15.9%	20,433	16.4%	18,332	16.6%	

Fort Sumner Tours, Inc.

5 Year Average

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WORKSHEET NOS. 1 & 2: AVERAGE GROSS RECEIPTS & MINIMUM FRANCHISE

RECEIPTS BY SERVICE CATEGORY (SCH 8)
(after deducting authorized deductions from Sch 8)

	1990	1989	1988	1987	1986	AV	MIN	AVG X MIN
Hotel/Motel	0	0	0	0	0	0	0.0%	0
Cabins/Cottages	0	0	0	0	0	0	0.0%	0
Tent	0	0	0	0	0	0	0.0%	0
Restaurant	0	0	0	0	0	0	0.0%	0
Cafeteria	0	0	0	0	0	0	0.0%	0
Snack Bar/Fast Food	84193	79539	81553	83869	75647	80961	0.9%	729
Bar	0	0	0	0	0	0	0.0%	0
Gifts, Curios	112448	142077	130139	124489	110135	123842	1.0%	1,256
Grocery	0	0	0	0	0	0	1.0%	0
Package Liquor	0	0	0	0	0	0	1.0%	0
Photographic	0	0	0	0	0	0	1.0%	0
Other Merchandise	0	0	0	0	0	0	1.0%	0
Auto Fuel and Oil	0	0	0	0	0	0	0.4%	0
Auto Parts, Service	0	0	0	0	0	0	1.4%	0
Slips and Mooring	0	0	0	0	0	0	0.7%	0
Houseboat Rental	0	0	0	0	0	0	3.8%	0
Boat and Motor Rental	0	0	0	0	0	0	3.8%	0
Marine Fuel and Oil	0	0	0	0	0	0	0.4%	0
Boat and Motor Sales	0	0	0	0	0	0	0.9%	0
Boat Repair	0	0	0	0	0	0	1.4%	0
Dry Storage	0	0	0	0	0	0	0.7%	0
Other Marine	0	0	0	0	0	0	0.7%	0
Boat Transportation	1154395	1165733	1333419	1171678	1250774	1212000	0.0%	0
Vehicle Transportation	0	0	0	0	0	0	1.4%	0
Saddle Horse	0	0	0	0	0	0	1.9%	0
Fleet Trips	0	0	0	0	0	0	1.9%	0
Ski Lifts and Tows	0	0	0	0	0	0	2.7%	0
Trailer Village	0	0	0	0	0	0	2.3%	0
Vending Machine	0	0	0	0	0	0	1.3%	0
Bathhouse	0	0	0	0	0	0	2.0%	0
Rentals	0	0	0	0	0	0	7.9%	0
Guide and Instruction	0	0	0	0	0	0	1.9%	0
Other	0	0	0	0	-80311	-16102	2.0%	(322)
SUBTOTALS						1400700		1,648
AUTHORIZED DEDUCTIONS FROM SCH 8								
Handicraft	0	0	0	0	0	0		
Employee's Services	0	0	0	0	0	0		
Gasoline Taxes	0	0	0	0	0	0		
Other	0	0	0	0	974349	195250		
TOTAL	1335036	1367351	1543113	1379956	2332294	1999950		

MINIMUM "AVG X MIN" subtotal divided by
"AVERAGE" subtotal, or 0.15

Fort Sumter Tours, Inc.

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FRANCHISE FEE WORKSHEET 3: REPORTED STATISTICS AND ADJUSTMENTS

IIia ADJUSTMENTS TO INCOME	AMOUNT	BASIS
Officer Salaries	162,742	Limit officer salaries to 10% of gross receipts
Vessel Rent	175,812	Assume purchase rather than rental
Depreciation	(35,356)	Assume \$1 million cost of vessel and a 18 year useful life
Interest	(48,000)	Average interest for an initial 10 year \$600,000 loan at 10%
	<u>232,999</u>	
IIib ADJUSTMENTS TO EQUITY	AMOUNT	BASIS
To approximate industry	(347,700)	Assume average equity of 30% of assets
	<u>(347,700)</u>	
IIic ADJUSTMENTS TO ASSETS	AMOUNT	BASIS
To eliminate non-concession and add new boat	17,924	Based on boats used and approx concession needs
	<u>17,924</u>	

WORKSHEET 4: FEE DETERMINATION

I. ADJUSTED INCOME

Avg % Franchise Fee	58,348	(from page 2)
Avg Income Before Taxes	150,504	(from page 2)
Avg Inc Bef Taxes & FF	208,872	
Total Income Adjustments	232,999	(from above)
Adjusted Income Bef Taxes	441,871	
Estimated Taxes	183,011	
Adjusted Income After Taxes	258,860	
New Returns (Before Franchise Fees):	on gross 18.3% where gross receipts are 1,416,766	
	on equity 41.3% where total equity is 624,000	
	on assets 20.8% where total assets are 1,244,000	

MINIMUM FEE (FROM PAGE 4): 0.1%

II. MAXIMUM FEE GUIDELINE: 15.6% or, 1/2 of 441,871 divided by 1,416,766

III. FEE DETERMINATION: BASED ON COMPARISON WITH INDUSTRY RETURNS (STATISTICAL QUANTILES)
(check mark indicates concessioner return in relation to industry)

Primary Services	Gross	-0.3	3.2	8.7	✓
Water transportation	Equity	-15.3	5.7	35.8	✓
SIC 4489	Assets	-2.9	4.7	11.6	✓
No Breakdown					
1980 - 1989					

Fort Sutter Tours, Inc.

FOBU001

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FINANCIAL SUMMARY - WITH NEW FRANCHISE FEES INSERTED - FOR COMPARISON WITH INDUSTRY STATISTICS

INCOME STATEMENT	AVERAGE w/4.25% FF (as reported)	AVERAGE w/5% FF (as adjusted)	AVERAGE w/5% FF (as adjusted)	AVERAGE w/10% FF (as adjusted)	AVERAGE w/11% FF (as adjusted)	AVERAGE w/12% FF (as adjusted)
GROSS RECEIPTS	1,416,766 100.0%	1,416,766 100.0%	1,416,766 100.0%	1,416,766 100.0%	1,416,766 100.0%	1,416,766 100.0%
RETURNS	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%
NET SALES	1,416,766 100.0%	1,416,766 100.0%	1,416,766 100.0%	1,416,766 100.0%	1,416,766 100.0%	1,416,766 100.0%
COST OF SALES	112,346 7.9%	112,346 7.9%	112,346 7.9%	112,346 7.9%	112,346 7.9%	112,346 7.9%
GROSS PROFIT	1,304,420 92.1%	1,304,420 92.1%	1,304,420 92.1%	1,304,420 92.1%	1,304,420 92.1%	1,304,420 92.1%
Direct Salaries	245,200 17.3%	245,200 17.3%	245,200 17.3%	245,200 17.3%	245,200 17.3%	245,200 17.3%
Operating Supplies	22,402 1.6%	22,402 1.6%	22,402 1.6%	22,402 1.6%	22,402 1.6%	22,402 1.6%
Repair & Maint	60,257 4.3%	60,257 4.3%	60,257 4.3%	60,257 4.3%	60,257 4.3%	60,257 4.3%
Utilities	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%
Vehicle Expense	42,210 3.0%	42,210 3.0%	42,210 3.0%	42,210 3.0%	42,210 3.0%	42,210 3.0%
Commissions	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%
Other Direct	188,886 13.3%	15,074 1.1%	15,074 1.1%	15,074 1.1%	15,074 1.1%	15,074 1.1%
TOTAL DIRECT	558,953 39.5%	385,143 27.2%	385,143 27.2%	385,143 27.2%	385,143 27.2%	385,143 27.2%
Officers' Salaries	304,419 21.5%	141,677 10.0%	141,677 10.0%	141,677 10.0%	141,677 10.0%	141,677 10.0%
Other Salaries	110,005 7.8%	110,005 7.8%	110,005 7.8%	110,005 7.8%	110,005 7.8%	110,005 7.8%
Advertising	54,231 3.8%	54,231 3.8%	54,231 3.8%	54,231 3.8%	54,231 3.8%	54,231 3.8%
Auditing Fee	11,507 0.8%	11,507 0.8%	11,507 0.8%	11,507 0.8%	11,507 0.8%	11,507 0.8%
Profit Sharing	18,760 1.3%	18,760 1.3%	18,760 1.3%	18,760 1.3%	18,760 1.3%	18,760 1.3%
Travel	9,780 0.7%	9,780 0.7%	9,780 0.7%	9,780 0.7%	9,780 0.7%	9,780 0.7%
Other Admin	128,674 9.1%	128,674 9.1%	128,674 9.1%	128,674 9.1%	128,674 9.1%	128,674 9.1%
TOTAL ADMIN	637,376 45.0%	474,633 33.5%	474,633 33.5%	474,633 33.5%	474,633 33.5%	474,633 33.5%
Insurance	14,160 1.0%	14,160 1.0%	14,160 1.0%	14,160 1.0%	14,160 1.0%	14,160 1.0%
Depreciation	44,359 3.1%	100,114 7.1%	100,114 7.1%	100,114 7.1%	100,114 7.1%	100,114 7.1%
Interest	1,839 0.1%	49,839 3.5%	49,839 3.5%	49,839 3.5%	49,839 3.5%	49,839 3.5%
Other Fixed	33,369 2.4%	33,369 2.4%	33,369 2.4%	33,369 2.4%	33,369 2.4%	33,369 2.4%
TOTAL FIXED	93,927 6.6%	197,483 13.9%	197,483 13.9%	197,483 13.9%	197,483 13.9%	197,483 13.9%
Paid Up Fee	894 0.1%	894 0.1%	894 0.1%	894 0.1%	894 0.1%	894 0.1%
Franchise Fee	58,348 4.1%	97,721 6.9%	109,936 7.8%	122,132 8.6%	134,367 9.5%	146,582 10.3%
Other Fee	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%
TOTAL FRAN FEE	59,242 4.2%	98,615 7.0%	110,830 7.8%	123,043 8.7%	135,261 9.5%	147,476 10.4%
OTHER INCOME	195,403 13.8%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%
INC DEF INCOME TAXES	150,504 10.6%	148,346 10.5%	136,331 9.6%	124,116 8.8%	111,901 7.9%	99,666 7.0%
INCOME TAXES	36,320 2.6%	48,081 3.4%	42,462 3.0%	34,843 2.5%	31,234 2.2%	25,424 1.8%
NET INCOME	114,173 8.1%	100,468 7.1%	93,869 6.6%	87,273 6.2%	80,677 5.7%	74,061 5.2%
RETURN ON EQUITY	11.7%	16.1%	15.0%	16.0%	12.9%	11.9%
RETURN ON ASSETS	9.3%	8.1%	7.5%	7.0%	6.3%	6.0%

Primary Services	Gross	-0.5	3.2	✓	8.7
Water Transportation	Equity	-13.3	5.7	✓	33.0
810 6489	Assets	-2.9	4.7	✓	11.6
No Breakdown					
1985 - 1989					

WITH A FEE OF 12 %

Fort Sumter Tours, Inc.

Proforma Analysis

Including:

**Summary sheet of expected results of entire 15 year contract
Proforma assumptions for the years 1991 through 2000
Proforma income & balance sheets with pertinent averages
Assumed depreciation schedule**

total

Fort Minor Tours, Inc.

With a franchise fee of 12.0%

CUMULATIVE OWNER CONTRACT	ACTUAL VALUE	PRESENT VALUE	15 YEAR CUMULATIVE RETURN
Net Income as a % of Equity	1,723	1,022	ROE 7.3%
as a % of Assets	15.0%	17.5%	ROE 15.0%
Cash Flow	10.9%	12.0%	ROA 12.1%
Dividends as a % of Equity	MA	MA	
EBIT	1,654	850	
	14.5%	14.5%	
		17.3%	
			REMAINING DEBT 0

Yearly Summary	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Net Income	258	140	243	188	130	55	61	67	69	73	76	82	86	91	95
Dividends	96	70	245	174	121	41	47	53	61	66	126	128	130	133	149
Borrowings	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Equity	714	783	763	780	789	803	818	832	840	845	797	751	709	646	612
Assets	1,275	1,297	1,233	1,201	1,164	1,132	1,100	1,069	1,031	990	947	904	867	829	780

PROYECTOS	21-feb-92	21-feb-92
		ASSUMPTIONS:
GRAND RECEIPTS (NET)	1.00	
COST OF SALES	0.00	
GRAND PROFIT		
Direct Material	0.2	
Supplies & Material	0.05	
Back Invoicing	0.00	
Overhead	0.00	
TOTAL COSTS		
Office's Salaries	0.1	
Office's Expenses	0.05	
Advertising	0.05	
Freight Handling	0.01	
Other Admin	0.07	
TOTAL COSTS		
Insurance	0.01	
Depreciation	0.07	
Interest	0.1	
Taxes	0.04	
TOTAL COSTS		
Building New Proj	0.05	
Permitting	0.10	
TOTAL COSTS		
GRAND PROFIT	0.95	
TAX NEW INCOME TAXES	0.4	
INCOME TAXES		
NET INCOME		
GRAND ON END QUALITY		
GRAND ON END QUALITY		
Current Assets	100.00	
Long Term Assets	0.00	
Other Assets	0.00	
TOTAL ASSETS	100.00	
Current Liabilities	100.00	
Long Term Debt	0.00	
Equity	0.00	
LIAB & EQUITY	100.00	
Additions	0.00	
Deletions	0.00	
Principals Payments	0.00	
Additional Debt	0.00	
Cumulative Returns:		
Returns on Cash		
Returns on Debt		
Returns on Eq		
Returns on Inv		

PROFESSOR	21-Feb-92	Fort Baxter Four, Inc. 1992	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050	2051	2052	2053	2054	2055	2056	2057	2058	2059	2060	2061	2062	2063	2064	2065	2066	2067	2068	2069	2070	2071	2072	2073	2074	2075	2076	2077	2078	2079	2080	2081	2082	2083	2084	2085	2086	2087	2088	2089	2090	2091	2092	2093	2094	2095	2096	2097	2098	2099	2100	2101	2102	2103	2104	2105	2106	2107	2108	2109	2110	2111	2112	2113	2114	2115	2116	2117	2118	2119	2120	2121	2122	2123	2124	2125	2126	2127	2128	2129	2130	2131	2132	2133	2134	2135	2136	2137	2138	2139	2140	2141	2142	2143	2144	2145	2146	2147	2148	2149	2150	2151	2152	2153	2154	2155	2156	2157	2158	2159	2160	2161	2162	2163	2164	2165	2166	2167	2168	2169	2170	2171	2172	2173	2174	2175	2176	2177	2178	2179	2180	2181	2182	2183	2184	2185	2186	2187	2188	2189	2190	2191	2192	2193	2194	2195	2196	2197	2198	2199	2200	2201	2202	2203	2204	2205	2206	2207	2208	2209	2210	2211	2212	2213	2214	2215	2216	2217	2218	2219	2220	2221	2222	2223	2224	2225	2226	2227	2228	2229	2230	2231	2232	2233	2234	2235	2236	2237	2238	2239	2240	2241	2242	2243	2244	2245	2246	2247	2248	2249	2250	2251	2252	2253	2254	2255	2256	2257	2258	2259	2260	2261	2262	2263	2264	2265	2266	2267	2268	2269	2270	2271	2272	2273	2274	2275	2276	2277	2278	2279	2280	2281	2282	2283	2284	2285	2286	2287	2288	2289	2290	2291	2292	2293	2294	2295	2296	2297	2298	2299	2300	2301	2302	2303	2304	2305	2306	2307	2308	2309	2310	2311	2312	2313	2314	2315	2316	2317	2318	2319	2320	2321	2322	2323	2324	2325	2326	2327	2328	2329	2330	2331	2332	2333	2334	2335	2336	2337	2338	2339	2340	2341	2342	2343	2344	2345	2346	2347	2348	2349	2350	2351	2352	2353	2354	2355	2356	2357	2358	2359	2360	2361	2362	2363	2364	2365	2366	2367	2368	2369	2370	2371	2372	2373	2374	2375	2376	2377	2378	2379	2380	2381	2382	2383	2384	2385	2386	2387	2388	2389	2390	2391	2392	2393	2394	2395	2396	2397	2398	2399	2400	2401	2402	2403	2404	2405	2406	2407	2408	2409	2410	2411	2412	2413	2414	2415	2416	2417	2418	2419	2420	2421	2422	2423	2424	2425	2426	2427	2428	2429	2430	2431	2432	2433	2434	2435	2436	2437	2438	2439	2440	2441	2442	2443	2444	2445	2446	2447	2448	2449	2450	2451	2452	2453	2454	2455	2456	2457	2458	2459	2460	2461	2462	2463	2464	2465	2466	2467	2468	2469	2470	2471	2472	2473	2474	2475	2476	2477	2478	2479	2480	2481	2482	2483	2484	2485	2486	2487	2488	2489	2490	2491	2492	2493	2494	2495	2496	2497	2498	2499	2500	2501	2502	2503	2504	2505	2506	2507	2508	2509	2510	2511	2512	2513	2514	2515	2516	2517	2518	2519	2520	2521	2522	2523	2524	2525	2526	2527	2528	2529	2530	2531	2532	2533	2534	2535	2536	2537	2538	2539	2540	2541	2542	2543	2544	2545	2546	2547	2548	2549	2550	2551	2552	2553	2554	2555	2556	2557	2558	2559	2560	2561	2562	2563	2564	2565	2566	2567	2568	2569	2570	2571	2572	2573	2574	2575	2576	2577	2578	2579	2580	2581	2582	2583	2584	2585	2586	2587	2588	2589	2590	2591	2592	2593	2594	2595	2596	2597	2598	2599	2600	2601	2602	2603	2604	2605	2606	2607	2608	2609	2610	2611	2612	2613	2614	2615	2616	2617	2618	2619	2620	2621	2622	2623	2624	2625	2626	2627	2628	2629	2630	2631	2632	2633	2634	2635	2636	2637	2638	2639	2640	2641	2642	2643	2644	2645	2646	2647	2648	2649	2650	2651	2652	2653	2654	2655	2656	2657	2658	2659	2660	2661	2662	2663	2664	2665	2666	2667	2668	2669	2670	2671	2672	2673	2674	2675	2676	2677	2678	2679	2680	2681	2682	2683	2684	2685	2686	2687	2688	2689	2690	2691	2692	2693	2694	2695	2696	2697	2698	2699	2700	2701	2702	2703	2704	2705	2706	2707	2708	2709	2710	2711	2712	2713	2714	2715	2716	2717	2718	2719	2720	2721	2722	2723	2724	2725	2726	2727	2728	2729	2730	2731	2732	2733	2734	2735	2736	2737	2738	2739	2740	2741	2742	2743	2744	2745	2746	2747	2748	2749	2750	2751	2752	2753	2754	2755	2756	2757	2758	2759	2760	2761	2762	2763	2764	2765	2766	2767	2768	2769	2770	2771	2772	2773	2774	2775	2776	2777	2778	2779	2780	2781	2782	2783	2784	2785	2786	2787	2788	2789	2790	2791	2792	2793	2794	2795	2796	2797	2798	2799	2800	2801	2802	2803	2804	2805	2806	2807	2808	2809	2810	2811	2812	2813	2814	2815	2816	2817	2818	2819	2820	2821	2822	2823	2824	2825	2826	2827	2828	2829	2830	2831	2832	2833	2834	2835	2836	2837	2838	2839	2840	2841	2842	2843	2844	2845	2846	2847	2848	2849	2850	2851	2852	2853	2854	2855	2856	2857	2858	2859	2860	2861	2862	2863	2864	2865	2866	2867	2868	2869	2870	2871	2872	2873	2874	2875	2876	2877	2878	2879	2880	2881	2882	2883	2884	2885	2886	2887	2888	2889	2890	2891	2892	2893	2894	2895	2896	2897	2898	2899	2900	2901	2902	2903	2904	2905	2906	2907	2908	2909	2910	2911	2912	2913	2914	2915	2916	2917	2918	2919	2920	2921	2922	2923	2924	2925	2926	2927	2928	2929	2930	2931	2932	2933	2934	2935	2936	2937	2938	2939	2940	2941	2942	2943	2944	2945	2946	2947	2948	2949	2950	2951	2952	2953	2954	2955	2956	2957	2958	2959	2960	2961	2962	2963	2964	2965	2966	2967	2968	2969	2970	2971	2972	2973	2974	2975	2976	2977	2978	2979	2980	2981	2982	2983	2984	2985	2986	2987	2988	2989	2990	2991	2992	2993	2994	2995	2996	2997	2998	2999	3000	3001	3002	3003	3004	3005	3006	3007	3008	3009	3010	3011	3012	3013	3014	3015	3016	3017	3018	3019	3020	3021	3022	3023	3024	3025	3026	3027	3028	3029	3030	3031	3032	3033	3034	3035	3036	3037	3038	3039	3040	3041	3042	3043	3044	3045	3046	3047	3048	3049	3050	3051	3052	3053	3054	3055	3056	3057	3058	3059	3060	3061	3062	3063	3064	3065	3066	3067	3068	3069	3070	3071	3072	3073	3074	3075	3076	3077	3078	3079	3080	3081	3082	3083	3084	3085	3086	3087	3088	3089	3090	3091	3092	3093	3094	3095	3096	3097	3098	3099	3100	3101	3102	3103	3104	3105	3106	3107	3108	3109	3110	3111	3112	3113	3114	3115	3116	3117	3118	3119	3120	3121	3122	3123	3124	3125	3126	3127	3128	3129	3130	3131	3132	3133	3134	3135	3136	3137	3138	3139	3140	3141	3142	3143	3144	3145	3146	3147	3148	3149	3150	3151	3152	3153	3154	3155	3156	3157	3158	3159	3160	3161	3162	3163	3164	3165	3166	3167	3168	3169	3170	3171	3172	3173	3174	3175	3176	3177	3178	3179	3180	3181	3182	3183	3184	3185	3186	3187	3188	3189	3190	3191	3192	3193	3194	3195	3196	3197	3198	3199	3200	3201	3202	3203	3204	3205	3206	3207	3208	3209	3210	3211	3212	3213	3214	3215	3216	3217	3218	3219	3220	3221	3222	3223	3224	3225	3226	3227	3228	3229	3230	3231	3232	3233	3234	3235	3236	3237	3238	3239	3240	3241	3242	3243	3244	3245	3246	3247	3248	3249	3250	3251	3252	3253	3254	3255	3256	3257	3258	3259	3260	3261	3262	3263	3264	3265	3266	3267	3268	3269	3270	3271	3272	3273	3274	3275	3276	3277	3278	3279	3280	3281	3282	3283	3284	3285	3286	3287	3288	3289	3290	3291	3292	3293	3294	3295	3296	3297	3298	3299	3300	3301	3302	3303	3304	3305	3306	3307	3308	3309	3310	3311	3312	3313	3314	3315	3316	3317	3318	3319	3320	3321	3322	3323	3324	3325	3326	3327	3328	3329	3330	3331	3332	3333	3334	3335	3336	3337	3338	3339	3340	3341	3342	3343	3344	3345	3346	3347	3348	3349	3350	3351	3352	3353	3354	3355	3
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[illegible]

DEPRECIATION SCHEDULE

Cost Asset Description	Yrs	Cost	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
31,200 Exlt Assets 12/31/85	1.5	51,200	34	17	0	0	0	0	0	0	0	0	0	0	0	0	0
2,75 Exlt Assets 12/31/85	2.4	2,75	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0
13,519 Exlt Assets 12/31/85	4.2	13,519	3	3	3	3	1	0	0	0	0	0	0	0	0	0	0
1000 1984 Boat	18	1000	54	54	54	54	54	54	54	54	54	54	54	54	54	54	54
52 Mic	5	7	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
38 1987 Mic	10	52	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10
35 1988 Mic	5	38	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4
41 1988 Mic	10	35	7	7	7	7	7	7	7	7	7	7	7	7	7	7	7
35 1989 Mic	5	41	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
21 1989 Mic	10	35	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
4 1990 Mic	5	21	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4
21 1990 Mic	10	4	7	7	7	7	7	7	7	7	7	7	7	7	7	7	7
21 1991 Mic	5	21	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
23 1991 Mic	10	21	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
49 1992 Mic	5	49	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
21 1992 Mic	10	23	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
41 1993 Mic	5	41	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
25 1993 Mic	10	41	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
43 1994 Mic	5	25	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
24 1994 Mic	10	43	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
43 1995 Mic	5	24	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
43 1995 Mic	10	43	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
27 1996 Mic	5	27	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
44 1996 Mic	10	44	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
44 1997 Mic	5	27	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
38 1997 Mic	10	44	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
47 1998 Mic	5	38	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
29 1998 Mic	10	47	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
49 1999 Mic	5	29	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
38 1999 Mic	10	49	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
38 2000 Mic	5	38	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
31 2000 Mic	10	31	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1

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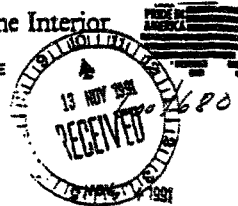
11/17/58

CBS (SER-CC)

UNITED STATES Department of the Interior

NATIONAL PARK SERVICE
SOUTHEAST REGIONAL OFFICE

75 Spring Street, S.W.
Atlanta, Georgia 30303



Memorandum

To: Associate Director, Operations, WACO
From: Regional Director, Southeast Region
Subject: Franchise Fee Reconsideration, Fort Sumter Tours, Inc.

Pursuant to the Director's memorandum of August 27, we have reviewed the financial analysis for franchise fee reconsideration for Fort Sumter Tours, Inc., and as requested, offer our comments. Incidentally, Fort Sumter Tours, Inc., was notified by letter of June 20 of our intent to reconsider the franchise fees.

First, the analysis is in error by indicating that the corporation operates a restaurant adjacent to the dock. Actually, the vessel Spirit of Charleston offers dinner cruises in Charleston Harbor, and all food is catered by an outside independent restaurant.

The Director's memorandum indicated that the prorations did not appear to adequately reflect the proper breakdown of the expenses between the concession and nonconcession operations. One of the most used and acceptable methods of prorating is based on revenues. If we deduct the cost of sales indicated for the nonconcession operations with the presumption that those costs are for the outside catering, the remaining revenues break down into roughly a ratio of 3:2 concession to nonconcession. The accountant's comments accompanying the annual financial reports since 1957 indicate that this ratio is used for office expenses (salaries, supplies and telephone). A 7:3 ratio is used for boat lease fees, fuel, repairs, and maintenance. We were advised that this ratio was developed using either the running times of the vessel or the number of passengers served. Other expenses are charged directly with the exception of officer salaries with 85 percent charged to the concession operation, and accountants' fees which are equally divided. As no objections had been raised against these allocations, and as we insisted that the concessioner develop a basis for allocating expenses which could not be specifically identified with either operation, we have not taken any exception to them. We would welcome any suggestions for revisions.

The financial analysis indicates that these allocations have caused a distortion of the concession profitability in favor of the nonconcession. We suggest that the opposite is true. A cursory review of the annual reports would indicate the impact of Hurricane Hugo in 1989. In the last full year before Hugo, the concession and nonconcession revenues were practically even, whereas in 1990 the nonconcession revenues exceeded the concession by 2.4 percent. That difference reflects a dollar amount in excess of \$100,000. The 1989 report estimates that boat passenger revenues of \$155,000 were lost for that year alone due to the closing of Fort Sumter from September 29 to November 2. We also note that the administrative overhead allocations for 1989 and 1990, except for officers' salaries, show that 56 percent and 52 percent of these expenses were absorbed by the nonconcession.

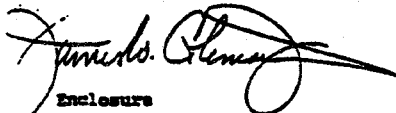
The analysis indicates that the "unsupported" cost of the new boat, Spirit of Charleston, was approximately \$1 million. To an extent this implication is true. The cost of the vessel was originally estimated at \$1,000,000. The annual financial reports indicate that the industrial development revenue note which is carried on the books of Fort Sumter Tours, Inc., as a contingent liability, had an original obligation of \$1.3 million which is to be retired annually in equal amounts over a 10-year period. This strongly suggests to us that the cost of the vessel was in all probability in excess of \$1.3 million.

In regard to the lease fee which has averaged "over \$250,000 a year," and the 18-year estimated depreciation of a purchased boat, we suggest that the lease fee is reasonable and the assumed depreciation schedule is not. Assuming a cost of \$1.3 million, at 10-percent interest, a repayment schedule of 10 years, and using 10-year straight line depreciation, our computer model, a copy of which is enclosed for your convenience, indicates a monthly payment of \$17,179.64, or \$206,156 annually, and \$130,000 in annual depreciation. Perhaps the preparer has access to more current information, but the last IRS schedules we saw for commercial boats indicated 7 years for depreciation, not the 18 suggested in the analysis, nor the 10 used in our review. This would make the difference even greater.

As such, we are not in a position to comment on the adjustments indicated for vessel rent, depreciation, interest, equity, assets, or officer salaries, until the foregoing basic factors are considered. We do suggest that the analysis be revised to reflect these conditions, and that it be more carefully reviewed with more attention to the annual financial reports and particularly to the accountant's notes and comments. While the reports may be complicated by including nonconcession results, since 1987 the reports have been submitted in such a manner that separate analyses can easily be made if desired.

Also, we are not in a position to comment on the fee proposed as we do not have access to the industry standards used for comparison purposes as the last data made available to us was applicable to 1985.

As a final issue, we were unaware that reduced rates were an alternative to increased franchise fees.


Enclosure

**CRITIQUE OF THE NATIONAL PARK SERVICE'S
FRANCHISE FEE ANALYSIS
REGARDING
FORT SUMTER TOURS, INC.
A NATIONAL PARK SERVICE CONCESSIONER**

**February 26, 1996
Revised March 15, 1996**

**GEORGE E. "CHIP" CAMPSER III, J.D., M.S.
Attorney for Fort Sumter Tours, Inc.**

**CAMPSER & CAMPSER
Attorneys at Law
56 Broad Street - P.O. Box 59
Charleston, South Carolina 29402
(803) 722-0123**

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Cash Flow - 4.25% Franchise Fee

Cash Flow - 12% Franchise Fee

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Average Decrease in Cash & Securities Balance, January 1 - March 31

Projected Cash & Securities Position on March 31, 1996

**EXHIBIT 1: AFFIDAVIT OF MARK F. HARTLEY, D.B.A., ASSOCIATE
PROFESSOR OF STATISTICS, COLLEGE OF CHARLESTON,
CHARLESTON, SOUTH CAROLINA**

**EXHIBIT 2: CRITICISM AND LIMITATION OF *RMA ANNUAL STATEMENT
STUDIES***

1. EXECUTIVE SUMMARY

Fort Sumter Tours, Inc. ("FST") is a concessioner with the National Park Service ("NPS") that operates boats to Fort Sumter in Charleston Harbor, South Carolina, where the Civil War began. Fort Sumter is a part of Fort Sumter National Monument ("FSNM"), and FST operates its concession-related activities pursuant to a fifteen year concessions contract that expires in 2000. In March of 1992 the NPS notified FST that it was unilaterally increasing its 4.25% franchise fee to 12%, approximately the highest fee permissible for FST's category of business. The fee increase was retroactive to June 14, 1991, the beginning of the sixth year of the contract. The total principal amount of the 12% franchise fee for the period June 14, 1991, through December 31, 1995, is \$1,069,693. The principal difference between that amount and the 4.25% fee FST has been paying for the same time period is \$687,840. The total payment FST will have to make if the NPS prevails will be approximately \$800,000 with interest. This is no insignificant sum for a small family operated concession that had an average net income of only \$73,000 from its concession for the five year period ending December 31, 1994.

This unilateral franchise fee increase is one of many the NPS has pursued since 1987 when it reversed its longstanding interpretation of the Concessions Policy Act, 16 U.S.C. §§ 20 to 20g ("CPA"), the statute authorizing and governing concessions operations in the Parks, and announced through an internal agency guideline that it had the authority to unilaterally increase franchise fees during the term of concessions contracts. FST challenged the NPS's newly claimed authority on several grounds in federal court. At this time the litigation remains ongoing.

The NPS arrived at the 12% fee through the preparation of a document entitled, Franchise Fee Analysis: Fort Sumter Tours, Inc., Fort Sumter National Monument, National Park Service, Concessions Division, Finance Branch, February 1992 ("FFA"). In the FFA the NPS calculated FST's average financial statement account balances and average net income for the five year period, 1986-1990 (the average net income figure is hereinafter referred to as "ANI"). It then applied several adjustments to this ANI figure to arrive at an adjusted ANI ("Adjusted ANI"). The Adjusted ANI was then utilized, along with the average financial statement account balances, in the calculation of FST's

adjusted profitability to conclude FST was too profitable and should have its franchise fee increased. After applying several franchise fee rates to FST's Adjusted ANI, the NPS settled upon a 12% rate - the highest it had considered. The NPS then prepared a proforma depicting FST's expected financial performance with the 12% rate and compared these proforma returns with a quartile presentation of financial statement and return measures for samples of businesses classified by Standard Industrial Classification ("SIC") code as reported by the Dunn & Bradstreet publication, *Industry Norms* ("*D&B Industry Norms*"). According to NPS-48, an internal agency guideline, the express purpose of this procedure is to set franchise fees at a level so as to limit FST's profitability to approximately the median for the industry in which it is a participant.

The purpose of this Critique of the National Park Service's Franchise Fee Analysis Regarding Fort Sumter Tours, Inc., a National Park Service Concessioner ("FFA Critique") is to bring to light the deficiencies of the FFA, and in doing so to show that the imposition of a 12% franchise fee on FST is an arbitrary and capricious abuse of agency discretion that is not in conformity with the CPA. The final portion of this critique shows that if only a handful of the FFA's most egregious deficiencies are corrected, a proforma employing the exact same methodology found in the FFA proforma ("FFA Proforma") demonstrates that a 12% franchise fee is devastating to FST's financial viability, and the current 4.25% fee results in profitability measures in the second and middle of the third quartiles of the *D&B Industry Norms* data, the precise range the NPS is aiming for in setting FST's franchise fee. Among the specific adjustments the NPS made in the FFA to FST's actual financial statement figures are the following:

- (i) The lease of the vessel "Spirit of Charleston" by FST in 1986 was reconstituted as a purchase ("SOC Reconstitution"). This resulted in FST's net income being adjusted upward by over \$70,000. This reconstitution was imposed by the NPS even though FST had solicited and received NPS approval of the form of ownership of the vessel and the lease agreement as required by its contract. The SOC Reconstitution was not fully accounted for, however. The NPS failed to make balance sheet entries mandated by Generally Accepted Accounting Principles ("GAAP") that would have benefited FST by making its assets and equity higher, and therefore its profitability lower. The NPS also used purchase price and debt figures for the

vessel of \$1 million and \$500,000, respectively, when it actually knew the debt to be \$1.3 million and the purchase price to be higher than that (the actual purchase price was over \$1.4 million).

- (ii) Over \$160,000 of FST's officers salaries were disallowed on the basis of the median officers' salaries in a nonrandom sample of ten businesses reported in the Robert Morris and Associates publication, *1990 Annual Statement Studies* ("*RMA Statement Studies*"). Although FST was above the median of the sample, its actual officers' salaries, were squarely in the middle of the third quartile reported by the *RMA Statement Studies*. Although NPS-48 instructs the NPS to use "caution" when adjusting officers' salaries, the NPS failed to inquire into FST's operational situation that would explain its salary level. This discussion of salaries thus far actually begs the threshold issue which is that the data the NPS relied upon in this adjustment was statistically invalid because of the nonrandom nature of the sample, the small sample size, the unverified nature of the data, the criticism of the data by its publisher, and the overly broad definition parameters of the SIC code(s) employed.
- (iii) Over \$350,000 of FST's equity was assumed away to reflect the median equity reported in the *D&B Industry Norms*, which is 10% of assets. In this adjustment the NPS failed to consider the relatively low level of debt carried by FST as instructed in NPS-48. It also failed to factor in the impact the SOC Reconstitution should have had on FST's asset balance as alluded to above. As in the case of the *RMA Statement Studies* data, the *D&B Industry Norms* data upon which this adjustment was predicated is statistically invalid for similar reasons.

These and other adjustments to FST's actual financial statements had the effect of increasing its apparent ANI by \$233,000, and understating its assets and equity, thus making FST appear vastly more profitable than it actually was. This inflated profitability arises because profitability is measured in the FFA by return on assets, return on equity and return on gross. The higher its gross income, or the lower its assets or equity, the more profitable FST appears.

Once these adjustments of questionable credulity were made to FST's actual financial statements, the NPS proceeded to commit additional material errors in the establishment of the 12% franchise fee. In concluding that FST was too profitable and should have its franchise fee raised, the NPS included over \$195,000 of average annual net income that was not derived from operations under its concession contract, but rather from FST's non-concession activities which it operates

outside the scope of its contract privileges. These include dinner cruises, charters and harbor tours that do not stop at FSNM. The NPS also failed to take into account FST's state and federal income tax liability resulting from its operations simply because it had made an election to be taxed as an S corporation.

The NPS gave no consideration to FST's low debt structure, its fully depreciated assets, its impeccable operational reports, and its operational efficiencies in setting the franchise fee as required by NPS-48. It also failed to conduct a field study of FST's operation which NPS-48 considers to be "especially important in judging management performance".

In the development of the FFA Proforma, and in the calculation of FST's anticipated profitability under the 12% fee, the NPS utilized book value for FST's assets which severely understates assets and equity in a mature company like FST with fully depreciated assets, and thereby artificially inflated FST's apparent return on assets and return on equity. The NPS also ignored FST's historical growth rate for gross receipts in its FFA Proforma projections, and ignored FST's actual financial condition as the appropriate starting point for its FFA Proforma. This is one of the most bizarre aspects to the FFA. Rather than use FST's actual audited 1990 balance sheet which had been reported to the NPS, in the FFA Proforma the NPS imposed a fictitious balance sheet that assumed away \$600,000 of equity, \$1.6 million of assets, and almost \$540,000 of debt that FST's real 1990 balance sheet would have shown once the SOC Reconstitution was properly accounted for. This of course had the effect of overstating FST's return on assets and return on equity.

Addendum A to this critique demonstrates that if the actual purchase price and debt level for the vessel "Spirit of Charleston" (which information the NPS was cognizant of when it formulated the FFA) is utilized in the SOC Reconstitution, and if the SOC Reconstitution is accounted for consistent with GAAP, using the exact same methodology employed by the NPS in its FFA Proforma, produces paltry cumulative returns with a 12% franchise fee. For example, return on equity is only 1.25%, about 1/6th of what one can earn on US Treasury obligations. Addendum B, on the other hand shows that with the same assumptions, the 4.25% franchise fee produces two return measures

in the second quartile, and one in the middle of the third, indicating that a 4.25% franchise fee is appropriate according to the NPS's own standards. These results are depicted in tabular and graphic form in Addendum C. Addendum D shows that a 12 % franchise fee in 1991 - 1994, when applied to FST's actual numbers, would generate negative cash flows, whereas a 4.25% fee generates some negative and some positive, albeit marginal cash flows. Finally, Addendum E shows that if FST has to pay the 12% franchise fee in arrears, it will be stripped of all of its liquid assets and have to borrow approximately \$139, 000 to make it through its slow season. That is not the worst of it, however, because addendum D shows that starting with this \$139,000 deficit, FST can only expect negative annual cash flows.

FST's situation would be better if it could simply refuse to accept the 12% franchise fee and close down its concession operation. Although such a course would be painful, for it means walking away from what has been heretofore a pleasurable business that members of the Campsen family have sunk their capital, lives and careers into, it is better than the alternative of paying \$800,000 to the NPS and then operating at a loss for the remainder of the contract term. Unfortunately, the previous course is not an option because it would place FST in default of its contract. The NPS has assumed the unusual position of being able to unilaterally increase franchise fees on its concessioners to the point where they operate at a loss, really at any time according to the interpretation of the CPA it advances, and then be able to force the insolvent concessioners to continue to operate at a loss until their contract term expires. A more one-sided and unconscionable arrangement is difficult to imagine.

Throughout this critique there are demonstrations of how the NPS violates the CPA in its FFA which are too numerous and complex to express in this Executive Summary, so they are left for the body of the document. The author offers his apologies for the length and somewhat technical and deliberate nature of the document, but there was simply no other way to dispense with the deficiencies in the FFA. I commend the body of this FFA Critique for your investigation. I am convinced that an objective and reasoned examination of the information contained herein will impress upon the reader the injustice falling upon FST, and the need to reform the NPS franchise fee determination process.

II. INTRODUCTION AND FACTUAL BACKGROUND

Fort Sumter, where the Civil War began, is located on an island in Charleston Harbor, South Carolina. It is administered by the National Park Service ("NPS") as part of Fort Sumter National Monument ("FSNM"). Fort Sumter Tours, Inc. ("FST") is a privately held family corporation that has provided public boat transportation to Fort Sumter and operated a gift shop on the Fort pursuant to four concessions contracts with the NPS. The initial contract was entered into on July 13, 1961, when the NPS selected FST out of five competing proposals. Throughout this long relationship FST has been an exemplary concessioner, consistently receiving the highest possible annual operational evaluations, and building a cordial and efficient working relationship with the local NPS officials administering FSNM.

The NPS maintains FSNM and a suitable dock there, and the contract requires FST, at its expense, to operate and maintain two mainland docking facilities, and to provide the required passenger vessels, operating personnel, and other things necessary to accommodate visitation to FSNM. The contract grants to the NPS strict control over FST's operation, including the right to set FST's schedule and approve its rates. FST in turn pays the NPS a franchise fee expressed as a flat fee plus a percentage of gross receipts.

The present contract was entered into on June 13, 1986, for a term of fifteen years. At the time the present contract was entered into, FST had two and one-half years remaining on the then existing ten year contract. As an inducement to construct a second docking facility at Patriots Point Naval and Maritime Museum on Charleston Harbor at a cost of over \$150,000, and to construct a new vessel for the carrying of passengers to FSNM at a cost of over \$1.4 million, the NPS, after publication of required notices in the Federal Register and the solicitation of competitive bids, canceled the remainder of FST's ten year contract and entered into the present contract with a fifteen year term.

Section 9(a)(2) of the present contract calls for FST to pay a flat fee plus 4.25% of gross receipts as a franchise fee for the entire fifteen year term. (Administrative Record, Tab A) (hereinafter the Administrative Record is cited as "A.R."). Section 9(e) provides for reconsideration of the fee every five years. In a letter dated June 20, 1991, five years into the fifteen year contract, the NPS Southeast Regional Director notified FST that it was considering a renegotiation of the franchise fee. (A.R., Tab C). The NPS prepared a Franchise Fee Analysis dated February 27, 1992 ("FFA"), wherein it concluded that it would impose a 12% franchise fee. (A.R., Tab G). FST was advised of the NPS's fee determination by letter dated March 16, 1992. (A.R., Tab H). FST objected to the 12% figure by a letter dated March 24, 1992. (A.R., Tab D).

In the FFA, the NPS calculated average net income ("ANI") and average balance sheet and income statement figures based upon FST's financial reports for the years 1986 - 1990. It then applied adjustments to these average figures to arrive at adjusted ANI ("Adjusted ANI") by limiting officers' salaries to 10% of gross receipts, reconstituting the lease of the passenger vessel "Spirit of Charleston" as a purchase ("SOC Reconstitution"), and assuming away almost \$350,000 of FST's equity. The limitation of officers' salaries to 10% of gross receipts was based upon information reported in the publication by Robert Morris and Associates, *1990 Annual Statement Studies* ("RMA Statement Studies"). Once these adjustments were made, Return on Assets ("ROA"), Return on Equity ("ROE"), and Return on Gross Receipts ("ROG") calculations were applied to the adjusted average balance sheet and income statement figures at various franchise fee rates (ROA, ROE and ROG are hereafter collectively referred to as "Profitability Measures"). The Profitability Measures at the various franchise fee rates were then compared to Profitability Measures reported in the Dunn & Bradstreet publication, *Industry Norms* ("D&B Industry Norms") for a sample of businesses reporting to Dunn & Bradstreet under a combination of the four digit SIC code 4489, Water Passenger Transportation, Not Elsewhere Classified, and another SIC code that is unknown.¹ The

¹ "SIC" is an acronym for Standard Industrial Classification, and is "the statistical classification standard underlying all establishment-based Federal economic statistics classified by industry." *Standard Industrial Classification Manual, 1987*, Executive Office of the President, Office of Management and Budget, National Technical Information Service, Springfield, VA, Preface. In essence, the SIC classification system is an attempt to define and categorize various industries

express purpose of this comparison was to set a franchise fee rate so as to limit FST's profits to approximately the median reported in the *D&B Industry Norms*. Once the 12% franchise fee was thus set, proforma balance sheets, income statements and Profitability Measures for 1986 - 2000 were then projected, and the resulting cumulative Profitability Measures again compared to the *D&B Industry Norms* Profitability Measures to assure that the projected returns of FST approximated the median returns reported in the *D&B Industry Norms*. Having satisfied itself that the 12% fee would, according to its calculations, thus limit FST's profits, the NPS settled upon the 12% franchise fee. This unilateral increase in the franchise fee by the NPS, five years into the fifteen year contract, constituted almost a threefold increase in the franchise fee

After receiving notification of the unilateral increase to 12%, FST made two Freedom of Information Act ("FOIA") requests upon the NPS under 5 U.S.C. § 552, soliciting information pertaining to the franchise fee increase, the FFA, and the publications the NPS predicated its FFA upon, namely, *D&B Industry Norms* and *RMA Statement Studies*. (A.R., Tabs K and M). Information regarding *D&B Industry Norms* and *RMA Statement Studies* was denied, along with information the NPS classified as "internal pre-decisional documents". (A.R., Tab N). By letters dated July 17, 1992, and September 17, 1992, legal counsel for FST informed the NPS that its refusal to supply the requested information did not qualify as an exemption under the FOIA, again requested the withheld information, and informed the NPS that it had appealed the NPS's denial of the requested information. (A.R., Tabs O and P). By an internal Memorandum dated March 29, 1993, the NPS Associate Director of Operations instructed the Southeast Regional Director to rescind a previously granted delay in negotiations, which delay had been granted until after an answer was received regarding the appeal of the FOIA request denial. (A.R., Tab R). Upon notification of the NPS's rescission of the delay in negotiations, and still not in receipt of the requested information regarding the FFA calculations, the *D&B Industry Norms*, or the *RMA Statement Studies*, FST notified the NPS

comprising the U.S. economy. There are actually two levels of SIC codes, a four digit level, and a nine digit level, the former being more general, and the latter more specific. As discussed *infra*, the diversity and dynamism of the economy make the establishment of a SIC system that particular businesses "fit neatly" into virtually impossible, particularly when four digit codes are used, as is the case in the FFA.

by letter dated April 14, 1993, that it did not believe the NPS had the authority to unilaterally increase FST's franchise fees, and that FST would have to seek adjudication of its rights. (A.R., Tab S). The NPS responded by pronouncing its unilateral 12% franchise fee determination a final agency decision by letter of the Southeast Regional Director dated June 16, 1993. (A.R., Tab V).

In the subsequent litigation in the Federal District Court for the District of South Carolina, Judge Falcon Hawkins presiding, FST once again attempted, through discovery, to gain information regarding the *D&B Industry Norms*, the *RMA Statement Studies*, and the methodology employed by the NPS in the FFA in utilizing the data contained therein. The NPS sought and was granted a protective order precluding the information FST had so diligently attempted to obtain, thus limiting the evidence in the case to the Administrative Record ("A.R."), which is attached to this FFA Critique.

This detailed history leading up to the present litigation shows that FST's persistent attempts to obtain information regarding the methodology and assumptions underlying the NPS's FFA, and the statistical data upon which the FFA was based, have been blocked at every turn by the NPS. And the District Court's refusal to permit discovery in this area precluded a more substantive criticism of the NPS's methods during the course of the litigation.

Issues involved in the present litigation include whether the NPS has the statutory right to unilaterally increase FST's franchise fees during the term of the contract. The controlling statute is the Concessions Policy Act, 16 U.S.C. §§ 20 to 20g ("CPA"). Section 20b (d) of the CPA provides:

Franchise fees, however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for net profit in relation to both gross receipts and capital invested. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates. Appropriate provisions shall be made for

reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time.

FST contends that the somewhat ambiguous reconsideration provision of §20b (d) only provides for adjusting fees during the term of a contract by mutual agreement of both parties. This is consistent with the title of §20b of the CPA where the reconsideration provision is found, "Protection of Concessioner Investment", and with the substantive provisions of every paragraph subsumed thereunder, all of which contain provisions for the encouragement and protection of concessioners' financial interests. It is also consistent with the long standing policy of the NPS that predates passage of the CPA. In fact, the NPS's own interpretation of the CPA was consistent with that advanced by FST until 1987 when, without explanation and through internal agency guidelines (not through regulation, to which greater deference is owed), the NPS altered its interpretation of the CPA to grant itself the unilateral right to increase franchise fees during the term of a contract.

The merit of the interpretation FST is advancing comes clearly into light when one considers the implications of the interpretation supported by the NPS. If the NPS's interpretation prevails, the statute authorizes the NPS to unilaterally increase franchise fees whenever it chooses because the language in the statute says that franchise fees shall be "reconsidered . . . at least every five years" (emphasis added). Under the NPS's construction of the CPA, Congress authorized it to unilaterally increase franchise fees every day if it so desired! Certainly such an unconscionable provision was not the intent of Congress. For if it was, and if the NPS's interpretation prevails, no sane businessperson will ever become a concessioner, and the entire concession system will collapse. No one will invest their time, talent and capital into a concessions relationship if the NPS can unilaterally raise franchise fees to whatever level it chooses, whenever it chooses. Such a one-sided construction of §20b (d) of the CPA places concessioners totally at the mercy of the NPS. Business relationships like the one the NPS is attempting to impose upon FST and its other concessioners simply do not exist in the real world of the marketplace.

The proper construction of §20b (d) of the CPA is that it provides for reconsideration of franchise fees by mutual consent, and requires it at least every five years in case a concessioner's

actual operational results fall short of what is necessary to remain solvent. Unlike the interpretation advanced by the NPS, there is a mutual benefit to this construction. It authorizes the NPS to reduce fees if necessary to assure that visitor services, which the §20b (d) of the CPA expressly considers paramount, remain intact. And of course this is not an undue benefit to the concessioner because any reduction in fees requires NPS approval, which may be withheld for any reason. It is wholly appropriate for the NPS to have the final say as whether a concessioner's request for fee reduction is granted, as the interpretation advanced by FST provides. But it is wholly inappropriate for the NPS to have the final say in increasing fees during the term of a contract whenever it chooses, as the interpretation posited by the NPS provides. FST's interpretation is reasonable and contains mutuality; the NPS construction is unconscionable and lacks any mutuality, for it places the concessioner completely at the NPS's mercy. In light of these and other reasons which are too expansive to explore in this document, FST contends it is unreasonable to interpret paragraph (d) of §20b, "Protection of Concessioner Investment", as the only paragraph in §20b of the CPA that, rather than providing for protection of concessioner investment as the title to the section indicates, grants to the NPS the incredible right to unilaterally increase fees at its pleasure.

Other issues involved in the litigation include whether the NPS gave FST proper notice of the fee increase according to the terms of the contract, and whether the NPS may limit the profits of its concessioners to a purported industry standard in contravention of the legal doctrine that the federal government may not limit the profits of government contractors absent the clear and unambiguous authorization of Congress. *see U.S. v. Bethlehem Steel*, 315 U.S. 289 (1942), and Renegotiation Act of 1951, 65 Stat. 7 (1951), as amended, 50 U.S.C. App. §§ 1211-1233 (1964) (repealed 1978).

Yet another issue in the case is whether the NPS acted in an arbitrary and capricious manner that constituted an abuse of agency discretion or a violation of law in unilaterally setting FST's fee at 12%. Corollary to this issue is whether the NPS's and the court's refusal to permit discovery into the substantive methodology employed by the NPS in its FFA constitutes harmful error.

It is this last issue, whether the methodology employed by the NPS in the FFA constituted arbitrary and capricious agency action that was an abuse of discretion or not in conformity with the law, that is the subject of this FFA Critique. Having been denied the right, unjustly so in FST's view, to get this type of analysis and critique into evidence in the case, and having been denied by the NPS access to the documents and information forming the basis of its decision that so devastates FST, FST felt compelled to offer this FFA Critique for the benefit of those in policy making positions. The larcenous abuse the NPS is attempting to impose upon FST must be clearly understood and prohibited if not only FST, but the entire concession system is to survive. If the federal government is permitted to destroy concessioners in the fashion described herein, the entire concession system will disintegrate, and the foundational principles upon which our great country was founded - protection of property rights, market capitalism, and the nurturing of an environment in which the entrepreneurial spirit is rewarded for efficient operations that meet the needs of customers - are in jeopardy.

The effect of this arbitrary and capricious action by the NPS is not inconsequential. If permitted to stand it results in an increase in franchise fees payable by FST from \$381,853 to \$1,069,693, an increase of \$687,840 excluding interest, for the period June 14, 1991, through December 31, 1995. This is almost a threefold increase imposed unilaterally by the NPS during the term of the concessions contract! The effect of paying what will be close to \$800,000 with interest will devastate FST, essentially stripping it of all its cash and securities, which stood at \$1,073,000 as of January 1, 1996. This would leave a cash and securities balance of \$273,000 as of January 1, 1996, and a negative cash and securities balance of approximately \$139,000 by March 31, 1996, the traditional low point of FST's cash and securities during the calendar year. (See Addendum E).

III. STATEMENT OF DEFICIENCIES IN THE FRANCHISE FEE ANALYSIS

This FFA Critique clearly demonstrates why the NPS was determined to block FST's access to the information it sought concerning the FFA. For this FFA Critique, limited as it is because of

FST's inability to access information utilized in the formation of the FFA, and by FST's inability to depose the individual(s) responsible for preparing the FFA, clearly demonstrates that the NPS's methodology in the FFA constitutes an arbitrary and capricious abuse of agency discretion that is not in accordance with the law. Consequently, the 12% franchise fee resulting therefrom is inappropriate. An in depth review of the process employed by the NPS in its FFA reveals that the process is flawed on the following grounds:

- (1) *The industries the NPS compared FST's profitability and financial statements to, as defined by Standard Industrial Classification ("SIC") codes, are inappropriate comparators because the businesses comprising those SIC codes are so dissimilar to FST.*
- (2) *The data contained in the D&B Industry Norms and the RMA Statement Studies is unreliable because of the absence of accounting standards in its collection, verification and reporting.*
- (3) *The data reported on samples of businesses in the D&B Industry Norms and the RMA Statement Studies, and the inferences the NPS drew from that data, are statistically invalid. And since the NPS's conclusion that a 12% franchise fee is appropriate is predicated upon these statistically invalid inferences, the conclusion that a 12% franchise fee is appropriate is, itself, invalid.*
- (4) *Because of (1), (2) and (3) supra, the NPS failed in its duty to establish the statistical validity of the data it utilized in setting FST's franchise fee.*
- (5) *D&B's and RMA's own criticism and limitation of the data reported in the D&B Industry Norms and the RMA Statement Studies renders the NPS's reliance upon that data arbitrary and capricious, and an error in judgement.*
- (6) *The manner in which the NPS employed the D&B Industry Norms and the RMA Statement Studies data, the way in which it manipulated FST's financial information, and the assumptions it made in the FFA, so violate the CPA, NPS-48, Generally Accepted Accounting Principles ("GAAP"), fundamental economic principles, and economic and operational realities, as to constitute an arbitrary and capricious abuse of agency discretion that is not in accordance with the law.*
- (7) *If the NPS had not improperly manipulated FST's financial data or made assumptions in its FFA that have no basis in fact, the very methodology employed in the FFA would have shown that the present 4.25% franchise fee should result in profits that fall well within the quartile limits the NPS is aiming for.*

- (8) *The 12% franchise will strip FST of its cash and securities, and result in a negative annual cash flow.*

IV. STANDARD OF REVIEW APPLICABLE TO NPS ACTION IN ADJUSTING FRANCHISE FEES

Since this analysis critiques the NPS's franchise fee determination process at length, an exploration of the judicial standard of review applicable to such agency action is warranted. Under the Administrative Procedures Act ("APA"), administrative actions are not to be upheld by the courts if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706 (2) (A). Under the arbitrary and capricious standard of the APA, a court has a duty to ensure there is a "rational connection between the facts found and the choice made" when reviewing agency action. *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962). Furthermore:

[T]he reviewing court must assure itself that the agency decision was 'based on a consideration of the relevant factors . . .'
[footnote omitted] Moreover, it must engage in a 'substantial inquiry' into the facts, one that is 'searching and careful.' *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-35 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976), *citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971).

And finally, courts should not uphold administrative decisions "that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *United States Army Eng'g Ctr. v. Fed. Labor Relations Auth.*, 762 F.2d 409, 414 (4th Cir. 1985), *quoting National Labor Relations Bd. v. Brown*, 380 U.S. 278, 291-92 (1965).

However, in the present case an even lower standard of review than that for arbitrary and capricious as described above is appropriate. The lower standard of review is based upon the NPS reaching its franchise fee conclusion pursuant to NPS-48, an agency guideline which sets forth the discretionary procedure for determining franchise fees. As an agency guideline or interpretation of

policy, NPS-48 has neither the force of law nor legislative regulation. *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974).² It is merely a clarification of the agency's construction of the statute it administers, and "agency regulations not mandated by federal law are not entitled to the degree of judicial deference and enforcement due those promulgated under compulsion of law". *Onslow County v. United States Dep't of Labor*, 774 F. 2d 607, 611 (4th Cir. 1985). Thus, while judicial review of a legislative rule may be limited by the "arbitrary and capricious" standard of § 706 of the APA, "a court is free to make an independent inquiry into the correctness or propriety of an interpretive rule . . ." *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F. 2d 658, 665 (D.C. Cir. 1978).³ In making its inquiry, a court may even substitute its own judgement for that of an agency when reviewing an interpretive rule or guideline. *Water Quality Ass'n Employees' Benefit Corp. v. United States*, 795 F.2d 1303, 1305 (7th Cir. 1986).

In reviewing agency action pursuant to an interpretive rule or guideline, a court is to perform a "substantial inquiry" that is "searching and careful" into the "correctness or propriety" of such action as required by *Ethyl Corp.* and *Guardian Fed.* The franchise fee determination process as applied in the case of FST is clearly in derogation of even the higher arbitrary and capricious standard of review applicable to substantive regulations, and any question as to its impropriety should be

² NPS-48, issued March 6, 1987, first announced the NPS's new found prerogative to unilaterally increase franchise fees *sua sponte*. It is merely an internal policy guideline that was not published in the Federal Register, or contained in the Code of Federal Regulations. Revised Standard Concessions Contract language that reflected the newly-claimed power in NPS-48 was published in the Federal Register on September 3, 1992. 57 *Fed. Reg.* 40508. However, this publication of revised Standard Concessions Contract language did not imbue NPS-48 with any authority beyond that accorded policy guidance, for, "[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations." *Brock v. Cathedral Bluffs Shale oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986); see also 44 U.S.C. § 1510 (1982). NPS-48 has not been published in the Code of Federal Regulations, and as such it should be treated as a general statement of policy or an interpretive rule.

³ See also *Batterson v. Francis*, 432 U.S. 416, 424-26, n.9 (1977) (while legislative rules "have the force and effect of law, a court is not required to give effect to an interpretive regulation"); and, *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (a court may accord less weight to interpretive guidelines than to "administrative regulations which Congress has declared shall have the force of law").

decided in favor of FST in light of the lower standard of review that is actually applicable, and in light of a court's prerogative to supplant an agency's judgement with its own when reviewing agency action pursuant to an interpretive rule or guideline. As demonstrated in great detail below, a thorough investigation into the machinations of the franchise fee determination process employed in the case of FST demonstrates the process to be arbitrary, capricious, an abuse of discretion, and not in accordance with the CPA.

V. DESCRIPTION OF THE FRANCHISE FEE RECONSIDERATION PROCESS

The NPS utilized NPS-48 as a guideline in the reconsideration of FST's franchise fees. NPS-48 instructs the agency to calculate average concessioner returns on gross receipts, equity, and assets based upon the annual audited financial reports of the concessioner for the most recent five years. (A.R., Tab B, Guideline at 15-20). NPS-48 further authorizes the NPS, at its discretion, to adjust the concessioner's reported expenses to "reflect the value realized by the concessioner". (A.R., Tab B, Guideline, pgs. 13, 17, 19).⁵ The express aim of these adjustments is to arrive at a figure that "represents the probable value of the opportunity granted by the [contract] authorization". (A.R., Tab B, Ex. 3, p. 1). The NPS then chooses "representative" industry categories from the Dunn & Bradstreet, Inc. Publication, *Industry Norms* ("*D&B Industry Norms*"), and compares the concessioner returns, as adjusted by the NPS, to the D&B data.⁶ The NPS is then instructed to vary the proposed franchise fee to ascertain a fee level that limits the concessioner's returns on gross receipts, equity and assets to approximately the industry median according to the D&B Industry Norms (A.R., Tab B, Guideline, p. 18; and, Exhibit 1, p. 4). Finally, once the fee has been determined by reviewing past financial results, some fact finding is supposed to occur to incorporate any

⁵The NPS reviewed FST's financial data for the years 1986-1990. The adjustments were applied to average figures for the five year period. (A.R., Tab G).

⁶The *D&B Industry Norms* reports median and quartile financial statement and profitability information on businesses in its sample population which have been classified into various four digit Standard Industrial Classification (SIC) codes.

significant future changes into a pro forma depiction of the new fee's impact on future results. (A.R., Tab B, p. 19).

In the review of the franchise fee determination process as implemented in the FFA, attention will first be focused upon the impropriety of utilizing industries represented by SIC codes as comparators to FST. Then, the statistical invalidity of the NPS relying upon the *D&B Industry Norms* and the *RMA Statement Studies* data to draw inferences about the population of businesses comprising such SIC codes will be addressed. The consequence of the NPS's failure in its duty to establish the statistical validity of the *D&B Industry Norms* and the *RMA Statement Studies* data it employed will then be discussed. And finally, the NPS's adjustments to FST's financial statements, and the assumptions made in the FFA will be critiqued.

VI. THE MANNER IN WHICH THE NPS EMPLOYED THE D&B INDUSTRY NORMS AND THE RMA STATEMENT STUDIES IN THE FFA IS NOT STATISTICALLY VALID

- (1) *It is Not Valid for the NPS to Assume that FST's Financial Statement and Profitability Measures Should Approximate the Median for the Population of Businesses Categorized Under SIC 4489*

A substantive analysis and criticism of the *D&B Industry Norms* will illuminate the arbitrary and capricious nature of employing data contained in the *D&B Industry Norms* as a comparator to FST. In order to compare FST's operating results to industry quartiles and medians as called for in NPS-48, the NPS had to assign FST to a SIC industry classification. In the FFA, the NPS indicated that it compared FST's profitability to, "the median returns for the water transportation industry (SIC 4489) reported by Dunn & Bradstreet in its Industry Norms for the years 1985 through 1989." (A.R., Tab G). However, as is demonstrated below, this was not possible.

SIC 4489, which the NPS purported to use for the entire period, 1985-1989, did not even exist until 1987, and annual data classified under this code was not available in the *D&B Industry Norms* until the 1988 calendar year. The SIC codes in effect up until 1988 were established in 1972. These 1972 codes were revised by the Office of Management and Budget, and published in the *Standard Industrial Classification Manual, 1987* Executive Office of the President, Office of Management and Budget, National Technical Information Service, Springfield, VA ("*SIC Manual, 1987*"). It is in this 1987 revision that SIC 4489 was created by merging parts of what were SIC 4441 and SIC 4459 under the 1972 regime, into the new SIC 4489. SIC 4441 was a code for Transportation of Freight and Passengers on Rivers and Canals, and SIC 4459 was a code for Local Transportation of Freight and Passengers, Not Elsewhere Classified. It is the transportation of passengers parts of SIC 4441 and SIC 4459 that were combined in 1987 to create the new SIC code 4489, Water Transportation of Passengers, Not Elsewhere Classified. The 1987 revisions merged the remaining parts of the old SIC 4441 and SIC 4459 having to do with transportation of freight, into another new code, SIC 4449, Water Transportation of Freight, Not Elsewhere Classified. *SIC Manual, 1987*, pgs. 670 and 689.

In the Preface to the *SIC Manual, 1987*, James C. Miller III, then Director of the Office of Management and Budget, wrote that the SIC Codes are "revised periodically to reflect the economy's changing industrial organization". Upon publication of its intent to revise the SIC codes in the *Federal Register* on February 22, 1984, OMB received over 1100 proposals for changes. To analyze the proposals and make the changes, OMB established a multi agency Technical Committee on Industrial Classification, which accepted approximately 40% of the recommended changes. Concerning the fruit of this Technical Committee's labors, Director Miller wrote:

The 1987 SIC revision has taken into account technological changes, institutional changes such as deregulation in the banking, communications, and transportation industries; and the tremendous expansion in the service sector. In addition, changes have been made to improve industry detail, coverage, and definitions, and to clarify classification concepts and the classification of industrial activities.

The point of this exploration into the 1987 revisions of the SIC codes, and the etiology of SIC 4489 is twofold. First, the NPS purported in the FFA to compare FST's returns to those reported for SIC 4489 in *D&B's Industry Norms* for the five year period, 1985-1989, but SIC 4489 did not even exist for three of the five years reviewed. Secondly, whatever SIC code the NPS utilized for the years 1985-1987,⁷ are inappropriate comparators to FST on two grounds. First, assuming the NPS utilized SIC 4441 and/or SIC 4459, which, upon inspection of the SIC codes in existence at that time were its only options,⁸ the composition of those SIC codes taint them as comparators for FST because they include businesses engaged in the passage of freight. The pre-1987 SIC 4441 and SIC 4459 included canal barge operations, canal freight transportation, intra-coastal freight transportation, and log rafting and transportation. *SIC Manual, 1987*, pgs. 275, 670 and 690. The only nexus these type of operations have with FST is that they all involve boats. The second reason the SIC code(s) utilized by the NPS for 1985-1987 are not representative of FST's operation is clearly logical. No SIC existed prior to 1987 that came close to representing the transportation of passengers on inland waters, for if one did, the Technical Committee on Industrial Classification would not have dissected out passenger from freight transportation in preexisting SIC codes as it did, in order to create SIC 4489. The clear implication is that even the committee that established the 1987 SIC codes, consistent with the reasons given for SIC code changes in the Preface to the *SIC Manual, 1987*, realized that changes in the marketplace had made whatever SIC code(s) the NPS utilized for the years 1985-1987 obsolete. There is no other conclusion that can be drawn from the fact that they segregated these old SIC codes into parts, merged some of the parts into the new SIC 4489, and abolished the old codes.

⁷ FST can only speculate as to what the NPS utilized for 1985-1987, because its request to depose the author of the FFA was denied by the District Court. Presumably the NPS utilized SIC 4441, SIC 4459, or a combination of the two, since components of these two SIC's were merged to form SIC 4489. The FFA gives no indication on its face as to what the NPS did for these years other than use SIC 4489, which, as has been established, was impossible.

⁸ The only other pre-1987 revision SIC code that, by virtue of its title appears plausible for the NPS to have used, is the old SIC 4469, *Water Transportation Services, Not Elsewhere Classified*. But upon close inspection, SIC 4469 is an even worse match than SIC 4441 or 4459. It included marinas, sanitary services, drydocks and shipyards, marine salvaging and surveying, canal operation, piloting vessels in and out of harbors, and wrecking ships for scrap. *SIC Manual, 1987*, pgs. 276, and 670-671. If the NPS used old SIC 4469 in 1985-1987, that decision is even more arbitrary than the utilization of SIC 4441 and/or 4459 that is being criticized herein.

The NPS purported to use a SIC code for 1985-1987 that did not exist. The only possible explanation as to what it really used, is that it utilized SIC code(s) for 1985-1987 that the OMB committee responsible for establishing SIC codes had determined to be obsolete and not reflective, not only of FST's industry, but of *any* industry. And this decision to employ the obsolete code(s) was made in 1991, four years after the obsolete nature of the code(s) was established. Finally, the most plausible codes that the NPS might have used for 1985-1987 are clearly inappropriate because they included businesses that carry freight on self-propelled vessels, tug boats, and barges on inland waters, businesses that carry freight in barges and self-propelled vessels on canals and rivers, and businesses that raft up and transport logs.⁹ It is needless to say that transporting a load of coal on the Mississippi River, or assembling and transporting a raft of logs on the Ohio River has *no* correlation to FST's concession operation of hosting and transporting passengers to, and operating a gift shop on, FSNM, except that they all occur on the water (the gift shop excluded, of course).

As demonstrated above, the SIC code(s) the NPS utilized in 1985-1987 are clearly composed of businesses that are inappropriate comparators to FST. Yet the 4489 SIC code utilized in 1988-1989 evokes no more confidence in the NPS's process. Businesses included in SIC code 4489 include air boats, swamp buggy rides, excursion boat operations and water taxis. *SIC Manual, 1987*, p. 275. Air boats are rarely capable of carrying more than six passengers, and as such are not subject to rigorous and expensive US Coast Guard inspection standards as FST's vessels are.¹⁰ And a business engaged in taking passengers on air boat rides through marshy areas, six passengers at a time, bears little resemblance to FST's concession operation. Swamp buggies aren't even vessels at all, but are wheeled vehicles that are propelled via tire contact with the ground in muddy environments, and they too carry very few passengers. Water taxis are generally small boats under forty feet that, similar to

⁹ Actually the NPS is being given the benefit of the doubt because an assumption has been made that the NPS utilized the pre-1987 SIC codes that are the closest fit to FST's operation (SIC 4441 and/or 4459). If the NPS actually used Water Transportation Services, Not Elsewhere Classified (SIC 4469), which title "sounds" like it fits FST, the NPS was even farther off base as discussed in the previous footnote.

¹⁰ Passenger vessels carrying six or less passengers for hire are not subject to many US Coast Guard standards which FST's vessels are subject to in their construction, maintenance and operation.

land based taxis, transport a few passengers on demand from one point to another. Air boat, swamp buggy and water taxi operations involve relatively inexpensive vehicles carrying only a handful of people, operating in a completely different market niches and natural environments. They hardly compare to FST's vessels which, in the case of the "Spirit of Charleston", cost \$1.4 million and is capable of carrying 423 passengers. Most of these type of businesses are, based upon FST's observations, "mom and pop" operations that carry very few passengers annually and are barely solvent. It would be safe to say there is not an air boat, swamp buggy or water taxi operation in the country that annually carries 10% of the 220,000+ passengers FST carries to Fort Sumter. Neither are excursion boat operations, which typically include meals and entertainment, and often all day cruises, comparable to FST's operations under its concessions contract. And few if any of these comparators face the same rigid price and operational controls imposed upon FST by the NPS.¹¹

This discussion of SIC codes highlights the fact that SIC codes, particularly four digit SIC codes as employed in the FFA, "paint with a broad brush". The businesses comprising a particular four digit SIC code are so diverse, it is impossible to utilize financial data categorized by such codes to establish what the profitability of a particular business should be. Consider SIC 4499 (Water Transportation Services, Not Elsewhere Classified), which is a post-1987 code that the old SIC 4469 was merged into. It includes such diverse operations as marine surveyors, which are essentially marine appraisers and adjusters with little or no labor force or capital assets, boat rental companies, and marine railways and drydocks, which require massive capital assets and large labor forces. This is not to say that the SIC system has no utility at all, for if it had none, presumably the entire scheme would not exist. The SIC codes are beneficial for classifying businesses in a very general sense. For example, SIC 4499 is beneficial for gauging the contribution to Gross Domestic Product (GDP) made by businesses engaged in providing services incidental to water transportation. For the purposes of a measurement such as GDP contribution, classifying marine surveyors, boat rental companies and

¹¹ For example, the NPS regulates: (1) the price and nature of all merchandise and services provided by FST; (2) FST's schedule, forcing FST to run in the off-season when it is unprofitable; (3) FST's advertising; (4) the number of passengers FST may carry on any particular trip; (5) FST's maintenance of vessels; (6) FST's insurance coverage; and, (7) FST's internal operational policies, such as its Safety and Loss Control Program. (A. R., Tab A, Exhibit E).

marine railways together is perfectly appropriate, for it is the magnitude of their only common characteristic, services incidental to marine transportation, that is being measured. It is wholly inappropriate, however, to assume that a quartile presentation of financial statement data and Profitability Measures derived from a sample comprised of marine surveyors, boat rental companies and marine railways accurately infers anything about similar measures for the population of businesses, or any particular business, categorized under SIC 4499. The financial statements of these diverse businesses are simply too dissimilar, because the businesses are so dissimilar. Another example of an appropriate utilization of the SIC classification might involve the Department of Transportation utilizing SIC 4489 to establish the number of passengers transported annually on inland waters. As in the example above, the magnitude of the one common element among the businesses comprising SIC code 4489, transportation of passengers on inland waters, is being measured. However, once again, it is erroneous to assume that a quartile presentation of financial statement data and Profitability Measures derived from a sample of businesses classified under SIC 4489 infers anything about what the financial statements or Profitability Measures for the population of businesses, or any particular business, subsumed under SIC 4489 should be. The financial statements and Profitability Measures of businesses classified under SIC 4489 are simply too diverse because their assets and liabilities, the environments they operate in, the operational challenges they face, and the market niches they serve, are so incongruous. The reality is that the U.S. economy is so complex, the businesses comprising the economy so diverse, and industries are evolving so rapidly, that it is truly impossible to establish industry classifications that any particular business will neatly "fit" into for the purpose of estimating some target level of profitability. The only reasonable conclusion that can be drawn from a serious inquiry into the NPS's utilization of the *D&B Industry Norms* data as dictated by NPS-48, is that the data, being classified by SIC code as it is, is insufficient for the purpose for which it is employed.

Thus far the polemic regarding the NPS's utilization of the *D&B Industry Norms* and the *RMA Statement Studies* has focused upon the four digit SIC codes the data is classified by. It has been established that, although SIC codes are appropriate for some applications, it is wholly inappropriate to assemble a sample of businesses by four digit SIC code, calculate quartile financial

statement data and Profitability Measures from that sample, and assume that the resulting data is reflective of the population of businesses or any particular business classified under that SIC code. That the SIC codes are inappropriate when employed to establish norms for financial statement and profitability data is a function of the diversity of businesses falling within any particular four digit SIC code's broad definition and categorization parameters. In essence, this is a systemic inadequacy resulting from the "broad brush" approach to SIC code classification. This inadequacy would prevail whether one uses *D&B Industry Norms*, *Robert Morris & Associates Annual Statement Studies*, or any similar compilation of financial and profitability data by four digit SIC code.

(2) *The D&B Industry Norms Data is Not reliable Because of the Lack of any Accounting Standards in its Collection*

Now the focus will shift to the particular information reported in the *D&B Industry Norms* for SIC 4489. Even if one assumes there is no systemic inadequacy in employing financial statement and profitability data categorized by four digit SIC code as the NPS did in its FFA; and, even if one assumes the industrial category, SIC 4489, is truly representative of FST's concession operation; the validity of the data reported for SIC 4489 in the *D&B Industry Norms* for 1988 and 1989 is insufficient because of the lack of any accounting standards. The figures utilized in the *D&B Industry Norms* database are not audited or verified by D&B. They are simply reported by management on forms provided by D&B in a nonuniform manner. For example, the D&B data does not distinguish between businesses using the accrual or cash method of accounting; between businesses using Last In-First Out (LIFO), or First In-First Out (FIFO) methods of accounting for inventory; or between businesses that use accelerated versus straight line depreciation. Neither does D&B make any attempt to confirm that the businesses report figures consistent with GAAP. Yet, the NPS compares FST's financial statements, which it knows to be audited because NPS-48 requires them to be so, with a compilation of data derived from unaudited, unverified reports voluntarily supplied by managers of, not a random sample of companies, but companies that choose to participate in D&B's reporting services.

In considering the propriety of utilizing D&B's figures, one must not lose sight of the fact that D&B is a credit rating service. The primary purpose for which companies report information to D&B is to obtain a good credit rating. These company's credit ratings are better the higher they make assets and equity appear, and the lower they make liabilities appear. So to the extent the participating companies are willing and able (and they are very able in the case of unaudited companies) to "fudge" their numbers, they will over report assets and equity, and underreport liabilities. This phenomenon has the effect of skewing the Return on Assets and Return on Equity profitability figures for the sample lower. This in turn makes FST, with its audited statements, appear relatively more profitable than it would if the figures reported by participating companies were audited. And the NPS can not disregard the significance of the participating companies not submitting audited statements and remain consistent with its own values as expressed in NPS-48, for NPS-48's requirement that concessioners grossing over \$1 million submit audited financial statements to the NPS clearly demonstrates that it considers audited statements to be essential for accurate reporting of financial information. (A.R., Tab B, p.1). If the NPS requires audited statements from its concessioners, it should also, if its going to compare such statements to a compilation of data from other companies, assure that the data on such other companies is also based upon audited statements.

(3) *The NPS's Inference that the D&B Industry Norms Data Equals or Closely Approximates the Financial Statement and Profitability Measures of the Larger Population of Businesses Classified Under SIC 4489 is Statistically Invalid*

As stated previously, 1988 and 1989 are the only years during the five year period analyzed by the FFA for which the *D&B Industry Norms* reported data for SIC 4489. Since it is uncertain which SIC codes the NPS utilized in 1985-1987, and since it has been demonstrated that whatever code(s) were employed for those years, they were obsolete and not representative of FST's concessions operations, focus will now be directed to the statistical invalidity of the 1988-1989 D&B data, and the inferences drawn therefrom. The statistical data reported in the *D&B Industry Norms* are the median and quartiles for financial statement accounts and Profitability Measures for a particular sample of companies classified under SIC 4489. The median and quartile measurements are known as descriptive statistical measures. That is, these statistics simply describe the population

sample being measured.¹³ These descriptive statistics offer no quantification of the degree of confidence one may place in inferences drawn from them. The degree of confidence one may place in inferences drawn from descriptive statistics such as these requires the application of inferential statistics. As opposed to descriptive statistics, which simply describe, in a statistical sense, a sample, inferential statistics deal with, "draw[ing] conclusions about the population from which [a] sample is drawn . . . [o]n the basis of data from [the] sample". *Statistics*, p.83.

In the present case, the NPS drew an inference from the descriptive statistics reported in the *D&B Industry Norms*. That inference was that the quartiles and medians reported for the samples of businesses classified under SIC 4489 in the *D&B Industry Norms*, are equal to or closely approximate the quartiles and medians for the entire population of businesses classified under SIC 4489. That this is an accurate statement of the NPS's inference from the D&B data is self evident in the process it employed in the FFA. Furthermore, NPS-48 indicates that the entire process of determining franchise fees is predicated upon this inference.

The appropriate franchise fee for concessioners shall be determined by first comparing the concessioner's profitability against the profitability of similar industries [emphasis added]. (A.R., Tab B, p.13).

Review the quartile thresholds provided in Exhibit 4 for the various services [Exhibit 4 lists industry returns by quartile as reported by D&B]. Choose the concessioner's primary service(s) and determine what quartile the concessioner's adjusted return on gross . . . falls into. Indicate the concessioner's relative profitability with respect to outside industry [emphasis added] . . .

¹³ Descriptive statistics are generally concerned with measures of center, such as the arithmetic mean, median and mode; with measures of location, such as quartiles and percentiles; and with measures of variation from the mean among reported data, such as variance and standard deviation. *Statistics*, 2nd ed., Gilbert, Norma, (Suanders College Publishing, Philadelphia, 1981) pgs. 54- 70. The quartile and median data reported in the *D&B Industry Norms* are descriptive statistics, but drawing inferences from those descriptive statistics as the NPS did in the FFA lies in the domain of inferential statistics.

The final fee determination is based on this comparison of the concessioner's returns with similar outside industry returns [emphasis added]. High concessioner returns (high 3rd quartile or 4th quartile) indicate a higher percentage fee. Low concessioner returns (1st quartile or low 2nd quartile) indicate a lower percentage fee. (A.R., Tab B, p.18).

That the entire franchise fee determination process set forth in NPS-48 is premised upon the inference that the data contained in the *D&B Industry Norms* represents industry returns was even recognized by the 4th Circuit when it stated:

Finally, NPS compared the FST data to the Dunn & Bradstreet ("D&B") Industry Norms for the water transportation industry. NPS settled on the 12% franchise fee, which it believed would allow FST to reap profits in excess of D&B's median returns for the industry [emphasis added]. (4th Cir. Slip Op. No. 94-1570, p.17).

However, this inference is statistically invalid because of the nonrandom nature of the sample, the small sample size, and the absence of data essential to evaluate the degree of confidence that may be placed in the inference.

The initial problem with the NPS's inference that the D&B sample data reflects the industry's Profitability Measures arises from the nonrandom nature of the samples employed by D&B. The companies for which data was reported were not randomly selected from the industry, but were companies that voluntarily reported their financial data to D&B. The samples are known as "convenience" or "accidental" samples in statistical parlance, and statisticians place no confidence in convenience samples.

The problem with convenience samples . . . is that [there is] no way of knowing if those included are representative of the target population. . . . When participation is voluntary or sample elements are selected because they are convenient, the sampling plan provides no assurance that the sample is representative. Empirical evidence, as a matter of fact, is much to the contrary. Rarely do samples selected on a convenience basis, regardless of size, prove representative.

Convenience samples are not recommended, therefore, for descriptive or causal research. *Marketing Research: Methodological Foundations*, 4th ed. (The Dryden Press, Chicago, 1987) pgs. 435-436.

Also,

A sample should be chosen objectively, and should not be determined by the convenience of the experimenter. . . . [V]alid conclusions about the population can be made if the sample taken is a simple random sample [emphasis in the original].

Definition: A simple random sample is chosen so that each sample of that size in the population is equally likely to be chosen. Such a selection is said to be made at random [emphasis in the original].

The techniques of statistical inference . . . are based on the assumption that your sample is a simple random one. . . . [T]he sample is a random one if each additional member added to the sample is chosen so that all remaining members of the population are equally likely to be chosen. *Statistics*, pgs. 20-21.

The samples used in the *D&B Industry Norms* are not random because SIC 4489 businesses not participating in D&B's reporting service had no chance whatsoever of being selected into the sampling set. There are at least 3,000 businesses in the passenger vessel business in the United States, yet in 1988 only 16 companies reported to D&B under SIC 4489, and in 1989 there were 56 companies.¹³ So it appears that at least 99.5% and 98.1% of the population of SIC 4489 businesses

¹³ The Passenger Vessel Association ("PVA") is the national trade association of passenger vessel operators in the United States. It has approximately 500 members, and according to W. R. Mosteller, the 1995-1996 PVA President, there are at least 2,500 other businesses in the industry that are not members of PVA. So an informed opinion as to the size of the passenger vessel industry in the United States is 3,000 businesses. However, the number of businesses comprising SIC 4489 should be yet higher. Because of the broad definition and industry parameters for SIC 4489, businesses that are not considered to be involved in the passenger vessel industry according to PVA criteria, are still included in SIC 489 (i.e. swamp buggies).

in 1988, and 1989, respectively, were excluded from the possibility of being included in the D&B samples.¹⁴ These clearly were not random samples of all businesses in SIC 4489.

In the FFA the NPS violated one of the cardinal statistical principles of sampling when it utilized nonrandom samples, and assumed the Profitability Measures derived from those samples were descriptive of the entire population of SIC 4489 businesses from which the samples were drawn. The statistical community has such little faith in nonprobability or nonrandom samples because they invariably are not representative of the larger population from which the sample was taken. They almost always introduce bias in the form of some characteristic or set of characteristics which are common to the sample members that cause or contribute to their being included in the nonrandom sample. In the present case, the sample consisted of businesses voluntarily reporting financial data to D&B in order to obtain a credit rating. Consequently, some bias in this sample might be introduced by an over representation of companies needing financing, or by a lack of integrity in the information reported by virtue of the voluntary submittal procedure. In any case, it is not necessary to speculate upon or identify the nature of the bias introduced by D&B's sampling procedure. The point of this discussion is to assist in developing an intuitive understanding as to why nonrandom sampling is unacceptable in inferential statistics. Another reason nonrandom samples are unacceptable is that they preclude an assessment of sampling error, and thereby prevent statisticians from determining the accuracy of their estimates.

Nonprobability [nonrandom] samples involve personal judgement somewhere in the selection process. . . . The fact that the elements are not selected probabilistically [randomly] precludes an assessment of 'sampling error'. Without some knowledge of sampling error that can be attributed to sampling procedures, we cannot place bounds on the precision of our estimates. *Marketing Research*, p.435.

¹⁴ Exclusion rate = (# companies in sample each year ÷ 3,000 companies in population) × 100

On the basis of the nonrandom nature of the samples employed by the NPS alone, it can be concluded that the NPS had no basis to conclude that the D&B data reflects the median for financial statement accounts or Profitability Measures of business classified under SIC 4489. On the contrary, it is clear that the consensus in the statistical community is that the nonrandom nature of the D&B sample renders the data completely unreliable as a predictor for anything about businesses classified under SIC 4489. There is no question about this. However, to emphasize the arbitrary and capricious nature of the FFA, additional statistical deficiencies in the D&B data employed will be discussed.

Another major deficiency in the *D&B Industry Norms* data has to do with sample size. Generally speaking, the larger the sample size in inferential statistics, the more accurate the statistical inference that the measure of a characteristic in a sample is reflective of the population as a whole. *Statistics*, p. 197. And, "the thing that directly affects the size of the sample is the variability of the characteristic in the population". *Id.*, p. 487. Because of the very small sample sizes (16 and 56), and the wide variation in the Profitability Measures, the sample sizes in the D&B data are too small to engender any reasonable level of confidence that they are reflective of Profitability Measure characteristics in the population of businesses classified under SIC 4489. Although there is insufficient data to quantify the level of confidence that may be placed in the inference that the *D&B Industry Norms* data is reflective of the population of SIC 4489 businesses, a consideration of the tremendous variation in the Profitability Measures reported intuitively demonstrates that the data, even if it were derived from a random sample, would not be considered reflective of the industry because the samples are too small. At this point it is important to keep in mind that the number of businesses in a sample necessary to produce characteristics that are reflective of the industry as a whole, is a function of the variability of the characteristics measured. The higher the variability, the greater sample size required. In the present case, the greater the variability in ROA, ROE and ROG in the D&B data, the larger the sample size should be to accurately depict the industry. Ideally, the measure of the variability of the Profitability Measures in the D&B samples of businesses, and the number of samples necessary to establish statistically valid inferences, would be quantified by calculating the

standard deviation of the quartile thresholds and medians for a large number of samples.¹⁵ However, the data available from the *D&B Industry Norms* is insufficient for the standard deviation calculation. Consequently, the best indication of variability of the Profitability Measures available from the D&B data is the variability of the second and fourth quartile thresholds reported for SIC 4489 businesses in the *D&B Industry Norms* samples for 1988 and 1989.¹⁶ These are depicted in the A below:

Table A: D&B Quartile Thresholds for SIC 4489, 1988 and 1989			
	1988 Second Quartile Threshold	1989 Fourth Quartile Threshold	Range Between Thresholds
ROA	(12.5%)	21.4%	33.9 %points
ROE	(56.1%)	49.7%	105.8 %points
ROG	(3.9%)	14.0%	17.9 %points

The variability of the medians for the Profitability Measures reported for SIC 4489 in the *D&B Industry Norms* samples for 1988 and 1989 is another indication of the variability of the Profitability Measures. These are depicted in Table B below:

Table B: D&B Median Profitability Measures for SIC 4489, 1988 and 1989			
	1988	1989	Variance
ROA	(7.7%)	13.8%	21.5 %points
ROE	(33.3%)	31.3%	64.6 %points
ROG	(1.2%)	6.9%	8.1 %points

¹⁵ The standard deviation is a measure of variability of a characteristic in a sample. *Statistics*, pgs. 68-70.

¹⁶ Remember these are not the ranges for these Profitability Measures. The ranges, defined by the 0th and 100th percentiles, would be greater than the quartile thresholds which are defined by the 25th and 75th percentiles. If the range data were available, it would show an even greater degree of variability.

Although the level of confidence that can be placed in the NPS's inference that the *D&B Industry Norms* data reflects the population of businesses classified under SIC 4489 cannot be statistically measured because of the insufficiency of the data that the NPS chose to utilize, consideration of the wide variability in the data as depicted in Tables A and B leads to the intuitive conclusion that the sample sizes in the *D&B Industry Norms* are too small to justify reliance upon the sample data to infer anything about the population of businesses classified under SIC 4489. Consider the ROE data reported by the *D&B Industry Norms*. The second quartile threshold for 1988 is negative 56.1%, and the fourth quartile threshold is positive 49.7%, resulting in an incredible range for quartile thresholds of 105.8 percentage points! Similarly, the reported ROE medians are negative 33.3% in 1988, and positive 31.3% in 1989, for a likewise incredible variance of 64.6 percentage points! These wide swings in reported ROE are accompanied by similarly wide swings in the other Profitability Measures.

Considering this extreme variability in the characteristics measured in the D&B samples, the NPS's conclusion that an average of the Profitability Measures reported for the D&B samples reflect the Profitability Measures for the entire population of businesses classified under SIC 4489 is completely without merit. The returns for that population of businesses simply could not have varied so wildly from 1988 to 1989. The only possible conclusion that can be drawn from a consideration of the extreme variation in the *D&B Industry Norms* data is that drawing any inferences about the population of businesses from which the samples were drawn on the basis of the characteristics measured in the samples is statistically invalid. No confidence can be placed in the data indicating anything about the population of businesses comprising SIC 4489. Subsequently, neither can the data supply any indication of what FST's Profitability Measures "should be". The NPS has simply missed its mark of holding FST's profitability close to the median for businesses classified under SIC 4489 because of the insufficiency of the *D&B Industry Norms* data.

(4) *The NPS Failed in its Duty to Establish the Statistical Validity of the Data It Used from the D&B Industry Norms*

It is the duty of an agency "to establish the statistical validity of the evidence before it prior to reaching conclusions based on that evidence," *St. James Hosp. V. Heckler*, 760 F.2d 1460, 1467 n.5 (7th Cir.), *cert. denied*, 474 U.S. 902 (1985). However, the NPS presented no evidence to establish the validity of the data it utilized or the inferences it drew from the *D&B Industry Norms*. Even if it had desired to present such evidence, the NPS could not engage in any type of inferential statistical analysis to establish the validity of its inference because the improper sampling technique employed, and the incomplete nature of the data, make such an analysis impossible.

Applying inferential statistics it is possible, with a random sample, and employing the Central Limit Theorem and parametric statistical analysis, to determine the sample size required to conclude, at a predetermined level of confidence, that the mean of a particular characteristic in a population falls within a defined range around the mean of that characteristic for the sample. *Statistics*, pgs. 155-164, 198-200. In the present case, if there were at least 30 measures of quartile returns, each derived from a set of random samples, and if additional data were available, it would be possible, employing widely accepted statistical techniques, to make a statement such as this: I am 95% confident that the interval 9.5% to 13.3% contains the mean of the median Return on Equity for the population of businesses classified under SIC code 4489.¹⁷ The same type of statement could be made about the quartile thresholds; about both of the other profitability measures (return on assets and return on gross); and about the financial statement accounts. The Central Limit Theorem and Confidence Interval calculation of parametric statistics is central to almost all inferential statistics. These are the statistical devices that are employed when, for example, survey results are assigned margins of error (another way to express a Confidence Interval). The point is this, the Central Limit Theorem and Confidence Interval calculation, with its concomitant determination of appropriate sample size, are not some esoteric or obscure statistical theories that the NPS should be excused for not employing in pursuit

¹⁷ The additional data needed to conduct this type of analysis would be median and quartile threshold data from the number of sample sets dictated by the desired level of confidence.

of its duty to establish the statistical validity of the data it used. They are foundational to basic inferential statistics. They are the way that statistical data is validated, and if the D&B data was presented in such a way that the validity of it could not be tested, the NPS should have looked elsewhere for data that was at least capable of being subjected to validity testing.

In light of the *a priori* invalidity of the D&B data because it is not derived from a random sample, and in light of the small sample sizes and wide variability of the characteristics measured in the samples, and in light of the inability to even submit the D&B data to statistical validity testing because of its incomplete nature, the conclusions the NPS reached in its FFA, which are wholly predicated upon inferences drawn from the D&B data, should be dismissed.

Clearly the NPS failed in its duty to establish the statistical validity of the data it employed and the inferences it made therefrom in the FFA. Not only did the NPS fail to even attempt a validation of its data and inferences, but it has been affirmatively demonstrated that the NPS so violates fundamental principles of inferential statistics in its FAA that a serious apology for its statistical methods is not possible. According to *St. James Hosp.*, this failure to validate its data and inferences sufficiently establishes that the NPS's methodology in raising FST's franchise fees is arbitrary and capricious, and the 12 % franchise fee should be set aside. However, an additional aspect of the *D&B Industry Norms* data buttresses the conclusion that the NPS's utilization of it in the FFA is arbitrary and capricious.

(5) *D&B's Own Criticism and Limitation of Its Data Renders the NPS's Reliance Upon That Data Arbitrary and Capricious, and an Error in Judgement*

The *D&B Industry Norms* were neither designed nor compiled for the purposes of the NPS, and courts have found that when an agency adopts a regulation based on a study not specifically designed for that purpose, and which has been limited or criticized by its authors on essential points, such agency action is arbitrary and capricious, and constitutes a clear error in judgement. *Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579, 1583 (10th Cir. 1985), *cert. denied*, 474 U.S. 863 (1985).

It is precisely the type of limitation and criticism found in *Humana of Aurora* that the publishers of the *D&B Industry Norms* used to caution its subscribers not to rely indiscriminately on their data. Each subscriber to the *D&B Industry Norms* must sign a contract that includes the following provision:

The subscriber acknowledges that D&B does not, and could not for the fees charged hereunder, guarantee or warrant the correctness, completeness, currentness, merchantability or fitness for a particular purpose of the information. Such information usually is not the product of an independent investigation prompted by each subscriber's inquiry but is updated and revised on a periodic basis. *Dunn & Bradstreet, Inc., § 3 of Standard Subscriber Contract.*

A similar caveat is provided with each written report that D&B provides its clients, which states:

This report . . . contains information compiled from sources which Dunn & Bradstreet, Inc. does not control and whose information, unless otherwise indicated in this report, has not been verified . . . Dunn & Bradstreet, Inc. . . . does not guarantee the accuracy, completeness, or timeliness of the information provided.

So, according to *Humana of Aurora*, the NPS's reliance upon the data contained in the *Industry Norms* renders the franchise fee determination process contained in NPS-48 arbitrary and capricious because of Dunn & Bradstreet's own criticism and limitation of that data.

(6) *The Identical Criticisms Leveled at the D&B Industry Norms Apply to the RMA Statement Studies employed by the NPS in Limiting Officers' Salaries*

The NPS employed data reported in the *RMA Statement Studies* to justify its limitation of FST's officers' salaries to 10% of gross receipts. Each of the criticisms leveled at the *D&B Industry Norms* apply to the *RMA Statement Studies*. The *RMA Statement Studies* contain a publisher's limitation and criticism of the data contained therein similar to that found in the *D&B Industry Norms* (see Exhibit 2). The NPS's utilization of the data should therefore be considered arbitrary and

capricious, and a clear error in judgement pursuant to *Humana of Aurora*. The data is compiled by SIC code utilizing nonrandom sampling techniques (see Exhibit 2, paragraph 1), and the sample size actually used by the NPS for SIC 4489 consisted of only 10 businesses. Not only is this a violation of the fundamentals of statistical analysis described supra, but the *RMA Statement Studies* itself specifically warns against using industry figures derived from small samples (see Exhibit 2, paragraphs 3 and 4). The *RMA Statement Studies* further provide a warning concerning the systemic deficiency of utilizing SIC code classification as discussed supra (see Exhibit 2, paragraphs 2, 5 and 6). Based upon these criticisms, the NPS's utilization of the *RMA Statement Studies* to disallow over \$162,000 of officers' salaries in the FFA is clearly an arbitrary and capricious abuse of agency discretion, and a clear error in judgement.

(7) *Conclusions Regarding the NPS's Utilization of the D&B Industry Norms and RMA Statement Studies Data as a Comparator for FST*

There is only one reasonable conclusion that can be drawn from this lengthy discussion of SIC codes and the NPS's utilization of the *D&B Industry Norms* and the *RMA Statement Studies* data. The data is statistically unreliable and invalid. This is the conclusion reached by Dr. Mark F. Hartley, D.B.A., an Associate Professor of Statistics at the College of Charleston. After reviewing NPS-48, the FFA, the *D&B Industry Norms* and the *RMA Statement Studies*, Dr. Hartley expressed his opinion in an Affidavit which is attached as Exhibit 1, along with his Curriculum Vita. Because the NPS failed in its duty to establish the statistical validity of the data it used in the FFA, its conclusion that a 12% franchise fee is appropriate is invalid, and the NPS's imposition of that fee constitutes an arbitrary and capricious abuse of agency discretion, and a clear error in judgement according to the doctrines of *St. James Hosp.* and *Humana of Aurora*.

Though less technical in nature, a similar conclusion was reached by an advisory arbitration panel addressing an increase in franchise fees imposed upon another NPS concessioner, Parkway Inn,

Inc. ("Parkway Panel").¹⁸ The *Parkway* Panel was the first impartial tribunal to review the franchise fee reconsideration process of NPS-48, and was clearly critical of the use of the *D&B Industry Norms*. The panel opined that, "[P]art of the difficulty in determining an appropriate franchise fee [is] the absence of more suitable data regarding the identity of Parkway's comparators." *Parkway*, p.9. Largely due to deficiencies in the *D&B Industry Norms* data, the *Parkway* Panel concluded that it could not recommend a franchise fee and suggested that:

[I]f appropriate data does not exist, the government should undertake either to develop its own data or to explore alternative approaches to franchise fee determinations that are not so heavily dependent on comparisons with facilities outside the national parks that operate in a different environment. Indeed, the government may wish to establish a task force, perhaps including representatives of the concessioner industry, to study the issues of comparators and/or alternative approaches to calculating franchise fees. *Id.* P.10.

The *Parkway* Panel concluded that the methodology for reconsidering franchise fees as set forth in NPS-48, predicated upon *D&B Industry Norms* data as it is, is invalid. Similarly, in the case of FST, the NPS's adoption of broad four digit SIC code classifications for the categorization of FST's concession operations, the NPS's reliance upon the *D&B Industry Norms* and the *RMA Statement Studies* data in its FFA, and the criticism and limitation of that data by the publishers, when coupled with the incisive demonstration supra that the data utilized and inferences drawn in the FFA are in fact statistically invalid, establishes that the NPS methodology employed in raising FST's franchise fees is an arbitrary and capricious abuse of agency discretion that constitutes a clear error in judgement.

¹⁸ Pursuant to § 9(e) of the standard NPS concessions contract, an independent arbitration panel was convened to review the franchise fee increase for Parkway Inn, Inc. in Great Smoky Mountains National Park. *Parkway Inn, Inc., Pisgah Inn and National Park Service*, No. 160061591G (AAA, 1993) (Kahn, Hanson, Winiwski, Arbs.).

VII. THE ARBITRARY, CAPRICIOUS AND ABUSIVE NATURE OF THE ASSUMPTIONS AND ADJUSTMENTS MADE TO FST'S FINANCIAL INFORMATION IN THE FFA

The following discussion addresses material errors made by the NPS in its manipulation of FST's financial data and in the assumptions it made in the FFA. In several instances the NPS actually violates the essence of the CPA's franchise fee provisions, transgresses its own guidelines as set forth in NPS-48, disregards fundamental economic principles, ignores known economic or operational realities, or usurps GAAP. Each of the errors works to either make FST appear historically more profitable than it actually was during the period, 1986-1990, thus "justifying" a higher fee, or works to ameliorate the apparent impact of the higher fee on FST's anticipated future results for 1991-2000.

In reviewing the NPS manipulation of FST's financial data, it is important to understand the mathematical relationships between the data being manipulated and the return or Profitability Measures utilized by the NPS. The three Profitability Measures employed in the comparison with the *D&B Industry Norms* data, as previously stated, are Return on Assets ("ROA"), Return on Equity ("ROE"), and Return on Gross Receipts ("ROG"). ROA, ROE and ROG express net income as a percentage of assets, equity and gross income, respectively. Net income is the numerator in each calculation, and the denominators are assets for ROA, equity for ROE, and gross receipts for ROG.¹⁹ Consequently, to the extent that NPS adjustments increase net income, or reduce assets, equity or gross receipts, FST's Profitability Measures are skewed upward, enhancing its adjusted return and apparent profitability. And the magnitude of the manipulations, particularly when compounded together, so grossly misrepresent FST's financial condition and the probable value of FST's contract privileges, and so violate the CPA, GAAP, NPS-48, economic and operational realities, and

¹⁹ ROE = [(adjusted average net income ÷ average equity) x 100]
 ROA = [(adjusted average net income ÷ average assets) x 100]
 ROG = [(adjusted average net income ÷ average gross receipts) x 100]

fundamental economic principles, that the setting of a 12 % franchise fee pursuant to the FFA constitutes arbitrary, capricious and abusive agency action that is not in accordance with the law.²⁰

(1) *The NPS Gave No Consideration for FST's Low Debt, Fully Depreciated Assets or Operational Efficiency*

NPS-48 envisions the adjustments made to FST's reported financial information to be of two types. The first is a quantitative type that is to be "translated into dollars and added or subtracted to net profits". (A.R., Tab B, Ex.3, p. 1). In making this type of quantitative adjustment NPS-48 cautions that care should be taken in comparing concessioner returns to industry standards in two particular fixed expense areas, namely, interest expense and depreciation. NPS-48 cautions that concessioners having little or no long term debt with low interest expense will show a profitability that is "overstated when compared to industry averages [emphasis in the original]". (A.R., Tab B, Ex.3, p. 2). Similarly, concessioners with older assets that are fully depreciated will be "overstating their profitability with respect to industry averages [emphasis in the original]". (A.R., Tab B, Ex.3, p. 3). According to its own guidelines, for the purpose of comparability to industry averages, FST's net income should of been adjusted downward because it had relatively little long term debt (and therefore a lower interest expense relative to the industry),²¹ and its major capital assets were fully

²⁰ "Arbitrary" means, "an 'arbitrary' manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgement; depending on the will alone [emphasis added] . . .". *Black's Law Dictionary*, 5th ed., West Publishing Co., 1979.

²¹ NPS reviewed FST's 1986-1990 financial data in the FFA. The actual debt figure utilized by the NPS for comparison to industry averages was the average debt for these five years, or only \$92,000. For the years 1988 and 1989 it had no debt. In 1986 and 1987 it had relatively insignificant debt levels of \$37,000 and \$40,000 respectively. Only in 1990 did FST carry any significant level of debt, and this was two Small Business Administration loans secured to cover losses incurred as a result of Hurricane Hugo. The two loans were originated in September of 1990, and the long term portions of the loans were \$383,000 on FST's December 31, 1990, balance sheet. So in only four months out of the five year historic period considered in the FFA did FST have what could be considered any significant long term debt, yet the NPS did not make the adjustment called for in NPS-48 when concessioners have little or no long term debt. In fact, a strong argument can be made that due to its extraordinary nature, this SBA debt should not contribute in any way to the NPS not making the beneficial adjustment being discussed.

depreciated (and therefore a lower depreciation expense relative to the industry).²² As discussed *supra*, these downward adjustments of net income would have decreased FST's Profitability Measures. The consequence of NPS not following its own guidelines is to penalize FST for having little or no debt, and for being a mature company that has maintained assets over the years in such a way as to prolong their economic life beyond that experienced by the industry at large.²³ This omission is a violation of the CPA because the franchise fee is thereby partially a function of FST's low debt and fully depreciated assets rather than the "probable value of the privileges granted by the contract" as required by §20b (d) of the CPA.

The second type of adjustment envisioned by NPS-48 is a nonquantitative type that, though not subject to mathematical calculation, is still to be taken into account in setting the fee. The nonquantitative type involves a review for evidence of good or poor management. In this nonquantitative review of management, NPS-48 considers "[f]ield observation to be especially important in judging management performance", and points to "[e]valuation reports" and "periodic operational reviews" as "useful aides". (A.R., Tab B, Ex.3, p. 1). Again, in performing the FFA the

²² The two passenger vessels owned by FST, its major capital assets, were purchased in 1963 and 1971. Consequently, their original cost basis have been fully depreciated. The FFA goes so far as to acknowledge that "the older boats are essentially depreciated" (A.R., Tab G), yet it does not make the beneficial adjustment to FST as NPS-48 requires.

²³ In essence the consequence of NPS's failure to make this adjustment is to require of FST an annual payment to the government of an amount of money equivalent to the difference between the industry average for interest expense plus depreciation, and FST's interest expense plus depreciation. In other words, every bit of net income FST would have realized by virtue of having paid for its capital assets and by virtue of maintaining these assets in excellent working order, will now be paid to the government. Robbing a business of these benefits of maturity (paid for capital assets with the concomitant low depreciation expense) is tantamount to robbing a retiree of his pension, and certainly has no relationship whatsoever to the "probable value of the privileges granted by the contract" which §20b (d) of the CPA requires franchise fees to be based upon. The higher franchise fee resulting from the NPS not properly taking into account FST's low debt and fully depreciated assets is only related to, and directly determined by FST's low debt and older assets, not by the probable value of its contract privileges. It results in a windfall to the government that is not authorized by the CPA. According to this methodology, once a concessioner pays off its notes on fully depreciated capital assets, its franchise fees to NPS should increase by the amount of the interest payments the concessioner no longer has to pay to the lender, plus the depreciation write off it no longer takes on its books. This is highly inequitable.

NPS failed to follow its own guidelines. There was no field observation by the person(s) responsible for setting the fee, and FST has received nothing but the highest scores in its annual operational reviews. A favorable adjustment in the fee should have been made for FST due to its operational efficiency according to NPS-48, yet, in derogation of NPS-48, no attempt to ascertain FST's operational efficiency was even made, and there clearly was no credit given to FST for operational efficiency because the NPS set a fee at "roughly the maximum" for FST's type of business. (A.R., Tab G). This failure to take into account the operational efficiency of FST is also violative of §20b (d) of the CPA, because the franchise fee becomes a function of operational efficiency rather than the "probable value of the privileges granted by the contract". And the relationship is perversely inverse. The greater the efficiency, the higher the net income and the higher the fee; the less the efficiency, the lower the net income and the lower the fee.

(2) *The NPS Assumed Away Almost \$350,000 of FST's Equity*

In the FFA the NPS adjusted FST's equity downward by almost \$350,000, with the only explanation being a notation, "Assume average equity of 50% of assets". (A.R., Tab G, p. 5). One can only assume this is an adjustment based upon the *D&B Industry Norms*. However, NPS-48 nowhere authorizes adjustments to concessioner's equity. Of course the impact of assuming away FST's equity is to make FST appear more profitable because the ROE calculation yields a higher return with a lower equity figure. According to GAAP, $\text{Equity} = \text{Assets} - \text{Liabilities}$,²⁴ but here, the NPS asserts that equity equals whatever it chooses it to be.

The reason FST has higher equity than the industry average is that FST is a mature company with relatively little debt that has made profits over the years. Equity is increased by the investment of capital in a business and annual earnings.²⁵ The investment of capital that increases equity may

²⁴ "The owner's equity in a business represents the resources invested by the owner; it is equal to the total assets minus the liabilities." Johnson, Charles E., Robert F. Meigs and Walter B. Meigs, *Accounting: The Basis For Business Decisions*, 4th ed., McGraw-Hill, 1977, p.16.

²⁵ "Owner's equity in a business comes from two sources: (1) Investment by the owner [and] (2) Earnings from profitable operation of the business . . ." *Ibid.*, p. 17.

take the form of not only initial start-up capital, but also the satisfaction of debt through principal payments. At the time the FFA was produced, FST had been in business for over thirty years. If in fact FST's equity is high relative to the industry, it is thirty years worth of satisfying debt and earning profits that has resulted in that high equity. Once again FST is being penalized for being a mature company that has its assets essentially paid for, and that penalty is being compounded. It is FST that should be reaping the benefit of having serviced and satisfied its debt over the years, yet the NPS is attempting to reap the benefit with its assumptions. Equity is something a company earns. It cannot be created by accounting slight of hand. It is the cumulative result of placing start up capital in a company, and then, through effective management year in and year out, earning profits, growing assets, and reducing liabilities. For the NPS to suspend the principles of GAAP and "assume away" equity so that a higher franchise fee can be charged is unconscionable! It is also, as stated above, not authorized by NPS-48, and it certainly has no relationship to "the probable value of the privileges granted by the contract" as §20b (d) of the CPA requires. In fact, this methodology is in direct conflict with the explicit provisions of §20b (d) of the CPA which states in part:

Franchise fees, however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for net profit in relation to both gross receipts and capital invested [emphasis added].

The CPA unequivocally requires that franchise fees are to reflect the probable value of contract privileges, and that the "value" of contract privileges is the opportunity for net profit in relation to gross receipts and capital invested. Equity is reflective of the capital invested in a business. Although not a perfect measure, equity is the best indication available from accounting information of the capital invested in a business.²⁶ The CPA specifically requires net income to be related to capital invested in setting franchise fees. When the NPS assumed away over \$350,000 of FST's equity and

²⁶ To the extent equity misrepresents the capital invested in a business such as FST which has significant fully depreciated assets, it understates capital invested because of the accumulation of depreciation which lowers the value of assets on the balance sheet.

then related net income to this lower equity figure, it directly violated the CPA by not giving FST "credit" for the capital it has invested.

(3) *The NPS Included Net Income From Non-Concession Sources, and Failed to Acknowledge Tax Liability in Calculating FST's Average Net Income*

The methodology employed in the FFA begins with the calculation of FST's average net income for the five year period, 1986-1990 ("ANI"). Adjustments are then applied to the ANI, and this adjusted ANI figure is utilized in the Profitability Measure calculations to arrive at FST's adjusted profitability. The NPS, considering FST's adjusted profitability too high for its liking, then proceeded to apply various franchise fee rates to the adjusted ANI until it settled on 12% (roughly the highest rate allowed). In the process of calculating ANI, fairness and deference to fundamental economic principles is crucial because the initial ANI figure, once adjusted in a manner beneficial to NPS, was utilized in the Profitability Measures to conclude FST was too profitable. If error was made in calculating ANI, the Profitability Measures are thrown off because ANI, once adjusted, is factored into each Profitability Measure. The higher ANI, the higher each Profitability Measure.

The NPS made two significant errors in calculating the important ANI figure for FST. First, it included non-concession related net income in ANI. Secondly, it assumed that FST's operations resulted in no income tax liability in the years 1989 and 1990 simply because FST had become an S corporation effective for calendar year 1989.

FST operates both concession related and non-concession related businesses. Concession related activities are all activities engaged in pursuant to the privileges granted in its concession contract with the NPS. Gross receipts from these concession related activities include ticket sales for trips to FSNM, snack bar sales on such trips, and gift shop sales at FSNM. Gross receipts from non-concession activities include harbor tour sales, charter sales, dinner cruise sales, and food and beverage sales on such trips. In its FFA, the NPS included in its ANI calculation for 1986 - 1990, an average of \$173,154 of non-concession related net income and \$22,449 of "other income" (primarily

income derived from investment of working capital). (A.R., Tab G, pgs. 2, 5).²⁷ The NPS then, as detailed above, utilized this ANI figure to conclude FST's concession related activities from 1986-1990 were too profitable. In concluding that EST was generating too much net income under its concession contract, the NPS included an average annual net income of \$195,603 that was not generated under the contract. (A.R., Tab G, Worksheet 3, pgs. 2 and 5). Yet what right does the NPS have to any fees that are based upon net income not derived under FST's concession contract? Not only is this inequitable and capricious under a common law standard, but it violates NPS-48 and the CPA. NPS-48 provides:

[Financial reports should reflect only in-park operations and not include income [or] expenses of other non-concession operations or business of a concessioner's organization (emphasis added). This is most important because each separate financial report should accurately reflect only the results of the concession operation under contract authorization to allow for meaningful analysis, comparison and evaluation by the Service. (A.R., Tab B, Guideline, p. 2).

In spite of the fact that NPS-48 specifically instructs the NPS to exclude non-concession net income for "meaningful analysis, comparison and evaluation", the NPS did in fact include the same in its analysis of FST's profitability.

Even more significant than violating NPS-48, the inclusion of FST's non-concession related net income violates the CPA. Section 20b (d) of the CPA requires that franchise fees:

[S]hall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for net profit in relation to both gross receipts and capital invested (emphasis added).

²⁷ It is important to note these \$173,154 and \$22,449 figures are net. No expenses are deducted from these figures at all. This non-concession related net income that is added to concession related net income "goes to the bottom line", and therefore grossly overstates the profitability of FST's concession related activities.

Here, the NPS goes beyond the limitations established by the CPA and determines FST's franchise fee by considering net income generated outside of "the privileges granted by the particular contract". Since FST's net income derived from non-concession related activity is not generated pursuant to any privileges granted to FST by its contract with the NPS, the NPS has no authority under the CPA to consider such non-concession net income in determining FST's franchise fee. The NPS simply conferred the authority upon itself, but an agency cannot confer power upon itself. *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355 (1986).

The second significant error the NPS made in calculating FST's ANI was to assume FST's operations generated no income tax liability for the years 1989 and 1990. For calendar year 1989 and beyond, FST made an election permitted by the Internal Revenue Code to be taxed as an S corporation. S corporations, similar to partnerships, are "pass through" entities that, in most instances, are not subject to any tax at the corporate level. Instead of paying a corporate level tax, as an S corporation the taxable income and various tax attributes of FST were "passed through" and attributed pro rata to its shareholders for 1989 and 1990. This is *not* to say that income tax wasn't due the federal and state governments on the taxable income generated by FST. The tax liability simply did not show up on FST's books by virtue of its S corporation election; but it was paid by FST's shareholders on their individual returns. And, as is common practice in the case of S corporations, the funds to pay that tax liability were provided to the shareholders by distributions of FST's earnings to its shareholders.²⁸ So there was tax liability resulting from FST's operations in 1989 and 1990, and the funds to satisfy that liability came from FST's earnings.

The general taxing scheme applicable to S corporations is simple and widely understood. It is capricious for the NPS to assume that no tax liability resulted from FST's operations in 1989 and 1990 when it not only knew that such liability existed, but was also cognizant, through FST's annual

²⁸ FST's taxable income that passed through to its shareholders in 1989 and 1990 was \$148,570 and \$41,164 respectively. The 1990 figure is low relative to the 1989 figure because of the deleterious impact Hurricane Hugo had on 1990's performance.

reports, of the level of taxable income that would be passed through to its shareholders.²⁹ The NPS simply assumed away or ignored income tax liability generated by and paid for from FST's earnings, and the impact of this error is to overstate ANI in its FFA. The income taxes figure used in calculating ANI is the average of the taxes paid over the five year period analyzed in the FFA. Since the NPS assumed no tax liability for two of the five years, the average income taxes figure is grossly understated, resulting in a higher ANI and, thereby, an apparently higher profitability.³⁰ This is clearly in violation of not only fundamental economic principles, but also of NPS-48. The failure to recognize such a significant expense item as income taxes is also in violation of the CPA. Section 20b (d) requires that franchise fees be determined "upon consideration of the probable value . . . of the privileges granted by the . . . contract". Probable value is defined in terms of the concessioner's "opportunity for net profit". So, to the extent the CPA permits consideration of profitability when setting franchise fees, it requires a realistic evaluation of the "opportunity for net profit". Net profit is the amount remaining after all expenses are paid.³¹ But refusing to acknowledge such a significant annual expense item as state and federal income taxes cannot be considered a realistic appraisal of

²⁹ In Schedule F of its 1989 *Concessioner Annual Report*, FST informed the NPS that FST had "elected to be taxed under Chapter S of the Internal Revenue Code beginning January 1, 1989. Shareholders are taxed individually on the income earned by the Corporation in 1989." For 1989 and 1990, the NPS should have, as required by NPS-48, assumed historical tax rates, or used a 40% rate as is required when "no historical rate is available". (A.R., Tab B, Exhibit 1, p. 4).

³⁰ If one takes the assumption that "operating conditions . . . will be basically similar to the years being reviewed" as required by NPS-48, the consequence of NPS not giving credit for income tax liability it knew FST's operations generated was to sequester every year, in the form of franchise fees, an amount equal to the contribution 1989 and 1990's tax liability should have made to average income taxes in the FFA. (A.R., Tab B, Guidelines, p. 15). In fact, there is a good argument that the relatively low 1990 income tax liability resulting from Hurricane Hugo should have been adjusted upward significantly, resulting in yet a higher average income tax figure with the concomitantly lower ANI and apparent profitability. NPS-48's directive to "approximate in the financial presentation", "any known changes that will be unique to the concessioner" should have justified this type of adjustment to account for the extraordinary impact of Hugo. (A.R., Tab B, Guideline, p. 15).

³¹ In *Accounting: The Basis for Business Decisions*, p. 77, the authors equate "net profit" to "net income", and state that "net income equals revenue minus expenses".

the "opportunity for net profit". Such an approach overstates net income by 67% if a combined federal and state tax rate of 40% is used.²²

(4) *The NPS Failed to Properly Account For the Reconstitution of the Vessel Lease as a Purchase*

In its FFA, after the NPS calculated ANI as discussed in the previous sections, it proceeded to adjust that ANI figure in ways that made FST appear more profitable. One of the most significant adjustments the NPS made to FST's ANI was to reconstitute the lease of the vessel "Spirit of Charleston" as a purchase ("SOC Reconstitution"). This was done even though, consistent with its contractual obligations, FST received NPS approval for the form of ownership and lease of the vessel. The NPS assumed a purchase price of \$1 million and debt of \$600,000, amortized over ten years. (A.R., Tab G). The vessel actually cost over \$1.4 million and had debt of \$1.3 million. The Washington office of the NPS (where the FFA was performed) was even put on notice that its assumptions regarding the cost and amount of debt on the vessel in question were erroneous.

In a memorandum from James Coleman, Southeast Regional Director, to the Associate Director for Operations in Washington, responding to the Washington office's request to review the then proposed FFA, Director Coleman advised the Washington office that, according to FST's financial reports, the amount of debt on the new vessel was "\$1.3 million which is to be retired annually in equal amounts over ten years". Mr. Coleman concluded, "[t]his strongly suggests to us that the cost of the vessel was in all probability in excess of \$1.3 million". The Regional Director further opined that, considering the actual amount of debt, "the lease fee [that FST actually paid to lease the vessel] is reasonable". He even notified the Washington office that the "assumed depreciation schedule [18 years] is not [reasonable]", citing IRS schedules indicating a 7 year

²² NPS-48 instructs the NPS to assume a 40% tax rate where the rate is unknown. (A.R., Tab B, Ex. 1, p.4). For example, if taxable income is \$100,000, and taxes are \$40,000 (40%), the net income after taxes is \$60,000. The \$40,000 difference between taxable income and net income after taxes is 67% of net income after taxes. So if taxes are not taken into account, net income is overstated by 67%.

depreciation schedule. Mr. Coleman's suggestion to the Washington office was that "the analysis be revised to reflect these conditions, and that it be more carefully reviewed with more attention to the annual financial reports". It is important to note that this memorandum is dated November 13, 1991, more than three months prior to the publication of the final FFA on February 27, 1992. (see A.R., Tab F, p.2).

In spite of being put on notice that the purchase price, debt and depreciation schedule assumptions regarding the vessel in question were erroneous, and in spite of the Regional Director's informed opinion that the lease payments for the vessel were reasonable, and in spite of the fact that the foregoing were communicated well in advance of publication of the final FFA, the NPS simply ignored the facts, disregarded the Regional Director's opinion, and proceeded to impose the SOC Reconstitution upon FST. Here we have the NPS utilizing assumptions that it knows to be factually incorrect in the reconstitution of a transaction. The only explanation for this refusal to acknowledge reality in its FFA is that the NPS was determined to exact a higher franchise fee from FST, and was willing to devolve to the surreal to accomplish that end. Certainly this violates the *Burlington Truck Lines* standard which requires of agency action a "rational connection between the facts found and the choice made", and of the *Ethy/ Corp.* standard which mandates an agency decision be "based on a consideration of the relevant factors". Allowing this action to stand would essentially be sanctioning the proposition that the NPS's authority to unilaterally increase franchise fees on concessioners during the terms of their contracts is limited only by its ability to fantasize justifications for such increases. It is difficult to conceive of a more arbitrary and capricious abuse of agency discretion.³³

As if this arbitrary aspect of the SOC Reconstitution were not enough, the only adjustment NPS made to FST's financial data to reflect the reconstitution was to increase ANI by over \$70,000, the difference between FST's actual lease payments, and the interest and depreciation expense that would occur under the NPS's assumptions. Notable adjustments that are required by GAAP to

³³ The NPS ignoring the real terms of the vessel purchase is clearly "not founded in the nature of things" and was "depending on [its] will alone". It was therefore arbitrary. (See definition of "arbitrary", *Black's Law Dictionary*).

properly account for the SOC Reconstitution but that were not made are concomitant increases on the balance sheet in assets (to reflect the assumed purchase of the vessel), and an increase in liabilities (to reflect the assumed debt).³⁴ Here the NPS goes beyond any subjective standard of arbitrariness and capriciousness, and actually violates GAAP in its financial machinations.³⁵ According to GAAP, on FST's balance sheet, net assets should have been increased by \$600,000.³⁶ Since this reconstituted transaction was assumed to have occurred in 1986, FST's equity should have also been increased by 1990, the last year analyzed, because as FST made the principal payments on the assumed ten year \$600,000 note, its equity would increase.³⁷ The arbitrary nature of the NPS's FFA is perhaps nowhere more clear than in this reconstitution of a lease as a purchase. The NPS first assumed a purchase price that it knew was over 28% less than the vessel actually cost. Then the NPS assumed interest payments substantially less than what they would have been if FST had actually purchased the vessel for its real cost rather than leased it. The consequence of this fiction is to make FST's net income look higher, and therefore make its Profitability Measures appear higher. Finally, in their assumed reconstitution of the lease, the NPS once again suspends the principles of GAAP and fails to make the adjustments to assets, liabilities and equity mandated thereby. And it is these omitted adjustments that are the only adjustments prescribed by the SOC Reconstitution that, if they had been

³⁴ "Every event recorded in the accounts affects at least two items; there is no conceivable way of making only a single change in the accounts. Accounting is thus properly called a *double entry system* [emphasis in the original]." Anthony, Robert N. and James S. Reese, *Accounting: Texts and Cases*, 6th ed., Richard D. Irwin, Inc., 1979. p.30.

Also, "[T]he rule, to which there absolutely is no exception [emphasis in the original], [is] that for each transaction the debit amount . . . must equal the credit amount. This is why bookkeeping is called *double-entry* [emphasis in the original] bookkeeping. It follows that the recording of a transaction in which debits do not equal credits is incorrect [emphasis added]. *Ibid.*, p. 94.

³⁵ "[T]his equality between the assets and the claims against the assets is always maintained. Any increase in the amount of total assets is necessarily accompanied [emphasis added] by an equal increase on the other side of the [accounting] equation, that is, by an increase in either liabilities or the owner's equity." *Accounting: The Basis for Business Decisions*, p. 18.

³⁶ The \$600,000 net increase in assets would be entered as follows: \$1,000,000 increase in fixed assets - \$400,000 decrease in cash utilized to pay for the equity in the vessel.

³⁷ $\text{Equity} = \text{Total Assets} - \text{Total Liabilities}$. *Accounting: The Basis for Business Decisions*, p. 16. As principal payments were made on the note secured by the vessel, liabilities would decrease and equity increase by the amount of these principal payments.

made, would have benefitted FST by decreasing net income, and increasing assets and equity, and thereby reducing its Profitability Measures. The NPS should not have it both ways - reconstituting a transaction in order to justify a higher fee, and neglecting those aspects of a full accounting for the reconstitution that inure to the benefit of FST. If the SOC Reconstitution is imposed by the NPS, it should be properly accounted for.

(5) *The Disallowance of Officer's Salaries Was Made Without Adequate Consideration of FST's Operational Realities*

The second major adjustment NPS made to ANI was to disallow over 53% of officer's salaries in order to limit them to 10% of gross receipts. (A.R., Tab G, p. 5). According to the FFA, this limitation was imposed to approximate "the median of the water transportation industry reported by Robert Morris for 1989, in its 1990 Annual Statement Studies". (A.R., Tab G).³⁸ With regard to adjustments to officer's salaries, NPS-48 warns the NPS that, "[a]ny adjustments made to operating or administrative expenses because of observed differences with industry statistics must be made with caution." (A.R., Tab B, Ex. 3, p. 1). Yet no caution was demonstrated by the NPS in disallowing these salaries. No inquiry was made of FST as to why the salaries appeared above the industry average. In reality, the reason FST's officer's salaries appeared above the industry average is because FST is a family owned and operated business which, during the period analyzed, involved the labors of six family members. These family members, largely in an effort to avert any familial animosity, were each designated as officers, regardless of the job function they performed. Officer status was conferred upon individuals by virtue of their family ties rather than their job description. FST has had "officers" captain company boats, spend days in the engine rooms of boats performing repairs and maintenance, sell tickets, take reservations, preside over food and beverage services, engage in sales activities, clean the office, etc. In other words, FST's "officers" perform tasks that would not be performed by officers in a non-family owned business. If a "cautious" inquiry had been made into FST's entire payroll as required by NPS-48, higher than average "officers" salaries would have been

³⁸ The statistical invalidity of the data utilized by the NPS from the *RMA Statement Studies* has already been established *supra*.

found to coexist with a lower than average non-officer payroll.³⁹ This phenomenon is a consequence of FST "officers" performing functions not typically performed by officers, and thereby supplanting non-officer payroll. For the NPS to charge FST a higher franchise fee based upon who it happens to designate as an "officer" is capricious. FST could just as easily have designated only one or two officers with cumulative salaries much less than the industry average, and thereby avert this massive adjustment against its interest.⁴⁰ When one considers that possibility, the arbitrary nature of this adjustment comes to light. Clearly, who FST happened to designate as an officer had a substantial impact on the franchise fee the NPS is attempting to charge FST, but this is in derogation of §20b (d) of the CPA, which precludes such arbitrary measures by requiring the fee to be based upon "the probable value of the privileges granted by the particular contract". It is the value of the contract rights that the NPS is to look at in setting franchise fees, not who happens to hold "officer" designation.

(6) *The Utilization of Book Value in the Profitability Measures is Unsound*

In the FFA, both in concluding that FST was too profitable, and in projecting the future impact of the 12% fee, the NPS utilized book value as the value of FST's assets.⁴¹ The consequence of using book value in calculating FST's Profitability Measures is to significantly overstate ROA and ROE, because the fair market values of FST's long term capital assets are much greater than their

³⁹ The *RMA Statement Studies* supplies no data for non-officer payroll, so this phenomenon cannot be quantified by reference to that document. This should not relieve the NPS of the duty of making further inquiry, however, since NPS-48 specifically requires that "caution" be used when making such adjustments. The *RMA Statement Studies* does indicate that the upper threshold for the third quartile for officer's salaries is 29.9% of gross receipts. The FFA shows FST's unadjusted average officer's salaries to be in the middle of the third quartile at 21.5% of gross receipts. (A.R., Tab G). So even in an unadjusted state, FST's officer's salaries are not really out of line with the *RMA Statement Studies* figures.

⁴⁰ The salary adjustment made by the NPS resulted in FST's ANI being adjusted upwards by \$162,742. (A.R., Tab G, Worksheet 3, p.5). This of course resulted in FST's Profitability Measures being significantly higher.

⁴¹ "Book value" is, "[t]he net amount at which an asset is shown in accounting records. For depreciable assets, book value equals costs minus accumulated depreciation". *Accounting: The Basis for Business Decisions*, p. 142.

book values.⁴² A thorough understanding of how FST's Profitability Measures are overstated by using book value requires an exploration of the concept and limitations of accounting for long term capital assets:

In reading a balance sheet, it is important to bear in mind that the dollar amounts listed do not indicate the prices at which the assets could be sold, nor the prices at which they could be replaced. One useful generalization to be drawn from this discussion is that a balance sheet does not show 'how much a business is worth' [emphasis added]. *Accounting: The Basis for Business Decisions*, p. 14.

Also:

[A]n asset is ordinarily entered on the accounting records at the price paid to acquire it—that is, at its cost—and that cost is the basis for all subsequent accounting for the asset.

Since for a variety of reasons, the real worth of an asset may change with the passage of time, the accounting measurement of assets does not necessarily—indeed, does not ordinarily—reflect what assets are worth, except at the moment they are acquired. There is therefore a considerable difference between the way in which assets are measured in accounting and the everyday, non-accounting notion that assets are measured at what they are worth. In accounting, assets are initially recorded at the exchange price paid to acquire them, that is, at their cost; and this amount is ordinarily unaffected by subsequent changes in the value of the asset. In ordinary usage, the 'value' of an asset is usually understood to mean the amount for which it currently could be sold. [emphasis added]

Example. If a business buys a plot of land, paying \$50,000 for it, this asset would be recorded in the accounts of the business at the amount of \$50,000. If a year later the land could be sold for \$100,000,

⁴² The book value of these vessels on FST's balance sheet is, consistent with GAAP, derived as follows: Book Value of Asset = Original Cost + Capital Improvements - Accumulated Depreciation. Since the original costs of the vessels have long been depreciated away, the book value of the vessels amounts to nothing more than the costs of recent capital improvements which themselves are depreciated over their expected life.

or if it could be sold for only \$20,000, no change would ordinarily be made in the accounting records to reflect this fact.

Thus, the amounts at which assets are shown in a company's accounts do not indicate sales values of the assets. One of the most common mistakes made by uninformed persons regarding accounting reports is that of believing there is a close correspondence between the amount at which an asset appears on these reports and the actual value of the asset [emphasis added]. *Accounting: Texts and Cases*, pgs. 27-28.

Finally:

The cost of an asset that has a long, but nevertheless limited, life is systematically reduced over that life by the process called 'depreciation' . . . The purpose of the depreciation process is systematically to remove the 'cost' of the asset from the accounts and to show it as a cost of operations; depreciation has no necessary relationship to changes in market value or in the real worth of the asset to the company [emphasis added]. *Ibid.*, p. 28.

Clearly the book value of long term capital assets, particularly ones against which annual depreciation deductions are applied, as in the case of FST's passenger vessels, is simply an accounting concept that has no relationship to the real economies involved. Utilizing book value for assets in calculating ROA and ROE obviates the purpose for which these measures are typically employed. The real utility in calculating ROA and ROE is to determine the relative efficiency of asset deployment. The proper utilization of ROA and ROE is best understood with an example:

Example: If an investor had a particular investment, X, and the owner of X were considering liquidating it and redeploying the proceeds into another investment, Y, he would calculate ROA and ROE on X, valuing it at its fair market value, and then compare these returns to the ROA and ROE the owner might expect if the proceeds of X were redeployed in Y. The investor utilizes fair market value instead of book value because fair market value is what he will realize from the sale of X to reinvest in Y. The owner of X would be foolish to use the book value of X in his ROA and ROE calculations, because book value is not determinative of how much he can realize from the sale of X to reinvest in Y.

Yet the NPS utilizes book value in calculating two of its three Profitability Measures (ROA and ROE) in the FFA. Understating the real value of assets as the utilization of book value does, not only skews ROA upwards (because it understates assets and therefore makes ROA higher), but it also overstates ROE, because $\text{Equity} = \text{Assets} - \text{Liabilities}$. Understating the real value of assets makes assets and equity appear lower; therefore ROA and ROE are higher. This misapplication of the concept of book value in FST's Profitability Measures artificially inflates FST's apparent returns. If the market value for FST's capital assets were used, as economic prudence dictates, both assets and equity would be significantly higher, and therefore the profitability measures, ROA and ROE would be significantly lower.

The manner in which the NPS employed book value in its ROA and ROE calculations to establish FST's franchise fees is in violation of the CPA because the nature of these accounting concepts produces franchise fees that are dictated, not by the "probable value" of contract rights as § 20b (d) of the requires, but by factors such as the age and depreciable life of assets. This point is best illustrated by an example:

Example. Assume Company A owns one depreciable asset with a fair market value of \$1 million, a book value of \$500,000, and debt of \$300,000. A's equity would be \$200,000. Assume Company B bought A's asset for its \$1 million fair market value minus the \$300,000 debt, which B assumed. B continues in the business A was previously engaged in. The book value of B's asset would be \$1 million, and B's equity would be \$700,000. Further assume that in A's last year of operating the business, and in B's first year of operation, they each earned \$100,000 of net income. A's ROA and ROE would be 20% and 50%, respectively; whereas B's would be 10% and 14%. In this example A and B are utilizing the same asset, in the same business, with the same amount of debt, and earning identical net income in consecutive years. Yet A has a ROA that is twice that of B, and a ROE that is over three and one-half times that of B! This phenomenon is purely a function of utilizing book value in the ROA and ROE calculations. Because they are predicated upon book value, the ROA and ROE figures are not reflective of the economic realities of A's and B's businesses, or what those businesses (or concessions contract privileges, if they operated under one) are worth. They in fact

are the same businesses with the same market value. If actual market value for the asset were used in the ROA and ROE calculations, the Profitability Measures for A and B would be identical, and would be truly reflective of their businesses.

It is this same phenomenon that is at play in the Profitability Measures applied to FST, and FST is more or less in the position of A, having its apparent profitability overstated because it is a mature company with a low book value for its fully depreciated capital assets. This example demonstrates that attempting to utilize book value to compare the profitability of businesses grossly misrepresents the economic realities, yet this is precisely what the NPS does in its FFA. The result is that what FST happens to show on its books for its depreciable assets is largely determinative of the franchise fee the NPS seeks to impose. This is of course in violation of the CPA, which instructs the NPS to set fees commensurate with the "probable value of the privileges granted by the particular contract". The NPS is nowhere authorized to set fees based upon the book value of assets. Such a concept is simply irrelevant to the value of FST's contract privileges.

(7) *FST's Historical Trends and Actual Financial Condition Were Ignored in the NPS's FFA Proforma*

The final segment of the FFA involved the development of a proforma income statement and balance sheet for the years 1986 - 2000, the term of the contract ("FFA Proforma"). The FFA Proforma reflects the adjustments and assumptions made by the NPS, along with the 12% franchise fee. (A.R., Tab G, Proforma). From this FFA Proforma, anticipated Profitability Measures were derived to determine the impact a 12% franchise fee would have on FST's future performance. Upon close scrutiny one discovers, as in the case of the adjustments and assumptions regarding FST's reported financial data, that the assumptions in the FFA Proforma have little or no basis in fact. They do, however, have the effect of enhancing FST's apparent profitability for the remainder of the contract term.

The first assumption the NPS made in the FFA Proforma was that gross receipts would grow at 3%, when in fact gross receipts from 1986 to 1990 fell by 7.06%, an average annual growth rate

of -1.76%. (A. R., Tab G, p. 2). The impact of this assumption is to overstate future net income, and thereby make FST appear more profitable than the historical trend would dictate. Adjustments in interest expense, depreciation, lease payments for the leased vessel, and officer's salaries also appear in the FFA Proforma, but these will not be addressed here, as they have already been discussed above.

The most curious assumptions made in the FFA Proforma are the amount of assets, liabilities and equity showing on its balance sheets. The latest financial report available to the NPS when the FFA Proforma was compiled was for calendar year 1990. Since the nature of a proforma balance sheet is to look into the future and anticipate future financial conditions, and since the nature of an actual balance sheet is a "snapshot" of a business' financial condition at a particular point in time,⁴³ the only logical point for the NPS to begin its formulation of FST's future balance sheets is with the known figures from the 1990 balance sheet. The NPS could then proceed from this 1990 balance sheet with its assumptions regarding the items that change a balance sheet from year to year, and produce a proforma that at least had a factual starting point.⁴⁴ Yet instead of using FST's "real" 1990 balance sheet numbers as a starting point, the NPS, assumed away FST's actual financial condition. In its place, the NPS imposed a fictitious financial condition that, consistent with the recurring theme of the FFA, inures to the NPS's benefit at FST's expense. Table C below contrasts FST's reported 1990 balance sheet figures ("FST Reported"),⁴⁵ FST's 1990 balance sheet figures properly adjusted for the SOC Reconstitution ("FST Adjusted"),⁴⁶ and the 1990 balance sheet figures assumed by the

⁴³ "The purpose of a balance sheet is to show the financial position of a business at a particular date", and, "the body of the balance sheet . . . consists of three distinct elements: assets, liabilities, and the owner's equity." *Accounting: The Basis for Business Decisions*, p. 12.

⁴⁴ The major items that change a balance sheet include the purchase or sale of assets, the incurring or satisfaction of liabilities, the retention of annual earnings, and distributions made to shareholders. *Accounting: The Basis for Business Decisions*, pgs. 18-23.

⁴⁵ The FST Reported balance sheet figures are the 1990 balance sheet figures reported on FST's audited Concessioner Annual Financial Report submitted to the NPS for 1990.

⁴⁶ The FST Adjusted balance sheet figures are the FST Reported balance sheet figures adjusted only to reflect the impact the SOC Reconstitution would have on the balance sheet in 1990. All of the NPS's assumptions regarding the SOC Reconstitution are utilized except that the actual purchase price of \$1.4 million and actual debt of \$1.3 million are used. The effect the accounting for this transaction would have on FST's 1990 balance sheet is as follows:

NPS ("NPS"). The table then expresses the degree to which the NPS under reported FST's balance sheet had it been properly adjusted to reflect the SOC Reconstitution ("Under Reported"). The Under Reported figures are expressed both in absolute terms and as percentages.

Table C: 1990 Balance Sheet Discrepancies				
	FST Reported	FST Adjusted	NPS	Under Reported
Assets	\$1,766,372	\$2,816,371	\$1,164,000	(\$1,652,371) (58.7%)
Liabilities	\$613,802	\$1,393,802	\$375,000	(\$1,018,802) (73.1%)
Equity	\$1,152,570	\$1,422,569	\$789,000	(\$633,569) (44.5%)

Through its assumptions in the FFA Proforma, the NPS under reported FST's assets by 58.7%, its liabilities by 73.1%, and its equity by 44.5% in 1990, a year in which the NPS had FST's actual numbers! To appreciate the arbitrary nature of this particular assumption requires some reflection upon the nature of balance sheets. As stated above, a balance sheet is a "snapshot" of a business' financial condition at the time the balance sheet is compiled. It is an expression of a business' assets (i.e., cash balances, accounts receivables, net fixed assets), its liabilities (i.e., accounts

Assets: Increased by \$1,049,999. (\$1.4 million purchase price - [\$77,778 annual depreciation x 4.5 years]). 4.5 years is used because only ½ a years depreciation is taken in the first year, 1986.

Liabilities: Increased by \$780,000. (\$1.3 million original debt - [\$130,000 annual principal payments x 4 years]). The first \$130,000 principal payment is made in 1987.

Equity: Increased by \$361,110. (\$1,011,110 increase in assets - \$650,000 increase in liabilities).

payable, notes payable), and the difference between the two (equity).⁴⁷ A balance sheet is objectively true. It is above reproach. Except in the accounting of relatively esoteric transactions, it is not subject to opinion, manipulation, or alternative methods of formulation. It is objectively compiled and reflective of reality.

The impact of assuming away over \$1.6 million of assets and over \$600,000 of equity is to, once again, overstate FST's Profitability Measures, as the ROA and ROE calculations are thereby inflated. However, the absurdity of the NPS assuming away FST's real financial condition in 1990 is no where more clearly demonstrated than when one considers what it did with FST's liabilities. FST reported \$383,168 of long term debt and \$230,634 of current liabilities in its 1990 financial report, for total liabilities of \$613,802. (A.R., Tab G, p.1). In its FFA Proforma the NPS assumed \$250,000 of long term debt and \$125,000 of current liabilities, for total liabilities of \$375,000. (A.R., Tab G, Proforma). Of these total liabilities in the FFA Proforma, the entire \$250,000 of long term debt and \$50,000 of the current liabilities are attributed to the SOC Reconstitution.⁴⁸ Adjusting the NPS liability figures for the liabilities resulting from the SOC Reconstitution yields \$75,000 of liabilities from sources other than the SOC Reconstitution.⁴⁹ This \$75,000 figure is the amount of liabilities the NPS assumes FST had in 1990 prior to liability adjustments dictated by the SOC

⁴⁷ "A balance sheet consists of a listing of the assets and liabilities of a business, and of the owner's equity." *Accounting: The Basis for Business Decisions*, p. 12.

⁴⁸ According to the introduction to the FFA, the NPS assumed a debt of \$600,000, beginning in 1986, the year the vessel in question was actually purchased. However, in reciting the assumptions utilized in the FFA Proforma, the NPS assumed only \$500,000 of long term debt in 1986. This is an example of the NPS adopting assumptions that not only are inconsistent with reality, but which are inconsistent with its own assumptions! Nevertheless, utilizing the NPS assumptions of an original debt of \$500,000 on the vessel in 1986, and \$50,000 of principal being retired every year, produced the \$250,000 of long term debt that appears in the FFA Proforma in 1990. \$50,000 of the current liabilities are also attributable to the reconstituted transaction for it represents the current portion (due within one year) of the vessel debt.

⁴⁹ The goal of this "dissecting out" of the amount of debt attributable to the SOC Reconstitution is to ascertain the real liabilities the NPS assumed away. It is only by comparing the FFA Proforma liability levels absent the debt attributed to the SOC Reconstitution, to FST's real liability levels in 1990 (which included no fictitious vessel debt) that the amount of real liabilities the NPS "assumed away" can be ascertained.

Reconstitution. But the reality is that FST reported \$613,802 in liabilities in 1990. And bear in mind, no portion of these liabilities are from the vessel purchase, because the vessel purchase never happened. These were real liabilities, and in its FFA Proforma the NPS simply assumed away \$538,802 of them! If the NPS insists upon imposing a fictitious transaction upon FST's financial statements, it should at least adjust the data that was there. It should have added its fictitious debt to the real debt that existed in 1990. Instead, it chose to pretend that 87% of FST's liabilities did not exist before imposing the additional debt dictated by its fictitious transaction. The impact of this pretense, once again, inured to the NPS's favor, as it made FST's interest expenses appear lower, and therefore its net income higher.

Now the fact that the NPS "assumed away" these liabilities did not make them any less real. The NPS assumption did not satisfy any creditors and it did not pay any account balances. The debt was still real and had to be satisfied by FST. The capriciousness of the NPS assuming away over \$500,000 of liabilities so that it can then assume FST is capable of paying a higher franchise fee speaks volumes regarding the disingenuous nature of its prevarications. If this is permitted to stand, there is no sense of equity or justice remaining in our government.

(8) *The NPS's Cumulative Profitability Measures are Inappropriate*

After the NPS applied its adjustments and assumptions to FST's reported financial data in the FFA, it concluded that FST's fees should be raised to 12%. Then, in the final portion of the FFA, the NPS developed the FFA Proforma to anticipate the impact of the higher fee on future performance. In the FFA Proforma, the NPS calculated both annual and cumulative Profitability Measures. The annual Profitability Measures are ROA, ROE and ROG for each year. In the cumulative Profitability Measures, the net income figure utilized in the calculations is the sum of the annual net income for the years analyzed in the FFA Proforma (1986-2000). Similarly, the assets, equity and gross receipts figures utilized in the cumulative Profitability Measures are the sums of those figures for the years analyzed in the FFA Proforma. So the cumulative Profitability Measures are essentially a running average of ROA, ROE and ROG for the period analyzed. And it is these cumulative Profitability

Measures that are the focus of the NPS's consideration as to whether the higher franchise fee will be too deleterious to FST's future performance.

It is significant that the cumulative Profitability Measures calculated by the NPS covered, not only the future years that the increased franchise fee would apply to (1991-2000), but also the period of the contract that had expired (1986-1990). The impact of including in the cumulative Profitability Measures the expired years in which a lower franchise fee was paid and profitability was therefore higher, is to understate the deleterious impact the higher fee has on the remainder of FST's contract term. This is best demonstrated by an example:

Example. If one of the cumulative Profitability Measures were 25% for the initial 5 year period of the 15 year contract, but 7% for the last 10 years, that cumulative Profitability Measure for the entire 15 year period would be 13% ($(25\% \times 1/3) + [7\% \times 2/3]$).

But this 13% is not reflective of the impact the higher fee has upon the remainder of the contract term, which is to reduce profitability to 7%. The impact of the higher fee on future returns is the only the only appropriate consideration. In the example, when the owners of the business go to work the day after the franchise fee is raised, and every day thereafter until the contract expires, they will be earning 7%, not 13%. The fact that they earned higher than 7% during the first 5 years of the contract would be of little consolation, because the fundamental consideration in every business endeavor is whether it is profitable to go on from the present. The past is history. The question is whether the future is worth the risks, and one's capital and effort. This process of including expired contract years in the cumulative Profitability Measures has the effect of allowing the NPS to go back to years prior to a franchise fee increase, and take those profits into account when considering whether a future increase is too draconian.

If the NPS is perfectly successful in achieving its goal of limiting FST's profitability to industry averages by implementing a fee increase in mid-term, the returns earned after the increase are necessarily lower than the industry average if the returns earned prior to the increase were higher.

The process essentially results in a retroactive franchise fee increase, which is clearly inappropriate because FST should be given the benefit of the bargain it struck with the NPS in negotiating the initial fee. Employing the logic of this approach, in 1996, if the NPS perceived that FST earned higher than industry averages not only in 1986-1990, but also in the period at issue, it could unilaterally set a fee that it calculates will take FST's profitability down to zero or below, and justify the same by showing a cumulative profitability over the entire contract term equal to industry averages. And as stated previously, FST would have no option under the terms of its contract but to continue operating at a loss until its contract expired.

This process of "looking back" to periods prior to a franchise fee increase to get "credit" for a future fee increase is certainly in violation of §20b (d) of the CPA, for it necessarily overstates the "probable value of contract privileges", which by their very nature are only forward looking. A privilege granted by a contract only has value if one is able to act pursuant to that privilege. And of course one cannot act in a time period that has already expired.

(9) *Summary of the FFA Discussion*

This laborious critique of the NPS's methods could go on *ad nauseam*. However, such a tortuous course is not warranted, as it has been clearly demonstrated that the NPS, through the statistical data it used, the process it employed, the adjustments it made, and the assumptions it imposed, acted in an arbitrary and capricious manner that constitutes an abuse of agency discretion, and is not in conformity with the law. Table D that follows is a compilation of the material errors that have been discussed:

Table D: NPS Errors in the FFA	
Error:	Violation of:
Predicated the its conclusions upon statistically invalid data	Fundamental Statistical Principles
No consideration given for FST's low debt	CPA & NPS-48
No consideration given for FST's fully depreciated assets	CPA & NPS-48
No consideration given for FST's operational efficiency	CPA & NPS-48
Assumed away almost \$350,000 of FST's equity	CPA, GAAP, NPS-48 & Fundamental Economic Principles
Included net income from non-concession sources	CPA, NPS-48 & Economic Realities
Failed to acknowledge tax liability arising from FST's operations	CPA, NPS-48, Fundamental Economic Principles & Economic Realities
Improperly accounted for the SOC Reconstitution	CPA, GAAP & NPS-48
Adjusted officer's salaries in disregard of operational realities	CPA, NPS-48 & Operational Realities
Utilized book value in Profitability Measures	CPA, NPS-48, Economic Realities & Fundamental Economic Principles
Ignored FST's historical gross sales trend	NPS-48, Historical trends & Fundamental Economic Principles
Ignored FST's true financial condition at the beginning of the increased rate period	CPA, GAAP, NPS-48 & Economic Realities
Employed inappropriate Profitability Measures	CPA & Fundamental Economic Principles

VIII. ANALYSIS OF THE PROFITABILITY MEASURES AND THE FINANCIAL IMPACT OF THE FRANCHISE FEE

The attached Addendum A, FST Proforma - 12% Franchise Fee, and Addendum B, FST Proforma - 4.25% Franchise Fee are proforma financial statements and Profitability Measures for FST for the period 1991-2000. The year 1990 has been included as a starting point for FST's financial condition, and that condition is changed from year to year as the annual performances in the proformas dictate. Addendum A ("PF12") depicts performance with a 12% franchise fee, and Addendum B ("PF4.25") depicts performance with a 4.25% franchise fee. All the assumptions and adjustments made by the NPS in its FFA Proforma are incorporated into PF12 and PF4.25, except for the following:

- (i) FST's actual 1990 balance sheet and income statement, as reported to the NPS, are utilized as the starting point of the analysis. They have only been adjusted to accurately reflect, consistent with GAAP, the SOC Reconstitution, which assumption the NPS imposes in its FFA;
- (ii) The actual purchase price and debt of the above mentioned vessel are utilized; and,
- (iii) No dividends are paid because of the absence of sufficient cash flow.

In Addendum C, Cumulative Return Comparisons, the cumulative returns under PF12 and PF4.25 as of the year 2000 are compared to the *D&B Industry Norms* quartiles employed by the NPS in its FFA. Addendum C also contains a graphic comparison of FST's returns under PF12 and PF4.25, and the industry median and 3rd quartile returns as reported in the *D&B Industry Norms*. The Cumulative Return Comparisons show that each of the Profitability Measures under PF12 fall within the 2nd quartile, with ROA at 0.88%, ROE at 1.25% and ROG at 1.30%. These are all significantly below the reported industry medians which are 4.70%, 5.70% and 3.20%, respectively. Under PF4.25, two of the three Profitability Measures fall within the 2nd quartile, and a third falls in the middle of the 3rd quartile. ROA is 3.47%, ROE is 4.63% and ROG is 5.95%. Under the FFA

Proforma, ROA is 10.9%, ROE is 15.0%, and ROG is 7.5%. These results are depicted in Table E below:

Table E: Cumulative Profitability Measures			
	ROA	ROE	ROG
PF12	0.88%	1.25%	1.30%
PF4.25	3.47%	4.63%	5.95%
FFA Proforma	10.90%	15.00%	7.50%
Industry Median	4.70%	5.70%	3.20%

The disparity between the Profitability Measures under PF12 and PF4.25, and those in the FFA Proforma, illustrate the significance of the NPS using a fictitious balance sheet and income statement in 1990, assuming a fictitious debt level and purchase price for the SOC Reconstitution in 1986, and not following GAAP in accounting for that vessel. Addendums A, B and C clearly show that these errors, which are really denials of reality, had a significant negative impact on FST in the setting of its franchise fee. If just these three unfounded assumptions and adjustments the NPS imposed in the FFA are altered to reflect reality, the profitability of FST appears quite differently from that portrayed in the FFA. Such a return to reality demonstrates that according to the NPS's own methodology, the current 4.25% franchise fee is appropriate, for it places each of FST's cumulative Profitability Measures squarely within the second or lower half of the third quartile of the Profitability Measures reported in the *D&B Industry Norms* for SIC 4489.

The real impact of the 12% franchise fee as depicted in PF12 is clearly devastating to FST. It takes away all incentive to continue operation under its concessions contract. No one would engage in any business enterprise that had an expected return on equity of 1.25%. One can earn six times that amount on capital simply by investing in U.S. Treasury obligations! Only a fool would undertake the risks and problems associated with running an operating company for such a paltry return. And it must be stressed, that even these returns overstate real returns, because they are predicated upon

book value, which, as stated previously, understates assets and equity, and therefore overstates returns.

Addendums A, B and C employ the NPS's FFA methodology to show what their conclusions should have been at the time the FFA was produced. Like the FFA Proforma, they take a 1990 perspective because FST's 1990 Concessioner Annual Financial Report was the most current financial report the NPS had at the time of the publication of the FFA on February 27, 1992. Addendum D, Concession Cash Flow Analysis, 1991-1994, on the other hand, capitalizes upon the most current financial information reported to the NPS by FST. It is not a proforma, the accuracy of which is uncertain because of its prospective nature. Rather Addendum D utilizes FST's actual operating results for 1991-1994 to show FST's cash flow under its current 4.25% franchise fee, and what its cash flow would have been under a 12% franchise fee. With the 4.25% fee the cash flow was marginal at best, with a negative cash flow of \$109,000 in 1991, and positive cash flows of \$23,000, \$17,000 and \$42,000 in 1992-1994, respectively. The actual cash flows FST would have experienced in 1991-1994 with a 12% franchise fee are dismal. 1991 would have had a negative cash flow of \$191,000, and 1992-1994 would have each had negative cash flows of \$66,000, \$74,000 and \$52,000, respectively. It must again be emphasized that these negative cash flows are not conjectural. They are premised upon FST's actual operating results.

Addendum E, Impact of 12% Fee on FST's Cash Position, depicts the impact paying the 12% franchise fee already accrued since June 14, 1991, will have on FST's cash and securities balance as of January 1, 1996, and March 31, 1996. As in each of the other financial analyses discussed thus far, the resultant impact is not one likely to entice the private sector to invest in the National Park System. FST's cash and securities balance stood at \$1,073,000 on January 1, 1996. Lest one think this is a large amount of cash and securities for a concession the size of FSNM, remember, FST is a mature company with low debt service, having been in business for over 35 years. For its entire history it has paid very little dividends, its dividend policy being to distribute enough to cover the tax liability that

passes through to shareholders by virtue of its status as an S corporation.²⁰ A major reason FST has adopted this policy of retaining its earnings is so that it will have sufficient capital to invest in the Dockside II project as a joint venturer of sorts with the NPS (discussed infra). It must also be noted that FST's concession operation comprises only about half of its total business. Much of the cash and securities FST has managed to accumulate over the years are not derived from its concession operation at all, but from other non-concession aspects of its business. However, this fact has not inhibited the NPS from attempting to take all of it.

As stated previously, FST's cash and securities balance stood at \$1,073,000 as of January 1, 1996. The principal amount of the additional franchise fee due if the 12% fee is sustained is \$687,840. With interest, the total payment will be close to \$800,000. Such a payment would bring FST's January 1, 1996, cash and securities balance down to \$273,000. FST is a very seasonal business, with little revenue from November through March. January and February are the months FST takes its vessels off line to do annual maintenance and capital projects. The confluence of these two factors results in March 31 being the lowest cash and securities position of the company each year. As depicted in Addendum E, for the five years from January 1, 1990, through March 31, 1995, FST averaged a decline of \$412,000 each year between January 1 and March 31. Consequently, by March 31, 1996, assuming the average negative cash flow from operations and the 12% franchise fee arrearage plus interest being paid, FST will have a negative cash and securities position of \$139,000. FST will have to borrow money to pay the 12% franchise fee arrearage, and be in a negative annual cash flow position thereafter as shown in Addendum D.

Even though the interpretation of the CPA and the concessions contract advanced by the NPS will result in FST having a negative cash flow each year, if the NPS ultimately prevails, FST will not have the option of ceasing operations under its contract. The NPS will be in the position of being able to unilaterally increase franchise fees during the term of FST's contract to the point where FST has

²⁰ FST has been an S corporation since 1989.

a significant negative cash flow, and at the same time be able to force FST to continue this money losing endeavor until its contract expires in the year 2000!

IX. THE DOCKSIDE II PROJECT: A COROLLARY ISSUE

Other than making distributions to cover shareholders' tax liability resulting from their ownership of FST's stock during the years it has been an S corporation, FST has basically retained all its earnings. And the reason it has retained its earnings for the period from 1985 to the present is so that it will have sufficient capital to develop the Dockside II Project ("Dockside II") at the foot of Calhoun Street in Charleston, South Carolina. Dockside II is a joint development between the NPS, the City of Charleston and FST that will feature a tour boat landing site and interpretive facility for FSNM (developed by the NPS), the South Carolina Marine Science Museum (an aquarium developed by the City of Charleston), and a food service facility and gift shop (developed by FST). The estimated cost of FST's portion of the project is \$3.5 million, of which approximately 70% will be financed, and 30%, or just over \$1 million, will come from equity contributions made by FST. So the reason FST has been retaining and saving its earnings over the last 11-12 years is so that it can meet the commitments it has made to the NPS and the City of Charleston as a joint venturer in Dockside II.

Volumes could be written on the obstacles and threats from outside sources the three parties to the Dockside II joint venture have overcome, through cooperative effort, since the project's inception in 1985. FST never dreamed the biggest threat to its realization of the project would come from one of its joint venture partners, but it has. The NPS's attempt to unilaterally raise FST's franchise fees in a manner that is essentially retroactive, constitutes the biggest obstacle FST has faced to date with regard to the project, for if successful, the NPS would essentially strip FST of the capital it has saved for its equity contribution to Dockside II.

X. CONCLUSION

In this FFA Critique FST has made a strong case that the NPS's action in unilaterally increasing FST's franchise fee is arbitrary, capricious, and constitutes an abuse of agency discretion. At times the points made may have appeared harsh, or too incisive, but FST believes it is not only in its interest, but in the interest of the NPS to have such a deliberate and critical examination of its franchise fee determination process come to light. Throughout the critique care has been taken to avoid personal disparagements, and FST hopes no offense is taken by any individuals involved in the process of setting FST's franchise fee. But the fact remains that in attempting to justify an almost threefold increase in FST's franchise fee unilaterally during the term of its contract, the NPS has violated fundamental principles of statistical analysis, the statute establishing the National Park concession system, its own internal guidelines, GAAP, fundamental economic principles, and FST's economic and operational realities. The effect of this increase in franchise fees is to essentially strip FST of all its liquidity, and place it in a position where it must continue to operate at a loss for the remaining ten years on its contract term, or be found in default. So devastating has the NPS's actions been to FST, that the objective observer is compelled to consider whether the NPS's intentions somehow devolved to malice. FST, however, chooses to believe that, rather than overt malice aforethought, the NPS is struggling to implement a relatively new system of franchise fee analysis and determination, the deficiencies of which have crystallized in the case of FST.

There is, however, still opportunity to rectify the travesty of justice that is descending upon FST, and in doing so, begin to mend a system of franchise fee determination for which serious deficiencies have surfaced. FST understands that these deficiencies are not due to any ineptness or malfeasance on the part of the individuals involved in preparing and implementing the conclusions of the FFA. The people involved in the process are simply executing their duties as consistently as possible with NPS internal directives. But it is clear that the internal directives, and the course the NPS has taken in recent years regarding franchise fees, suffer from serious systemic problems. The system is in dire need of an overhaul, and it should begin with the case of FST.

It is time for the NPS to reconsider its franchise fee determination process with the same vigor it reconsiders the franchise fees of its concessioners. For if the process continues unchanged, not only will companies like FST, family owned businesses that have invested capital and careers in the National Parks and Monuments, be financially devastated, but the entire concession system designed to attract essential services, capital and expertise to the National Parks will be in jeopardy. Businesses and the people behind those businesses simply will not invest time, talent and capital into the Parks if they are treated the way FST has been treated thus far with regards to its franchise fee. FST's prayer is that reasonable minds will prevail and rescind its franchise fee increase so that FST, and the hundreds of similarly situated businesses it represents, will be able to continue the beneficial relationship enjoyed between the NPS and its concessioners, thus enabling the public to continue to enjoy a relaxing boat ride, or a fine meal, or an exciting raft trip, or an excellent hotel room, in our nations wonderful National Parks and Monuments.

ADDENDUM A: EST PRO FORMA - 12% FRANCHISE FEE
(All figures except returns in \$000's)

	1990	1991	1992	1992	1994	1995
INCOME STATEMENT						
GROSS RECEIPTS (NET)	1,333	1,375	1,414	1,439	1,503	1,548
COST OF SALES	104	110	113	117	120	124
GROSS PROFIT	1,231	1,265	1,303	1,322	1,383	1,424
Direct Salaries	291	275	283	292	301	310
Repair & Maintenance	70	69	71	73	75	77
Bent Expenses	39	41	42	44	45	46
Other Direct	51	41	42	44	45	46
TOTAL DIRECT	451	426	438	453	466	479
Officers' Salaries	134	138	142	146	150	155
Other Salaries	90	96	99	102	105	108
Advertising	30	41	42	44	45	46
Profit Sharing	12	14	14	15	15	15
Other Administrative	96	96	99	102	105	108
TOTAL ADMIN.	362	385	396	409	420	433
Insurance	14	14	14	15	15	15
Depreciation	170	171	171	172	181	186
Interest	83	83	89	95	91	27
Other Fixed	51	25	37	58	60	62
TOTAL FIXED	318	323	311	301	297	290
Building Use Fee	1	1	1	1	1	1
12% Franchise Fee (except 1990)	57	165	170	179	180	186
TOTAL FRANCHISE FEE	58	166	171	176	181	187
INCOME BEFORE TAXES	42	(35)	(13)	3	19	36
INCOME TAXES	17	(14)	(5)	1	7	14
NET INCOME	25	(21)	(8)	2	11	22
BALANCE SHEET						
Current Assets	1,267	1,205	1,153	1,110	1,081	1,065
Net Fixed Assets	1,609	1,500	1,509	1,484	1,173	1,077
Other Assets	111	131	111	111	111	111
TOTAL ASSETS	2,987	2,816	2,657	2,507	2,365	2,233
Current Liabilities	358	359	360	361	362	363
Long Term Debt	1,183	1,035	884	732	579	423
Current Portion, LT Debt	(150)	(151)	(152)	(153)	(154)	(155)
Net Long Term Debt	1,033	884	732	579	425	278
TOTAL LIABILITIES	1,393	1,243	1,092	940	787	633
EQUITY	1,594	1,573	1,565	1,567	1,578	1,600
LIABILITIES & EQUITY	2,987	2,816	2,657	2,507	2,365	2,233
SOURCES & USES OF FUNDS						
Net Income		(21)	(8)	2	11	22
Depreciation		171	171	173	181	186
Additions to Fixed Assets		(62)	(64)	(66)	(68)	(70)
Principal Payments		(130)	(131)	(132)	(133)	(134)
Additional Debt		0	0	0	0	0
NET CHANGE IN FUNDS		(62)	(32)	(43)	(89)	(14)
RETURN MEASURES						
RETURN ON END ASSETS	0.25%	-0.75%	-0.30%	0.07%	0.47%	0.97%
RETURN ON END EQUITY	1.59%	-1.34%	-0.50%	0.11%	0.71%	1.36%
RETURN ON GROSS	1.90%	-1.53%	-0.55%	0.12%	0.74%	1.40%
CUMULATIVE RETURNS						
CUMULATIVE RETURN ON ASSETS		-0.75%	-0.53%	-0.44%	-0.15%	0.05%
CUMULATIVE RETURN ON EQUITY		-1.54%	-0.92%	-0.57%	-0.25%	0.05%
CUMULATIVE RETURN ON GROSS		-1.53%	-1.05%	-0.66%	-0.17%	0.05%

	1996	1997	1998	1999	2000
INCOME STATEMENT					
GROSS RECEIPTS (NET)	1,594	1,643	1,691	1,742	1,794
COST OF SALES	128	131	135	139	144
GROSS PROFIT	1,466	1,511	1,556	1,603	1,650
Direct Salaries	319	328	338	348	359
Repairs & Maintenance	82	82	85	87	90
Rent Expense	48	49	51	52	54
Other Direct	48	49	51	52	54
TOTAL DIRECT	497	508	525	539	557
Officers' Salaries	159	164	169	174	179
Other Salaries	113	115	118	122	126
Advertising	48	49	51	52	54
Profit Sharing	16	16	17	17	18
Other Administrative	113	115	118	122	126
TOTAL ADMIN.	447	459	473	487	503
Insurance	16	16	17	17	18
Depreciation	191	193	190	194	195
Interest	13	12	11	9	8
Other Fixed	64	66	68	70	72
TOTAL FIXED	284	287	286	290	293
Building Use Fee	1	1	1	1	1
12% Franchise Fee (except 1990)	191	197	203	209	215
TOTAL FRANCHISE FEE	192	198	204	210	216
INCOME BEFORE TAXES	48	59	68	77	81
INCOME TAXES	19	24	27	31	32
NET INCOME	29	35	41	46	48
BALANCE SHEET					
Current Assets	1,058	1,186	1,314	1,448	1,580
Net Fixed Assets	938	819	705	589	475
Other Assets	111	111	111	111	111
TOTAL ASSETS	2,107	2,116	2,130	2,148	2,166
Current Liabilities	234	235	236	238	239
Long Term Debt	270	244	217	189	159
Current Portion, LT Debt	(26)	(27)	(28)	(30)	(31)
Net Long Term Debt	244	217	189	159	128
TOTAL LIABILITIES	478	452	423	397	367
EQUITY	1,629	1,664	1,705	1,751	1,799
LIABILITIES & EQUITY	2,107	2,116	2,130	2,148	2,166
SOURCES & USES OF FUNDS					
Net Income	29	35	41	46	48
Depreciation	191	193	190	194	195
Additions to Fixed Assets	(78)	(74)	(76)	(78)	(81)
Principal Payments	(135)	(24)	(27)	(28)	(30)
Additional Debt	0	0	0	0	0
NET CHANGE IN FUNDS	(7)	128	128	134	132
RETURN MEASURES					
RETURN ON END ASSETS	1.36%	1.67%	1.92%	2.19%	2.24%
RETURN ON END EQUITY	1.76%	2.13%	2.40%	2.64%	2.69%
RETURN ON GROSS	1.80%	2.19%	2.42%	2.69%	2.70%
CUMULATIVE RETURNS					
CUMULATIVE RETURN ON ASSETS	8.24%	8.42%	8.59%	8.74%	8.88%
CUMULATIVE RETURN ON EQUITY	8.54%	8.63%	8.84%	1.87%	1.23%
CUMULATIVE RETURN ON GROSS	8.59%	8.66%	8.91%	1.12%	1.38%

ADDENDUM B: FST PRO FORM - 4.25% FRANCHISE FEE

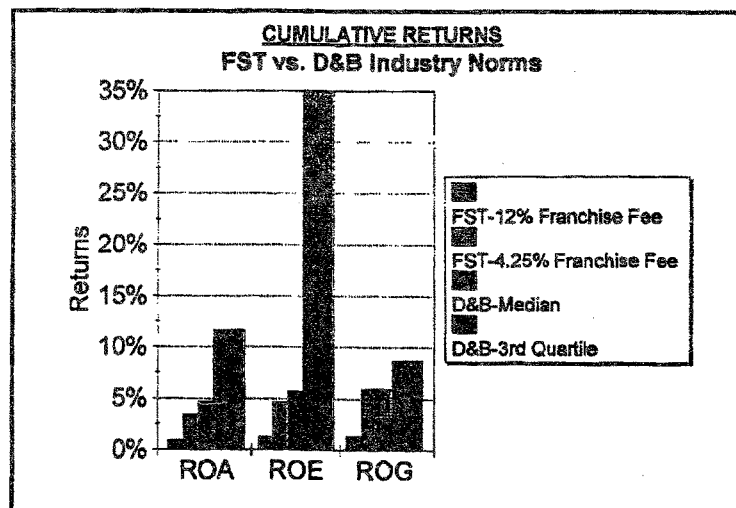
(All figures except returns in \$000's)

	1990	1991	1992	1993	1994	1995
INCOME STATEMENT						
GROSS RECEIPTS (NET)	1,335	1,373	1,416	1,459	1,503	1,548
COST OF SALES	104	110	113	117	120	124
GROSS PROFIT	1,231	1,263	1,303	1,342	1,383	1,424
Direct Salaries	291	275	283	292	301	310
Repairs & Maintenance	70	69	71	73	75	77
Boat Expense	39	41	42	44	45	46
Other Direct	51	41	42	44	45	46
TOTAL DIRECT	451	426	438	453	466	479
Officers' Salaries	134	138	142	146	150	155
Other Salaries	90	96	99	102	105	108
Advertising	30	41	42	44	45	46
Profit Sharing	12	14	14	15	15	15
Other Administrative	96	96	99	102	105	108
TOTAL ADMIN.	362	385	396	409	420	432
Insurance	14	14	14	15	15	15
Depreciations	127	159	171	173	181	186
Interest	83	83	69	53	41	27
Other Fixed	51	55	57	58	60	62
TOTAL FIXED	275	321	311	301	297	290
Building Use Fee	1	1	1	1	1	1
4.25% Franchise Fee	57	58	60	62	64	66
TOTAL FRANCHISE FEE	58	59	61	63	65	67
INCOME BEFORE TAXES	85	74	97	116	135	156
INCOME TAXES	34	29	39	46	54	62
NET INCOME	51	44	58	70	81	94
BALANCE SHEET						
Current Assets	1,267	1,268	1,282	1,307	1,340	1,404
Net Fixed Assets	1,609	1,502	1,395	1,284	1,175	1,039
Other Assets	111	111	111	111	111	111
TOTAL ASSETS	2,987	2,881	2,788	2,706	2,634	2,574
Current Liabilities	358	359	360	361	363	363
Long Term Debt	1,185	1,085	884	732	579	415
Current Portion, LT Debt	(150)	(151)	(152)	(153)	(154)	(155)
Net Long Term Debt	1,035	884	732	579	425	270
TOTAL LIABILITIES	1,393	1,243	1,092	940	787	633
EQUITY	1,594	1,638	1,696	1,766	1,847	1,941
LIABILITIES & EQUITY	2,987	2,881	2,788	2,706	2,634	2,574
SOURCES & USES OF FUNDS						
Net Income		64	58	70	81	94
Depreciation		169	171	173	181	186
Additions to Fixed Assets		(62)	(64)	(66)	(68)	(70)
Principal Payments		(150)	(151)	(153)	(155)	(154)
Additional Debt		0	0	0	0	0
NET CHANGE IN FUNDS		1	14	33	41	54
RETURN MEASURES						
RETURN ON ASSETS	1.71%	1.53%	2.08%	2.57%	3.08%	3.64%
RETURN ON EQUITY	3.21%	2.69%	3.43%	3.94%	4.39%	4.83%
RETURN ON GROSS	3.83%	3.21%	4.10%	4.77%	5.39%	6.05%
CUMULATIVE RETURNS						
CUMULATIVE RETURN ON ASSETS		1.51%	1.80%	2.05%	2.30%	2.53%
CUMULATIVE RETURN ON EQUITY		2.69%	3.07%	3.57%	3.67%	3.95%
CUMULATIVE RETURN ON GROSS		3.21%	3.64%	4.04%	4.40%	4.75%

	1996	1997	1998	1999	2000
INCOME STATEMENT					
GROSS RECEIPTS (NET)	1,394	1,642	1,691	1,742	1,794
COST OF SALES	128	131	133	139	144
GROSS PROFIT	1,466	1,511	1,556	1,603	1,650
Direct Salaries	319	328	338	348	359
Repair & Maintenance	80	82	83	87	90
Best Expenses	48	49	51	52	54
Other Direct	48	49	51	52	54
TOTAL DIRECT	495	508	523	539	557
Officers' Salaries	159	164	169	174	179
Other Salaries	113	115	118	122	126
Advertising	48	49	51	52	54
Profit Sharing	16	16	17	17	18
Other Administrative	113	115	118	122	126
TOTAL ADMIN.	447	459	473	487	503
Insurance	16	16	17	17	18
Depreciation	191	193	190	194	195
Interest	13	12	11	9	8
Other Fixed	64	66	68	70	72
TOTAL FIXED	284	287	286	290	293
Building Use Fee	3	1	1	1	1
4.25% Franchise Fee	68	70	72	74	76
TOTAL FRANCHISE FEE	69	71	73	75	77
INCOME BEFORE TAXES	171	186	199	212	220
INCOME TAXES	69	74	80	81	88
NET INCOME	103	112	119	127	132
BALANCE SHEET					
Current Assets	1,470	1,675	1,822	2,097	2,313
Net Fixed Assets	940	921	707	591	477
Other Assets	111	111	111	111	111
TOTAL ASSETS	2,521	2,607	2,700	2,799	2,901
Current Liabilities	234	235	236	238	239
Long Term Debt	270	344	217	189	159
Current Portion, LT Debt	(36)	(27)	(38)	(30)	(31)
Net Long Term Debt	234	317	179	159	128
TOTAL LIABILITIES	478	452	423	397	367
EQUITY	2,043	2,155	2,275	2,402	2,534
LIABILITIES & EQUITY	2,521	2,607	2,700	2,799	2,901
SOURCES & USES OF FUNDS					
Net Income	103	112	119	127	132
Depreciation	191	193	190	194	195
Additions to Fixed Assets	(72)	(74)	(76)	(78)	(81)
Principal Payments	(155)	(56)	(27)	(28)	(30)
Additional Debt	0	0	0	0	0
NET CHANGE IN FUNDS	67	203	206	213	216
RETURN MEASURES					
RETURN ON ASSETS	4.08%	4.29%	4.43%	4.54%	4.59%
RETURN ON EQUITY	5.89%	5.18%	5.25%	5.30%	5.20%
RETURN ON GROSS	6.45%	6.80%	7.87%	7.30%	7.33%
CUMULATIVE RETURNS					
CUMULATIVE RETURN ON ASSETS	2.79%	3.88%	3.18%	2.54%	3.47%
CUMULATIVE RETURN ON EQUITY	4.11%	4.39%	4.43%	4.53%	4.68%
CUMULATIVE RETURN ON GROSS	3.65%	3.59%	5.57%	5.78%	5.99%

ADDENDUM C: CUMULATIVE RETURN COMPARISONS**Table No. 1: FST's Profitability Measures Relative to D&B Industry Norms**

Return Measure	1st Quartile	2nd Quartile	3rd Quartile	4th Quartile
D&B Industry ROA				
FST ROA @ 12%		0.88%		
FST ROA @ 4.25%		3.47%		
D&B Industry ROE				
FST ROE @ 12%		1.25%		
FST ROE @ 4.25%		4.63%		
D&B Industry ROG				
FST ROG @ 12%		1.30%		
FST ROG @ 4.25%			5.05%	

Graph No. 1: Depiction of FST's Profitability Measures vs. D&B Industry Norms

ADDENDUM D: CONCESSION CASH FLOW ANALYSIS, 1991-1994

(All figures in \$000's)

CASH FLOW - 4.25% FRANCHISE FEE

	1991	1992	1993	1994
NET OPERATING INCOME				
GROSS RECEIPTS (NET)	1,738	1,913	1,947	2,001
COST OF SALES	140	153	154	170
GROSS PROFIT	1,598	1,760	1,793	1,831
EXPENSES (LESS FRANCHISE & USE FEE)	1,632	1,577	1,622	1,630
4.25% FRANCHISE FEE	74	81	83	85
BUILDING USE FEE	1	1	1	1
TOTAL EXPENSES	1,707	1,659	1,706	1,716
NET OPERATING INCOME	(109)	101	87	115
INCOME TAXES	(44)	40	35	46
NOI AFTER TAXES	(65)	60	52	69
CASH FLOW				
NOI AFTER TAXES	(65)	60	52	69
CAPITAL EXPENDITURES	(71)	(63)	(63)	(56)
PRINCIPAL PAYMENTS	(15)	(16)	(16)	(18)
DEPRECIATION	42	44	46	47
CASH FLOW @ 4.25% FRANCHISE FEE	(109)	23	17	42

CASH FLOW - 12% FRANCHISE FEE

	1991	1992	1993	1994
NET OPERATING INCOME				
GROSS RECEIPTS (NET)	1,738	1,913	1,947	2,001
COST OF SALES	140	153	154	170
GROSS PROFIT	1,598	1,760	1,793	1,831
EXPENSES (LESS FRANCHISE & USE FEE)	1,632	1,577	1,622	1,630
12% FRANCHISE FEE	210	231	235	241
BUILDING USE FEE	1	1	1	1
TOTAL EXPENSES	1,843	1,809	1,858	1,872
NET OPERATING INCOME	(245)	(49)	(65)	(41)
INCOME TAXES	(98)	(19)	(26)	(16)
NOI AFTER TAXES	(147)	(29)	(39)	(25)
CASH FLOW				
NOI AFTER TAXES	(147)	(29)	(39)	(25)
CAPITAL EXPENDITURES	(71)	(63)	(63)	(56)
PRINCIPAL PAYMENTS	(15)	(16)	(16)	(18)
DEPRECIATION	42	44	46	47
CASH FLOW @ 12% FRANCHISE FEE	(191)	(64)	(74)	(52)

ADDENDUM E: IMPACT OF 12% FEE ON EST's CASH POSITION
 (All figures in \$000's)

AVERAGE DECREASE IN CASH & SECURITIES BALANCE, JANUARY 1 - MARCH 31

<u>Year</u>	<u>Cash & Securities Balance on January 1</u>	<u>Cash & Securities Balance on March 31</u>	<u>Decrease in Cash & Securities Balance</u>
1991	1,015	679	336
1992	960	634	326
1993	1,004	559	445
1994	960	437	523
1995	995	567	<u>428</u>
Average Decrease in Cash & Securities, January 1 - March 31			412

PROJECTED CASH & SECURITIES POSITION ON MARCH 31, 1996

Cash & Securities Balance as of January 1, 1996	1,073
Less: Average Decrease in Cash & Securities Balance	(412)
Less: 12% Franchise Fee in Arrears, Plus Interest	<u>(800)</u>
Projected Cash & Securities Balance on March 31, 1996	(139)

[EXHIBIT 1]

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) AFFIDAVIT OF MARK F. HARTLEY, D.B.A.

PERSONALLY appeared before me, MARK F. HARTLEY, D.B.A., who being duly sworn, deposes and says:

1. I was born November 30, 1956, in West Palm Beach, Florida, and am presently an Associate Professor of Business Administration at the College of Charleston in Charleston, South Carolina, which position I have held for twelve (12) years. I hold a Doctor of Business Administration degree from Louisiana Tech University with a major in quantitative analysis, and teach statistics at the College of Charleston. Attached to this Affidavit is my curriculum vita, academic credentials, employment history, and membership in professional and academic organizations. Also attached is a list of 33 recent quantitative research studies I have coordinated or performed, and a list of 57 academic publications or presentations I have authored or contributed to.
2. I am generally familiar with the issues and relevant facts in the case of Fort Sumter Tours, Inc. versus Bruce Babbitt, Secretary, Department of the Interior, an Agency of the Federal Government (Case No. 94-1570). Specifically, I am familiar with and have reviewed the franchise fee determination process set forth in NPS-48, an agency guideline for the National Park Service ("NPS"). I have also reviewed the Franchise Fee Analysis for Fort Sumter Tours, Inc. ("FST") and Fort Sumter National Monument, prepared by the NPS Concessions Division, Finance Branch, which is dated February 27, 1992 ("FFA"). Furthermore, I am familiar with and have reviewed the annual Dunn and Bradstreet

Publication, *Industry Norms* ("D&B Industry Norms") for SIC code 4489, Water Transportation, Not Elsewhere Classified, for the years 1988-1989, and am also familiar with and have reviewed the *D&B Industry Norms* data for each SIC code which includes water transportation services for the years 1985-1987. I am also familiar with and have reviewed the Robert Morris and Associates publication, *1990 Annual Statement Studies* ("RMA Statement Studies"). I am familiar with the content, sampling procedures and methodology employed in formulating these two publications, and am aware, based upon my educational and professional experience, of the utility and limitations of the data contained therein. I am also familiar with the Standard Industrial Classification ("SIC") system, along with its utility and limitations.

3. Upon reviewing NPS-48, the FFA, the *D&B Industry Norms* and the *RMA Statement Studies*, it is clear that the NPS attempted to set FST's franchise fee at a level that would cause its profitability to fall at or near the median profitability for the population of businesses classified under SIC code 4489 and its predecessor(s). In this attempt, the entire franchise fee determination process was predicated upon the following inference: The profitability data reported in the *D&B Industry Norms* for SIC code 4489 and its predecessor(s) is equal to or closely approximates the profitability of the larger population of businesses classified thereunder. In my professional and academic opinion, there is no question that this inference is statistically invalid. In fact, no statistically valid inferences regarding the population of businesses, or any particular business, comprising SIC code 4489 or its predecessor(s) can be drawn from the median and quartile data reported in the *D&B Industry Norms* or the *RMA Statement Studies*. Specifically, it is invalid for the NPS to infer that the data contained in the *D&B Industry Norms* or the *RMA Statement Studies* are reflective of financial statement data or profitability data for the entire population of businesses, or any particular business (including FST), classified under SIC 4489 or its predecessor(s). Drawing any such inferences from the *D&B Industry Norms* or the *RMA Statement Studies* data violates fundamental

principles of statistics, and constitutes a misuse of the data.

4. Because, as indicated above, the fundamental inference upon which the NPS predicates its FFA is statistically invalid, the conclusion drawn from the FFA, which is, that a twelve percent (12%) franchise fee will cause FST's profitability to equal or approach the median profitability for the industry under which FST is classified, is also statistically invalid.

5. In fact, no valid inferences regarding the population of businesses, or any particular business, classified under SIC 4489 or its predecessor(s) may be drawn from the *D&B Industry Norms* or the *RMA Statement Studies* data. The data simply has insurmountable statistical deficiencies. Among the statistical deficiencies are:
 - (a) The samples of businesses from which the information was drawn are not random samples. In inferential statistics, if one is to draw any inferences about a population, based upon the measurement of a characteristic in a sample, the sample must be randomly selected. Otherwise, the sample is not considered representative of the larger population.

 - (b) Based upon my information and belief the population of businesses classified under SIC 4489 is approximately three thousand (3,000) businesses.¹ The sample sizes employed in the *D&B Industry Norms* under SIC 4489 were 16 in 1988 and 56 in 1989, and the sample size employed in the *RMA Statement Studies* used by the NPS was 10. Even if these samples had been randomly

¹ According to W.R. Mosteller, 1995-1996 President of the Passenger Vessel Association, the national trade association of passenger vessel operators, the passenger vessel industry in the United States is composed of approximately 3,000 businesses.

selected, they are too small to draw any inferences about the larger population when one considers the rather broad variability of quartile and median data reported.

- (c) The NPS's methodology is statistically unreliable because of the nonrandom nature of the samples employed, the small sample sizes, and the absence of other data essential to properly test the statistical validity of the *D&B Industry Norms* and the *RMA Statement Studies* data. Because of this unreliability, the validity of any inferences drawn from the *D&B Industry Norms* and the *RMA Statement Studies* data cannot be subjected to statistical validity testing. It is thus fatally flawed for the purposes employed by the NPS. Typically data such as that reported in the *D&B Industry Norms* and *RMA Statement Studies* would be subject to the quantification of appropriate sample sizes and confidence intervals pursuant to the Central Limit Theorem of parametric statistics. This is a standard and fundamental procedure in the field of quantitative statistical analysis to measure the degree of confidence one may place in inferences about a population when those inferences are based upon the measurement of a characteristic in a sample. However, the *D&B Industry Norms* and *RMA Statement Studies* data is beyond the reach of such fundamental statistical evaluation because of its incomplete nature and the unreliable statistical techniques employed. The only possible conclusion is that the data has no validity for the purposes employed by the NPS.

- 6. In my professional opinion, if the *D&B Industry Norms* and *RMA Statement Studies* data were collected by an appropriate random method, and if the sample sizes were of an appropriate size considering the variability of the characteristics measured, and if sufficient

additional data were available to quantify the level of confidence that could be placed in the inferences drawn from the data, only then could a statistically valid inference be made from the *D&B Industry Norms* and *RMA Statement Studies* data about the population of businesses classified under SIC 4489 or its predecessor(s). This is not to say, however, that if all the above mentioned conditions were met, it would be appropriate to assume that the population of businesses classified under SIC 4489, or its predecessor(s) constitute an acceptable comparator to FST for the purpose of determining appropriate or expected profitability, or balances in financial statement accounts. The inappropriate nature of utilizing any set of data classified by SIC code for the purpose of setting profitability levels or financial statement balances is a function of the broad parameters employed in defining each relevant SIC code. Generally, four digit SIC codes such as that employed in the *D&B Industry Norms* and *RMA Statement Studies* include too many diverse businesses to be utilized for this purpose. In other words, rarely does a particular business sufficiently "fit" into a four digit SIC code to enable the researcher to confidently utilize financial statement and profitability data classified by that SIC code as an indicator of what the financial statement and profitability data for that particular business should be. In my professional opinion this is the case with regards to FST and the NPS's attempt to determine what FST's financial statement and profitability data "should be", by comparing such data to information classified by SIC code in the *D&B Industry Norms* and *RMA Statement Studies*.

7. It is important to clarify that in this affidavit I am not criticizing the NPS's goal of setting franchise fees at a level that will result in FST's profitability being equal to or approximately equal to the median profitability of the industry FST is a participant in. Whether or not that is an appropriate goal is a policy issue beyond the appropriate limits of my opinion. What I am criticizing is the methodology employed by the NPS to achieve that goal. The NPS's methodology in the FFA is statistically invalid, and no confidence whatsoever may reasonably be placed in its conclusion that a 12% franchise fee should result

in FST's anticipated profitability approximating the median for the industry FST is a participant in.


 MARK F. HARTLEY, D.B.A.

SWORN to before me, Augusta L. Allen
 this 4 day of March, 1996.


 NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires _____
 AUGUSTA L. ALLEN
 NOTARY PUBLIC FOR SOUTH CAROLINA
 MY COMMISSION EXPIRES SEPT. 27, 2000

**CURRICULUM VITAE
MARK F. HARTLEY**

School of Business and Economics
The College of Charleston
Charleston, SC 29424
(803) 953-5955, (803) 953-1797 fax

PO Box 1822
Mt. Pleasant, SC 29465
(803) 971-9425
hartleym@cofc.edu email

Education:

Doctor of Business Administration (D.B.A.), 1986
Louisiana Tech University, Ruston, LA
Major field of study: Quantitative Analysis
Minor fields of study: Marketing, Economics
Dissertation: Income Concentration in the United States: Measurement, Trends, and Stability of Correlates, 1950-1980.

Master of Business Administration (M.B.A.), 1979
Columbus College, Columbus, GA
Major field of study: Administration

Bachelor of Business Administration (B.B.A.), 1978
Columbus College, Columbus, GA
Major field of study: Marketing

Employment:

Associate Professor, 1994 - present. Assistant Professor, 1985 - 1994.
Department of Management and Marketing, School of Business and Economics
The College of Charleston, Charleston, SC.
Tenured August, 1988.
Holder, National Association of Purchasing Management - Carolinas/Virginia Chair, 1993 to present.

Courses taught at the College of Charleston:

Production and Operations Management, Purchasing and Materials Management, Business Statistics II,
Marketing Research, Quantitative Methods and Decision Making, Intermodal Information Systems

Assistant Professor, 1982 - 1985.
School of Business Administration
Columbus College, Columbus, GA.

Teaching Assistant, 1980 - 1982.
College of Administration and Business
Louisiana Tech University, Ruston, LA.

Honors and Recognitions:

Beta Gamma Sigma (Business Honorary Organization)
Omicron Delta Epsilon (Economics Honorary Organization)
School of Business and Economics Dean's Special Service Award

Publications in Academic Refereed Journals:

- "Purchasing's Role in the Corporate Strategic Planning Process." Accepted for publication in International Journal of Physical Distribution and Logistics Management. (with Wade Ferguson and Gregory B. Turner).
- "Ethics, Gratuities, and Professionalization of the Purchasing Function." Journal of Business Ethics, XIV, 751-760. (with Gregory B. Turner and Stephen Taylor).
- "Developing Ethical Policy Statements in Purchasing Departments." T.S.U. Business and Economic Review, XIX(2), 2-6. (with Gregory B. Turner and Charlie Cook).
- "Ethics Policies and Gratuity Acceptance by Purchasing Agents." International Journal of Purchasing and Materials Management, XXX(3), 42-47. (with Gregory B. Turner and Stephen Taylor).
- "Are You Taking Advantage of the Productivity Incentives in the Tax Reform Act of 1986?" Industrial Management, XXXV(2), 22-24. (with J. Michael Alford and B. Perry Woodside).
- "Income Concentration in South Carolina: How Much and Why." Lander College Business Review, II(2), 5-9. (with Tom S. Sale and John D. Jackson).

Other Unpublished Circulated Working Papers:

- "The Use of Inbound Shipment Tracing Systems: Redefining the Expediting Function." Under review, Logistics and Transportation Review. (with Gregory B. Turner and Stephen LeMay).

Other Publications and Academic Professional Program Presentations:

- "Public Sector Attitudes Toward Gratuities and Gift Acceptance." Accepted for publication in Proceedings of the 1996 National Association of Purchasing Management International Meeting, to be Presented in Chicago, IL at the Annual Meeting, April, 1996. (with Gregory B. Turner and Wade C. Ferguson).
- "Regional Variations in Ethical Standards and Conduct Among Purchasing Managers." Accepted for publication in Proceedings of the 1996 National Association of Purchasing Management International Meeting, to be Presented in Chicago, IL at the Annual Meeting, April, 1996. (with Gregory B. Turner and Wade C. Ferguson).
- "Designing for the Japanese Market." Accepted for publication in Proceedings of the 1996 Southeast Decision Sciences Institute, to be Presented in Charleston, SC at the Annual Meeting, February, 1996. (with J. Michael Alford and Gregory B. Turner).
- "Purchasing's Role in the Development of Corporate Ethics Statements." Proceedings of the 1995 National Association of Purchasing Management International Meeting, 266-271. Presented at Anaheim, CA at the Annual Meeting, May, 1995. (with Gregory B. Turner and Wade C. Ferguson).
- "Uncertainty, Effort and Risk Aversion in Sales Force Compensation: What Does Agency Theory Offer?" Proceedings of the 1994 Southeast Institute of Management Science, 319-321. Presented in Myrtle Beach, SC at the Annual Meeting, November, 1994. (with Gregory B. Turner and Wade C. Ferguson).
- "Group Decision Support Systems: An Application in the Participative Budgeting Process." Proceedings of the 1994 Southeast Institute of Management Science, 222-224. Presented in Myrtle Beach, SC at the Annual Meeting, November, 1994. Winner, Best Paper Award. (with Gregory B. Turner, Mark Mitchell, and Ron Berry).

- "Purchasing's Involvement in Corporate Strategic Planning." Proceedings of the 1994 Atlantic Marketing Association, 187-192. Presented in Atlantic City, NJ at the Annual Meeting, October, 1994. (with Gregory B. Turner, Wade C. Ferguson, and Ed Pierce).
- "Purchasing Planning for Disaster - Are You Prepared?" Proceedings of the 1994 National Association of Purchasing Management International Meeting, 259-263. Presented in Atlanta, GA at the Annual Conference, May, 1994. (with Wade C. Ferguson).
- "A Content Analysis of Ethical Policy Statements in Purchasing Departments." Proceedings of the 1993 Southern Marketing Association, 171-173. Presented in Atlanta, GA at the Annual Meeting, November, 1993. (with Gregory B. Turner).
- "The Impact of Inbound Shipment Tracing Systems on the Expediting Function." Proceedings of the 1993 Atlantic Marketing Association, 435-437. Presented in Orlando, FL at the Annual Meeting, October, 1993. (with Stephen LeMay, Paul T. Nelson, and Gregory B. Turner).
- "The Acceptance of Gratuities by Purchasing Agents: Toward the Development of Effective Control Methods." Proceedings of the 1993 Association of Marketing Theory and Practice, 522-525. Presented in Hilton Head, SC at the Annual Meeting, March, 1993. (with Gregory B. Turner and Steve Taylor).
- "Teaching Styles and Methodologies: Pitfalls and Suggestions." Symposium for the Graduate Student Workshop of the Southeast Decision Sciences Institute. Presented in Chattanooga, TN at the Annual Meeting, February, 1993. (with Ronald M. Zigli and Robert L. Andrews).
- "An Empirical Examination of the Diffusion of Document Imaging Processing Systems." Proceedings of the 1993 Southeast Decision Sciences Institute, 179-181. Presented in Chattanooga, TN at the Annual Meeting, February, 1993. (with Gregory B. Turner).
- "Symbiosis: A Theoretical Foundation for the Development of Strategic Procurement Alliances." Proceedings of the 1993 Southeast Decision Sciences Institute, 204-206. Presented in Chattanooga, TN at the Annual Meeting, February, 1993. (with Gregory B. Turner and Mark A. Mitchell).
- "An Examination of Political Campaign Pricing Decisions: A Multi-Stage Approach." Proceedings of the 1992 Atlantic Marketing Association, 419-423. Presented in Greensboro, NC at the Annual Meeting, October, 1992. (with Gregory B. Turner).
- "Take It Or Leave It?.....The Ethics of Gift Acceptance by Industrial Purchasing Agents." Proceedings of the 1992 Atlantic Marketing Association, 233-237. Presented in Greensboro, NC at the Annual Meeting, October, 1992. (with Gregory B. Turner and Mark A. Mitchell).
- "Studying Ethics Within the Purchasing Function: Let's Start by Building Some Theoretical Foundations." Proceedings of the 1992 Southeast Institute of Management Science, 360-364. Presented in Myrtle Beach, SC at the Annual Meeting, September, 1992. (with Gregory B. Turner).
- "Inbound Shipment Tracing Systems: A Perspective From the Purchasing Department." Proceedings of the 1991 Southeast Institute of Management Science, 255-256. Presented in Myrtle Beach, SC at the Annual Meeting, October, 1991. (with Paul T. Nelson).
- "Discrimination Awards." Symposium on Forensic Evaluations for the 1991 Southeast Institute of Management Science. Presented in Myrtle Beach, SC at the Annual Meeting, October, 1991. (with B. Perry Woodside and Bill Hardy).
- "An Update of Statistical Applications in Age Discrimination Cases." Symposium on Forensic Evaluations for the 1989 Southeast Decision Sciences Institute. Presented in Charleston, SC at the Annual Meeting, February, 1989. (with B. Perry Woodside).
- "A Review and Applications of Statistical Methodologies Appropriate for Evidence in Age Discrimination Litigation." Symposium on Forensic Evaluations for the 1988 Decision Sciences Institute. Presented in Las Vegas, NV at the Annual Meeting, November, 1988. (with B. Perry Woodside).

- "Testing for Model Specification Errors in Income Distribution Research." Proceedings of the 1988 Southeast Decision Science Institute, 99-101. Presented in Winston-Salem, NC at the Annual Meeting, February, 1988. (with John D. Jackson and Tom S. Sale).
- "The On-Line Case: A 'Bottom Line' Approach to Statistical Pedagogy." Proceedings of the 1988 Southeast Decision Science Institute, 105-107. Presented in Winston-Salem, NC at the Annual Meeting, February, 1988. (with James Hawkes).
- "Age Discrimination: Statistical Evidence and Measurement of Damages." Proceedings of the 1987 Southeast Institute of Management Science, 34-36. Presented in Myrtle Beach, SC at the Annual Meeting, October, 1987. (with B. Perry Woodside).
- "An Empirical Investigation of Income Concentration in the South: 1950-1980." Proceedings of the 1987 Southern Regional Sciences Institute, 25-29. Presented in Atlanta, GA at the Annual Meeting, March, 1987. (with John D. Jackson and Tom S. Sale).
- "The Direct Mail Simulation Game: Teaching Marketing Research for 'Bottom Line' Results." Proceedings of the 1987 Southwest Institute of Decision Science, 233-235. Presented in Houston, TX at the Annual Meeting, March, 1987. (with James Hawkes and Robert N. Carter).
- "Experiment Shows Entrepreneurs Can Benefit from Maturity Training." Proceedings of the 1987 Southwest Small Business Institute, 65-68. Presented in Houston, TX at the Annual Meeting, March, 1987. (with Robert N. Carter).
- "Training Retail Computer Sales Personnel." Proceedings of the 1987 Southwest Small Business Institute, 82-84. Presented in Houston, TX at the Annual Meeting, March, 1987. (with Robert N. Carter).
- "Level of Personal Maturity Seen as Fuel for Entrepreneurial Spirit." Abstract reprinted in The Journal of Private Enterprise, 2(1), 56. Presented in San Antonio, TX at the Association of Private Enterprise Education Meeting, April, 1986. (with Robert N. Carter).
- "The Possible Effects of Firm Size on Case Writing: A Preliminary Investigation." Proceedings of the 1986 Mid-Western Case Writers Association, 53-59. Presented in Chicago, IL at the Annual Meeting, March, 1986. (with Robert N. Carter).
- "The Family Medical Center: Marketing Research and Strategic Planning." Proceedings of the 1985 National Decision Sciences Institute, Case Supplement, 39-45. Presented in Las Vegas, NV at the Annual Meeting, November, 1985. (with Robert N. Carter).
- "State of Individual Maturity Advanced as Key Determinant of Successful Retail Sales Training." Proceedings of the 1985 Academy of Marketing Science/ American Collegiate Retailing Association, 195-197. Presented in Charleston, SC at the Annual Meeting, October, 1985. (with Robert N. Carter).
- "Gap Exists in Manufacturing-Sponsored Training for Retail Computer Sales Personnel: Combined Training in Fundamental Techniques and Skills and Beyond Motivation Concepts Holds Remedy." Proceedings of the 1984 Academy of Marketing Science, 473. Presented in Niagara Falls, NY at the Annual Conference, May 1984. (with Robert N. Carter).
- "Advancing the Small Business Computer Marketing Channel Through Training the Retail Salesperson." Proceedings of the 1984 Southwest Small Business Institute, 54-66. Presented in Houston, TX at the Annual Meeting, March, 1984. (with Robert N. Carter).
- "Respondent Samples in Marketing Research: A Comparison Study." Proceedings of the 1984 Southeast Decision Sciences Institute, 177-179. Presented in Savannah, GA at the Annual Meeting, February, 1984. (with Albert J. Taylor).
- "Salesmanship and Motivation Training: A New Direction." Proceedings of the 1983 Mid-Atlantic Marketing Association, 1-14. Presented in Valdosta, GA at the Annual Meeting, October, 1983. (with Robert N. Carter).
- "Predicting Sales Performance: A Literature Review." Proceedings of the 1983 Southwest Decision Sciences Institute, 107-109. Presented in Houston, TX at the Annual Meeting, March, 1983. (with C. Richard Huston and Albert J. Taylor).

Recent Institutional Research Activities Coordinated for Members of the College Community:

- "A Program Assessment of the College of Charleston's Center for Entrepreneurship," performed for the Dean of the School of Business and the College's Entrepreneur in Residence, 1995.
- "An Assessment of the College of Charleston's Department of Public Safety," performed for the Director of the Department, 1995.
- "An Assessment of the College of Charleston's Maymester and Summer Sessions Program," performed for the Director of the Program, 1994.
- "The 1994 Student Budget Survey," performed for the Office of Financial Aid and Scholarships at the College, 1994.
- "Assessment of Attendance at Men's Basketball Games at The College of Charleston," performed for the Athletic Department at the College, 1994.
- "A Risk Management & Insurance Curriculum Program Feasibility Study," performed for the Dean of the School of Business and Economics at the College, 1993.
- "An Assessment of the Office of Financial Assistance and Scholarships," performed for the Director of the Office of Financial Aid and Scholarships at the College, 1993.
- "An Assessment of the Office of Career Development," performed for the Interim Director Office of Career Development and Placement at the College, 1992.
- "The 1992 Student Budget Survey," performed for the Office of Financial Aid and Scholarships at the College, 1992.
- "The TQM Initiative: A Study to Determine the Integration of TQM into the Business and Economics Curricula," performed for the School of Business and Economics, 1992.
- "The 1991 Student Expenses Study," performed for the Office of Financial Aid and Scholarships at the College, 1991.
- "The Feasibility of a Major in Communications at The College," performed for the Office of the Vice President for Academic Affairs and the English Department Faculty, 1991.
- "The Masters of Accountancy Program Feasibility Study," performed for the Accounting Faculty in the School of Business and Economics, 1989.
- "The 1989 Student Budget Study," performed for the Office of Financial Aid and Scholarships at the College, 1989.
- "A Feasibility Study of Off-Campus and Weekend Programs at the College of Charleston," performed for the Office of the Vice President for Academic Affairs, 1989.
- "An Internal Audit of the College Campus Shop," performed for the College Bookstore, 1988.

Other Research Published in Professional Trade Journals:

- "Salary Gender Gap Continues to Narrow Among Carolinas-Virginia Purchasing Professionals: Results of the Third Annual NAPM-CV Salary Survey." *The Southern Purchaser*, XXVI, (1), 9-11, (January-February 1996). (with Wade C. Ferguson and Gregory B. Turner).
- "Purchasing Planning for Disaster - Are You Prepared?" *NAPM Insights*, V (11), 42-44, (November 1994). (with Wade C. Ferguson and Gregory B. Turner).
- "Carolinas-Virginia Purchasing Salaries Continue to Outpace National Averages: Results of the Second Annual NAPM-CV Salary Survey." *The Southern Purchaser*, XXIV, (6), 22-24, (November-December 1994). (with Wade C. Ferguson).
- "Keep Purchasing Functioning in Disaster's Wake." *Supplier Selection & Management Report*, 94-8, 10-11, (August 1994). (with Wade C. Ferguson).
- "How Do Carolinas-Virginia Purchasing Professionals Measure Up in Today's Economy: Results of the First Annual NAPM-CV Salary Survey." *The Southern Purchaser*, XXIII (4), 20-24, 31, (July-August 1993). (with Wade C. Ferguson).
- "Gratuity Acceptance: Views of Future Purchasing Agents." *The Southern Purchaser*, XXIII (4), 26-31, (July-August 1993). (with Gregory B. Turner).
- "Careful There Partner...They May Be A Gunning' For You." *The Southern Purchaser*, XXII (5), 20-24, (September-October 1992). (with Gregory B. Turner).
- "Let's Compare Ethics Policy Statements: A Study of Purchasing Practices in the PMAC-V Region." *The Southern Purchaser*, XXII (4), 18-21, (July-August 1992). (with Gregory B. Turner).
- "Gifts and Favors From Suppliers: A Study of Purchasing Practices in the PMAC-V Region." *The Southern Purchaser*, XXII (3), 18-22, (May-June 1992). (with Gregory B. Turner).
- "What's Happening on the Home Front: A Study of Purchasing Ethical Practices in the PMAC-V Region." *The Southern Purchaser*, XXII (2), 38-40, (March-April 1992). (with Gregory B. Turner).
- "An Agricultural Product to Bank On: Trees." *The Louisiana Banker*, XLIX(10), 3-8. (with Lyndon E. Dawson).
- "From Pulpwood to Paper: The Channel of Distribution for Louisiana-Produced Paper." *The Louisiana Economy*, XV(1), 6-8. (with Lyndon E. Dawson).
- "The Louisiana Timber Industry: Marketing Channels and Pricing Practices." *The Louisiana Economy*, XIV(4), 5-8. (with Lyndon E. Dawson).

Memberships, Offices Held, and Activities in Professional Organizations:

- Coordinator and Publisher, *The NAPM-CV Purchasing Manager's Report*, published monthly and extensively disseminated throughout the print and electronic media nationally and in the Carolinas-Virginia region.
- Professional Development Chairman (1991-1993), Board of Directors Member, Purchasing Scholarship Coordinator, Quarterly Meeting Host and Local Arrangements Coordinator, *National Association of Purchasing Management - Carolinas/Virginia (NAPM-CV)*
- Coordinator, *The College of Charleston Purchasing Professional Development Seminar Series*
- Monthly Meeting Speaker, numerous Local Chapters of the *NAPM-CV*
- Speaker and Participant, *The NAPM Annual International Purchasing Conference*
- Speaker and Participant, *The NAPM-CV Annual Purchasing Educators Conference*
- Annual Convention Speaker, *The South Carolina Association of Government Purchasing Officers*
- Vice President for Planning & Development (1992-1993), Past (1989) and Current (1996) Co-Host and Local Arrangements Coordinator, Track Chair, Session Chair, Manuscript Reviewer, Paper Discussant, *The Southeast Decision Sciences Institute*

Track and Session Chair, Manuscript Reviewer, Paper Discussant, The Southeast Institute of Management Science
 Session Chair, Manuscript Reviewer, Paper Discussant, The Southwest Decision Sciences Institute
 Session Chair, Manuscript Reviewer, Paper Discussant, The Southern Marketing Association
 Session Chair, Manuscript Reviewer, Paper Discussant, The Atlantic Marketing Association

Personal Employment, Consulting, Internships:

Consultant, 1995, Kiawah Property Owners Group, Kiawah Island, SC
 Consultant, 1994, Trident's B.E.S.T. Committee, Charleston, SC
 Consultant, 1992-present, The Patriot's Point Development Authority, Mt. Pleasant, SC
 Consultant, 1991-1992, Advertising Services Agency, Charleston, SC
 Consultant, 1989, Gamble, Givens, and Moody CPA Firm, N. Charleston, SC
 Co-Owner, 1992-present, Power Alley Sports Cards, Inc., Mt. Pleasant, SC

Involvement in Extension and Public Service Activities:

Vice Chairman of Commissioners, The Charleston County Housing and Redevelopment Authority
 Member, The Public Housing Authority Director's Association
 Member, Carolinas Council of Housing, Redevelopment, and Codes Officials
 Chairman, The Charleston County Republican Party
 Sponsor and Volunteer, The Juvenile Diabetes Foundation Walkathon
 Volunteer, The American Red Cross Trident Chapter
 Volunteer, The Charleston Interfaith Crisis Ministry
 Site Coordinator, The South Carolina Adopt-A-Highway Program
 Member, Ducks Unlimited East Cooper Chapter
 Speaker, The East Cooper Public Schools After School Adventure Program

Doctoral Dissertation Committee Assignments Held:

Committee Member, An Evaluation of Participation by the Purchasing Function in the Corporate Strategic Planning Process, a dissertation by Wade C. Ferguson, Purchasing Manager, Santee Cooper, Moncks Corner, SC, for Nova University, 1993.

Major College and Department Committee Assignments Held:

Member, BA/ECON Faculty, Student, & Alumni Issues Committee
 Member, BA/ECON Computer Utilization Committee
 Past Member, College of Charleston Judicial Board
 Past Coordinator, The College of Charleston Career Festival
 Administrator, The NAPM-CV Purchasing Scholarship Program
 Administrator, The National Collegiate Business Merit Award Program
 Assistant to the Dean, AACSB Accreditation and Reaccreditation Studies
 Faculty Advisor, The College of Charleston Varsity Baseball Team
 Faculty Advisor, The College Republicans

Recent External Research Activities Coordinated for Members of the Local Community:

- "A Customer Profile and Opportunity Assessment for the Sports Rock Cafe," performed for the management of the North Charleston based operation, 1995.
- "An Awareness Assessment of the Charleston Area Arts Council," performed for the Director of the local agency, 1995.
- "A Feasibility Study of Opening an All-Natural Products Store in Americus, GA," performed for a client interested in entering this industry, 1995.
- "A Feasibility Study of the Piggly Wiggly Carolina Company's Centralized Bakery," performed for the Vice President of the corporation, 1994.
- "An Assessment of the Charleston Trident Business Education Partnership Program," performed for the Trident Chamber of Commerce, 1993.
- "A Study of the Ethnic Greeting Card Industry," performed for a client interested in entering the industry, 1993.
- "Summary of Light Manufacturing/Distribution Operations in South Carolina," performed for a local business brokerage company, 1992.
- "South American Import/Export Study," performed for a local group of future importers, 1992.
- "A New Product Development and Current Product Line Expansion Study," performed for a local book retailer, 1991.
- "A Temporary Employment Services Attitudinal Survey," performed for a regional temporary employment services company, 1991.
- "Medical University of South Carolina Purchasing Department Assessment," performed for the Director of Procurement at the Medical University of South Carolina, 1990.
- "A Needs Assessment for the Charleston World Trade Center," performed for the Trident Chamber of Commerce and the Council of Trade, 1990.
- "A Peninsular Charleston Fitness Facility Feasibility Study," performed for clients interested in developing such a facility, 1990.
- "A Study of the Need for Mortgage Information Services in the Trident Market," performed for clients interested in the start-up of such a business, 1990.
- "A Dealership Satisfaction Survey," performed for a local power boat manufacturing company, 1989.
- "A Feasibility and Location Study for U-Bake-It Pizza," performed for clients interested in bringing this concept to the Charleston market, 1989.
- "A Home Furnishings Consumer Preference Study," performed for a national home furnishings concern, 1989.

[EXHIBIT 2]

Interpretation of Statement Studies Figures

RMA recommends that Statement Studies data be regarded only as general guidelines and not as absolute industry norms. There are several reasons why the data may not be fully representative of a given industry:

- (1) The financial statements used in the *Statement Studies* are not selected by any random or statistically reliable method. RMA member banks voluntarily submit the raw data they have available each year, with those being the only constraints: (a) The fiscal year-ends of the companies reported may not be from April 1 through June 30, and (b) their total assets must be less than \$250 million.
- (2) Many companies have varied product lines; however, the *Statement Studies* categorize them by their primary product Standard Industrial Classification (SIC) number only.
- (3) Some of our industry samples are rather small in relation to the total number of firms in a given industry. A relatively small sample can increase the chances that some of our composites do not fully represent an industry.
- (4) There is the chance that an extreme statement can be present in a sample, causing a disproportionate influence on the industry composite. This is particularly true in a relatively small sample.
- (5) Companies within the same industry may differ in their method of operations which in turn can directly influence their financial statements. Since they are included in our sample, too, these statements can significantly affect our composite calculations.
- (6) Other considerations that can result in variations among different companies engaged in the same general line of business are different labor markets; geographical location; different accounting methods; quality of products handled; sources and methods of financing; and terms of sale.

For these reasons, RMA does not recommend the Statement Studies figures be considered as absolute norms for a given industry. Rather the figures should be used only as general guidelines and in addition to the other methods of financial analysis. RMA makes no claim as to the representativeness of the figures printed in this book.

Robert Morris Associates
One Liberty Place
Philadelphia, PA 19103

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AN ANALYSIS OF THE APPROPRIATE FRANCHISE FEE

FOR FORT SUMTER TOURS, INC.

MAY 10, 1996

REVISED SEPTEMBER 10, 1998

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I. INTRODUCTION

In March of 1992 the National Park Service ("NPS") notified Fort Sumter Tours, Inc. ("FST") that it was unilaterally increasing its franchise fee from 4.25% to 12% in the sixth year of its fifteen year Concessions Contract ("Contract"). The new fee was retroactive to June 14, 1991, and is approximately the highest permissible for FST's category of business. The purpose of this document is to appeal to the reasonableness of someone with governmental authority, by highlighting the inappropriate nature of the FFA and the franchise fee determination process and to demonstrate why FST's present 4.25% franchise fee is appropriate.

II. FST's 12% FRANCHISE FEE SHOULD BE SET ASIDE BECAUSE THE PROCESS BY WHICH THAT FEE WAS DETERMINED IS NOT VALID

The entire franchise fee determination process applied to FST, as set forth in NPS-48, is premised upon the assumption that data contained in the *Dunn & Bradstreet Industry Norms* ("*D&B Industry Norms*") accurately depicts return and financial statement data for the industry in which FST is a participant. The affidavit of Dr. Mark F. Hartley, and the analysis of Dr. Robert L. Andrews, both Professors of Statistics, along with a document entitled, "Critique of the National Park Service's Franchise Fee Analysis Regarding Fort Sumter Tours, Inc., A National Park Service Concessioner" ("FFA Critique"), conclusively demonstrate that this premise is statistically invalid.¹ Because this fundamental premise is invalid, the conclusion drawn therefrom, that a 12% franchise fee is appropriate for FST, is also invalid.

¹ See pages 24-34 of the FFA Critique, Dr. Hartley's Affidavit attached as Exhibit 1, and Dr. Andrew's analysis attached as Exhibit 2.

It is further demonstrated that from the standpoint of accounting and sound business practices, the FFA is flawed.² Many of these flaws were confirmed by David Jackson in a letter to Rex Maughn dated April 26, 1996 (attached as Exhibit 3). Among the flaws in this area are:

- (i) The NPS assumed away almost \$350,000 of FST's equity in direct violation of §20b(d) of the CPA, which instructs the NPS, in the setting of franchise fees, to consider the opportunity for net profit in relation to capital invested (which is essentially equity).
- (ii) The NPS imputed a purchase price and debt level for the vessel "Spirit of Charleston" it knew to be incorrect when it reconstituted the lease of the vessel as a purchase, and then failed to make adjustments to account for the reconstitution which would have been beneficial to FST and are called for by Generally Accepted Accounting Principles ("GAAP").
- (iii) The NPS assumed away over \$160,000 of officers' salaries on the basis of statistically invalid data derived from a nonrandom sample of 10 businesses reported in *Robert Morris & Associates 1990 Annual Statement Studies*. This was done even though FST's officers' payroll was actually in the middle of the third quartile of the data utilized, an acceptable range according to NPS-48. (See *NPS-48, Chapter 24, Exhibit 3*).
- (iv) The NPS gave no consideration to FST's low debt, fully depreciated assets or operational efficiency as required by NPS-48. (See *NPS-48, Chapter 24, Exhibit 3*).

² The accounting and business practices flaws in the FFA are discussed on pages 37-60, and summarized on pages 60-61 of the FFA Critique.

- (v) The NPS included net income from non-concession sources and failed to acknowledge FST's tax liability in concluding it was too profitable and needed to have its franchise fee raised.

In light of the invalid statistical premise of NPS-48, and in light of other deficiencies that manifest themselves in the FFA, some of which are highlighted above, the NPS's conclusion that a 12% franchise fee is appropriate for FST should be set aside. The 4.25% franchise fee should be restored as the appropriate fee for FST, as the remainder of this document demonstrates.

III. CORRECTION OF JUST TWO OF THE MANY UNFOUNDED ADJUSTMENTS MADE TO FST's FINANCIAL STATEMENTS IN THE FFA DEMONSTRATES THAT A 4.25% FRANCHISE FEE IS APPROPRIATE

The NPS's own methodology as employed in the FFA demonstrates that 4.25% is an appropriate franchise fee if just two of the NPS's most unfounded adjustments to Fort Sumter Tour's financial statements are corrected so that they more accurately reflect reality. The specific corrections are as follows:

- (i) The actual purchase price of \$1.4 million, and actual debt of \$1.3 million for the vessel "Spirit of Charleston" are used; and,
- (ii) FST's actual 1990 balance sheet is used as the starting point in the FFA Proforma, with the balance sheet only adjusted to accurately reflect, consistent with GAAP, the reconstitution of the "Spirit of Charleston" lease as a purchase, which reconstitution is imposed by the NPS.

If only the above corrections are made to the NPS adjustments in the FFA Proforma, FST's Cumulative Profitability Measures (Return on Assets, Return on Equity, and Return on Gross

Receipts) fall within the quartile ranges targeted by NPS-48.³ The returns are depicted in Table A below.

Table A: Cumulative Profitability Measures - Corrected NPS Proforma			
	ROA	ROE	ROG
FST with 4.25% Franchise Fee	3.47%	4.63%	5.95%
D&B Industry Median	4.70%	5.70%	3.20%

ROA and ROE are below the median in the second quartile. ROG, though above the median, is still in the acceptable range according to NPS-48, being in the middle of the third quartile.⁴ These returns are depicted graphically and in tabular form relative to the *D&B Industry Norms* medians in Addendum C of the FFA Critique.

IV. THE NPS FAILED TO MAKE A BENEFICIAL ADJUSTMENT TO FST FOR ITS RELATIVELY LOW DEBT AND LOW BASIS IN DEPRECIABLE ASSETS

As demonstrated in Section III *supra*, according to the NPS's own methodology, FST's profitability falls within acceptable NPS ranges if just two of its most unfounded adjustments are corrected to reflect reality. However, if two other adjustments beneficial to FST that were not made,

³These conclusions are demonstrated on pages 62-66, and Addendums A, B and C of the FFA Critique.

⁴The FFA indicates the D&B upper quartile threshold for ROG is 8.7%. NPS-48 indicates that middle and lower third quartile returns are acceptable. "High concessioner returns (high 3rd quartile or 4th quartile) indicate a higher percentage fee. Low concessioner returns (1st quartile or low 2nd quartile) indicate a lower percentage fee." *NPS-48, Chapter 24, p. 18*. The inference is that the acceptable range is the middle of the 2nd quartile to the middle of the 3rd quartile.

had been made as called for in NPS-48, FST's profitability would have appeared even lower. These overlooked adjustments should dismiss any question as to whether the 4.25% franchise fee is appropriate.

NPS-48 indicates that adjustments beneficial to the concessioner should be made when the concessioner has little or no long term debt, and when the concessioner has older fully depreciated assets.⁵ FST's passenger vessels, its major capital assets, were purchased in 1963 and 1971. Their original cost basis was fully depreciated by 1986, the first year the NPS considered in its FFA. The asset balance showing on the balance sheet for these assets during the years analyzed was merely the depreciated costs of recent capital improvements to the vessels rather than the true value of the vessels. Thus FST's assets and equity were grossly understated, making FST appear more profitable than it really is.

The NPS reviewed FST's 1986-1990 financial data in the FFA. The actual debt figure utilized by the NPS for comparison to industry averages was the average debt for the five year period, or only \$92,000. For the years 1988 and 1989 FST had no debt. In 1986 and 1987 FST had relatively insignificant debt levels of \$37,000 and \$40,000 respectively. Only in 1990 did FST carry any significant level of debt, and this was two Small Business Administration loans secured to cover the extraordinary losses incurred as a result of Hurricane Hugo. The two loans were originated in September of 1990, and the long term portions of the loans were \$383,000 on FST's December 31, 1990, balance sheet. So in only four months out of the five year historic period considered in the FFA did FST have what could be considered any significant long term debt, yet the NPS did not make the adjustment called for in NPS-48 when concessioners have little or no long term debt. In fact, a strong argument can be made that due to its extraordinary nature, this SBA debt should not contribute in any way to the NPS not making the beneficial adjustment being discussed.

⁵ "Concessioners reporting no long term debt should have low interest expense. As a result, profitability will be overstated [emphasis in the original] when comparing to industry averages." NPS-48, Chapter 24, Exhibit 3, p. 2. Also, "Concessioners with older assets that have fully depreciated will be overstating [emphasis in the original] their profitability with respect to industry averages." NPS-48, Chapter 24, Exhibit 3, p. 3.

It is not possible to quantify the amount of beneficial adjustment the NPS should have made to FST's financial data because no guidelines are provided in NPS-48 as to how the adjustment is to be calculated. But there is no question that FST meets the criteria of a concessioner that will have its profitability overstated by virtue of its low debt and older fully depreciated assets, as set forth in *NPS-48, Chapter 24, Exhibit 3*. It is sufficient to conclude that, according to the NPS's own guidelines, the returns depicted in Section III, *supra*, which fall within ranges acceptable to the NPS are themselves an overstatement of FST's returns. Consequently, any question as to the appropriateness of the current 4.25% franchise fee should be decided in FST's favor.

V. THE 1991-1995 D&B INDUSTRY NORMS INDICATE THAT 4.25% IS AN APPROPRIATE FRANCHISE FEE

Although the validity of utilizing the *D&B Industry Norms* to establish FST's franchise fee has been discredited, if the NPS insists upon this methodology, comparison of FST's returns to returns reported by D&B under SIC 4489 for the period 1991-1995 shows that 4.25% is an appropriate franchise fee. In Addendum A, FST's cumulative Profitability Measures under two scenarios are compared to those reported by D&B for 1991-1995. The first scenario compares FST's data as reported in its Concessioner Annual Financial Report to the average D&B data for the period. The only adjustments to FST's reported data deal with adjusting out the disputed contingent franchise fee, and non-concession income. Under Scenario 1, FST's ROA (5.1%) and ROE (6.8%) are in the lower half of the second quartile, and ROG (5.2%) is ever so slightly above the median (by 0.2 percentage points). Clearly under Scenario 1, which again is FST's reported financial data, there is no justification for increasing FST's franchise fees.

The second scenario adjusts FST's reported net income upwards by \$100,000 per year. The \$100,000 figure is used because it is FST's average net income for the five year period under Scenario 1. Rather than fret over the propriety of particular adjustments to FST's financial data, Scenario 2 simply assumes that the average net income realized by FST for the five year period is

twice what has actually been reported. FST considers this a very generous assumption, and suggests that any adjustments the NPS might impose that go beyond doubling FST's average net income would be difficult to justify indeed.

Under Scenario 2, which again doubles FST's average net income, ROA (9.8%) is in the middle of the third quartile, and ROE (12.9%) is still in the second quartile, each acceptable ranges according to NPS-48. ROG (9.8%) is in the upper half of the third quartile, and is the only Profitability Measure under Scenario 2 that might possibly be considered out of the acceptable range. However, FST suggests that it is precisely this type of situation - two Profitability Measures in acceptable ranges and one slightly out of an acceptable range - in which it is appropriate for the NPS to give the concessioner consideration for low debt and low basis in its older fully depreciated assets. As noted in footnote 5 *supra*, NPS-48 acknowledges that profitability will be overstated in just such a situation.

Comparison of these Profitability Measures are depicted in tabular form in Addendum B, and in graphic form in Graphs 1-3 attached hereto. A review of this data clearly demonstrates that 4.25% is an appropriate franchise fee according to the franchise fee determination procedure of NPS-48, even if the NPS imposes assumptions that double FST's average net income. Certainly the only reasonable conclusion is that FST's fee should remain at 4.25%.

An interesting phenomenon that comes to light in this analysis is that the median Profitability Measures D&B reports for SIC 4489 for 1991-1995 are so much higher than those reported by D&B for 1985-1989 and used in the FFA. The differences are depicted in Table B below:

Table B: Comparison of D&B Profitability Measure Medians Used in FFA and D&B Averages for 1991-1995			
Profitability Measure	D&B Medians Data in FFA	Average D&B Medians, 1991-1995	Percent Change
ROA	4.7%	8.4%	78.7%
ROE	5.7%	15.0%	163.2%
ROG	3.2%	5.0%	56.3%

Two points should be made regarding the wide fluctuation between the median D&B Profitability Measures used in the FFA, and those reported by D&B for 1991-1995. First, these fluctuations are both an indicator and consequence of the inherent invalidity of the D&B data. The industry simply did not experience such wild fluctuation of returns. The only reasonable conclusion is that the D&B data does not accurately reflect the industry. It is precisely this type of wide fluctuation in sampling data that causes statisticians to conclude that the sampling technique employed must be invalid.⁶ The second point is that even if one continues to insist that the D&B data is valid, the returns for 1991-1995 should be considered more reflective of FST's industry because data classified under SIC 4489 was used for that entire period. As noted in pages 24-31 of the FFA Critique, SIC 4489 did not exist until 1987, and data was not classified thereunder until 1988. So the D&B data the NPS used in the FFA for 1985-1989 was a synthesis of data classified under SIC 4489 and some other SIC code(s) which included businesses very dissimilar from FST. Thus, to the extent the D&B data on FST's industry is reliable at all, the data reported for 1991-1995 must be considered more reliable than that reported for 1985-1989. And the 1991-1995 data, which indicates FST's industry is much more profitable than assumed in the FFA, justifies FST's profitability with a 4.25% franchise fee as being within ranges acceptable to the NPS.

⁶ See pages 24-31 of the FFA Critique for a more detailed discussion of why these wide fluctuations in sampling data are both an indication and consequence of the statistical invalidity of the D&B data.

VI. FST DOES NOT HAVE THE LIQUIDITY TO PAY THE FRANCHISE FEES DEMANDED

By letter dated April 26, 1996, the NPS demanded payment of \$722,224.84 in past due franchise fees, plus interest and penalty. It is impossible for FST to meet this demand, for as of March 31, 1996, FST only had \$620,371.46 of cash and securities. When interest and penalty is added to the principal amount of \$722,224.84, FST would have to borrow approximately \$200,000 simply to pay the franchise fee arrearage. No lending institution would extend FST credit however, because as demonstrated in Addendum D of the FFA Critique, with a 12% franchise fee FST would be in a negative cash flow position for the remainder of the contract and be unable to service such a loan. Even if FST were not in a negative cash flow position, no lending institution would extend credit to FST in light of the NPS's newly asserted authority to unilaterally increase franchise fees *sua sponte*.

It should be noted that it is not because FST has paid out excessive distributions that it is unable to pay the franchise fee arrearage. On the contrary, FST has altered its normal distribution policy of distributing enough so that its shareholders are able to meet the income tax liability flowing through to them from FST's S Corporation tax return. The last distribution FST made was a \$50,000 distribution in the first quarter of 1995 to cover 1994's tax liability. No distribution has been made since to cover 1995 tax liability flowing through to shareholders.

VII. CONSIDERATION SHOULD BE GIVEN TO DOCKAGE FEES PAID BY FST WHICH ARE IN THE NATURE OF FRANCHISE FEES

FST's Contract requires FST, at its own expense, to secure mainland docking privileges at or near Patriots Point, and on the peninsula of Charleston. For the years 1991-1995 FST paid an average of 3.91% of its concession related gross receipts for the right to operate its Fort Sumter trips from Patriots Point and the Charleston City Marina. FST contends these fees are in the nature of

franchise fees, and FST should be given credit for the same, bringing FST's present effective franchise fee rate to 8.16%. It is appropriate for the NPS to consider these dockage fees as tantamount to franchise fees because the docking privileges they secure are required by the Contract, and are essential to the transportation of visitors to Fort Sumter. The docking privileges FST pays for are essentially the mainland end of the water transportation bridge to Fort Sumter. The Contract privileges only allow FST to land its vessels at the Fort. Without the mainland docking facilities the Contract privileges are worthless. Charging FST a franchise fee for docking at the fort while requiring it to pay a similar fee for mainland docking privileges, and not recognizing such as essentially an additional franchise fee, is analogous to requiring a concessioner in one of the land-based parks to not only pay a franchise fee on its gross receipts, but to additionally pay for the road that brings visitors into the park. If the NPS furnished the needed mainland docking facilities, a higher overall fee to the NPS might be appropriate. But it is not appropriate to require FST to pay third parties similar fees which are necessary for the Contract privileges to have any value, and for the transportation of the first visitor to Fort Sumter, without in turn giving consideration for such expense. The NPS should acknowledge that FST essentially now pays 8.16 % of gross receipts in franchise fees.

VIII. THE DOCKSIDE II PROJECT: A COROLLARY ISSUE

Other than making distributions to cover shareholders' tax liability during the years it has been an S corporation, FST has basically retained all its earnings so that it will have sufficient capital to develop the Dockside II Project ("Dockside II") at the foot of Calhoun Street in Charleston, South Carolina. Yet now the NPS is attempting to strip FST of all these savings. Dockside II is a joint development between the NPS, the City of Charleston and FST that will feature a tour boat landing site and interpretive facility developed by the NPS, an aquarium developed by the City of Charleston, and a food service facility and gift shop developed by FST. The estimated cost of FST's portion of the project is \$3.5 million, of which approximately 70% will be financed, and 30%, or just over \$1 million, will come from equity contributions made by FST. So the reason FST has been retaining and

saving its earnings over the last 11-12 years is so that it can meet the commitments it has made to the NPS and the City of Charleston as a joint venturer in Dockside II.

Volumes could be written about the obstacles and threats from outside sources the three parties to the Dockside II joint venture have overcome, through cooperative effort, since the project's inception in 1985. But FST never dreamed the biggest threat to its realization of the project would come from one of its joint venture partners, yet it has. The NPS's attempt to unilaterally raise FST's franchise fees in a manner that strips it of all liquidity and places it in a negative cash flow situation for the remainder of the Contract, constitutes the biggest obstacle FST has faced to date with regard to the project. The implementation of this fee increase will destroy FST's ability to proceed with its portion of the development.

IX. CONCLUSION

Not only will implementation of the 12% franchise fee destroy FST's ability to proceed with the Dockside II development, it will terminate a heretofore successful partnership with the NPS, for FST cannot have the NPS strip it of all its liquidity and continue to operate under the Contract at a loss. FST suggests that the destruction of its partnership with the NPS will not only be a detriment to each partner, but the visitor to Fort Sumter, who each of us is charged to please, will also suffer. It should be clear to anyone who has read the FFA Critique, and who has considered the various professional opinions about the validity of the franchise fee determination process contained in NPS-48, that the process is inherently flawed. Because FST's 12% fee was established pursuant to this flawed process, it should be set aside.

It has been demonstrated from various lines of reasoning, including the NPS's own current procedure, that if only the most unfounded adjustments to FST's financial data are corrected, or if the most current D&B data is used, 4.25% is the appropriate franchise fee for FST. FST requests,

therefore, that the NPS not destroy its concession, and leave its franchise fee at 4.25%. This is the only fair, just and reasonable course to take.

Respectfully submitted by,


George E. "Chip" Campsen III
Executive Vice President
Fort Sumter Tours, Inc.

ADDENDUMS

ADDENDUM A**FST PROFITABILITY MEASURES RELATIVE TO D&B INDUSTRY NORMS, 1991-1995**

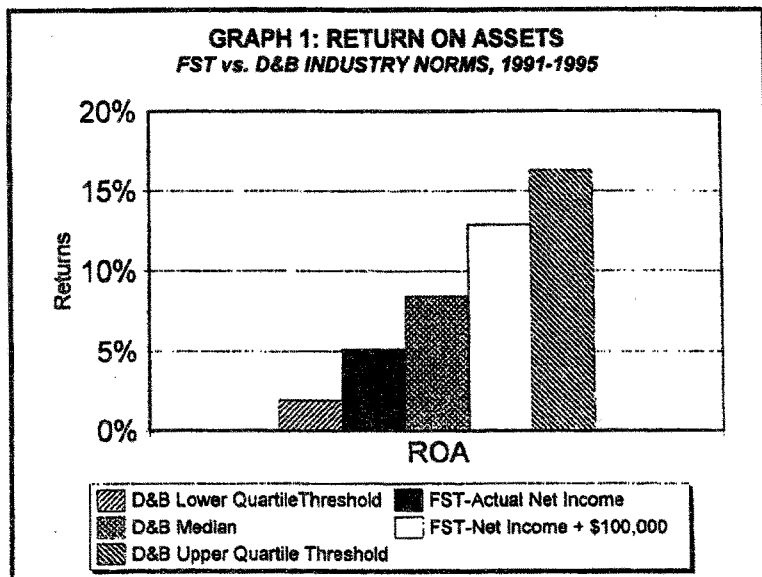
(All figures except returns in \$000)

	1991	1992	1993	1994	1995	Average
FINANCIAL STATEMENT ACCOUNTS:						
Balance Sheet Accounts						
Total Assets	1,795	1,915	1,987	1,931	2,070	1,940
Equity per Financial Report	1,284	1,403	1,425	1,462	976	
Adjustment for Contingent Franchise Fee	0	0	0	0	688	
Total Equity	1,284	1,403	1,425	1,462	1,664	1,448
Income Statement Accounts						
Gross Receipts	1,738	1,913	1,947	2,001	2,005	1,921
Net Income per Financial Report	(20)	166	151	185	(413)	
Adjustment for Other Income	(26)	(65)	(64)	(70)	(37)	
Adjustment for Contingent Franchise Fee	0	0	0	0	688	
Net Income	(46)	101	87	115	238	99
PROFITABILITY MEASURES:						
Scenario 1						
FST Profitability Measures with Actual Net Income						
Cumulative ROA	-2.6%	1.5%	2.5%	3.4%	5.1%	
Cumulative ROE	-3.6%	2.0%	3.5%	4.6%	6.8%	
Cumulative ROG	-2.6%	1.5%	2.5%	3.4%	5.2%	
Scenario 2						
FST Profitability Measures with Actual Net Income Adjusted Upwards \$100,000 per Year						
Cumulative ROA	2.8%	6.5%	7.4%	8.2%	9.8%	
Cumulative ROE	3.9%	8.8%	10.0%	11.0%	12.9%	
Cumulative ROG	3.1%	7.0%	7.5%	8.2%	9.8%	
D&B Profitability Measures						
ROA						
Lower Quartile Threshold	2.3%	-2.3%	9.0%	-0.1%	0.4%	1.9%
Median	15.7%	2.9%	10.7%	5.2%	7.5%	8.4%
Upper Quartile Threshold	18.4%	7.1%	15.9%	19.0%	20.9%	16.3%
ROE						
Lower Quartile Threshold	4.2%	2.4%	13.4%	1.3%	1.8%	4.6%
Median	16.9%	9.3%	20.0%	10.4%	18.6%	15.8%
Upper Quartile Threshold	19.5%	11.5%	28.9%	34.8%	48.7%	28.7%
ROG						
Lower Quartile Threshold	2.3%	0.3%	6.1%	-0.2%	0.1%	1.7%
Median	5.8%	3.6%	7.0%	3.5%	5.1%	5.0%
Upper Quartile Threshold	10.3%	8.9%	13.8%	7.3%	9.8%	10.0%

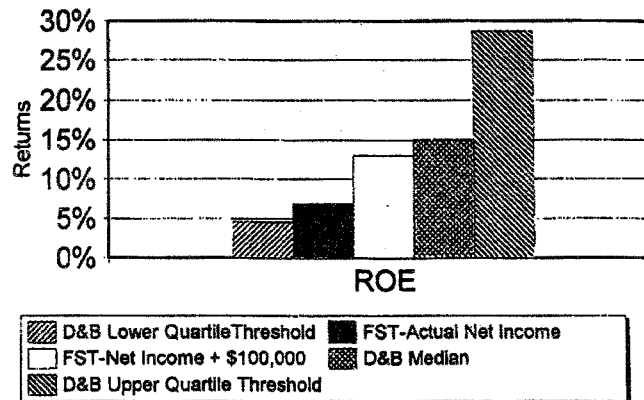
ADDENDUM B**CUMULATIVE PROFITABILITY COMPARISONS, 1991-1995***FST's Profitability Measures Relative to D&B Industry Norms*

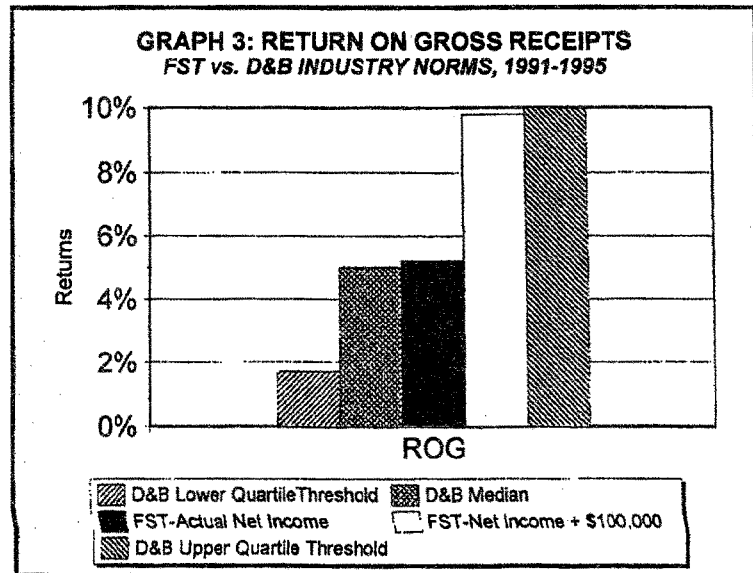
Profitability Measure	1st Quartile	Quartile Threshold	2nd Quartile	Median	3rd Quartile	Quartile Threshold	4th Quartile
D&B Industry ROA							
FST ROA - Actual Net Income			5.1%			16.3%	
FST ROA - Net Income + \$100,000					9.8%		
D&B Industry ROE							
FST ROE - Actual Net Income			6.8%	15.0%		28.7%	
FST ROE - Net Income + \$100,000			12.9%				
D&B Industry ROG							
FST ROG - Actual Net Income				5.0%	5.2%	10.0%	
FST ROG - Net Income + \$100,000					9.8%		

GRAPHS



GRAPH 2: RETURN ON EQUITY
FST vs. D&B INDUSTRY NORMS, 1991-1995





EXHIBITS

[EXHIBIT 1]

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF MARK F. HARTLEY, D.B.A.
 COUNTY OF CHARLESTON)

PERSONALLY appeared before me, MARK F. HARTLEY, D.B.A., who being duly sworn, deposes and says:

1. I was born November 30, 1956, in West Palm Beach , Florida, and am presently an Associate Professor of Business Administration at the College of Charleston in Charleston, South Carolina, which position I have held for twelve (12) years. I hold a Doctor of Business Administration degree from Louisiana Tech University with a major in quantitative analysis, and teach statistics at the College of Charleston. Attached to this Affidavit is my curriculum vita, academic credentials, employment history, and membership in professional and academic organizations. Also attached is a list of 33 recent quantitative research studies I have coordinated or performed, and a list of 57 academic publications or presentations I have authored or contributed to.

2. I am generally familiar with the issues and relevant facts in the case of Fort Sumter Tours, Inc. versus Bruce Babbitt, Secretary, Department of the Interior, an Agency of the Federal Government (Case No. 94-1570). Specifically, I am familiar with and have reviewed the franchise fee determination process set forth in NPS-48, an agency guideline for the National Park Service ("NPS"). I have also reviewed the Franchise Fee Analysis for Fort Sumter Tours, Inc. ("FST") and Fort Sumter National Monument, prepared by the NPS Concessions Division, Finance Branch, which is dated February 27, 1992 ("FFA"). Furthermore, I am familiar with and have reviewed the annual Dunn and Bradstreet

Publication, *Industry Norms* ("D&B Industry Norms") for SIC code 4489, Water Transportation, Not Elsewhere Classified, for the years 1988-1989, and am also familiar with and have reviewed the *D&B Industry Norms* data for each SIC code which includes water transportation services for the years 1985-1987. I am also familiar with and have reviewed the Robert Morris and Associates publication, *1990 Annual Statement Studies* ("RMA Statement Studies"). I am familiar with the content, sampling procedures and methodology employed in formulating these two publications, and am aware, based upon my educational and professional experience, of the utility and limitations of the data contained therein. I am also familiar with the Standard Industrial Classification ("SIC") system, along with its utility and limitations.

3. Upon reviewing NPS-48, the FFA, the *D&B Industry Norms* and the *RMA Statement Studies*, it is clear that the NPS attempted to set FST's franchise fee at a level that would cause its profitability to fall at or near the median profitability for the population of businesses classified under SIC code 4489 and its predecessor(s). In this attempt, the entire franchise fee determination process was predicated upon the following inference: The profitability data reported in the *D&B Industry Norms* for SIC code 4489 and its predecessor(s) is equal to or closely approximates the profitability of the larger population of businesses classified thereunder. In my professional and academic opinion, there is no question that this inference is statistically invalid. In fact, no statistically valid inferences regarding the population of businesses, or any particular business, comprising SIC code 4489 or its predecessor(s) can be drawn from the median and quartile data reported in the *D&B Industry Norms* or the *RMA Statement Studies*. Specifically, it is invalid for the NPS to infer that the data contained in the *D&B Industry Norms* or the *RMA Statement Studies* are reflective of financial statement data or profitability data for the entire population of businesses, or any particular business (including FST), classified under SIC 4489 or its predecessor(s). Drawing any such inferences from the *D&B Industry Norms* or the *RMA Statement Studies* data violates fundamental

principles of statistics, and constitutes a misuse of the data.

4. Because, as indicated above, the fundamental inference upon which the NPS predicates its FFA is statistically invalid, the conclusion drawn from the FFA, which is, that a twelve percent (12%) franchise fee will cause FST's profitability to equal or approach the median profitability for the industry under which FST is classified, is also statistically invalid.

5. In fact, no valid inferences regarding the population of businesses, or any particular business, classified under SIC 4489 or its predecessor(s) may be drawn from the *D&B Industry Norms* or the *RMA Statement Studies* data. The data simply has insurmountable statistical deficiencies. Among the statistical deficiencies are:
 - (a) The samples of businesses from which the information was drawn are not random samples. In inferential statistics, if one is to draw any inferences about a population, based upon the measurement of a characteristic in a sample, the sample must be randomly selected. Otherwise, the sample is not considered representative of the larger population.

 - (b) Based upon my information and belief the population of businesses classified under SIC 4489 is approximately three thousand (3,000) businesses.¹ The sample sizes employed in the *D&B Industry Norms* under SIC 4489 were 16 in 1988 and 56 in 1989, and the sample size employed in the *RMA Statement Studies* used by the NPS was 10. Even if these samples had been randomly

¹ According to W.R. Mosteller, 1995-1996 President of the Passenger Vessel Association, the national trade association of passenger vessel operators, the passenger vessel industry in the United States is composed of approximately 3,000 businesses.

selected, they are too small to draw any inferences about the larger population when one considers the rather broad variability of quartile and median data reported.

- (c) The NPS's methodology is statistically unreliable because of the nonrandom nature of the samples employed, the small sample sizes, and the absence of other data essential to properly test the statistical validity of the *D&B Industry Norms* and the *RMA Statement Studies* data. Because of this unreliability, the validity of any inferences drawn from the *D&B Industry Norms* and the *RMA Statement Studies* data cannot be subjected to statistical validity testing. It is thus fatally flawed for the purposes employed by the NPS. Typically data such as that reported in the *D&B Industry Norms* and *RMA Statement Studies* would be subject to the quantification of appropriate sample sizes and confidence intervals pursuant to the Central Limit Theorem of parametric statistics. This is a standard and fundamental procedure in the field of quantitative statistical analysis to measure the degree of confidence one may place in inferences about a population when those inferences are based upon the measurement of a characteristic in a sample. However, the *D&B Industry Norms* and *RMA Statement Studies* data is beyond the reach of such fundamental statistical evaluation because of its incomplete nature and the unreliable statistical techniques employed. The only possible conclusion is that the data has no validity for the purposes employed by the NPS.

6 In my professional opinion, if the *D&B Industry Norms* and *RMA Statement Studies* data were collected by an appropriate random method, and if the sample sizes were of an appropriate size considering the variability of the characteristics measured, and if sufficient

additional data were available to quantify the level of confidence that could be placed in the inferences drawn from the data, only then could a statistically valid inference be made from the *D&B Industry Norms* and *RMA Statement Studies* data about the population of businesses classified under SIC 4489 or its predecessor(s). This is not to say, however, that if all the above mentioned conditions were met, it would be appropriate to assume that the population of businesses classified under SIC 4489, or its predecessor(s) constitute an acceptable comparator to FST for the purpose of determining appropriate or expected profitability, or balances in financial statement accounts. The inappropriate nature of utilizing any set of data classified by SIC code for the purpose of setting profitability levels or financial statement balances is a function of the broad parameters employed in defining each relevant SIC code. Generally, four digit SIC codes such as that employed in the *D&B Industry Norms* and *RMA Statement Studies* include too many diverse businesses to be utilized for this purpose. In other words, rarely does a particular business sufficiently "fit" into a four digit SIC code to enable the researcher to confidently utilize financial statement and profitability data classified by that SIC code as an indicator of what the financial statement and profitability data for that particular business should be. In my professional opinion this is the case with regards to FST and the NPS's attempt to determine what FST's financial statement and profitability data "should be", by comparing such data to information classified by SIC code in the *D&B Industry Norms* and *RMA Statement Studies*.

7. It is important to clarify that in this affidavit I am not criticizing the NPS's goal of setting franchise fees at a level that will result in FST's profitability being equal to or approximately equal to the median profitability of the industry FST is a participant in. Whether or not that is an appropriate goal is a policy issue beyond the appropriate limits of my opinion. What I am criticizing is the methodology employed by the NPS to achieve that goal. The NPS's methodology in the FFA is statistically invalid, and no confidence whatsoever may reasonably be placed in its conclusion that a 12% franchise fee should result

in FST's anticipated profitability approximating the median for the industry FST is a participant in.


 MARK F. HARTLEY, D.B.A.

SWORN to before me, Augusta L Allen
 this 4 day of March, 1996.


 NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires _____
 AUGUSTA L. ALLEN
 NOTARY PUBLIC FOR SOUTH CAROLINA
 MY COMMISSION EXPIRES SEPT. 27, 2000

MARK F. HARTLEY

School of Business and Economics
 The College of Charleston
 Charleston, SC 29424
 (803) 953-5955, (803) 953-1797 fax

PO Box 1822
 Mt. Pleasant, SC 29465
 (803) 971-9425
 hartleym@cofc.edu email

Education:

Doctor of Business Administration (D.B.A.), 1986
 Louisiana Tech University, Ruston, LA
 Major field of study: Quantitative Analysis
 Minor fields of study: Marketing, Economics
 Dissertation: Income Concentration in the United States: Measurement, Trends, and Stability of Correlates, 1950-1980.

Master of Business Administration (M.B.A.), 1979
 Columbus College, Columbus, GA
 Major field of study: Administration

Bachelor of Business Administration (B.B.A.), 1978
 Columbus College, Columbus, GA
 Major field of study: Marketing

Employment:

Associate Professor, 1994 - present. Assistant Professor, 1985 - 1994.
 Department of Management and Marketing, School of Business and Economics
 The College of Charleston, Charleston, SC.
 Tenured August, 1988.
 Member, National Association of Purchasing Management - Carolinas/Virginia Chair, 1993 to present.

Courses taught at the College of Charleston:

Production and Operations Management, Purchasing and Materials Management, Business Statistics II,
 Marketing Research, Quantitative Methods and Decision Making, Intermodal Information Systems

Assistant Professor, 1982 - 1985.
 School of Business Administration
 Columbus College, Columbus, GA.

Teaching Assistant, 1980 - 1982.
 College of Administration and Business
 Louisiana Tech University, Ruston, LA.

Honors and Recognitions:

Phi Gamma Sigma (Business Honorary Organization)
 Pi Epsilon Delta Epsilon (Economics Honorary Organization)
 School of Business and Economics Dean's Special Service Award

Publications in Academic Refereed Journals:

- "Purchasing's Role in the Corporate Strategic Planning Process." Accepted for publication in International Journal of Physical Distribution and Logistics Management. (with Wade Ferguson and Gregory B. Turner).
- "Ethics, Gratuities, and Professionalization of the Purchasing Function." Journal of Business Ethics. XIV, 751-760. (with Gregory B. Turner and Stephen Taylor).
- "Developing Ethical Policy Statements in Purchasing Departments." T.S.U. Business and Economic Review. XIX(2), 2-6. (with Gregory B. Turner and Charlie Cook).
- "Ethics Policies and Gratuity Acceptance by Purchasing Agents." International Journal of Purchasing and Materials Management. XXX(3), 42-47. (with Gregory B. Turner and Stephen Taylor).
- "Are You Taking Advantage of the Productivity Incentives in the Tax Reform Act of 1986?" Industrial Management. XXXV(2), 22-24. (with J. Michael Alford and B. Perry Woodside).
- "Income Concentration in South Carolina: How Much and Why." Lander College Business Review. II(2), 5-9. (with Tom S. Sale and John D. Jackson).

Other Unpublished Circulated Working Papers:

- "The Use of Inbound Shipment Tracing Systems: Redefining the Expediting Function." Under review. Logistics and Transportation Review. (with Gregory B. Turner and Stephen LeMay).

Other Publications and Academic Professional Program Presentations:

- "Public Sector Attitudes Toward Gratuities and Gift Acceptance." Accepted for publication in Proceedings of the 1996 National Association of Purchasing Management International Meeting, to be Presented in Chicago, IL at the Annual Meeting, April, 1996. (with Gregory B. Turner and Wade C. Ferguson).
- "Regional Variations in Ethical Standards and Conduct Among Purchasing Managers." Accepted for publication in Proceedings of the 1996 National Association of Purchasing Management International Meeting, to be Presented in Chicago, IL at the Annual Meeting, April, 1996. (with Gregory B. Turner and Wade C. Ferguson).
- "Designing for the Japanese Market." Accepted for publication in Proceedings of the 1996 Southeast Decision Sciences Institute, to be Presented in Charleston, SC at the Annual Meeting, February, 1996. (with J. Michael Alford and Gregory B. Turner).
- "Purchasing's Role in the Development of Corporate Ethics Statements." Proceedings of the 1995 National Association of Purchasing Management International Meeting, 266-271. Presented at Anaheim, CA at the Annual Meeting, May, 1995. (with Gregory B. Turner and Wade C. Ferguson).
- "Uncertainty, Effort and Risk Aversion in Sales Force Compensation: What Does Agency Theory Offer?" Proceedings of the 1994 Southeast Institute of Management Science, 319-321. Presented in Myrtle Beach, SC at the Annual Meeting, November, 1994. (with Gregory B. Turner and Wade C. Ferguson).
- "Group Decision Support Systems: An Application in the Participative Budgeting Process." Proceedings of the 1994 Southeast Institute of Management Science, 222-224. Presented in Myrtle Beach, SC at the Annual Meeting, November, 1994. Winner, Best Paper Award. (with Gregory B. Turner, Mark Mitchell, and Ron Berry).

- "Purchasing's Involvement in Corporate Strategic Planning." Proceedings of the 1994 Atlantic Marketing Association, 187-192. Presented in Atlantic City, NJ at the Annual Meeting, October, 1994. (with Gregory B. Turner, Wade C. Ferguson, and Ed Pierce).
- "Purchasing Planning for Disaster - Are You Prepared?" Proceedings of the 1994 National Association of Purchasing Management International Meeting, 259-263. Presented in Atlanta, GA at the Annual Conference, May, 1994. (with Wade C. Ferguson).
- "A Content Analysis of Ethical Policy Statements in Purchasing Departments." Proceedings of the 1993 Southern Marketing Association, 171-173. Presented in Atlanta, GA at the Annual Meeting, November, 1993. (with Gregory B. Turner).
- "The Impact of Inbound Shipment Tracing Systems on the Expediting Function." Proceedings of the 1993 Atlantic Marketing Association, 435-437. Presented in Orlando, FL at the Annual Meeting, October, 1993. (with Stephen LeMay, Paul T. Nelson, and Gregory B. Turner).
- "The Acceptance of Gratuities by Purchasing Agents: Toward the Development of Effective Control Methods." Proceedings of the 1993 Association of Marketing Theory and Practice, 522-525. Presented in Hilton Head, SC at the Annual Meeting, March, 1993. (with Gregory B. Turner and Steve Taylor).
- "Teaching Styles and Methodologies: Pitfalls and Suggestions." Symposium for the Graduate Student Workshop of the Southeast Decision Sciences Institute. Presented in Chattanooga, TN at the Annual Meeting, February, 1993. (with Ronald M. Zigli and Robert L. Andrews).
- "An Empirical Examination of the Diffusion of Document Imaging Processing Systems." Proceedings of the 1993 Southeast Decision Sciences Institute, 179-181. Presented in Chattanooga, TN at the Annual Meeting, February, 1993. (with Gregory B. Turner).
- "Symbiosis: A Theoretical Foundation for the Development of Strategic Procurement Alliances." Proceedings of the 1993 Southeast Decision Sciences Institute, 204-206. Presented in Chattanooga, TN at the Annual Meeting, February, 1993. (with Gregory B. Turner and Mark A. Mitchell).
- "An Examination of Political Campaign Pricing Decisions: A Multi-Stage Approach." Proceedings of the 1992 Atlantic Marketing Association, 419-423. Presented in Greensboro, NC at the Annual Meeting, October, 1992. (with Gregory B. Turner).
- "Take It Or Leave It?....The Ethics of Gift Acceptance by Industrial Purchasing Agents." Proceedings of the 1992 Atlantic Marketing Association, 233-237. Presented in Greensboro, NC at the Annual Meeting, October, 1992. (with Gregory B. Turner and Mark A. Mitchell).
- "Studying Ethics Within the Purchasing Function: Let's Start by Building Some Theoretical Foundations." Proceedings of the 1992 Southeast Institute of Management Science, 360-364. Presented in Myrtle Beach, SC at the Annual Meeting, September, 1992. (with Gregory B. Turner).
- "Inbound Shipment Tracing Systems: A Perspective From the Purchasing Department." Proceedings of the 1991 Southeast Institute of Management Science, 255-256. Presented in Myrtle Beach, SC at the Annual Meeting, October, 1991. (with Paul T. Nelson).
- "Discrimination Awards." Symposium on Forensic Evaluations for the 1991 Southeast Institute of Management Science. Presented in Myrtle Beach, SC at the Annual Meeting, October, 1991. (with B. Perry Woodside and Bill Hardy).
- "An Update of Statistical Applications in Age Discrimination Cases." Symposium on Forensic Evaluations for the 1989 Southeast Decision Sciences Institute. Presented in Charleston, SC at the Annual Meeting, February, 1989. (with B. Perry Woodside).
- "A Review and Applications of Statistical Methodologies Appropriate for Evidence in Age Discrimination Litigation." Symposium on Forensic Evaluations for the 1988 Decision Sciences Institute. Presented in Las Vegas, NV at the Annual Meeting, November, 1988. (with B. Perry Woodside).

- "Testing for Model Specification Errors in Income Distribution Research." Proceedings of the 1988 Southeast Decision Science Institute, 99-101. Presented in Winston-Salem, NC at the Annual Meeting, February, 1988. (with John D. Jackson and Tom S. Sale).
- "The On-Line Case: A 'Bottom Line' Approach to Statistical Pedagogy." Proceedings of the 1988 Southeast Decision Science Institute, 105-107. Presented in Winston-Salem, NC at the Annual Meeting, February, 1988. (with James Hawkes).
- "Age Discrimination: Statistical Evidence and Measurement of Damages." Proceedings of the 1987 Southeast Institute of Management Science, 34-36. Presented in Myrtle Beach, SC at the Annual Meeting, October, 1987. (with B. Perry Woodside).
- "An Empirical Investigation of Income Concentration in the South: 1950-1980." Proceedings of the 1987 Southern Regional Sciences Institute, 25-29. Presented in Atlanta, GA at the Annual Meeting, March, 1987. (with John D. Jackson and Tom S. Sale).
- "The Direct Mail Simulation Game: Teaching Marketing Research for 'Bottom Line' Results." Proceedings of the 1987 Southwest Institute of Decision Science, 233-235. Presented in Houston, TX at the Annual Meeting, March, 1987. (with James Hawkes and Robert N. Carter).
- "Experiment Shows Entrepreneurs Can Benefit from Maturity Training." Proceedings of the 1987 Southwest Small Business Institute, 65-68. Presented in Houston, TX at the Annual Meeting, March, 1987. (with Robert N. Carter).
- "Training Retail Computer Sales Personnel." Proceedings of the 1987 Southwest Small Business Institute, 82-84. Presented in Houston, TX at the Annual Meeting, March, 1987. (with Robert N. Carter).
- "Level of Personal Maturity Seen as Fuel for Entrepreneurial Spirit." Abstract reprinted in The Journal of Private Enterprise, 2(1), 56. Presented in San Antonio, TX at the Association of Private Enterprise Education Meeting, April, 1986. (with Robert N. Carter).
- "The Possible Effects of Firm Size on Case Writing: A Preliminary Investigation." Proceedings of the 1986 Mid-Western Case Writers Association, 53-59. Presented in Chicago, IL at the Annual Meeting, March, 1986. (with Robert N. Carter).
- "The Family Medical Center: Marketing Research and Strategic Planning." Proceedings of the 1985 National Decision Sciences Institute, Case Supplement, 39-45. Presented in Las Vegas, NV at the Annual Meeting, November, 1985. (with Robert N. Carter).
- "State of Individual Maturity Advanced as Key Determinant of Successful Retail Sales Training." Proceedings of the 1985 Academy of Marketing Science/ American Collegiate Retailing Association, 195-197. Presented in Charleston, SC at the Annual Meeting, October, 1985. (with Robert N. Carter).
- "Gap Exists in Manufacturing-Sponsored Training for Retail Computer Sales Personnel: Combined Training in Fundamental Techniques and Skills and Beyond Motivation Concepts Holds Remedy." Proceedings of the 1984 Academy of Marketing Science, 473. Presented in Niagara Falls, NY at the Annual Conference, May 1984. (with Robert N. Carter).
- "Advancing the Small Business Computer Marketing Channel Through Training the Retail Salesperson." Proceedings of the 1984 Southwest Small Business Institute, 54-66. Presented in Houston, TX at the Annual Meeting, March, 1984. (with Robert N. Carter).
- "Respondent Samples in Marketing Research: A Comparison Study." Proceedings of the 1984 Southeast Decision Sciences Institute, 177-179. Presented in Savannah, GA at the Annual Meeting, February, 1984. (with Albert J. Taylor).
- "Salesmanship and Motivation Training: A New Direction." Proceedings of the 1983 Mid-Atlantic Marketing Association, 1-14. Presented in Valdosta, GA at the Annual Meeting, October, 1983. (with Robert N. Carter).
- "Predicting Sales Performance: A Literature Review." Proceedings of the 1983 Southwest Decision Sciences Institute, 107-109. Presented in Houston, TX at the Annual Meeting, March, 1983. (with C. Richard Huston and Albert J. Taylor).

Other Research Published in Professional Trade Journals:

- "Salary Gender Gap Continues to Narrow Among Carolinas-Virginia Purchasing Professionals: Results of the Third Annual NAPM-CV Salary Survey." The Southern Purchaser, XXVI, (1), 9-11. (January-February 1996). (with Wade C. Ferguson and Gregory B. Turner).
- "Purchasing Planning for Disaster - Are You Prepared?" NAPM Insights, V (11), 42-44, (November 1994). (with Wade C. Ferguson and Gregory B. Turner).
- "Carolinas-Virginia Purchasing Salaries Continue to Outpace National Averages: Results of the Second Annual NAPM-CV Salary Survey." The Southern Purchaser, XXIV, (6), 22-24, (November-December 1994). (with Wade C. Ferguson).
- "Keep Purchasing Functioning in Disaster's Wake." Supplier Selection & Management Report, 94-8, 10-11, (August 1994). (with Wade C. Ferguson).
- "How Do Carolinas-Virginia Purchasing Professionals Measure Up in Today's Economy: Results of the First Annual NAPM-CV Salary Survey." The Southern Purchaser, XXIII (4), 20-24, 31. (July-August 1993). (with Wade C. Ferguson).
- "Gratuity Acceptance: Views of Future Purchasing Agents." The Southern Purchaser, XXIII (4), 26-31. (July-August 1993). (with Gregory B. Turner).
- "Careful There Partner...They May Be A Gunnin' For You." The Southern Purchaser, XXII (5), 20-24. (September-October 1992). (with Gregory B. Turner).
- "Let's Compare Ethics Policy Statements: A Study of Purchasing Practices in the PMAC-V Region." The Southern Purchaser, XXII (4), 18-21, (July-August 1992). (with Gregory B. Turner).
- "Gifts and Favors From Suppliers: A Study of Purchasing Practices in the PMAC-V Region." The Southern Purchaser, XXII (3), 18-22, (May-June 1992). (with Gregory B. Turner).
- "What's Happening on the Home Front: A Study of Purchasing Ethical Practices in the PMAC-V Region." The Southern Purchaser, XXII (2), 38-40, (March-April 1992). (with Gregory B. Turner).
- "An Agricultural Product to Bank On: Trees." The Louisiana Banker, XLIX(10), 3-8. (with Lyndon E. Dawson).
- "From Pulpwood to Paper: The Channel of Distribution for Louisiana-Produced Paper." The Louisiana Economy, XV(1), 6-8. (with Lyndon E. Dawson).
- "The Louisiana Timber Industry: Marketing Channels and Pricing Practices." The Louisiana Economy, XIV(4), 5-8. (with Lyndon E. Dawson).

Memberships, Offices Held, and Activities in Professional Organizations:

- Coordinator and Publisher, The NAPM-CV Purchasing Manager's Report, published monthly and extensively disseminated throughout the print and electronic media nationally and in the Carolinas-Virginia region.
- Professional Development Chairman (1991-1993). Board of Directors Member, Purchasing Scholarship Coordinator, Quarterly Meeting Host and Local Arrangements Coordinator, National Association of Purchasing Management - Carolinas/Virginia (NAPM-CV)
- Coordinator, The College of Charleston Purchasing Professional Development Seminar Series
- Monthly Meeting Speaker, numerous Local Chapters of the NAPM-CV
- Speaker and Participant, The NAPM Annual International Purchasing Conference
- Speaker and Participant, The NAPM-CV Annual Purchasing Educators Conference
- Annual Convention Speaker, The South Carolina Association of Government Purchasing Officers
- Vice President for Planning & Development (1992-1993). Past (1989) and Current (1996) Co-Host and Local Arrangements Coordinator. Track Chair. Session Chair, Manuscript Reviewer, Paper Discussant. The Southeast Decision Sciences Institute

Track and Session Chair, Manuscript Reviewer, Paper Discussant, The Southeast Institute of Management Science
 Session Chair, Manuscript Reviewer, Paper Discussant, The Southwest Decision Sciences Institute
 Session Chair, Manuscript Reviewer, Paper Discussant, The Southern Marketing Association
 Session Chair, Manuscript Reviewer, Paper Discussant, The Atlantic Marketing Association

Personal Employment, Consulting, Internships:

Consultant, 1995, Kiawah Property Owners Group, Kiawah Island, SC
 Consultant, 1994, Trident's B.E.S.T. Committee, Charleston, SC
 Consultant, 1992-present, The Patriot's Point Development Authority, Mt. Pleasant, SC
 Consultant, 1991-1992, Advertising Services Agency, Charleston, SC
 Consultant, 1989, Gamble, Givens and Moody CPA Firm, N. Charleston, SC
 Co-Owner, 1992-present, Power Alley Sports Cards, Inc., Mt. Pleasant, SC

Involvement in Extension and Public Service Activities:

Vice Chairman of Commissioners, The Charleston County Housing and Redevelopment Authority
 Member, The Public Housing Authority Director's Association
 Member, Carolinas Council of Housing, Redevelopment, and Codes Officials
 Chairman, The Charleston County Republican Party
 Sponsor and Volunteer, The Juvenile Diabetes Foundation Walkathon
 Volunteer, The American Red Cross Trident Chapter
 Volunteer, The Charleston Interfaith Crisis Ministry
 Site Coordinator, The South Carolina Adopt-A-Highway Program
 Member, Ducks Unlimited, East Cooper Chapter
 Speaker, The East Cooper Public Schools After School Adventure Program

Doctoral Dissertation Committee Assignments Held:

Committee Member, An Evaluation of Participation by the Purchasing Function in the Corporate Strategic Planning Process, a dissertation by Wade C. Ferguson, Purchasing Manager, Santee Cooper, Moncks Corner, SC, for Nova University, 1993.

Major College and Department Committee Assignments Held:

Member, BA/ET/ON Faculty, Student, & Alumni Issues Committee
 Member, BA/ET/ON Computer Utilization Committee
 Past Member, College of Charleston Judicial Board
 Past Coordinator, The College of Charleston Career Festival
 Administrator, The NAPM-CV Purchasing Scholarship Program
 Administrator, The National Collegiate Business Merit Award Program
 Assistant to the Dean, AACSB Accreditation and Reaccreditation Studies
 Faculty Advisor, The College of Charleston Varsity Baseball Team
 Faculty Advisor, The College Republicans

Recent External Research Activities Coordinated for Members of the Local Community:

- "A Customer Profile and Opportunity Assessment for the Sports Rock Cafe," performed for the management of the North Charleston based operation, 1995.
- "An Awareness Assessment of the Charleston Area Arts Council," performed for the Director of the local agency, 1995.
- "A Feasibility Study of Opening an All-Natural Products Store in Americus, GA," performed for a client interested in entering this industry, 1995.
- "A Feasibility Study of the Piggly Wiggly Carolina Company's Centralized Bakery," performed for the Vice President of the corporation, 1994.
- "An Assessment of the Charleston Trident Business Education Partnership Program," performed for the Trident Chamber of Commerce, 1993.
- "A Study of the Ethnic Greeting Card Industry," performed for a client interested in entering the industry, 1993.
- "Summary of Light Manufacturing/Distribution Operations in South Carolina," performed for a local business brokerage company, 1992.
- "South American Import/Export Study," performed for a local group of future importers, 1992.
- "A New Product Development and Current Product Line Expansion Study," performed for a local book retailer, 1991.
- "A Temporary Employment Services Attitudinal Survey," performed for a regional temporary employment services company, 1991.
- "Medical University of South Carolina Purchasing Department Assessment," performed for the Director of Procurement at the Medical University of South Carolina, 1990.
- "A Needs Assessment for the Charleston World Trade Center," performed for the Trident Chamber of Commerce and the Council of Trade, 1990.
- "A Peninsular Charleston Fitness Facility Feasibility Study," performed for clients interested in developing such a facility, 1990.
- "A Study of the Need for Mortgage Information Services in the Trident Market," performed for clients interested in the start-up of such a business, 1990.
- "A Dealership Satisfaction Survey," performed for a local power boat manufacturing company, 1989.
- "A Feasibility and Location Study for U-Bake-It Pizza," performed for clients interested in bringing this concept to the Charleston market, 1989.
- "A Home Furnishings Consumer Preference Study," performed for a national home furnishings concern, 1989.

Recent Institutional Research Activities Coordinated for Members of the College Community:

- "A Program Assessment of the College of Charleston's Center for Entrepreneurship," performed for the Dean of the School of Business and the College's Entrepreneur in Residence, 1995.
- "An Assessment of the College of Charleston's Department of Public Safety," performed for the Director of the Department, 1995.
- "An Assessment of the College of Charleston's Maymester and Summer Sessions Program," performed for the Director of the Program, 1994.
- "The 1994 Student Budget Survey," performed for the Office of Financial Aid and Scholarships at the College, 1994.
- "Assessment of Attendance at Men's Basketball Games at The College of Charleston," performed for the Athletic Department at the College, 1994.
- "A Risk Management & Insurance Curriculum Program Feasibility Study," performed for the Dean of the School of Business and Economics at the College, 1993.
- "An Assessment of the Office of Financial Assistance and Scholarships," performed for the Director of the Office of Financial Aid and Scholarships at the College, 1993.
- "An Assessment of the Office of Career Development," performed for the Interim Director Office of Career Development and Placement at the College, 1992.
- "The 1992 Student Budget Survey," performed for the Office of Financial Aid and Scholarships at the College, 1992.
- "The TQM Initiative: A Study to Determine the Integration of TQM into the Business and Economics Curricula," performed for the School of Business and Economics, 1992.
- "The 1991 Student Expenses Study," performed for the Office of Financial Aid and Scholarships at the College, 1991.
- "The Feasibility of a Major in Communications at The College," performed for the Office of the Vice President for Academic Affairs and the English Department Faculty, 1991.
- "The Masters of Accountancy Program Feasibility Study," performed for the Accounting Faculty in the School of Business and Economics, 1989.
- "The 1989 Student Budget Study," performed for the Office of Financial Aid and Scholarships at the College, 1989.
- "A Feasibility Study of Off-Campus and Weekend Programs at the College of Charleston," performed for the Office of the Vice President for Academic Affairs, 1989.
- "An Internal Audit of the College Campus Shop," performed for the College Bookstore, 1988.

ADVISORY BOARD:

Howard F. Rudd, Jr., Ph.D.
Dean, School of Business and Economics
The College of Charleston
Charleston, SC 29424
(803) 953-8110

Rhonda Mack, Ph.D.
Chairman, Department of Management & Marketing
School of Business and Economics
The College of Charleston
Charleston, SC 29424
(803) 953-6566

Wade C. Ferguson, D.B.A., C.P.M.
Past President of NAPM - Carolinas/Virginia
c/o Santee Cooper
PO Box 2946101
Moncks Corner, SC 29461
(803) 761-8000, ext. 5498

V. Gilbert Snyder, Jr., C.P.M.
Executive Vice President
NAPM - Carolinas/Virginia
5601 Roanne Way, Suite 312
Greensboro, NC 27409

Henry D. McMaster, Esq.
Chairman, South Carolina Republican Party
c/o Tompkins and McMaster Law Firm
PO Box 7337
Columbia, SC 29202

Interpretation of Statement Studies Figures

RMA recommends that Statement Studies data be regarded only as general guidelines and not as absolute industry norms. There are several reasons why the data may not be fully representative of a given industry:

- (1) The financial statements used in the *Statement Studies* are not selected by any random or statistically reliable method. RMA member banks voluntarily submit the raw data they have available each year, with these being the only constraints: (a) The fiscal year-ends of the companies reported may not be from April 1 through June 29, and (b) their total assets must be less than \$250 million.
- (2) Many companies have varied product lines; however, the *Statement Studies* categorize them by their primary product Standard Industrial Classification (SIC) number only.
- (3) Some of our industry samples are rather small in relation to the total number of firms in a given industry. A relatively small sample can increase the chances that some of our composites do not fully represent an industry.
- (4) There is the chance that an extreme statement can be present in a sample, causing a disproportionate influence on the industry composite. This is particularly true in a relatively small sample.
- (5) Companies within the same industry may differ in their method of operations which in turn can directly influence their financial statements. Since they are included in our sample, too, these statements can significantly affect our composite calculations.
- (6) Other considerations that can result in variations among different companies engaged in the same general line of business are different labor markets; geographical location; different accounting methods; quality of products handled; sources and methods of financing; and terms of sale.

For these reasons, RMA does not recommend the Statement Studies figures be considered as absolute norms for a given industry. Rather the figures should be used only as general guidelines and in addition to the other methods of financial analysis. RMA makes no claim as to the representativeness of the figures printed in this book.

Robert Morris Associates
One Liberty Place
Philadelphia, PA 19103

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Printed in U.S.A.

[EXHIBIT 2]

2018 Grove Avenue
Richmond, VA 23220-4534
May 4, 1996

Dr. Allan Howe
National Park Hospitality Association
1225 New York Avenue, Suite 450
Washington, DC 20005

Dear Dr. Howe:

I am enclosing a brief vita and a copy of my analysis of the Franchise Fee Analysis by the National Park Services for Fort Sumter Tours, Inc. and of the statistically related procedures in NPS-48. Subsequent to our telephone conversation on Thursday I added to the initial report I sent dated April 29. I added a statement on the first page indicating an expanding of the opinion beyond the fee analysis for Fort Sumter Tours and a section entitled Summary Statement that addresses the statistically related procedures in NPS-48. I have enjoyed working on this project.

I have spent at least 15 hours on this project. When we agreed for me to do the analysis I indicated that my rate was \$100 per hour. You said that you hoped the total amount would not exceed \$1,000. When I spent the extra hours that would push the cost beyond the maximum you indicated, I realized that I had no assurance of being compensated financially for this extra time. Obviously, I would love to be paid for the full number of hours but will certainly honor our initial agreement. Please make payment to me personally, Robert L. Andrews.

I would also like to be kept apprised of the outcome.

Sincerely,


Robert L. Andrews

Richmond, Virginia
May 4, 1996

Below is a professional opinion by Robert L. Andrews, Associate Professor of Management Science, School of Business, Virginia Commonwealth University. The opinion is of the Franchise Fee Analysis (FFA) by the National Park Services (NPS) for Fort Sumter Tours, Inc. (FST) and of the statistically related procedures in NPS-48. I hold a Ph.D. in statistics from Virginia Tech, 1971. I have 20 years experience teaching statistics and related topics in business schools. Courses taught have been at the undergraduate, masters and doctoral levels. My work has been published in a variety of professional journals. I have been recognized professionally by my peers by being elected to the board of directors of the Decision Sciences Institute, an international organization of primarily university faculty who teach decision science topics.

A Framework for my Analysis

A statistical inferential process involves several steps. The first is the identification of a target population. Ideally, one would like to have correctly measured data for all members of this population. In many cases this population cannot be isolated for sampling. A population that can be sampled is identified and may referred to as the frame or sampled population. If the sampled population differs from the target population then the inferences will be for a different population than the targeted one. Generally a sample is taken from the sampled population rather than obtaining data from every unit in the population. This sample should be taken so as to ensure that the sample data are representative of the population from which the sample is selected. The universally accepted method is to use simple random sampling from the frame with follow up to obtain data from all units selected to be sampled. Nonresponse can cause a bias because those who respond may be different from those who do not respond. A critical part of this process is making sure that each measurement is taken in exactly the same way for each unit being sampled. No amount of statistical calculation can correct measurement error unless multiple observations are taken for each unit being sampled. Summary calculations made from sample data are subject to being different from population values being estimated. Either bias in the overall process or variability inherent to the estimation process can be the cause of this difference. The average magnitude of the variability of an estimate is measured by the standard error of the estimate. Larger samples provide more reliable estimates and smaller standard errors. Inferences about population values should take into account standard errors of the estimates being used and using processes with little or no bias eliminates the need to estimate the magnitude of bias in the estimation.

When data or statistics derived from the data are being used for management decisions then the decision maker must know the value and the short comings of the statistical process involved. A correct understanding and use of statistical procedures is a vital part of quality management that has revitalized many businesses.

My Opinion of the Franchise Fee Analysis (FFA) performed by the National Park Services (NPS) for Fort Sumter Tours, Inc. (FST)

First I will begin with the statistical process used to obtain the data for the industry norms used by NPS. Next I will address the procedures outlined in NPS-48 and how they were applied to FST. I am basing my opinion on my professional knowledge and documents provided to me by FST. These documents included

1. NPS 48, Chapter 24, Section D "Franchise Fee"
2. NPS Franchise Fee Analysis, Fort Sumter Tours, Inc. and
3. Affidavit of Mark F. Hartley, D.B.A.

Target Population or Universe of Interest: Firms truly comparable to FST.

Sampled Population or Frame: Corporate entities with SIC Code 4489.

The sampled population is not the same as the target population. The SIC code reflects primary business. It does not reflect anything about areas of diversification in other business ventures or the size of the company. The fact that the sampled population is not the same as the target population means that inferences from sample data about the target population are subject to error due to this difference. Since the NPS has data for all concessioners, would it not seem appropriate to look at the data for all NPS concessioners? It would appear that FST would have more in common with them than the wide variety of companies that could be in SIC 4489, water transportation.

Sampling Procedure: A convenience sample on companies that voluntarily choose to provide data.

There is no attempt to measure nonresponse bias. Nonresponse bias is the bias that is introduced because the information for the nonresponse group is different from the response group. Dr. Hartley in his testimony on the FST analysis by the NPS refers to the very small sample size relative to the population for the SIC Code 4489. With a nonresponse group that is clearly larger than the response group and with the response group being determined by forces that do not ensure representativeness of the sample in any way, then the likelihood of the information for these groups being different is large. The result is that the sample values have little likelihood of truly being representative of the sampled population.

Measurements: There are no uniformly applicable operational definitions for the quantitative measurements provided in the sample. Neither are there any controls to ensure any uniformity of the measurements obtained.

There are no clearly defined guides or controls that would ensure that the same criteria would be applied in supplying the numbers used in determining the Dunn and Bradstreet norms. For example, the method of depreciation is not required to be the same for all reporting companies. The fact that different people would arrive at different numbers

from the same set of circumstances is most clearly illustrated by the fact that the NPS used the same set of numbers as FST and the NPS determined total equity to be \$624,000 while FST had self-reported total equity to be \$921,840. According to the NPS the self-reported value here had a total error of \$297,840 which represents a 47.7% error. Hence the NPS has confirmed that the self-reported values can be in error by as much as 47.7%. If the NPS does this type of analysis on all concession providers, they should surely have their own set of data on the distribution of errors of self-reported values. No such information is provided. Such information could potentially be used to establish some measure of standard error of these estimates. Instead, the NPS assumes that these values had no error and the self-reported measurements are used for the norms and treated as being absolutely true even though the NPS has shown a 47.7% error in a self-reported measure. Return on assets which is used as a profitability measure is clearly susceptible to measurement error. There was no mechanism to provide for or control the uniformity of the key measurements. There was no effort to measure and use standard errors of the estimates.

Statistical Result: Data obtained from the above process were used to determine quartile values for three different measures of profitability, Return on Gross Profit (ROG), Return on Assets (ROA) and Return on Equity (ROE).

The proverbial statement that a chain is no stronger than its weakest link is applicable here. If any portion of the process is flawed then the final result is flawed. A major problem with this process is that every part of the process is seriously flawed. The sampled population does not contain a group of companies that are truly comparable to FST. Because of the way the sample data were collected there is absolutely no assurance that the sample data are representative of the sampled population. There was nothing in place to ensure that the measurements are recorded according to uniformly defined criteria. The NPS by its own calculations has shown that the measurement part of the process alone is subject to having at least a 47.7 % error for equity.

Reality Check of the Statistical Results: One way to check whether a set of statistical analyses was possibly correct or not is to see if the results make sense.

The quartiles used by the NPS for the FFA were :

	1st Quartile	Median	3rd Quartile
ROG	-0.5	3.2	8.7
ROE	-13.3	5.7	35.0
ROA	-2.9	4.7	11.6

These quartile values alone mean that over one quarter of the firms in this group operate at a loss. In fact, if one fits a bell-shaped normal distribution to these data then about one third of the companies would be operating at an annual loss. This does not pass as being reasonable to me. Surely the NPS does not expect one third of its concession providers to operate at a loss. Unrealistic results generally come from incorrect analysis or data or both.

Use of the Results: The quartile norms from self reported data are used as standards and the NPS adjusted data are made to conform to the midpoint of the distribution by changing the franchisee fee percentage.

At an early age mathematics students learn to not mix apples and oranges when doing calculations. The NPS adjusted the numbers for FST without making any adjustment to the numbers for the standards. The result is analogous to comparing apples and oranges when the NPS adjusted numbers are compared to the unadjusted self-reported values.

Apparent Inconsistency in Following NPS Guidelines: NPS 48, Chapter 24, Section D "Franchise Fee", Financial Administration, Exhibit 3, page 1, states, "The review of the concessioner's results will consist of a search for overstated or understated expenses and for evidence of good or poor management."

I see no indication of a search for evidence of good or poor management to accompany the adjustments of financial data by the NPS. Calculations and statistics are guides to be used along with knowledge of the process being analyzed. Good or poor management clearly has an effect on productivity. The process used by the NPS seems dedicated to penalizing good management rather than encouraging it.

Flawed Logic in the use of Statistical Data to Adjust Fees: The process used by NPS is to adjust fees so that the profitability of a concession provider is close that of the middle of the industry. The NPS-48 document has given rather explicit guidelines for the process until a final franchisee fee is determined. NPS-48, Chapter 24, Financial Administration, page 19, states, "If this fee is in a comparable range with industry statistics, then this percentage franchise fee will be the determined fee and presented to the Regional Director for presentation to the parties."

Adjusting profitability measures to be comparable to the median means that a concession provider has little to gain by performing well. This procedure takes away any incentive to perform well. The recent collapse of the Soviet Union is an example of the result of management that controls profits at the central level and does not provide incentives for good performance. Working closely with business partners is a part of the philosophy in managing for quality espoused by Dr. Deming and other recognized experts in this area. If one member of a business activity has been particularly profitable then it may make sense to encourage that partner to share some of the gain with another entity involved in the activity. However, reducing profitability to the median level for the industry removes the incentive to perform well and has serious long-term implications financially for the NPS and for the quality of services provided by concessioners.

If the NPS intends to adjust productivity for individual concessioners to the median of the industry norm then the NPS will also be required to decrease fees for companies below the median. Hence the NPS is now taking on risk associated with the operation of a business over which the NPS has no direct control. This is of particular concern because the NPS is at the same time taking away incentive for the concessioner to perform well. This

policy may increase short-term income for the NPS but has serious consequences long-term.

If the NPS had data that would provide valid industry norms for a concessioner then the distribution described by these norms could be used to identify companies that were out of the ordinary. However, merely being above or below the median is certainly not out of the ordinary. The median is defined to be the point in the middle of a distribution such that half of the observations are below and half are above. By using some small undefined band of values about the median as being an acceptable range for profitability, the NPS would label the vast majority of companies in any SIC group as being out of the ordinary. Generally accepted statistical practice would consider having 5% on each end of the distribution as being a large percentage. Having 5% on each end means that 10% overall of a true distribution of values are being selected as being out of the ordinary. The most used amount is 5% overall which selects 2.5% from each end of the distribution. The NPS has allowed for an entirely too tight of a band of values around the median as being acceptable for concessioner profitability. NPS-48 allows an analyst to make a rather arbitrary decision about which numbers would be considered comparable to the industry norm. Why was a 12% fee selected for PST rather than another value? The final determination allows a great deal of discretion on the part of the analyst. It seems the only restriction is that the fee be "in a comparable range with industry statistics" and between the calculated minimum of .1% and the maximum of 15.6%. The selected 12 % is much closer to the maximum than the midrange value of 8.35% that would be midway between the two limits. How can NPS defend a procedure as being fairly applied to all when it allows so much judgment at the time of determining a final fee?

Conclusions

I have examined the procedure in NPS-48 used to perform the Franchise Fee Analysis by the National Park Services (NPS) for Fort Sumter Tours, Inc. (FST). In this procedure the profitability data from FST were compared with industry norms for the SIC Code 4489. The fee charged to FST by the NPS affects profitability. In the analysis for FST, the fee charged by the NPS was adjusted until the profitability for FST was comparable to the median of the industry norm.

I find this process to be flawed in several ways. The major areas of difficulty are:

1. Companies in SIC Code 4489 represent at best a questionable peer group for FST.
2. There is no assurance that the sample is representative of the sampled population.
3. The measurements obtained in the sample are self-reported with no control for uniformity. This can be a source of significant error. The NPS said the FST self-reported value for equity was in error by 47.7 %.
4. The NPS uses the industry norms as being true values from the target population rather than being estimates obtained from sample data. NPS-48 gives no guidelines for determining or using margins of error of the estimated values that determine the norms. This is a serious error when using sample estimates from small samples.
5. The resulting industry norm used by the NPS for FST is not realistic. It has about 1/3 of the companies operating at a loss for the year.
6. There is an inconsistency in comparison when the NPS adjusts the self-reported values provided by FST and compares them to the unadjusted self-reported values for the industry norm.
7. The NPS appears to have violated its own guidelines by showing no sign of searching for evidence of good or poor management on the part of FST.
8. The NPS violates standard statistical practice when it allows the use of an undefined and apparently narrow band around the median to determine an acceptable range of profitability.
9. Adjusting profits to a narrow band of values around the median means that the NPS is taking on the risk associated with doing business. Concessioners with low profits will be adjusted up and those with high profits will be adjusted down. Taking over the risk of doing business seems to be a questionable objective for the NPS.
10. The NPS procedure, as implemented for FST, removes incentive for a concessioner to perform well. In addition to the financial impact on concessioners this has serious long-term financial implications for the NPS and for the quality of services provided by concessioners.

Summary Statement

It is clear to me that the National Park Service(NPS) is proposing to place an unjustifiable financial burden on Fort Sumter Tours(FST) with a 282% increase in franchise fee by increasing from 4.25% to 12%. The culprit is primarily the fee revision process laid out in NPS-48. One could conclude that certain judgments made in this particular case were not appropriate. However, the real problem is that the underlying franchise fee revision process is ill-conceived.

The statistical procedures that obtain quartile values used to establish industry norms are totally inadequate to provide accurate values for a particular SIC Code. These provide rough guidelines at best and are not accurate enough to be used as absolute truth the way they are in NPS-48.

Using SIC Code to define a peer group for a concessioner is probably no better than using national norms. Within a particular SIC Code there is still too much variability of operations to provide a comparable peer group. Using a particular SIC Code effectively reduces the sample size for the estimates. The reliability of estimates is directly related to sample size and other issues, such as sample design.

Quartile values describe the usual distribution of values for a particular phenomenon. If the values are correct for a phenomenon then the distribution defines a normal spread or distribution of values for that phenomenon. As long as an observation is in the middle area of the distribution then it is considered to be normal or usual for that distribution. A fundamental concept of statistical analysis is that for an observation to be considered unusual or out of the ordinary it must be in the tails or the extremes of the distribution. Even using 10% of the total area as the demarcation line to label observations as being unusual rather than usual would be considered as large according to standard statistical practice. NPS-48 has shown no understanding of these fundamental concepts of statistics and instructs the analyst to use a narrow band of values around the median to define the usual range of values. However, NPS-48 does not give any defined guideline for the exact determination of this acceptable region after having been rather explicit up to this point in the process. Statistics as a subject area may be defined as the science that studies variability. NPS-48 procedures show no understanding of the natural variability inherent in processes.

Ignoring the existence of natural variability in construction of the NPS-48 procedures has serious financial implications for the National Park Service and its concessioners. Adjusting profitability to the median means that the NPS is effectively taking on the risk of operating a concession. If a concessioner's profitability is above the median the fee will be adjusted to bring profitability down to the median level or if profitability is below the median the fee will be adjusted to bring profitability up to the median level. Doing this removes the incentive for a concessioner to perform well. Any profitability obtained by outstanding performance will be taken away by the NPS. Initially, this may benefit the NPS if the current concessioners are performing well. However, removing all incentives for good performance will soon mean that concessioner performance will drop and that the NPS will decrease fees. It makes no sense to take on the risk associated with doing business at the same time as the incentive to perform well is removed.

The concessioners have a contract with the National Park Service to provide services to customers. How can an enterprise adjust the profitability of a service provider without taking into consideration the quality of services provided to the customers? NPS-48, Chapter 24, Financial Administration, page 12, SEC. 3(d) states, "Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates." The NPS-48 restructuring of fees totally ignores the quality of service provided even though the document itself says that revenue shall be subordinate to service to visitors and protecting the area.

I understand the idea of creating a mechanism that would have financially successful concessioners to share some of their gain with the National Park Service, who is a collaborator in their concession business. However, the fee revision process outlined in NPS-48 is not a fair process for the concessioners and its implementation has serious long-term financial implications for the National Park Service. The National Park Service needs to go back to the drawing board to create a mechanism of sharing gain that would be reasonable for the concessioners and that would not have potentially detrimental long-term effects for the National Park Service.

ROBERT LYNN ANDREWS

Prepared April 1998

Address:

School of Business, Virginia Commonwealth University
Richmond, Virginia 23284-4000

Office Telephone: (804) 828-7101 FAX: (804) 828-8534
e-mail: randrews@busnet.bus.vcu.edu

Home Address: 2018 Grove Avenue, Richmond, Virginia 23220
Home Telephone: (804) 355-4845 or (804) 355-8350

Personal Data:

Birth Date - June 7, 1943	Health - Good
Height - 6'5" (1.95 meters)	Weight - 210 lb. (95 kilos)
Citizenship - U. S. A.	Marital Status - Happily married
Children: Jonathan (1978) and Myra (1981)	

Educational Degrees:

Ph. D. (1971) and M. S. (1970) in statistics, Virginia Polytechnic Institute and State University, (V.P.I. & S.U.), Blacksburg, VA
M. A. (1967) and B. S. (1965) in mathematics, University of Alabama, University, AL

Academic Employment:**Fall 1978 - Present:**

School of Business, Virginia Commonwealth University, Richmond, Virginia 23284-4000. Spent the 1983-4 academic year in France with CERAM (Centre for Education and Research Applied to Management) and with the University of Nice on research study leave. Served as acting chairman of the Department of Decision Sciences and Business Law for the 1988 academic year. Served as the area coordinator for the quantitative area in the Department of Business Administration and Management for the academic years 1979-81 and 1984-87. Tenured and promoted to Associate Professor of Management Science, effective fall 1984.

Fall 1971 - Spring 1974:

Assistant Professor of Business Statistics, V.P.I. & S.U.

Areas of Interest and Expertise:

Applied Statistics, including Regression, and Multivariate Statistical Methods
Managing for Quality
Improving the Education Process
Preparing Students to Function in an International Environment
Decision Analysis
Bayes and Quasi Bayes Estimation
Basic Operations Research

Publications:

Author or co-author of 22 refereed articles in a variety of different academic journals and publications and 25 other articles dealing with the topics listed above.

Courses Taught:

College Algebra (Undergraduate)
 Finite Mathematics (Undergraduate)
 Calculus (Undergraduate)
 Management Science (Undergraduate)
 Basic Probability & Inference Sequence (Undergraduate & Graduate)
 Applied Statistics, Regression & Analysis of Variance (Graduate)
 Decision Analysis (Graduate)
 Applied Multivariate Methods (Graduate)
 Quantitative Methods (in France)
 Total Quality Management (Graduate, Team taught in France)

Service:

Service activity has been extensive at VCU ranging from the departmental to the university level. This activity extends outside the university to both professional and other organizations. Outstanding Service Award recipient for the School of Business in 1990.

Professional Memberships and Activities:

Decision Sciences Institute (formerly American Institute for Decision Sciences).
 At the national level, Regional Vice President and member of the Board of Directors 1995-1997. I have served as a referee for *Decision Sciences*, on the Regional Activities Committee 1990-92 and on the Nominating Committee 1992-94. I have been a referee, paper discussant and session chair at both regional and national meetings and a track chairman for a regional meeting.
 At the regional level, I have been elected to these offices in the southeast region:
 Council Member 1995-1997
 Past President and Nominating Committee chair 1992-93,
 President 1991-1992
 President Elect 1990-91
 Program Chairman 1989-90
 Vice President Finance 1988-89
 Vice President Elect for Finance 1987-88
 Local Arrangements Chairman 1986-87
 Vice President for Industry Liaison 1985-88
 Vice President for Curriculum and Academic Affairs 1982-83 and 1984-85.
 American Statistical Association: Local Arrangements Committee, 1981 ENAR meetings.
 Virginia Academy of Science: Statistics Section Editor, 1979-1984; session chair annual meeting.
 INFORMS (formerly The Institute of Management Science): Paper discussant and session chair at both regional and national meetings, student paper judge for regional meetings.
 American Society for Quality Control: Member and have attended local and regional meetings.
 The Journal of Economic Education: Referee

Outside Activities and Interests:

Basketball: Helms Foundation All-American Team 1966, Assistant coach at the Univ. of Alabama and Virginia Tech., Head coach in the European League in France (1974-1977), coached in youth leagues in both France and U.S.A.
 Christian: Activities range from teaching and leadership in local churches and numerous ministries functioning on the local through international level.

THIEM, JACKSON AND PACE, CPA'S, PA
 CERTIFIED PUBLIC ACCOUNTANTS

DAVID E. THIEM, CPA
 DAVID E. JACKSON, CPA
 SHELJA D. PACE, CPA
 HARRIETTE P. GRAVERSEN, CPA
 JEFFERY L. THOMAS, CPA

171 CHURCH STREET, SUITE 200
 POST OFFICE BOX 1408
 CHARLESTON, SOUTH CAROLINA 29402

MEMBERS
 AMERICAN INSTITUTE OF CPAS
 N. C. ASSOCIATION OF CPAS
 PHONE (803) 723-2110
 FAX (803) 723-2472

[EXHIBIT 3]

April 26, 1996

Mr. Rex Maughn, Chairman
 National Park Hospitality Association
 P.O. Box 29401
 Phoenix, Az 85038

Re: NPS-48 Guidelines

Dear Mr. Maughn:

I have been asked to give my opinion as to whether or not the NPS-48 review process for calculating franchise fees is consistent with Generally Accepted Accounting Principles (GAAP) and sound business practices. To provide a reasonable basis for my findings, I have familiarized myself with the Concessions Policy Act (CPA) and NPS-48 as they relate to the determination and reconsideration of franchise fees. In addition, I have studied the Franchise Fee Analysis (FFA) prepared by the National Park Service (NPS) dated February, 1992 for Fort Sumter Tours, Inc. (FST) which I assumed is a typical example of the general implementation of the guidelines contained in NPS-48.

The first extraordinary business practice I noted was the ability of the NPS to unilaterally impose a new franchise fee rate once one had been negotiated with a concessioner. This is unusual because the franchise fee is calculated as a percentage of gross receipts. This automatically provides the NPS with inflation protection and equitable participation in the future growth of revenue generated by the concessioner. This unilateral ability to change the franchise fee rate periodically during a contract term has a negative impact on the ability of a business to obtain long term financing and to project its long term capital requirements. How can a business plan for the long term if it has no control over what might be a significant change in its franchise fee expense?

Another flawed business practice is the use of selected business statistics published by Dunn and Bradstreet or Robert Morris Associates as standards to be used in the franchise fee determination process. Statisticians will certify that this information is not statistically sound due to the way the information is accumulated and selected. Additionally, this information is not audited or verified and is therefore unreliable. Can one imagine a lender using a company's D&B report to support its underwriting for a loan request instead of the company's audited financial statements? It is virtually impossible to find a SIC code grouping that actually matches a particular company.

Mr. Rex Maughn, Chairman
Page Two

To illustrate the departures of GAAP and errors which can be found in a FFA, I have listed below the problems which I identified in my review of FST's FFA which changed the company's franchise fee rate from 4.25% to 12% of gross receipts.

1. Capitalization of "Spirit of Charleston".

A material error was contained in the FFA with respect to the capitalization of this vessel. The analyst "assumed" a purchase price of \$1 million and "assumed" debt of \$600,000 in his calculations. In reality, the purchase price was in excess of \$1.4 million and the debt was \$1.3 million. This is clearly a departure from GAAP and an error which would understate interest and depreciation expense of the capitalized vessel.

Although the vessel was "assumed capitalized" in the FFA to increase income, when computing the profitability ratios of Return on Assets (ROA) and Return on Equity (ROE), the related capitalized value of the vessel and debt were ignored. Again, this is a material error and a departure from GAAP.

2. Calculation of Profitability Measures.

In addition to the errors stated above concerning the calculations of ROA and ROE, the FFA contained other errors which would affect the proper calculation of these ratios as well as its other measure of profitability, the return on gross receipts (ROG). First, "average net income" (ANI) is a key component in these calculations. Incorrectly included in the ANI was non-concession and other income of \$195,603. Including this income would invalidate the calculation of these three ratios which served as one of the basis for determining the reconsidered franchise fee amount. Again, another serious error contained in the FFA.

The Analyst also adjusted officer salaries in his determination of ANI. He simply limited them to 10% of gross receipts. No investigation was made to determine what actual jobs were performed by the officers. Also, no consideration was given to this being a family business with family members having the title of officers but in fact performing non-officer services for FST. Again, this adjustment would incorrectly increase ANI and invalidate the profitability measures.

Another serious error, the Analyst "assumed" a reduction of \$347,700 in equity to "approximate industry standard". This reduction had no basis in reality. The stated basis of "assume average equity of 50% of assets" is incredible. Equity is a function of the amount of capital principals have invested in a business. By assuming away FST's equity the NPS violated its imperative, as set forth in the CPA, to relate the capital invested in a concession operation to the appropriate level of franchise fees. This is clearly a departure from GAAP and invalidates the calculation of ROE.

Mr. Rex Maughn, Chairman
Page Three

FST is a mature company, having been in operation for thirty five years. Its passenger vessels, its major capital assets, are thirty four and twenty five years old, and fully depreciated except for recent capital improvements. Like many mature companies, FST also has a relatively low debt level. NPS-48 requires adjustments beneficial to the concessioner to be made in calculating profitability measures for a company so positioned, but this was not done in the case of FST. The NPS's failure to make these required adjustments resulted in FST's profitability measures being overstated.

3. Proforma Financial Statements


The proforma statements included in the FFA ignored historical trends of the business in determining its underlying assumptions. For example, in the FAA, gross receipts were "assumed" to increase 3% per year during the remainder of the contract term. In reality, for the period 1986 to 1990, gross receipts actually decreased an average of 1.76% per year. Ignoring recent actual business trends had the effect of overstating the profitability measures of ROG, ROA, and ROE.

4. Use of Industry Standards

Even if no departures from GAAP or errors existed in this FFA, the use of selected industry standards as published by Dunn and Bradstreet or Robert Morris Associates as a basis in the implementation process of NPS-48 is not sound business judgement. Because of these problems it is impossible for one to compare "apples with apples" even if the underlying information were reliable.

As illustrated above, the FFA prepared for FST was flawed with departures from GAAP and sound business practices. If the stated goal contained in the Concessions Policy Act of establishing franchise fees "to allow concessionaires the privilege of making a net profit in relation to both gross receipts and capital invested" is to be achieved, the process of establishing and reconsidering franchise fees needs to be revisited and changed. If this does not occur, in my opinion, the future operations and enjoyment of our national parks and monuments are in jeopardy.

Respectfully Submitted,


David E. Jackson, CPA

**CURRICULUM VITA
DAVID E. JACKSON, CPA**

Thiem, Jackson and Pace, CPA'S, PA	Mailing Address
171 Church Street, Suite 230	P.O. Box 1809
Charleston, S.C. 29401	Charleston, S.C. 29402
(803) 723-2110, (803) 723-2472 Fax	

Education:

B.S. in Business Administration, The Citadel, 1974
 Certified Public Accountant, 1976
 Continuing Education-800 hours

Employment:

Thiem, Jackson and Pace, CPA'S, PA--May 1, 1984 to Present
 Charleston, S.C. --President and Shareholder

McKnight, Frampton, Buskirk and Co.--January, 1974 to April 30, 1984
 Charleston, S.C. --Partner (July, 1979 to April 30, 1984)
 --Manager (July, 1978 to July, 1979)
 --Staff Accountant (Jan., 1974 to July, 1978)

As a CPA, I have been involved in all facets of financial and tax matters to include the oversight, review and preparation of audited, reviewed, and compiled financial statements; and the review and preparation of tax returns for individuals, trusts, partnerships, estates, and corporations. I have also been qualified as an expert witness for testimony in litigation support engagements.

United States Army--July, 1968 to February, 1971--Nuclear Weapons Electronics Specialist; Awarded a Top Secret Security Clearance, Highest Rank-E-5

Honors and Recognitions:

Gold Stars (Dean's List)
 Economic Honor Society
 Good Conduct Medal

Memberships, Offices, and Civic Organizations (Current and Former):

American Institute of Certified Public Accountants
 South Carolina Association of Certified Public Accountants--served on the practice review committee and nominating committee
 Coastal Chapter of SCACPAS
 Estate Planning Council of Charleston
 East Cooper Baptist Church--served as a member of Church Council, Deacon, and Finance Committee
 Charleston Southern University Board of Visitors
 Association of Citadel Men--life member
 Executive Association of Charleston--Board of Directors
 Trident Chamber of Commerce--served on membership committee
 Trident Homebuilders Association--Associate member
 Rotary Club of North Charleston
 Rotary Club of Moncks Corner
 Civitan Club of Charleston
 Kiawanas Club of Charleston
 Sertoma Club of Mt. Pleasant

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE

--oo0oo--

FORT SUMTER TOURS, INC.

FORT SUMTER NATIONAL MONUMENT

--oo0oo--

CC-FCS4001-36
CONTRACT NO. ~~CC-5076-6-0002~~ EXECUTED June 13, 1986

COVERING THE PERIOD

June 13, 1986 Through December 31, 2000

Fort. Senter Tours, Inc.
George E. Casper, President
P.O. Box 37

Department of the Interior

NATIONAL PARK SERVICE

P.O. BOX 37127
WASHINGTON, D.C. 20013-7127

Charlotte NC 28402-
-C-FOSU001-86

IN REPLY REFER TO:
C3823(680)

December 17, 1986

Dear Concessioner:

Several years ago we initiated use of the concession identification number (CONCID) as an internal method of identifying every concession that existed in 1979 or has since been added to the rolls.

The structure of the CONCID is simple. It is composed of seven digits--the first four being an alpha code that identifies the park in which the concession is located and the final three being a numerical suffix which sequentially identifies each and every concession operation in the park.

The CONCID identifies the concession, not the concessioner. Once a CONCID is assigned to a concession, it does not change even if the operation is sold or transferred. Also, the CONCID has been accepted as the identification factor for several information systems in the National Park Service.

Recently several suggestions were made that the CONCID number be adopted as the concession authorization number. The concept is supported by NPS regional and field personnel. However, it was suggested that several additional factors were necessary to establish the specificity of a concession authorization.

Effective immediately, the National Park Service is revising its concession authorization numbering system. Under the new system, the number is composed of eleven digits. The first two digits indicate the type of authorization, the next seven identify the CONCID Number, and the last two are the fiscal year in which the authorization is signed by the National Park Service.

Your current concession authorization has been renumbered. In the lower left portion of this letter, we have entered in pen and ink the new number that has been assigned to your concession authorization. Please be sure to pass this information along to all of those in your organization that deal with the concession operation.

Sincerely,

William Penn Wirt, Jr.
for William Penn Wirt, Jr.
Director

New concession authorization number

CONCESSION CONTRACT

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EXHIBITS

1. Exhibit "A": Government-Owned Structures Assigned
2. Exhibit "B": Nondiscrimination
3. Exhibit "C": Possessory Interest Assets
4. Exhibit "D": Building Replacement Cost for Insurance Purposes
5. Exhibit "E": Concessioner Operation Plan

Contract
No. CC-5076-6-0002

THIS CONTRACT made and entered into by and between the United States of America, acting in this matter by the Secretary of the Interior, through the Regional Director, Southeast Region, National Park Service, hereinafter referred to as the "Secretary," and Fort Sumter Tours, Inc., a corporation organized and existing under the laws of the State of South Carolina, hereinafter referred to as the "Concessioner":

W I T N E S S E T H:

THAT WHEREAS, Fort Sumter National Monument hereinafter referred to as the "area" is administered by the Secretary to conserve the scenery and the natural and historic objects and the wildlife therein, and to provide for the public enjoyment of the same in such manner as will leave such area unimpaired for the enjoyment of future generations; and

WHEREAS, the accomplishment of these purposes requires that facilities and services be provided for the public visiting the area and that all private interest shall be excluded except so far as may be necessary for the accomplishment of said purposes, including accommodation of the public; and

WHEREAS, the United States has not itself provided such necessary facilities and services and desires the Concessioner to establish and operate the same at reasonable rates under the supervision and regulation of the Secretary; and

WHEREAS, the establishment and maintenance of such facilities and services involves a substantial investment of capital and the assumption of the risk of operating loss, it is therefore proper, in consideration of the obligations assumed hereunder and as an inducement to capital, that the Concessioner be given assurance of security of such investment and of a reasonable opportunity to make a profit; and

WHEREAS, pursuant to law the Secretary is required to exercise his authority hereunder in a manner consistent with a reasonable opportunity by the Concessioner to realize a profit on the operations conducted hereunder as a whole commensurate with the capital invested and the obligations assumed:

NOW, THEREFORE, pursuant to the authority contained in the Acts of August 25, 1916, (39 Stat. 535; 16 U.S.C. 1, 2-4), and October 9, 1965, (79 Stat. 969; 16 U.S.C. 20), and other laws supplemental thereto and amendatory thereof, the said parties agree as follows:

SEC. 1. Term of Contract. (a) This contract shall supersede and cancel Contract No. 99UOC20117 effective upon its execution and shall be for a term of approximately fifteen (15) years through December 31, 2000.

(b) The Concessioner shall establish and maintain two bases of operation, one of which must be located in the City of Charleston, and shall provide sufficient vessels, as determined necessary by the Secretary, to accommodate the public from each base. Such bases shall be operational within one (1) year from the execution date of this contract.

(c) In the event that the Secretary develops and provides a docking facility in the City of Charleston, the Concessioner shall move its Charleston base to that facility and shall provide all equipment and furnishings necessary to conduct its operations therefrom. The Concessioner shall also relocate its sales facility from the Fort Sumter museum to the new docking facility and shall provide such furnishings and equipment as may be necessary to conduct its operations therefrom. Such moves shall be accomplished within one (1) year after notification by the Secretary of the availability date of said facility.

(d) It is expressly agreed between the parties hereto that the investments and/or expenditures required in the foregoing are consistent with subsection 3(a) hereof.

(e) The Concessioner may, in the discretion of the Secretary, be relieved in whole or in part of any or all of the obligations of establishing two (2) bases of operation and/or of relocating its Charleston base for such stated periods as the Secretary may deem proper upon written application by the Concessioner showing circumstances beyond its control warranting such relief.

SEC. 2. ACCOMMODATIONS, FACILITIES AND SERVICES. (a) The Secretary requires and hereby authorizes the Concessioner during the term of this contract to provide accommodations, facilities, and services for the public within Fort Sumter National Monument, as follows:

- (1) Boat transportation services between:
 1. The City of Charleston, S.C. and Fort Sumter and;
 2. The Patriot's Point Naval and Maritime Museum development area and Fort Sumter
- (2) Boat transportation services to Fort Moultrie when the Secretary shall determine that such service is necessary for public use and enjoyment of the area
- (3) Sales of souvenirs
- (4) Food and beverage services, refreshments and sundries

These operations shall be conducted consistent with the provisions of an annual Concessions Operating Plan. Failure to comply with the Concessions Operating Plan shall constitute a material breach of this contract which may cause the Secretary to terminate this contract pursuant to the provisions of Section 11 herein. The Concessioner may provide services incidental to the operations authorized hereunder at the request of the Secretary.

(b) The Secretary reserves the right to determine and control the nature, type and quality of the merchandise and services described herein as authorized and required to be sold or furnished by the Concessioner within the area. Operations under this contract and the administration thereof by the Secretary shall be subject to the laws of Congress governing the area and the rules, regulations, and policies promulgated thereunder, whether now in force or hereafter enacted or promulgated, including but not limited to the United States Public Health Service requirements. Concessioners must also comply with current applicable criteria promulgated by the United States Department of Labor's Occupational Safety and Health Act of 1970 (OSHA) and those provisions outlined in the National Park Service's Safety and Occupational Health Policy associated with visitor safety and health.

(c) During the term hereof and subject to satisfactory performance hereunder, the Concessioner is granted a right of first refusal to provide such additional concession accommodations, facilities and services of the same character as required and authorized hereunder as the Secretary may designate as necessary or desirable for accommodation and convenience of the public in the area. If the Concessioner doubts the necessity, desirability, timeliness, reasonableness, or practicability of such new or additional facilities, accommodations or services and/or declines or fails within a reasonable time to comply with the designation of the Secretary, then the Secretary in his discretion may authorize others under substantially the same terms and conditions to provide such designated accommodations, facilities, or services. Except for any new facility provided by the Secretary for the purposes described in subsection 1(c) hereof, this right of first refusal does not apply to concession operations in connection with lands hereafter acquired which expand the existing boundary of the area.

SEC. 3. PLANT, PERSONNEL, AND RATES. (a)(1) The Concessioner shall maintain and operate the said accommodations, facilities, and services to such extent and in such manner as the Secretary may deem satisfactory, and shall provide the plant, personnel, equipment, goods, and commodities necessary therefor provided that the Concessioner shall not be required to make investments inconsistent with a reasonable opportunity to realize a profit on its operations hereunder commensurate with the capital invested and the obligations assumed.

(2) All rates and prices charged to the public by the Concessioner for accommodations, services, or goods furnished or sold hereunder shall be subject to regulation and approval by the Secretary. The Secretary shall exercise his decision making authority with respect to the Concessioner's rates and prices in a manner consistent with a reasonable opportunity for the Concessioner to realize a profit on its operations hereunder as a whole commensurate with the capital invested and the obligations assumed. Reasonableness of rates and prices will be judged primarily by comparison with those currently charged for comparable

accommodations, services, or goods furnished or sold outside of the areas administered by the National Park Service under similar conditions, with due allowance for length of season, provision for peak loads, average percentage of occupancy, accessibility, availability and cost of labor and materials, type of patronage, and other conditions customarily considered in determining charges, but due regard may also be given to such other factors as the Secretary may deem significant.

(3) The Concessioner shall require its employees to observe a strict impartiality as to rates and services in all circumstances. The Concessioner may, subject to the prior approval of the Secretary, grant complimentary or reduced rates under such circumstances as are customary in businesses of the character conducted hereunder. The Concessioner will provide Federal employees conducting official business reduced rates for essential transportation and other specified services in accordance with procedures established by the Secretary.

(b)(1) The Concessioner may be required to have its employees who come in direct contact with the public, so far as practicable, wear a uniform or badge by which they may be known and distinguished as the employees of the Concessioner. The Concessioner shall require its employees to exercise courtesy and consideration in their relations with the public.

(2) The Concessioner shall review the conduct of any of its employees whose action or activities are considered by the Concessioner or the Secretary to be inconsistent with the proper administration of the area and enjoyment and protection of visitors and shall take such actions as are necessary to fully correct the situation.

(3) The Concessioner shall comply with the requirements of (a) Title VII of the Civil Rights Act of 1964, as well as Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, (b) Title V, Section 503 and 504 of the Rehabilitation Act of September 26, 1973, P.L. 93-112 as amended in 1978, (c) 41 CFR, Part 60-2 which prescribes affirmative action requirements for contractors and subcontractors, (d) the Age Discrimination in Employment Act of December 15, 1967 (P.L. 90-202), as amended by P.L. 95-256 of April 6, 1978, and (e) the Architectural Barriers Act of 1968 (P.L. 90-480) which requires Government Contractors and Subcontractors to take affirmative action to employ and to advance in employment qualified handicapped individuals and to make facilities accessible to or usable by handicapped persons so that they will not be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service. The Concessioner shall also comply with regulations heretofore or hereafter promulgated, relating to nondiscrimination in employment and providing accessible facilities and services to the public and shall do nothing in advertising for employees which will prevent those covered by these laws from qualifying for such employment and use of their facilities. Regulations heretofore promulgated are set forth in Exhibit "B" attached hereto and made a part hereof.

SEC. 4. GOVERNMENT LAND AND IMPROVEMENTS. (a) The Secretary hereby assigns for use by the Concessioner during the term of this contract, certain parcels of land and Government Improvements, if any, (as described in Exhibit "A" hereto) necessary to conduct the operations authorized hereunder. The Secretary reserves the right to withdraw such assignments or parts thereof at any time during the term of this contract if, in his judgment, (1) such withdrawal is necessary for the purpose of protecting visitors or area resources, or, (2) the operations utilizing such assigned lands are terminated pursuant to Section 11 hereof. Any permanent withdrawal of assigned lands or improvements which are essential for conducting the operation authorized hereunder will be considered by the Secretary as a termination pursuant to Section 11 hereof. The Secretary shall compensate the Concessioner for any possessory interest in such withdrawn properties at book value as described in Section 12 hereof, or, in the event that Concessioner Improvements in which the Concessioner has a possessory interest are to be replaced by the Concessioner within the area, in accordance with fair value compensation for possessory interest described in subsection 12(b) hereof.

(b) "Government Improvements" as used herein, means the buildings, structures, utility systems, fixtures, equipment, and other improvements upon the lands assigned hereunder, if any, constructed or acquired by the Government and provided by the Government for the purpose of this contract. The Concessioner shall have a possessory interest in improvements it makes to Government Improvements. In the event that such possessory interest is acquired by the Government or a successor Concessioner at any time, the Concessioner will be compensated for such possessory interest pursuant to Section 12 hereof.

(c) The Secretary shall have the right at any time to enter upon the lands and improvements utilized by the Concessioner hereunder for any purpose he may deem reasonably necessary for the administration of the area and the Government services therein.

(d) The Concessioner may construct or install upon the assigned lands such buildings, structures, and other improvements as are necessary for the operations required hereunder, subject to the prior written approval by the Secretary of the location, plans, and specifications thereof. The Secretary may prescribe the form and contents of the application for such approval. The desirability of any project as well as the location, plans and specifications thereof will be reviewed in accordance with the provisions of the National Environmental Policy Act of 1969 and the National Historic Preservation Act of 1966.

(e) If during the term hereof a Government Improvement requires repairs or improvements that serve to prolong the life of the Government Improvement to an extent requiring capital investment for major repair, such capital investment shall be borne by the Government subject to the availability of appropriated funds. If appropriated funds are not available, and the Secretary determines that such repairs or improvements are necessary to a satisfactory performance of the Concessioner's obligations hereunder, the Concessioner may be required to repair the Government Improvement subject to the limitations on investment set forth in subsection 3(a) hereof.

SEC. 5. MAINTENANCE. Subject to subsection 4(e) hereof, the Concessioner will physically maintain and repair all facilities (both Government and Concessioner's Improvements) used in the operation hereunder, including maintenance of assigned lands and all necessary housekeeping activities associated with the operation to the satisfaction of the Secretary, consistent with the stipulations contained in the annual Concessions Operating Plan. In order that a high standard of physical appearance, operations, repair and maintenance be maintained, appropriate inspections will be carried out jointly by the Secretary and the Concessioner.

SEC. 6. CONCESSIONER'S IMPROVEMENTS. (a) "Concessioner's Improvements," as used herein, means buildings, structures, fixtures, equipment, and other improvements, affixed to or resting upon the lands assigned hereunder in such manner as to be a part of the realty, provided by the Concessioner for the purposes of this contract, (excluding improvements made to Government Improvements by the Concessioner), as follows: (1) such improvements upon the lands assigned at the date hereof as described in Exhibit "C" hereto; and (2) all such improvements hereafter constructed upon or affixed to the lands assigned to the Concessioner with the written consent of the Secretary. Concessioner's Improvements do not include any interest in the land upon which the described structures are located.

(b) The Concessioner shall have a possessory interest in all Concessioner's Improvements recognized by this contract. Possessory interest shall consist of all incidents of ownership, except legal title which shall be vested in the United States. However, such possessory interest shall not be construed to include or imply any authority, privilege, or right to operate or engage in any business or other activity, and the use or enjoyment of any structure, fixture, or improvement in which the Concessioner has a possessory interest shall be wholly subject to the applicable provisions of this contract and to the laws and regulations relating to the area. The said possessory interest shall not be extinguished by the expiration or other termination of this contract, and may not be terminated or taken for public use without just compensation as determined in accordance with Section 12. Wherever used in this contract, "possessory interest" shall mean the interest described in this paragraph. Performance of the obligations assumed by the Secretary under Section 12 hereof shall constitute just compensation with respect to the taking of a possessory interest in the circumstances therein described.

(c) Any salvage resulting from the authorized removal, severance, or demolition of a Concessioner's Improvement or any part thereof shall be the property of the Concessioner.

(d) In the event that a Concessioner's Improvement is removed, abandoned, demolished, or substantially destroyed and no other improvement is constructed on the site, the Concessioner shall promptly, upon the request of the Secretary, restore the site as nearly as practicable to a natural condition.

SEC. 7. UTILITIES. (a) The Secretary shall furnish utilities to the Concessioner for use in connection with the operations authorized hereunder, when available, at reasonable rates to be fixed by the Secretary in his discretion, and which shall at least equal the actual cost of providing the utility or service unless a reduced rate is provided for in an established policy of the Secretary in effect at the time of billing.

(b) Should any such service not be available or sufficient, the Concessioner may, with the written approval of the Secretary and under such requirements as shall be prescribed by him, secure the same at its own expense from sources outside the area or may install the same within the area subject to the following conditions:

(1) Any water rights deemed necessary by the Concessioner for use of water on Federal lands shall be acquired at its expense in accordance with any applicable state procedures and state law. Such water rights, upon expiration or termination of this contract for any reason, shall be assigned to and become the property of the United States without compensation.

(2) Any service provided by the Concessioner under this section shall, if requested by the Secretary, be furnished to the Government to such an extent as will not unreasonably restrict anticipated use by the Concessioner. The rate per unit charged the Government for such service shall be approximately the average cost per unit of providing such service.

(3) All appliances and machinery to be used in connection with the privileges granted in this section, as well as the plans for location and installation of such appliances and machinery, shall first be approved by the Secretary.

SEC. 8. ACCOUNTING RECORDS AND REPORTS. (a) The Concessioner shall maintain an accounting system whereby the accounts can be readily identified with the System of Account Classification prescribed by the Secretary. The Concessioner shall submit annually as soon as possible but not later than sixty (60) days after the 31st day of December a financial statement for the preceding year or portion of a year as prescribed by the Secretary, and such other reports and data as may be required by the Secretary. If annual gross receipts are in excess of \$1 million, the financial statements shall be audited by an independent certified public accountant or by an independent licensed public accountant certified or licensed by a regulatory authority of a state or other political subdivision of the United States on or before December 31, 1970, in accordance with the auditing standards and procedures promulgated by the American Institute of Certified Public Accountants. If annual gross receipts are between \$250,000 and \$1 million, the financial statements shall be reviewed by an independent certified public accountant or by a licensed public accountant certified or licensed by a regulatory authority of a state or other political subdivision of the United States on or before December 31, 1970, in accordance with the auditing standards and procedures promulgated by the American Institute of Certified Public Accountants.

Financial statements accompanied by remarks such as "prepared from client records without audit" are unacceptable. The independent-licensed or certified public accountant shall include a statement to the effect that the amounts included in the financial report are consistent with those included in the Federal and state tax returns. If they are not, then a statement showing differences shall be included. The Secretary shall have the right to verify and copy for his own use all such reports from the books, correspondence, memoranda, and other records of the Concessioner and subconcessioners, if any, and of the records pertaining thereto of a proprietary or affiliated company, if any, during the period of the contract, and for such time thereafter as may be necessary to accomplish such verification.

(b) The Secretary and Comptroller General of the United States or any of their duly authorized representatives shall, until the expiration of five (5) calendar years after the close of business year of the Concessioner and any subconcessioner, have access to and the right to examine any of the pertinent books, documents, papers, and records related to this contract, including Federal and state income tax returns.

SEC. 9. FRANCHISE FEE. (a) For the term of this contract, the Concessioner shall pay to the Secretary for the privileges granted herein as follows:

(1) An annual fee for the use of any Government Improvements utilized by the Concessioner hereunder, if any. Such fee and assigned Government buildings to be as set forth in Exhibit "A" hereto but in no event shall the fee exceed the fair annual value of such Government Improvements as determined by the Secretary.

(2) In addition to the foregoing, a further sum equal to FOUR AND ONE-QUARTER PERCENT (4 1/4%) of the Concessioner's gross receipts, as herein defined, for the preceding year.

(b) The franchise fee shall be due on a monthly basis in such a manner that payment shall be received by the Secretary within 25 days after the last day of each month that the Concessioner operates. Such monthly payment shall include the annual use fee for assigned Government Improvements, as set forth in Exhibit "A" hereto, divided by the expected number of operating months, as well as the specified percentage of gross receipts for the preceding month. The payment of any additional amounts due at the end of the operating year as a result of adjustments shall be paid at the time of submission of the annual financial report. Overpayments shall be offset against the following year's franchise fees due. All franchise fee payments consisting of \$10,000 or more, shall be deposited electronically by the Concessioner using the Treasury Financial Communications System.

(c) An interest charge will be assessed on overdue amounts for each 30-day period, or portion thereof, that payment is delayed. The percent of interest charged will be based on the current value of funds to the United States Treasury which is published quarterly in the Treasury Fiscal Requirements Manual.

(d)(1) The term "gross receipts," as used herein, shall be construed to mean the total amount received or realized by, or accruing to, the Concessioner from all sales, including those through vending machines and other coin-operated devices, for cash or credit or services, accommodations, materials, and other merchandise made pursuant to the rights granted in this contract, including gross receipts of subconcessioners as hereinafter defined and commissions earned on contracts or agreements with other persons or companies operating in the area, and excluding gross receipts from the sale of genuine United States Indian and native handicraft, intracompany earnings on account of charges to other departments of the operation (such as laundry), charges for employees' meals, lodgings, and transportation, cash discounts on purchases, cash discounts on sales, returned sales and allowances, interest on money loaned or in bank accounts, income from investments, income from subsidiary companies outside of the area, income from charter services which in no way involve Ft. Sumter National Monument, sale of property other than that purchased in the regular course of business for the purpose of resale, and sales and excise taxes that are added as separate charges to approved sales prices, gasoline taxes, fishing license fees, and postage stamps, provided that the amount excluded shall not exceed the amount actually due or paid Governmental agencies.

(2) The term "gross receipts of subconcessioners" as used in subsection (d)(1) of this section shall be construed to mean the total amount received or realized by, or accruing to, subconcessioners from all sources, including that through vending machines or other coin-operated devices, as a result of the exercise of the rights conferred by subconcession contracts hereunder without allowances, exclusions, or deductions of any kind or nature whatsoever, and the subconcessioner shall report the full amount of all such receipts to the Concessioner within 45 days after the 31st day of December of each year or portion of a year. The subconcessioners shall maintain an accurate and complete record of all items listed in subsection (d)(1) of this section as exclusions from the Concessioner's gross receipts and shall report the same to the Concessioner with the gross receipts. The Concessioner shall be entitled to exclude items listed in subsection (d)(1) in computing the franchise fee payable to the Secretary as provided for in subsection (a) hereof.

(e) Within sixty (60) days after the end of each 5-year period of this contract or as otherwise specified, at the instance of either party hereto, the amount and character of the franchise fees provided for in this section may be reconsidered. Such request shall be made in writing within 60 days after the end of the applicable contract year but cannot be made before the end of such year. In the event that the Secretary and the Concessioner cannot agree upon an adjustment of the franchise fees within 120 days from the date of the request for renegotiation as made by either party, the position of the Concessioner must be reduced to writing within 30 days therefrom and submitted to the Secretary for a determination of appropriate fees, consistent with the fair value of any assigned Government improvements and the probable value to the Concessioner of the privileges granted by this contract based upon a reasonable opportunity for a profit in relation to both gross receipts and capital invested. If desired by the Concessioner, an advisory arbitration panel will be established (one member to be selected by the Secretary, one by the Concessioner, and the third by agreement of the original two) for the

purpose of recommending to the Secretary appropriate franchise fees. The Secretary and the Concessioner shall share equally the expenses of such advisory arbitration. The written determination of the Secretary as to franchise fees shall be final and conclusive upon the parties hereto. Any new fees established will be retroactive to the commencement of the applicable period for which notice of reconsideration is given and be effective for the remaining term of the contract unless subsequent negotiations establish yet a different franchise rate. If new rates are greater than existing rates, the Concessioner will pay all back fees due with the next regular payment. If new rates are less than the existing rate, the Concessioner may withhold the difference between the two rates from future payments until he has recouped the overpayment. Any new franchise fees will be evidenced by an amendment to the contract unless based upon the written determination of the Secretary, in which event a copy of the determination will be attached hereto and become a part hereof as fully as if originally incorporated herein.

SEC. 10. BOND AND LIEN. The Secretary may, in his discretion, require the Concessioner to furnish a surety bond acceptable to the Secretary conditioned upon the faithful performance of this contract, in such form and in such amount as the Secretary may deem adequate, not in excess of TWENTY-FIVE THOUSAND DOLLARS (\$25,000). As additional security for the faithful performance by the Concessioner of all of its obligations under this contract, and the payment to the Government of all damages or claims that may result from the Concessioner's failure to observe such obligations, the Government shall have at all times the first lien on all assets of the Concessioner within the area.

SEC. 11. TERMINATION. (a) The Secretary may terminate this contract in whole or part for default at any time and may terminate this contract in whole or part when necessary for the protection of visitors or area resources. The operations authorized hereunder may be suspended in whole or in part at the discretion of the Secretary when necessary to protect the health and safety of visitors and employees or to protect area resources. Termination or suspension shall be by written notice to the Concessioner and, in the event of proposed termination for default, the Secretary shall give the Concessioner a reasonable period of time to correct stated deficiencies. Termination for default shall be utilized in circumstances where the Concessioner has breached any requirements of this contract, including failure to maintain and operate the required accommodations, facilities and services to the satisfaction of the Secretary in accordance with the Secretary's requirements hereunder.

(b) In the event of termination of this contract when necessary for the protection of visitors or area resources or for default, the compensation to the Concessioner for such termination shall be as described in Section 12, "Compensation."

(c) In the event it is deemed necessary to suspend operations hereunder in whole or in part to protect the visitors or resources of the area, the Secretary shall not be liable for any compensation to the Concessioner for losses occasioned thereby, including but not limited to, lost income, profit, wages, or other monies which may be claimed.

(d) To avoid interruption of service to the public upon the expiration or termination of this contract for any reason, the Concessioner, upon the request of the Secretary, will (1) continue to conduct the operations authorized hereunder for a reasonable time to allow the Secretary to select a successor, or (2) consent to the use by a temporary operator, designated by the Secretary, of the Concessioner's improvements and personal property, if any, not including current or intangible assets, used in the operations authorized hereunder upon fair terms and conditions, provided that the Concessioner shall be entitled to an annual fee for the use of such improvements and personal property, prorated for the period of use, in the amount of the annual depreciation on such improvement and personal property plus a return on the book value of such improvements and personal property equal to the prime lending rate, effective on the date the temporary operator assumes managerial and operational responsibilities, as published by the Federal Reserve System Board of Governors or as agreed upon by the parties involved. In this instance the method of depreciation used shall be either straight line depreciation or depreciation shown on Federal Tax Returns.

SEC. 12. COMPENSATION. (a) Just Compensation: The compensation described herein shall constitute full and just compensation to the Concessioner from the Secretary for all losses and claims occasioned by the circumstances described below.

(b) Contract expiration or termination where operations are to be continued: If for any reason, including contract expiration or termination as described herein, and subject to the limitation on compensation for possessory interest contained in subsection (d) hereof, the Concessioner shall cease to be required by the Secretary to conduct the operations authorized hereunder or substantial part thereof, and, at the time of such event, the Secretary intends for substantially the same or similar operations to be continued by a successor, whether a private person, corporation or an agency of the Government, (i) the Concessioner will sell and transfer to the successor designated by the Secretary its possessory interest in Concessioner and Government Improvements, if any, as defined under this contract, and (ii) the Secretary will require such successor, as a condition to the granting of a contract to operate, to purchase from the Concessioner such possessory interest, if any, and such other property, and to pay the Concessioner the fair value thereof. The fair value of any possessory interest in Government Improvements shall be book value as described in subsection 12(c) hereof. In the event that such possessory interest in Government Improvements is acquired by a successor, the successor will not be permitted to revalue such possessory interest. The fair value of possessory interest in Concessioner's Improvements shall be deemed to be the sound value of the improvement to which it relates at the time of transfer of such possessory interest, without regard to the term or other benefits of the contract. The sound value of any structure, fixture, or improvement shall be determined upon the basis of reconstruction cost less depreciation evidenced by its condition and prospective serviceability in comparison with a new unit of like kind, but not to exceed fair market value. The fair value of merchandise and supplies shall be replacement cost including transportation. The fair value of equipment shall be replacement cost less depreciation and obsolescence. If the Concessioner and the successor;

excepting Government agencies, cannot agree upon the fair value of any item or items, either party may serve a request for arbitration upon the other party, and the fair value of the item or items in question shall be determined by the majority vote of a board of three arbitrators, selected as follows: Each party shall name one member of such board and the two members so named shall select the third member. If either party fails to appoint an arbitrator within 15 days after the other shall have appointed an arbitrator and served written notice including the name and address of the arbitrator appointed upon the other party, then the American Arbitration Association shall be requested by the Secretary to appoint an arbitrator to represent the party failing to make the appointment. The costs and expenses of the arbitrator appointed by the American Arbitration Association to represent the party failing to make the appointment shall be paid for by that party. The two arbitrators so named shall select the third member. If the third member is not selected within 15 days after the appointment of the latter of the other two arbitrators, the American Arbitration Association shall be requested by the Secretary to appoint the third arbitrator. In requesting that the American Arbitration Association appoint an arbitrator in the situations discussed above, the Secretary shall request that the person or persons appointed be impartial and specially qualified in commercial and real estate appraisal. The fair value determined by the Board of Arbitrators shall be binding on the parties. The compensation and expenses of the third member shall be paid by the Concessioner and one-half of the amount so paid shall be added to the purchase price. Before reaching its decision, the board shall give each of the parties a fair and full opportunity to be heard on the matters in dispute. If the successor is a Government agency and there is a dispute as to the fair value of any possessory interest or other items, an advisory arbitration panel will be established at the request of the Concessioner (one member to be selected by the Secretary, one by the Concessioner, and the third by agreement of the original two) for the purpose of recommending to the Secretary an appropriate fair value. The Secretary and the Concessioner shall share equally the expenses of such arbitration. The written decision of the Secretary as to such fair value will be final and binding upon all parties.

(c) Contract expiration or termination where operations are to be discontinued: If for any reason, including contract expiration or termination as described herein, the Concessioner shall cease to be required by the Secretary to conduct the operations authorized hereunder, or substantial part thereof, and the Secretary at the time chooses to discontinue such operations, or substantial part thereof within the area, and/or to abandon, remove, or demolish any of the Concessioner's Improvements, if any, then the Secretary will take such action as may be necessary to assure the Concessioner of compensation for (i) its possessory interest in Concessioner Improvements, and Government Improvements, if any, in the amount of their book value (unrecovered cost as shown in Federal Income Tax Returns); (ii) the cost to the Concessioner of restoring any assigned land to a natural condition, including removal and demolition, (less salvage) if required by the Secretary; and (iii) the cost of transporting to a reasonable market for sale such movable property of the concessioner as may be made useless by such determination. Any such property that has not been removed by the Concessioner within a reasonable time following such determination shall become the property of the United States without compensation therefor.

(d) Contract Termination for Default for Unsatisfactory Performance Where Operations are to be Continued. Notwithstanding any provision of this contract to the contrary, in the event of termination of this contract for default for failure to maintain and operate the required accommodations, facilities and services to the satisfaction of the Secretary in accordance with the Secretary's requirements hereunder, compensation for the Concessioner's possessory interest in Concessioner's improvements, if any, shall be at book value as described in subsection 12(c) herein.

(e) Other Compensation. In the event of termination of this contract, or portions thereof, for the purpose of protecting visitors or area resources, the Concessioner may be compensated (in addition to the applicable compensation described in subsections (b) or (c) above) for such other costs as the Secretary, in his discretion, considers necessary to compensate the Concessioner for actual losses occasioned by such termination, including, but not limited to, and as the needs appear, cost of relocating from one building to another building, reasonable severance pay to employees that may be affected, penalties for early loan repayments, and reasonable overhead expenses required by such termination, but, not for lost profit or other anticipated gain from the operations authorized hereunder or anticipated sale or assignment of the Concessioner's assets, including this contract or any of its benefits.

SEC. 13. ASSIGNMENT OR SALE OF INTERESTS. (a)(1) The Concessioner and/or any person or entity which owns a controlling interest (as herein defined) in a Concessioner's ownership, (collectively defined as the "Concessioner" for the purposes of this section) shall not assign or otherwise sell or transfer responsibilities under this contract or the concession operations authorized hereunder, nor sell or otherwise assign or transfer (including, without limitation, mergers, consolidations, reorganizations or other business combinations) a controlling interest in such operations, this contract, or a controlling interest in the Concessioner's ownership, as defined herein, without the prior written approval of the Secretary. Failure to comply with this provision or the procedures described herein shall constitute a material breach of this contract for which this contract may be terminated immediately by the Secretary without regard to the procedures for termination for default described in Section 11 hereof, and the Secretary shall not be obliged to recognize any right of any person or entity to an interest in this contract or to own or operate the operations authorized hereunder acquired in violation hereof.

(2) The Concessioner shall advise the person(s) or entity proposing to enter into a transaction described in subsection (a)(1) above that the Secretary shall be notified and that the proposed transaction is subject to review and approval by the Secretary. The Concessioner shall request in writing the Secretary's approval of the proposed transaction and shall promptly provide the Secretary all relevant documents related to the transaction, and the names and qualifications of the person(s) or entity involved in the proposed transaction.

(b)(1) The Secretary in exercising the discretionary authority set forth herein shall, among other matters, take into consideration the management qualifications of individuals or entities which would thereby obtain an interest in the facilities or services authorized hereunder, the experience of such individuals or entities with similar operations, and the ability of such individuals or entities to operate the concession operations authorized hereunder in the public interest under the regulation of the Secretary.

(2) For purposes of this section, the term "controlling interest" in a Concessioner's ownership shall mean, in the instance of a corporate Concessioner, an interest beneficial or otherwise, of sufficient outstanding voting securities or capital of the Concessioner so as to permit exercise of substantial managerial influence over the operations of the Concessioner and, in the instance of a partnership, limited partnership, joint venture or individual entrepreneurship, any beneficial ownership of the capital assets of the Concessioner sufficient to permit substantial managerial influence over the operations of the Concessioner. The Secretary will determine at the request of interested parties whether or not an interest in a Concessioner constitutes a controlling interest within the meaning hereof.

(c) The Concessioner may not enter into any agreement with any entity or person except employees of the Concessioner to exercise substantial management responsibilities for the operation authorized hereunder or any part thereof without written approval of the Secretary at least 30 days in advance of such transaction.

(d) No mortgage shall be executed, and no bonds, shares of stock, or other evidence of interest in, or indebtedness upon, the assets of the Concessioner, including this contract, in the area, shall be issued, except for the purposes of installing, enlarging or improving, plant, equipment and facilities, provided that such assets, including possessory interests, or evidences of interests therein, in addition, may be encumbered for the purposes of purchasing existing concession plant, equipment and facilities. In the event of default on such a mortgage, encumbrance, or such other indebtedness, or of other assignment, transfer, or encumbrance, the creditor, or any assignee thereof, shall succeed to the interest of the Concessioner in such assets but shall not thereby acquire operating rights or privileges which shall be subject to the disposition of the Secretary.

SEC. 14. APPROVAL OF SUBCONCESSION CONTRACTS. All contracts and agreements (other than those subject to approval pursuant to Section 13 hereof) proposed to be entered into by the Concessioner with respect to the exercise by others of the privileges granted by this contract, in whole or part, shall be considered as subconcession contracts and shall be submitted to the Secretary for his approval and shall be effective only if approved. In the event any such subconcession contract or agreement is approved, the Concessioner shall pay to the Secretary within sixty (60) days after the 31st day of December each year or portion of a year, a sum equal to fifty percent (50%) of any and all fees, commissions, or compensation payable to the Concessioner thereunder, which shall be in addition to the franchise fee payable to the Secretary on the gross receipts of subconcessioners as provided for in Section 9 of this contract.

SEC. 15. INSURANCE AND INDEMNITY. (a) General. The Concessioner shall save, hold harmless, defend and indemnify the United States of America, its agents and employees for losses, damages or judgments and expenses on account of fire or other peril, bodily injury, death or property damage, or claims for bodily injury, death or property damage of any nature whatsoever, and by whomsoever made, arising out of the activities of the Concessioner, his employees, subcontractors or agents under the contract. The types and amounts of insurance coverage purchased by the Concessioner shall be approved by the Secretary. The Concessioner shall annually, or at the time insurance is purchased, provide the Secretary with Certificates of Insurance, Broker's Analysis, or similar documents sufficient to evidence compliance with this section and shall provide the Secretary thirty (30) days' advance written notice of any material change in the Concessioner's insurance program hereunder.

(b) Property Insurance. The Concessioner at its cost shall secure and maintain, for both Concessioner Improvements and assigned Government Improvements, fire, extended coverage and such other perils insurance in such types and limits as are determined by the Secretary to be necessary to repair or replace those buildings, structures, equipment, furnishings, betterments and improvements, and merchandise necessary to satisfactorily discharge the Concessioner's obligations under this contract. For insurance purposes, values of such property shall be determined at the inception of this contract and updated annually thereafter. Those values currently in effect are set forth in Exhibit "D" to this contract. Such insurance shall provide for the Concessioner and the United States of America to be named insureds as their interest may appear. Insurance provisions respecting replacement at the "same site" shall be waived. In the event of loss the Concessioner shall use all proceeds of such insurance to repair, rebuild, restore or replace Concessioner and Government Improvements, equipment, furnishings and other personal property hereunder, as directed by the Secretary. The lien provision of Section 10 shall apply to such insurance proceeds.

(c) Additional Property Damage Requirements--Government Improvements, Property and Equipment. The following additional requirements shall apply to structures, all or any part of which are "Government Improvements" as defined in subsection 4(b).

(1) The insurance policy shall contain a loss payable clause approved by the Secretary which provides that insurance proceeds shall be paid directly to the Concessioner without requiring endorsement by the United States.

(2) The use of insurance proceeds for repair or replacement of government structures will not alter their character as government structures and the Concessioner shall gain no possessory interest therein.

(d) Public Liability. The Concessioner shall purchase and maintain during the term of this contract Comprehensive General Liability insurance against claims occasioned by actions or omissions of the Concessioner in carrying out the activities and operations authorized hereunder. Such insurance shall be in the amount commensurate with the degree of risk and the scope and size of such activities authorized herein, but in any event not less than \$300,000 per accident. All liability policies are to specify that the insurance company shall have no right of subrogation against the United States of America except that caused by the sole negligence of the United States or its employees and have no recourse against the Government for payment of any premiums or assessments.

Specific types of coverages the Concessioner shall purchase and maintain during the term of this contract include Comprehensive General Liability, with extensions which provide Product Liability and Contractual Liability and Liquor Liability if liquor is served.

The Concessioner shall also obtain the following additional coverages:

a. Automobile Liability. The Concessioner shall provide the following coverages respecting vehicles owned and/or operated by the Concessioner: Comprehensive Automobile Liability, Uninsured Motorist coverages, and Statutory "No-Fault" coverages, as required by the state of operation.

b. Workers' Compensation. Statutory Workers' Compensation as required in the state of operation, Employers' Liability coverage Broad Form "All State" coverage, if the Concessioner operates in more than one state, Voluntary Compensation endorsement, and Employers' Liability in states with monopolistic Workers' Compensation funds.

c. Other. The Concessioner shall also obtain the following coverages, in at least the limits set forth for Comprehensive General Liability.

Protection and Indemnity (Watercraft Liability \$300,000)
Umbrella Liability Policy, (Limits \$700,000)

SEC. 16. PROCUREMENT OF GOODS, EQUIPMENT, AND SERVICES. In computing net profits for any purposes of this contract, the Concessioner agrees that its accounts will be kept in such a manner that there will be no diversion or concealment of profits in the operations authorized hereunder by means of arrangements for the procurement of equipment, merchandise, supplies, or services from sources controlled by or under common ownership with the Concessioner or by any other device including management contracts with affiliated companies.

SEC. 17. DISPUTES. (a) Except as otherwise provided in this contract, any dispute, or claim, concerning this contract which is not disposed of by agreement shall be decided by the Director, National Park Service, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Concessioner. The decision of the Director shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Concessioner mails or otherwise furnishes to the Director a written notification of appeal addressed to the Secretary. In accordance with the rules of the Board of Contract Appeals, the decision of the Secretary, or his duly authorized representative for the determination of such appeals, shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Concessioner shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute or claim hereunder, the Concessioner shall proceed diligently with the performance of the contract or as otherwise required in accordance with the Director's decision.

Claims shall be considered hereunder only if a notice is filed in writing with the Director within 30 days after the Concessioner knew or should have known of the facts or circumstances giving rise to the claim.

(b) This section does not preclude consideration of legal questions in connection with decisions provided for in paragraph (a) above; provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

(c) The provisions of this clause shall not apply to any claim of a precontractual nature nor of a non-contractual nature such as tort claims, nor with respect to discretionary acts or refusals to act by the United States, including but not limited to the establishment of utility rates and rates to the public hereunder and terminations or suspensions of the contract for protection of visitors or area resources nor to any other discretionary relief or action, nor in relation to action or inaction by the United States in its sovereign capacity. Decisions of the Director, National Park Service, concerning the matters mentioned in this subsection shall be final administrative determinations.

SEC. 18. GENERAL PROVISIONS. (a) Reference in this contract to the "Secretary" shall mean the Secretary of the Interior, and the term shall include his duly authorized representatives.

(b) The Concessioner is not entitled to be awarded or to have sole negotiating rights to any Federal procurement or service contract by virtue of any provision of this contract.

(c) Notwithstanding any other provision hereof, the Secretary reserves the right to provide directly or through cooperative or other non-concession agreements with non-profit organizations any accommodations, facilities or services to area visitors which are part of and appropriate to the park interpretive program.

(d) Any and all taxes which may be lawfully imposed by any State or its political subdivisions upon the property or business of the Concessioner shall be paid promptly by the Concessioner.

(e) No member of, or delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

(f) This contract may not be extended, renewed or amended in any respect except when agreed to in writing by the Secretary and the Concessioner.

IN WITNESS WHEREOF, the parties hereto have hereunder subscribed their names and affixed their seals.

Dated at Atlanta, Georgia, this 13th day of June, 19 86.

UNITED STATES OF AMERICA

BY *M. M. Baker*
National Director
Southeast Region
National Park Service

ATTEST:

BY *W. H. S. Campen*
TITLE *Sec.*

FORT SUMNER TOURS, INC.

BY *George E. Campen*
TITLE *President*

DATE _____

EXHIBIT "A"

GOVERNMENT-OWNED STRUCTURES ASSIGNED TO

FORT SUMTER TOURS, INC.

pursuant to

CONCESSION CONTRACT NO. CC-5076-6-0002

<u>Building Number</u>	<u>Description</u>	<u>Annual Fee</u>
	Space assigned in Fort Sumter for sales and storage	\$930

Total amount due pursuant to subsection 9(a)(1) \$930

Approved, effective June 13, 1986
BY:

FORT SUMTER TOURS, INC.

BY *[Signature]*TITLE President

UNITED STATES OF AMERICA

BY *[Signature]*

Regional Director
Southeast Region
National Park Service

EXHIBIT "B"
 Concession
 Contract No.: CC-5076-6-
 UUC

NONDISCRIMINATION

SECTION I

Requirements Relating to Employment and Service to the Public

A. EMPLOYMENT: During the performance of this contract, the Concessioner agrees as follows:

(1) The Concessioner will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Concessioner will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: Employment upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Concessioner agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Secretary setting forth the provisions of this nondiscrimination clause.

(2) The Concessioner will, in all solicitations or advertisements for employees placed by or on behalf of the Concessioner, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The Concessioner will send to each labor union or representative of workers with which the Concessioner has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Secretary, advising the labor union or workers' representative of the Concessioner's commitments under Section 202 of Executive Order 11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Concessioner will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The Concessioner will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to the Concessioner's books, records, and accounts by the Secretary of the Interior and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the Concessioner's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the Concessioner may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The Concessioner will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, so that such provisions will be binding upon each subcontractor or vendor. The Concessioner will take such action with respect to any subcontract or purchase order as the Secretary may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event the Concessioner becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Secretary, the Concessioner may request the United States to enter into such litigation to protect the interests of the United States.

B. CONSTRUCTION, REPAIR, AND SIMILAR CONTRACTS: The preceding provisions A(1) through (7) governing performance of work under this contract, as set out in Section 202 of Executive Order No. 11246, dated September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, shall be applicable to this contract, and shall be included in all contracts executed by the Concessioner for the performance of construction, repair, and similar work contemplated by this contract, and for that purpose the term "Concessioner" shall be deemed to refer to the Concessioner and to contractors awarded contracts by the Concessioner.

C. FACILITIES: (1) Definitions: As used herein: (i) Concessioner shall mean the Concessioner and its employees, agents, lessees, sublessees, and contractors, and the successors in interest of the Concessioner; (ii) facility shall mean any and all services, facilities, privileges, and accommodations, or activities available to the general public and permitted by this agreement.

(2) The Concessioner is prohibited from: (i) publicizing facilities operated hereunder in any manner that would directly or inferentially reflect upon or question the acceptability of any person because of race, color, religion, sex, or national origin; (ii) discriminating by segregation or other means against any person because of race, color, religion, sex, or national origin in furnishing or refusing to furnish such person the use of any such facility.

(3) The Concessioner shall post a notice in accordance with Federal regulations to inform the public of the provisions of this subsection, at such locations as will ensure that the notice and its contents will be conspicuous to any person seeking accommodations, facilities, services, or privileges. Such notice will be furnished the Concessioner by the Secretary.

(4) The Concessioner shall require provisions identical to those stated in subsection C herein to be incorporated in all of the Concessioner's contracts or other forms of agreement for use of land made in pursuance of this agreement.

SECTION II: EMPLOYMENT OF THE HANDICAPPED

Within 120 days of the commencement of a contract every Government contractor or subcontractor holding a contract that generates gross receipts which exceed \$50,000 or more and having 50 or more employees shall prepare and maintain an affirmative action program at each establishment which shall set forth the contractor's policies, practices and procedures in accordance with the affirmative action program requirement.

PART A

The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: Employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

PART B

The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

PART C

In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

PART D

The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, provided by or through the contracting officer. Such notices shall state the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified handicapped employees and applicants for employment, and the rights of applicants and employees.

PART E

The contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of Section 503 of the Rehabilitation Act of 1973, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.

PART F

The contractor will include the provisions of this clause in every subcontract that generates gross receipts which exceed \$2,500 or more unless exempted by rules, regulations, or orders of the Secretary issued pursuant to Section 503 of the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

EXHIBIT "U"

CONCESSIONER IMPROVEMENTS
PROVIDED BY
FORT SUMTER TOURS, INC.

Pursuant to Concession Contract No. CC-5076-6-0002
Subsection 6(a)(1)

None.

EXHIBIT "D"

BUILDING REPLACEMENT COST FOR INSURANCE PURPOSES

CONCESSIONER: FORT SUMTER TOURS, INC.CONCESSION CONTRACT NO: CC-5076-6-0002FOR THE PERIOD BEGINNING June 13, 1986

The replacement costs set forth herein are established for the sole purpose of insuring adequate property insurance coverage and shall not be construed as having application for any other purpose.

I. GOVERNMENT BUILDINGS

<u>Building No.</u>	<u>Description</u>	<u>Insurance Replacement Value</u>
	Space in Fort Sumter museum	None

II. CONCESSIONER BUILDINGS

<u>Building No.</u>	<u>Description</u>	<u>Insurance Replacement Value</u>
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FORT SUMTER TOURS, INC.

UNITED STATES OF AMERICA

BY George E. CampmanTitle PresidentDate 12-19-85
M. Baker
 Regional Director
 Southeast Region

agent would be forced to bear the full brunt of Title VII liability, without the agent's employer also bearing a portion of that liability, is illusory. Of course, any inequity which may have been created by the staggered liability caps is of Congress' making and the remedy for it lies solely with that body.

Finally, as noted above, Congress imposed tort damages for Title VII violations, in part, to establish "parity" between the liability schemes under Title VII and 42 U.S.C. § 1981. See also H.R.Rep. No. 92-238, 92d Cong., 2d Sess. 19 (1971); S.Rep. No. 92-415, 92d Cong., 2d Sess. 24 (1971). The possibility that an employer's agent might be held liable for tort damages under § 1981 has existed since at least 1975. See *Faraca*, 506 F.2d 956. If individual liability for discriminatory acts was truly beyond the contemplation of Congress, it had ample opportunity to correct those courts which have permitted such liability. Instead, the 1991 amendments broadened the damages available under Title VII and reaffirmed the breadth of liability under § 1981. The apparent political necessity of liability caps within that scheme should not shroud the clear desire on the part of Congress to bolster the broad remedial goals of Title VII. For these reasons, I find *Miller*, and its progeny, ultimately unpersuasive.

In conclusion, I remain convinced, as I was in *Goodstein v. Bombardier*, 839 F.Supp. 760 (D.Vt.1995), that Title VII permits an employer and that employer's agent to be held jointly and severally liable for Title VII violations. The language of the statute permits it, canons of statutory interpretation require it, and the object and overriding policy goals of Title VII warrant it. I would reverse the district court on the issue of individual liability under Title VII for the reasons stated and remand for further proceedings.



FORT SUMTER TOURS, INCORPORATED, Petitioner-Appellant,

v.

Bruce BABBITT, Secretary, United States Department of the Interior, Respondent-Appellee.

National Park Hospitality Association, Amicus Curiae.

No. 94-1570.

United States Court of Appeals,
Fourth Circuit.

Argued May 1, 1995.

Decided Sept. 27, 1995.

Transportation provider under concession contract with National Park Service (NPS) challenged decision of NPS to raise franchise fee owed under contract. The United States District Court for the District of South Carolina, Falcon B. Hawkins, Chief Judge, entered judgment for NPS, and provider appealed. The Court of Appeals, Mur-naghan, Circuit Judge, held that: (1) NPS could consider profits in adjusting fee; (2) NPS had statutory authority to unilaterally adjust fee; (3) NPS had contractual authority to adjust fee; (4) NPS gave sufficient notice of reconsideration to provider; and (5) NPS's calculation of franchise fee was proper.

Affirmed.

1. Federal Courts ⇐776

Court of Appeals reviews de novo district court's interpretation of statute.

2. United States ⇐57

National Park Service (NPS) could consider profits that could be expected by transportation provider and profits made by similar companies in same industries, in calculating proper franchise fee in connection with concessions contract between NPS and provider; such consideration did not violate National Park System Concessions Policy Act (CPA), which expressly allowed for consideration of profits, and guidelines used in calculating fee did not improperly limit provider's

FORT SUMTER TOURS, INC. v. BABBITT

1325

Cite as 66 F.3d 1324 (4th Cir. 1995)

profits. National Park System Concessions Policy Act, §§ 1-9, 16 U.S.C.A. §§ 20-20g.

3. United States ¶57

National Park Service (NPS) had authority to unilaterally adjust franchise fees under concessions contract with transportation provider, even though National Park System Concessions Policy Act (CPA) provided only for "reconsideration" of fees; power to reconsider implied power to adjust. National Park System Concessions Policy Act, § 3(d), 16 U.S.C.A. § 20b(d).

4. United States ¶57

'Provision of concessions contract between National Park Service (NPS) and transportation provider giving NPS authority to adjust franchise fees was "appropriate provision" for reconsideration of fees as required by National Park System Concessions Policy Act (CPA), even though it allowed Secretary of Interior to make final decision concerning fees without provider's consent, as NPS's authority was subject to significant procedural constraints and safeguards, provision set forth process by which each side could voice its opinions, and aggrieved concessioner could resort to courts under Administrative Procedure Act (APA). 5 U.S.C.A. §§ 701-706; National Park System Concessions Policy Act, §§ 1-9, 16 U.S.C.A. §§ 20-20g.

5. United States ¶57, 72(2)

Concession contract between National Park Service (NPS) and transportation provider giving NPS authority to adjust franchise fees did not violate common law of contracts by allowing for modification of contract term without consideration from party opposing modification or change in circumstances, as fee adjustment was not technically modification of contract since it was action contemplated by parties, and contract set forth detailed process for adjusting fees.

6. Federal Courts ¶776

Court of Appeals reviews de novo district court's construction of public contract.

7. United States ¶57

Contract between National Park Service (NPS) and transportation provider permitted

readjustment of franchise fee paid to NPS, pursuant to express provision of contract, notwithstanding provision of contract setting particular franchise fee "for the term of this contract"; plain reading of contract indicated that specific fee amount was meant to be subject to reconsideration, and contract was subject to National Park System Concessions Policy Act (CPA), which mandated provision for reconsideration. National Park System Concessions Policy Act, § 3(d), 16 U.S.C.A. § 20b(d).

8. United States ¶57

Notice by National Park Service (NPS) to transportation provider with which NPS had concession contract, as to NPS's reconsideration of franchise fee under contract, was adequate, even if letter was not request for change in "amount and character" of fees which were subject of reconsideration pursuant to contract, as contract provided for notice of reconsideration, not change itself, provider had ample time to respond, and notice occurred within time period mandated by contract.

9. United States ¶57

Transportation provider under concession contract with National Park Service (NPS) was not precluded from challenging method by which NPS calculated adjustment of franchise fees pursuant to contract, because provider allegedly failed to raise issue before agency prior to resorting to courts; no exhaustion of administrative remedies requirement existed under National Park System Concessions Policy Act (CPA), and provider notified NPS of its objection in letter and appended copy of petition it planned to file in court. National Park System Concessions Policy Act, §§ 1-9, 16 U.S.C.A. §§ 20-20g.

10. United States ¶57

National Park Service (NPS) could use agency's policy statement in adjusting franchise fee under concession contract with transportation provider, though statement was developed after provider entered contract with NPS, as statement was not law or regulation but was only guideline for use by NPS in making calculations.

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11. Administrative Law and Procedure

◊741, 788

On review of informal agency action, under Administrative Procedure Act (APA), it is court's task to review considerations on which agency relied, and to check that agency's decision has some basis in record. 5 U.S.C.A. § 706.

12. United States

◊57

Decision of National Park Service (NPS) to eliminate from its calculations in adjustment of franchise fee under concession contract with transportation provider consideration of lease payments made by provider for new boat, and instead substitute capital expenditure with depreciation, was not erroneous, based on NPS's belief that lease transaction lowered provider's earnings.

13. Federal Civil Procedure

◊1594

Denial of transportation provider's discovery request as to studies supporting decision of National Park Service (NPS) to adjust salaries of transportation provider's officers and compare provider's financial data to reported industry norm was not improper, in connection with NPS's readjustment of franchise fee pursuant to concession contract between NPS and provider, as studies were copyrighted publications available from their issuing organizations, and NPS's guideline contained bibliography which listed names of both publications and their issuing organizations.

14. Administrative Law and Procedure

◊676

Judicial review of administrative action is generally confined to administrative record.

15. Administrative Law and Procedure

◊458.1

Agency's use of study that is designed for purpose other than that for which it is used by agency, and which is limited and criticized by its authors on points essential to use sought to be made of it, may be considered arbitrary and capricious action.

16. United States

◊57

Reliance by National Park Service (NPS) on studies regarding salaries and in-

dustry norms related to transportation providers, in course of adjusting franchise fee pursuant to concession contract with transportation provider, did not constitute arbitrary and capricious action, absent showing either that industries studied in reports were not comparable to provider's or that reports themselves were inaccurate.

ARGUED: Marvin DeWitt Infinger, Sinkler & Boyd, P.A., Charleston, South Carolina, for Appellant. John Harris Douglas, Assistant United States Attorney, Charleston, South Carolina, for Appellee. ON BRIEF: George E. Campsen, Jr., Campsen & Campsen, Charleston, South Carolina, for Appellant. J. Preston Strom, Jr., United States Attorney, Charleston, South Carolina, for Appellee. Henry L. Diamond, Fred R. Wagner, Scott F. Belcher, Beveridge & Diamond, P.C., Washington, DC, for Amicus Curiae.

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge MURNAGHAN wrote the opinion, in which Chief Judge ERVIN and Senior Judge YOUNG joined.

OPINION

MURNAGHAN, Circuit Judge:

Fort Sumter Tours, Inc. ("FST") provides public boat transportation in Charleston, South Carolina under a concession arrangement with the United States Secretary for the Interior ("Secretary"), pursuant to a contract between FST and the National Park Service ("NPS"). Under the contract, FST is required to pay a franchise fee to the Secretary equal to a determined percentage of FST's annual gross receipts; the contract provides for reconsideration of the franchise fee at five-year intervals. After five years had passed on FST's present contract, NPS notified FST that it wished to renegotiate the franchise fee. FST objected to the proposed fee change, but refused to engage in discussions with NPS. After an investigation, NPS

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adopted a significantly increased franchise fee. When FST challenged the fee in the district court, the court affirmed NPS's decision to raise the franchise fee. FST appeals, and we affirm.

I. Factual Background

The Fort Sumter National Monument ("the Monument") is located in Charleston Harbor, South Carolina. NPS, which administers the Monument for the Secretary, organizes the provision of facilities and services for the public at the Monument by entering into concession contracts with private companies. FST is one such company. FST's contract with NPS provides that FST will furnish boat transportation services to and from the Monument. The concession contract requires FST to operate two mainland docking facilities and to provide sightseeing vessels; NPS maintains the Monument and a suitable dock at the Monument.

The concession relationship between the FST and NPS began on July 13, 1961, when NPS first selected FST to operate the boating facility. The present contract, entered into on June 13, 1986 with an expiration date of December 31, 2000, is the fourth in a series of concession contracts between FST and NPS. Section 9(a) of the present contract calls for FST to pay a franchise fee to the Secretary in the amount of 4.25% of FST's annual gross receipts. Section 9(e) of the contract further authorizes reconsideration of the fee at the end of each five-year period at the request of either party to the contract. If such a request is timely made (within sixty days after the end of a five-year period), the parties may negotiate the modification; if they cannot agree, however, NPS makes a final decision as to the franchise fee modification. The contract includes a provision for the appointment of an advisory arbitration panel to make a recommendation to NPS regarding the fee adjustment. Any new fees established are retroactive to the beginning of the five-year period for which a reconsideration of fees was sought.

In a letter of June 20, 1991, the NPS Southeast Regional Director notified FST that NPS was considering renegotiating the contractual franchise fee. NPS prepared a

franchise fee analysis on February 27, 1992, which concluded that a 12% franchise fee was appropriate for the five-year period starting on June 13, 1991. FST was advised of the NPS determination by letter dated March 16, 1992; the letter also indicated that NPS was willing to meet with FST to discuss the determination. FST objected to the 12% figure by a letter on March 24, 1992.

Thereafter, an FST attorney sought documents relevant to the fee determination from NPS under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. On May 15, 1992, NPS again invited FST to discuss the franchise fee modification. However, on April 14, 1993, FST advised NPS that, rather than pursuing further negotiations, it intended to ask a court to rule on NPS's authority to increase the franchise fee. FST filed a declaratory action in the United States District Court for the District of South Carolina on April 21, 1993, seeking a ruling regarding the rights and obligations of the parties under the National Park System Concessions Policy Act, 16 U.S.C. §§ 20-20g, and under the relevant concession contract. By a letter dated June 16, 1993, NPS advised FST that, because FST refused to negotiate the fee and did not wish to avail itself of the advisory arbitration provisions under the contract, NPS had performed an independent review and had determined that a fee of 12% was appropriate. The 12% fee determination became a final decision of the Secretary, and NPS requested payment of the fee amount from FST. FST's suit then became an administrative appeal of the Secretary's final decision, over which the district court had jurisdiction by virtue of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

Shortly after filing suit, FST attempted to depose several NPS employees. NPS moved for a protective order which was granted in part by a magistrate judge, and then granted in its entirety by the district court upon reconsideration. All discovery was prohibited.

After briefing and oral argument on January 5, 1994, the district court entered an order upholding NPS's decision to raise FST's franchise fee to 12% of FST's gross receipts. FST's motion for reconsideration

of the order was denied, and FST appealed. In this Court, FST claims that NPS did not have the statutory or the contractual authority to raise the franchise fee. FST also contends that NPS's notice of its intention to change the fee was inadequate under the contract, and that NPS calculated the 12% fee incorrectly.

II. Statutory Authority

[1] NPS claimed authority for its adjustment of FST's franchise fee under both the National Park System Concessions Policy Act ("CPA"), 16 U.S.C. §§ 20-20g, and the concession contract between FST and NPS. To calculate the exact amount of the adjusted fee, NPS further relied on Chapter 24 of the Concessions Guidelines, commonly referred to as "NPS-48," which is an agency guideline developed by NPS in 1986 that establishes a methodology for the calculation of concessioner franchise fees. FST argues that the method used by NPS to calculate the fees challenged in the instant case contravenes both the language and the purpose of the CPA. Specifically, FST claims that (1) NPS, in violation of the CPA, used the adjustment of franchise fees as a way in which to limit FST's profits; (2) while the CPA allows NPS to reconsider fees unilaterally, it does not allow NPS to adjust fees; and (3) section 9(e) of the concession contract, which provides the contractual authority for an adjustment of franchise fees, does not constitute an "appropriate provision" for the reconsideration of fees as required by the CPA. This Court reviews *de novo* the district court's interpretation of a statute. *C.G. Willis, Inc. v. The Spica*, 6 F.3d 193, 196 (4th Cir.1993) (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 111 S.Ct. 807, 818, 112 L.Ed.2d 866 (1991)).

A. Limitation of Profits

[2] The CPA authorizes the Secretary of the Interior to contract with private companies in order to provide services to visitors to the National Park System, *see* 16 U.S.C. § 20a; the Secretary administers the provision of these services through NPS. The Act governs the concession agreements between the Secretary and his concessioners, such as

the one between NPS and FST. The CPA contains an explicit provision regarding the reconsideration of franchise fees:

Franchise fees, however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for net profit in relation to both gross receipts and capital invested. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates. *Appropriate provisions shall be made for reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time.*

Id. § 20b(d) (emphasis added). NPS-48, developed pursuant to the CPA, provides a specific method for calculating franchise fees:

The appropriate franchise fee for concessioners shall be determined by first comparing the concessioner's profitability against the profitability of similar industries. The concessioner's reported statistics may be adjusted to reflect the value realized by the concessioner. Any known future changes in the financial condition of the operation should be taken into account.

In order to protect the investments and efforts of the parties involved, a minimum and maximum fee shall be determined thus establishing fee limits.

A fee will be determined within these limits that produces a reasonable level of profitability consistent with the risk undertaken by the concessioner.

As a final test, the impact of this fee should be reviewed to ensure that it is not at a level which will interfere with the concessioner's reasonable opportunity for a profit. Additionally, it should not interfere with the concessioner's ability to charge comparable rates or impact on NPS objectives of preserving and protecting park resources....

....

The final fee determination is based on this comparison of the concessioner's re-

turns with similar outside industry returns.

(emphasis added).

FST argues that NPS-48, and actions taken by NPS pursuant to NPS-48, contravene the CPA because the CPA does not allow NPS to consider profits when determining franchise fees. FST claims that the CPA grants NPS discretion over concession matters (i.e. details relating to FST's daily operational activity), the exercise of which has an incidental effect on profits, but does not allow NPS directly to adjust fees based on profits. According to FST, only market forces should exert direct control over a concessioner's profits.

FST contends, moreover, that NPS-48 controverts the purposes of the CPA by focussing the franchise fee determination on a comparison of a concessioner's returns with the profits of other companies in the industry. By calculating franchise fees based on such a comparison, FST claims, NPS necessarily tailors concessioner profits to the average profitability of other similar companies. FST argues that such a limitation of profits encourages mediocrity and discourages efficiency in the concession industry, although the CPA is designed to protect concessioner investment and encourage efficiency. See, e.g., 16 U.S.C. § 20b(a) (Secretary should "assure the concessioner of adequate protection against loss of investment . . ."); *id.* § 20e (concessioner acquires a possessory interest in structures and improvements on land administered by NPS); S.Rep. No. 765 ("Senate Report"), 89th Cong., 1st Sess. (1965) ("Section 2 emphasizes the importance of encouraging private concessioners to provide and operate such facilities as the Secretary of the Interior finds desirable for the accommodation of visitors to National Park Service areas and directs the Secretary to 'encourage and enable' such persons to do so."), reprinted in 1965 U.S.C.C.A.N. 3489, 3493.

We disagree with FST's characterization of the role of concessioner profits in the franchise fee determination. First, it is clear that the CPA permits the express consideration of profits. The CPA dictates that franchise fees should be based on the "probable

value to the concessioner of the privileges granted by the particular contract or permit involved[.]" 16 U.S.C. § 20b(d), and defines the "probable value" as the "opportunity for net profit in relation to both gross receipts and capital invested." *Id.* (emphasis added). The CPA further mandates that the Secretary "exercise his authority in a manner consistent with a reasonable opportunity for the concessioner to realize a profit on his operation as a whole commensurate with the capital invested and the obligations assumed." *Id.* § 20b(b) (emphasis added). Thus, the CPA itself quite explicitly permits the calculation of a franchise fee in relation to the profits that can be expected by a concessioner.

Further, FST has failed to substantiate its contention that NPS-48 is designed to limit concessioners' profits. Contrary to FST's contention, profit limitation is not the goal of NPS-48; rather, the goal of NPS-48 is clearly to provide a framework for the reporting of financial data and for the determination of an appropriate franchise fee, and the profit of others in the industry is a valid factor for NPS to include as a consideration in the fee determination. In sum, the CPA gives NPS the authority to consider profits in calculating franchise fees, and NPS-48 provides an appropriate method under the CPA for weighing profits in its fee determination.

B. Authority to Adjust Fees Unilaterally

[3] The contract between NPS and FST in the instant case details the procedure which a party must follow when seeking an adjustment of franchise fees. While the procedure involves the participation of both parties, in the end, it is NPS's final determination of the fee amount which governs. FST argues that although the CPA authorizes the unilateral reconsideration of fees by NPS, the statute does not allow NPS to adjust franchise fees absent agreement by both parties to the concession contract.

The CPA expressly provides for the reconsideration of a concessioner's fees: "Appropriate provisions shall be made for reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time." 16 U.S.C. § 20b(d). The stat-

ute does not, however, state whether the provision for reconsideration of fees also applies to adjustment of fees. We therefore look beyond the language of the statute to determine whether NPS's interpretation of the statute, which would authorize NPS not only to reconsider, but also to adjust fees in the instant case, is a rational one. See *Adams v. Dole*, 927 F.2d 771, 774 (4th Cir.), cert. denied, 502 U.S. 837, 112 S.Ct. 122, 116 L.Ed.2d 90 (1991) (If the language of a statute is clear, a court must give effect to the intent of Congress as expressed in the statute: "[i]f the statute is ambiguous, however, the question then becomes one of whether the interpretation by the agency charged with its administration is a permissible one." (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984))).

H.R. 2091, the bill which ultimately became the CPA, provided that "[a]ppropriate provision may be made for periodic reconsideration and adjustment of franchise fees . . ." H.R. 2091, 89th Cong., 1st Sess. (1965) (emphasis added). However, the bill as eventually passed stated that "[a]ppropriate provisions shall be made for reconsideration of franchise fees at least every five years . . ." 16 U.S.C. § 20b(d) (emphasis added). Stewart L. Udall, then Secretary of the Interior, suggested the amendment to the bill, stating, "This amendment would bring the provisions of the bill generally in line with the executive branch policy for frequent review of fees charged." Senate Report, reprinted in 1965 U.S.C.C.A.N. 3489, 3498. FST claims that the sole amendment that was made to the H.R. 2091 franchise fees provision before the bill was passed was the deletion of the word "adjustment" and that the amendment demonstrates Congress' intent to preclude NPS from adjusting franchise fees under the authority granted to NPS by the statute.

However, FST ignores another amendment that was made to the bill's language: the word "may" was changed to "shall." An equally plausible reason for the deletion of the word "adjustment" is that Congress chose to make reconsideration of franchise

fees mandatory as opposed to permissive (and therefore substituted "shall" for "may"), but did not wish to require adjustment of fees every five years (therefore deleting "adjustment"). In other words, although NPS should reconsider fees every five years, the fees need not actually be changed that often. "Adjustment" was thus deleted when "shall" was added. The legislative history of the CPA simply makes clear that Congress placed primary importance on the frequent reconsideration of fees; it does not necessarily indicate that Congress intended to preclude NPS's adjustment of fees.

NPS's interpretation of the CPA franchise fees provision—that it provides for adjustment as well as reconsideration of fees—is a completely logical one, and should be upheld. See *Adams*, 927 F.2d at 774 (we uphold an agency's interpretation of a statute if it is a "permissible" one); *Lewis v. Babbitt*, 998 F.2d 880, 881 (10th Cir.1993) ("We review an agency's interpretation of an ambiguous statute to determine whether it is 'rational and consistent with the statute.'" (quoting *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir.1990), cert. denied, 500 U.S. 916, 111 S.Ct. 2011, 114 L.Ed.2d 98 (1991))); see also *Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir.1989) (a court will not substitute its construction of a statute for a reasonable interpretation of the statute made by an agency (citing *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782)). In fact, NPS's interpretation is persuasive; a statutory provision calling for reconsideration of fees would be rendered meaningless if it did not include authority for the adjustment of fees as well. In addition, we do not find NPS's construction of the statute to contravene the CPA's purpose of encouraging the investment of private concessioners in the park system; a clause providing for periodic adjustment of fees, which might be raised or lowered, is not necessarily adverse to the interests of concessioners.

C. Appropriate Provision for Reconsideration of Fees

[4] The CPA requires that "[a]ppropriate provisions" be made for the reconsideration of fees at least every five years. See 16 U.S.C. § 20b(d). FST contends that, even if

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the CPA provides statutory authority for NPS to adjust franchise fees, § 9(e) of FST's contract with NPS is not an "appropriate provision" for the reconsideration of fees as mandated by the CPA. Section 9(e) states in its entirety:

Within sixty (60) days after the end of each 5-year period of this contract or as otherwise specified, at the instance of either party hereto, the amount and character of the franchise fees provided for in this section may be reconsidered. Such request shall be made in writing within 60 days after the end of the applicable contract year but cannot be made before the end of such year. In the event that the Secretary and the Concessioner cannot agree upon an adjustment of the franchise fees within 120 days from the date of the request for renegotiation as made by either party, the position of the Concessioner must be reduced to writing within 30 days therefrom and submitted to the Secretary for a determination of appropriate fees, consistent with the fair value of any assigned Government Improvements and the probable value to the Concessioner of the privileges granted by this contract based upon a reasonable opportunity for a profit in relation to both gross receipts and capital invested. If desired by the Concessioner, an advisory arbitration panel will be established (one member to be selected by the Secretary, one by the Concessioner, and the third by agreement of the original two) for the purpose of recommending to the Secretary appropriate franchise fees. The Secretary and the Concessioner shall share equally the expenses of such advisory arbitration. *The written determination of the Secretary as to franchise fees shall be final and conclusive upon the parties hereto.* Any new fees established will be retroactive to the commencement of the applicable period for which notice of reconsideration is given and be effective for the remaining term of the contract unless subsequent negotiations establish yet a different franchise rate. If new rates are greater than existing rates, the Concessioner will pay all back fees due with the next regular payment. If new rates are less than the existing rate, the Concessioner

may withhold the difference between the two rates from future payments until he has recouped the overpayment. Any new franchise fees will be evidenced by an amendment to the contract unless based upon the written determination of the Secretary, in which event a copy of the determination will be attached hereto and become a part hereof as fully as if originally incorporated herein.

(emphasis added). FST objects to the contractual provision because it allows the Secretary to make a final decision concerning fees without FST's consent. FST claims that § 9(e) thereby gives NPS "an absolute right to sabotage the entire contract...."

However, contrary to FST's assertions, the contract does not empower NPS to exercise unfettered discretion regarding a fee adjustment. The language of the contract authorizes NPS to change fees only by complying with significant procedural constraints and safeguards. The contractual provision does not allow the changing of fees based on mere speculation, but rather mandates that fees be changed only pursuant to "a determination of appropriate fees, consistent with ... the probable value to the Concessioner of the privileges granted by this contract based upon a reasonable opportunity for a profit in relation to both gross receipts and capital invested." Section 9(e) further details a process by which each side can voice objections to fee modifications. In addition, the contract provides for advisory arbitration for the purpose of recommending appropriate fees, and NPS has devised a detailed method, embodied in NPS-48, by which to recalculate fees. Finally, under the APA, 5 U.S.C. §§ 701-706, the aggrieved concessioner may resort to the courts, where the Secretary's actions will be scrutinized to determine whether he acted arbitrarily or capriciously. See *id.* § 706. Thus, § 9(e) would not allow NPS to "sabotage" the contract, as FST fears.

[5] Further, we reject FST's argument that § 9(e) of the contract violates the common law of contracts, because it allows for the modification of a contract term, *i.e.* the fee amount, without consideration from the party opposing the modification or a change

in circumstances. A fee adjustment is not technically a modification of the contract at issue; it is an action that takes place pursuant to the very terms of the contract itself, and is one that was contemplated by the parties at the time of signing the contract. Significantly, the contract does not allow random modification at the whim of NPS; as outlined above, the contract provides a check on random adjustment of fees by setting out a detailed process which must be followed before fees are changed. The contract is thus designed to force the party seeking adjustment of the fees to pursue negotiations with the other side, and to come to a fair and reasonable determination of the value of the concession.

In sum, § 9(e) is a completely appropriate contractual provision under the CPA in that it provides for modification of fees through a reasoned process, and does not vest in NPS unbridled authority; at the same time, § 9(e) guarantees that the parties will not reach a stalemate when a fee adjustment is sought. We affirm the district court's finding that NPS was acting within its statutory authority when it adjusted FST's franchise fee.

III. Contractual Authority

[6] FST also presents a challenge to NPS's authority under the contract itself to increase the franchise fee. FST claims that the contract is ambiguous because two of its terms conflict, and that the contract should therefore be construed against NPS. The district court found that under a plain reading of the contract, there was no conflict between the two contractual provisions. We review *de novo* the district court's construction of the contract. *Nehi Bottling Co., Inc. v. All-American Bottling Corp.*, 8 F.3d 157, 162 (4th Cir.1993).

[7] Section 9(a) of the contract provides: "For the term of this contract, the Concessioner shall pay to the Secretary for the privileges granted herein as follows: . . . a further sum equal to FOUR AND ONE-QUARTER PERCENT (4 1/4%) of the Concessioner's gross receipts, as herein defined, for the preceding year." FST contends that § 9(a), which provides for a 4.25% franchise fee to be paid for the term of the contract, is

in conflict with § 9(e) of the contract, which provides for the reconsideration of the franchise fee during the contract term. FST urges this Court to construe the conflict against NPS, and to hold that NPS may not change the 4.25% franchise fee specified in § 9(a).

We agree with the district court, however, that the contract is not ambiguous, because, under a plain reading of the contract, the specific fee amount in § 9(a) is meant to be subject to reconsideration as provided in § 9(e). Further, even if an ambiguity exists, we are compelled to interpret it in NPS's favor in this case. As FST itself points out, the concession contract incorporated the CPA as the law which was in effect at the time of the making of the contract. See *Northern Pac. Ry. Co. v. Wall*, 241 U.S. 87, 91, 36 S.Ct. 493, 495, 60 L.Ed. 905 (1916) ("[T]he laws in force at the time and place of the making of a contract and which affect its validity, performance and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."). Here, the CPA mandates that a concession contract contain a provision for reconsideration of fees at least every five years, see 16 U.S.C. § 20b(d), and, as we found above, reconsideration may include adjustment. Thus, any ambiguity which might be gleaned from the contractual language must be resolved in favor of the validity of § 9(e) of the contract, which carries out the statutory mandate requiring periodic reconsideration of fees. If we were to construe the contract to give effect to § 9(a) but not to § 9(e), we would be ignoring a provision of the contract that is necessary for the contract's validity under the CPA.

In addition, our interpretation of the contract, which provides for a fee of 4.25% under § 9(a) until the fee is reconsidered and adjusted under § 9(e), allows us to give effect to the contract as a whole rather than only to a single provision. See *Bruce v. Lumbermens Mut. Casualty Co.*, 222 F.2d 642, 645 (4th Cir.1955) (the general principles of contract interpretation "require that an interpretation which gives a reasonable effect to all the manifestations of intention in an agreement is preferred to an interpretation

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which leaves a part of such manifestations unreasonable or of no effect...."). We affirm the district court's finding that NPS had the contractual authority to adjust FST's fees in the instant case.¹

IV. Notice

[8] On June 20, 1991, seven days after the June 13, 1991 expiration of the first five-year period under the concession contract, NPS wrote to FST stating that "[t]his letter is to advise you that the National Park Service is considering a renegotiation of your franchise fee." The letter directed FST to a specific paragraph of NPS-48 as well as to § 9(e) of the contract between the parties. FST argues that NPS's letter did not constitute proper notice of reconsideration of fees under § 9(e) of the contract, because the letter was not a request for a change in the amount and character of the fees.

The contract provides:

Within sixty (60) days after the end of each 5-year period of this contract or as otherwise specified, at the instance of either party hereto, the amount and character of the franchise fees provided for in this section may be reconsidered. Such request shall be made in writing within 60 days after the end of the applicable contract year but cannot be made before the end of such year.

The contractual provision specifies that notice of reconsideration, not notice of a change, must be given. Moreover, FST was given ample opportunity to object to the franchise fee determination, both at the time that it received the June 20 letter, and subse-

quent to NPS's determination that a 12% fee would be appropriate. The district court correctly found that the June 20 letter was sufficient to put FST on notice of NPS's intention to reconsider the franchise fee. Since the notice came within the 60-day period, it was timely. The notice was therefore unobjectionable.

V. Method of Calculating Fees

[9] FST raises what it believes are three errors in NPS's calculation of the 12% franchise fee in the instant case.² We begin our discussion of FST's challenge by reviewing the way in which NPS determined the fee adjustment. Concessioners are required by their concession contracts to submit to NPS annual financial statements that have been audited in accordance with generally accepted accounting principles. The financial reports submitted during the five most recent complete years for which reports were filed are then used by NPS as the basis for its fee determination. NPS calculates the concessioner's annual gross receipts and adjusted net income, and based on these numbers, determines a minimum and maximum franchise fee. The final franchise fee is a number between the minimum and maximum, arrived at "based on [a] comparison of the concessioner's returns with similar outside industry returns." NPS then calculates the concessioner's anticipated returns using the new franchise fee to determine the effect of the new franchise fee on the concessioner's returns. Finally, NPS looks for other facts that could have an impact on the fee, and "[a]ny known future significant changes that

1. We find unpersuasive FST's additional argument that § 9(a) itself is ambiguous, because the provision does not state when the probable value of the contract to the concessioner should be assessed. It is clear from the language of the contract that the value of the contract must be determined at approximately the same time as the fee reassessment takes place, i.e. within the time period allowed by the contract for fee reconsideration.

2. NPS contends that FST should be precluded from challenging the method by which NPS calculated the fees, because FST did not raise the issue before the agency prior to resorting to the courts. First, we note that there is no requirement of exhaustion of administrative remedies under the CPA. See *Darby v. Cisneros*, — U.S.

—, —, 113 S.Ct. 2539, 2548, 125 L.Ed.2d 113 (1993) (where agency action is final, there is no requirement of exhaustion of administrative remedies in a case brought under the APA, unless expressly required by statute or agency rule). In any event, FST notified NPS in a letter of March 24, 1992 that it objected to the increase of the franchise fee from 4.25% to 12%. FST also appended a copy of the petition that it planned to file in the district court, detailing the contested issues, to a letter that it sent to NPS on April 14, 1993. NPS responded on June 16, 1993 that it had "carefully reviewed [FST's] objections to our financial analysis." We find that FST sufficiently raised its objections to the fee determination before NPS.

are unique to the concessioner's operating situation should be included in the final fee determination."

[10] FST submitted the required financial reports to NPS in accordance with the mandates of its contract and NPS-48.³ In making its calculations based on FST's financial data from 1986 through 1990, NPS made two major adjustments to the information before it. The first adjustment concerned the "Spirit of Charleston," a boat used by FST to provide ferry service to the Monument.⁴ NPS noted that the boat was also used by FST for charter and dinner cruise operations that were unrelated to its concession business ("outside operations"). Therefore, NPS found it necessary to prorate the operating, administrative, and fixed expenses of FST related to this boat in order to isolate the financial results of FST's concession operations. FST itself made most of the proration adjustments for the Spirit of Charleston's outside operations in its financial statements, and NPS used the prorated figures submitted by FST for its preliminary analysis.

NPS, however, made an additional finding as to the Spirit of Charleston. Rather than buying the boat, the concession leased it from a limited partnership, in which FST itself was the general partner. NPS concluded that "[t]he lease is not an arms length transaction and has resulted in lower earnings than would have occurred under an outright purchase of the boat." It therefore eliminated from its calculations consideration of the lease payments made by FST for the boat, and substituted a capital expenditure of \$1 million in 1986 with a depreciation over 18 years, which was the estimated life of the

boat. NPS assumed that FST had undertaken a debt of \$600,000 in order to finance the purchase, with interest in the amount of \$48,000 for a 10-year loan at 10%.

NPS's second adjustment to FST's financial data was made pursuant to NPS's finding that the amount of FST's officers' salaries (85% of which was attributed to the concession operation) had an adverse impact on FST's profitability. As an example, NPS pointed out that the president of FST was earning a yearly salary of approximately \$200,000, although his daily activity with the concession operation was limited. In performing calculations, NPS thus chose to limit officers' salaries to 10% of FST's gross receipts, which was approximately the median in the water transportation industry according to a report published by Robert Morris Associates, 1990 Annual Statement Studies ("Morris Studies"). NPS thus reduced officers' salaries in its calculation from \$304,419 to \$162,742.

After making adjustments and performing the requisite calculations in order to ascertain a minimum and maximum franchise fee, and arriving at an estimated fee of 12%, NPS calculated the effect of a 12% franchise fee on FST's adjusted returns. Finally, NPS compared the FST data to the Dun & Bradstreet ("D & B") Industry Norms for the water transportation industry. NPS settled on the 12% franchise fee, which it believed would allow FST to reap profits in excess of D & B's median returns for the industry.

FST argues that there were three flaws in NPS's calculation of the franchise fee. First, FST argues that NPS's decision to ignore the terms of FST's leasing arrangement for the Spirit of Charleston was irrational and

3. FST argues that because NPS-48 was developed after FST entered into a contract with NPS, the guideline cannot be applied to the agreement of the parties in the instant case. However, NPS is not a law or regulation, but rather is only a guideline for use by NPS in making calculations. We find no problem with the application of NPS-48 to the agreement at hand.

4. The story behind FST's acquisition of this particular boat sheds light on the basis of the dispute in the instant case. In 1986, NPS decided that public boat transportation to the Monument should be expanded, which would require addi-

tional docking facilities and a larger vessel. In order to encourage FST to assume the added risk of investment in these facilities, the parties cancelled their existing contract (which was to run only two more years) and agreed on a new contract (the one at issue in the instant case) with a fifteen-year term. FST subsequently acquired a new vessel and established a new docking facility. According to the district court's findings, the new vessel, the Spirit of Charleston, cost FST approximately \$1.4 million. The new docking facility was constructed at a cost to FST of \$154,000.

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Cite as 66 F.3d 1324 (4th Cir. 1993)

unsupported by relevant data. FST also contests NPS's adjustment to the salaries of its officers, claiming that NPS's use of the Morris Studies to tailor the salaries is rational only if those studies accurately represent the industry of which FST is a part. Finally, FST argues that NPS provided no basis upon which to conclude that D & B's water transportation industry statistics are reflective of an industry that can logically be compared to FST's, because FST's situation differs from that of others in the water transportation industry due to rigid controls imposed by NPS on FST's business. FST additionally points out that even if the Morris and D & B publications contain data on industries comparable to FST's, the reports themselves may be incomplete or inaccurate.

[11] When reviewing informal agency action under the APA, a court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." 5 U.S.C. § 706. Although the arbitrary and capricious standard provides only for limited review, *National Treasury Employees Union v. Horner*, 854 F.2d 490, 498 (D.C.Cir. 1988),

[a] reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971)). It is the court's task to review the considerations on which the agency relied, and to check that the agency's decision has "some basis in the record." *Horner*, 854 F.2d at 498.

[12] First, we find no error in NPS's decision regarding FST's leasing arrange-

ments for the Spirit of Charleston. We require the Secretary to articulate a rational connection between the evidence and his exercise of discretion. See *Virginia Agric. Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89, 93 (4th Cir.1985). The administrative record clearly lays out the factors upon which NPS relied in adjusting FST's financial data concerning the Spirit of Charleston. NPS stated that it made its calculations based on a sale rather than a lease arrangement because it believed that the nature of the leasing transaction had lowered FST's earnings, and offered the exact figures used to calculate what the cost of the boat would have been if the boat had been purchased outright. NPS's determination is clearly supported by the facts in the record, and was not arbitrary or capricious.

[13] FST's two remaining challenges to NPS's fee calculation—that NPS erred in adjusting FST's officers' salaries and in comparing FST's financial data to the D & B Industry Norms—we consider together. FST first claims that it was denied an opportunity to show that both the officers' salaries and the industry standards used by NPS for comparison were inaccurate, because it was not provided with copies of the Morris Studies and D & B Norms. The studies themselves were not included in the administrative record, and the district court granted NPS's motion for a protective order, although FST had hoped to obtain the financial reports through discovery and to depose certain NPS employees who were involved in the fee determination.⁵ FST claims that the district court's grant of the protective order constituted an abuse of discretion.

[14] Judicial review of administrative action is generally confined to the administrative record. See *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021, 1024 (4th Cir.) (in reviewing agency action under the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." (quoting *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973) (per curiam))).

5. FST also sought to obtain the relevant reports before trial, through a FOIA request. FST was not provided with the information because

"[t]hese documents are copyrighted public information that can be obtained directly from either [publishing] organization itself."

cert. denied, 423 U.S. 912, 96 S.Ct. 216, 46 L.Ed.2d 140 (1975); *Lewis*, 998 F.2d at 882 ("Judicial review under these standards is generally based on the administrative record that was before the agency at the time of its decision" (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 738 (10th Cir.1993))). However, although review is based on a limited record, "there may be circumstances to justify expanding the record or permitting discovery." *Public Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir.1982). We find that the district court did not abuse its discretion in finding that such circumstances did not exist in the instant case.

While it is the duty of an agency "to establish the statistical validity of the evidence before it prior to reaching conclusions based on that evidence." *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1467 n. 5 (7th Cir.), *cert. denied*, 474 U.S. 902, 106 S.Ct. 229, 88 L.Ed.2d 228 (1985), it is FST's burden to show that NPS's action was arbitrary and capricious, see *San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Comm'n*, 789 F.2d 26, 37 (D.C.Cir.) (party claiming that an agency's action was arbitrary and capricious bears the burden of proof), *cert. denied*, 479 U.S. 923, 107 S.Ct. 330, 93 L.Ed.2d 302 (1986). NPS contends, and FST does not dispute, that both the Morris Studies and the D & B Norms are copyrighted publications that are available from the organizations which issue them. In addition, NPS-48, included in the administrative record, contains a "Bibliography of Industry Statistics Available for Use in the National Park Service Franchise Fee Determination," which lists the names of both publications challenged by FST, and the names of the organizations which publish them. FST cannot claim that it was unaware of which reports were relevant to the franchise fee determination in the instant case, since FST listed the exact reports in which it was interested in the revised FOIA request that it submitted to NPS on May 12, 1992. It was FST's burden to procure the Morris Studies and the D & B Norms and to attempt to

supplement the administrative record, or to show why it could not obtain the reports. It was not an abuse of discretion for the district court to deny discovery which was intended to shift the burden of producing the reports onto NPS.⁶

[15, 16] Next, FST mounts a challenge to the Morris Studies and the D & B publications themselves, claiming both that the reports provide data on companies that are not comparable to FST, and that the data contained in the reports are not accurate. An agency's use of a study that is designed for a purpose other than that for which it is used by the agency, and "which is limited and criticized by its authors on points essential to the use sought to be made of it," may be considered arbitrary and capricious action. See *Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579, 1583 (10th Cir.), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180, 88 L.Ed.2d 149 (1985). FST has not, however, pointed to any evidence in the record tending to prove that NPS's reliance on the studies in question constituted arbitrary and capricious action. In ruling in favor of NPS on FST's challenge to NPS's calculations, the district court stated that

adjustments and the use of industry averages are a rational method for the government to measure profits and avoid the injustice of according lower franchise fees to concessioners with accounting methods which disguise profits. . . . [T]his court . . . finds that the procedures employed by the government analysts were rational and neither arbitrary nor capricious. It is not irrational for the NPS to utilize industry expense and profit averages as the basis to assess an individual concessioner's reasonable opportunity to make a profit.

We agree with the district court that the use of such studies by NPS in determining franchise fees is entirely appropriate. In addition, NPS-48 reflects that NPS employees are directed to use industry norms carefully when making franchise fee determinations. While FST makes bald assertions as to the

6. We note, as well, that it is unlikely that, had FST obtained the reports from the relevant organizations, NPS would have objected to the inclusion of the reports in the record before the court, since statistics from some older versions of the D & B Norms had already been included in the

administrative record as part of NPS-48. In fact, a stipulation filed with the district court on October 20, 1993 reflects that FST had supplemented the administrative record before the court on at least one occasion, with NPS's consent.

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Cite as 64 F.3d 1337 (4th Cir. 1995)

inaccuracy of the reports, it has shown neither that the industries studied in the reports were not comparable to FST's, nor that the reports themselves are inaccurate. We therefore affirm the district court's finding that NPS's use of the two publications did not constitute arbitrary or capricious action.

It was FST's burden to provide the court with evidence that NPS's actions were arbitrary or capricious. FST has produced no such evidence. We therefore affirm both the district court's finding that NPS's decision to raise FST's franchise fee to 12% was neither arbitrary nor capricious, and the district court's grant of a protective order to NPS.

VI. Conclusion

We find that NPS had both the statutory and the contractual authority to raise FST's franchise fee in the instant case. Further, the notice provided to FST and the fee determination itself were unobjectionable. The decision of the district court is therefore

AFFIRMED.



George BARGHOUT, Plaintiff-Appellee,
v.

BUREAU OF KOSHER MEAT AND
FOOD CONTROL; Mayor and City
Council of Baltimore; Mayer Kurefeld,
Rabbi, Defendants-Appellants,
and

Joseph Nelkin, Chairman; Joseph Robi-
son, Individually and in official capacity
as Mayor of Laurel, Defendants.

The National Jewish Commission on Law
and Public Policy, Amicus Curiae.

No. 94-1918.

United States Court of Appeals,
Fourth Circuit.

Argued Dec. 8, 1994.

Decided Oct. 2, 1995.

Owner of food business brought action
seeking declaration that municipal ordinance

making it misdemeanor to commit fraud in sale of food labeled kosher violated establishment clause. The United States District Court for the District of Maryland, Benson Everett Legg, J., 833 F.Supp. 540, granted summary judgment to business owner, declared statute unconstitutional, and enjoined its enforcement. Bureau of Kosher Meat and Food Control appealed. The Court of Appeals, Lay, Senior Circuit Judge, sitting by designation, held that kosher food consumer fraud municipal ordinance, which required appointment of three Rabbis and three laymen chosen from list submitted by Orthodox Jewish associations in order to establish and enforce kosher food standards, was unconstitutional under establishment clause.

Affirmed.

Luttig, Circuit Judge, filed opinion concurring in judgment in which Wilkins, Circuit Judge, concurred.

Wilkins, Circuit Judge, filed concurring opinion.

1. Constitutional Law ¶84.5(1)

Food ¶1.6

Kosher food consumer fraud municipal ordinance, which required appointment of three Rabbis and three laymen chosen from list submitted by Orthodox Jewish associations in order to establish and enforce kosher food standards, was unconstitutional under establishment clause; ordinance fostered excessive entanglement of religious and secular authority by vesting significant investigative, interpretive, and enforcement power in group of individuals based on their membership in specific religious sect. U.S.C.A. Const. Amends. 1, 14; Baltimore, Md., City Code art. 19, §§ 49, 52.

2. Constitutional Law ¶84.5(1)

Food ¶1.6

Kosher food consumer fraud municipal ordinance which was unconstitutional under establishment clause as requiring excessive