

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)

YOUNG BROTHERS, LIMITED )

DOCKET NO. 2006-0396

For Approval of a General Rate )  
Increase, Rate Restructuring, Fuel )  
Price Adjustment Clause, and Other )  
Tariff Changes. )

ORDER NO. 23222

Filed Jan. 26, 2007  
At 11 o'clock A.M.

Karen Higashi.  
Chief Clerk of the Commission

DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

2007 JAN 29 A 9:51

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ATTEST: A True Copy  
KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.

Karen Higashi.

<sup>3</sup>The suspension period will be six months from the date of the filing of this Order, unless otherwise stipulated to by the Parties with approval of the commission.

I.

Background

A.

Procedural History

Young Brothers is a water carrier authorized to transport property by barge between the islands of Oahu, Hawaii, Kauai, Maui, Molokai, and Lanai. Young Brothers' intrastate water carrier operations are subject to the commission's jurisdiction. The shipment of goods under its regulated water carrier service is governed by its Local Freight Tariff No. 5-A ("Tariff 5-A").

Throughout the 1990's, Young Brothers filed for and received multiple rate increases for the provision of its water transportation service.<sup>4</sup> In Docket No. 96-0483, Young Brothers' most recent general rate case, the commission authorized Young Brothers to: (1) increase its rates by approximately 3.71%, effective October 10, 1997; and (2) earn a rate of return of 11.06% on its average depreciated rate base ("authorized rate of return").

On August 1, 2001, in In re Young Bros., Ltd., Docket No. 01-0255, Young Brothers filed its Notice of Intent for Allowance of Rate Flexibility Within a Reasonable Zone or, in the Alternative, for a General Rate Increase. On October 1, 2001, Young Brothers filed its Application for Allowance of Rate

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<sup>4</sup>See In re Young Bros., Ltd., Dockets No. 7398 and No. 7506 (consolidated) (1993 - 1994 split test year, 5.5% increase); In re Young Bros., Ltd., Docket No. 94-0059 (1994 - 1995 split test year, 6% increase); In re Young Bros., Ltd., Docket No. 96-0079 (1996 test year, 3.1% increase); and In re Young Bros., Ltd., Docket No. 96-0483 (1997 test year, 3.71% increase).

Flexibility Within a Reasonable Zone,<sup>5</sup> "to establish a practice relating to its rates that will allow YB to continue to have the opportunity to earn a just and reasonable return on the average rate base as authorized by the Commission, without having to proceed through a general rate case in every instance."<sup>6</sup> In doing so, Young Brothers declined to seek a general rate increase; instead requesting only approval of a zone practice that would allow Young Brothers to adjust its rates within a reasonable zone set by the commission.

On December 14, 2001, Young Brothers and the Consumer Advocate filed their Stipulation Regarding Young Brothers' Application for Rate Flexibility Within a Reasonable Zone, agreeing to use a zone with a maximum annual increase of 5.5% and a maximum annual decrease of 10% over a twelve-month period ("Zone") under a three-year pilot program ("2001 Stipulation"). On December 20, 2001, the commission approved the 2001 Stipulation, which allowed Young Brothers to adjust its rates within the Zone, without a rate case proceeding, provided that Young Brothers does not exceed its authorized allowed rate of return on its average depreciated rate base.<sup>7</sup>

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<sup>5</sup>In re Young Bros., Ltd., Docket No. 01-0255, Young Brothers' Application for Allowance of Rate Flexibility Within a Reasonable Zone; Verification; and Certificate of Service, filed on October 1, 2001 (collectively, "Application for a Zone").

<sup>6</sup>Id. at 5.

<sup>7</sup>In re Young Bros., Ltd., Docket No. 01-0255, Decision and Order No. 19115, filed on December 20, 2001. The three-year pilot program began on December 20, 2001, the effective date of Decision and Order No. 19115.



By Decision and Order No. 19425, filed on June 20, 2002, in Docket No. 02-0118, the commission authorized a 3% rate increase in its non-containerized commodity rates, effective June 20, 2002, for Young Brothers under the Zone.<sup>8</sup>

On December 6, 2004, Young Brothers and the Consumer Advocate filed their Stipulation to Continue Decision and Order No. 19115 Rate Flexibility Within a Reasonable Zone, agreeing to continue the Zone for three additional years, until December 20, 2007 ("2004 Stipulation"). On April 22, 2005, the commission approved the 2004 Stipulation.<sup>9</sup>

The following year, on June 1, 2005, Young Brothers filed an Application for Approval of 2005 Rate Increase Pursuant to Decision and Order No. 21768 seeking a 5.5% across the board increase through Transmittal No. 16-0605. On July 18, 2005, the commission issued Order No. 21926 approving YB's 5.5% increase, effective July 18, 2005.<sup>10</sup>

On November 14, 2005, Young Brothers filed an Application for Expedited Approval of Tariff Change to Impose a Fuel Price Adjustment in which YB sought approval to amend its tariff to impose a fuel price adjustment to allow YB to automatically increase or decrease its rates to reflect the changes in YB's costs for diesel fuel above or below levels included in YB's base rates on 30 days' notice (without a rate

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<sup>8</sup>In re Young Bros., Ltd., Docket No. 02-0118, Decision and Order No. 19425, filed on June 20, 2002.

<sup>9</sup>In re Young Bros., Ltd., Docket No. 01-0255, Decision and Order No. 21768, filed on April 22, 2005.

<sup>10</sup>Order No. 21926, filed on July 18, 2005 (allowing Young Brothers' Transmittal No. 16-0605 to take effect).

proceeding) with prices reconciled quarterly. By Decision and Order No. 22154, filed on December 1, 2005, in Docket No. 05-0302, the commission denied Young Brothers' request to implement a fuel price adjustment on the ground that imposition of a new fuel price adjustment would constitute single-issue ratemaking. Rather than initiate an investigation into Young Brothers' rates, the commission left it to Young Brothers to determine whether to file for an increase under its Zone, or to file a general rate application. The commission, however, never stated that Young Brothers could file both.<sup>11</sup>

On August 4, 2006, Young Brothers filed an application for approval of a tariff change to reflect an across the board rate increase of 5.5%, pursuant to its Zone, which the commission approved effective September 18, 2006.<sup>12</sup>

B.

Young Brothers' Application

Two weeks after it received approval of a 5.5% across the board rate increase under its Zone, on October 2, 2006, Young Brothers filed its Notice of Intent to file an application for approval of a general rate increase and for certain revisions to its Tariff 5-A.<sup>13</sup>

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<sup>11</sup>In re Young Bros., Ltd., Docket No. 05-0302, Decision and Order No. 22154, filed on December 1, 2005.

<sup>12</sup>In re Young Bros., Ltd., Transmittal No. 06-0002, Decision and Order No. 22856, filed on September 15, 2006.

<sup>13</sup>Young Brothers' Notice of Intent and Certificate of Service, filed on October 2, 2006.

On December 15, 2006, Young Brothers filed its Application requesting the commission's approval of an average, overall rate increase of 10.7 percent for certain types of cargo, based on a 2007 calendar test year and a proposed rate of return of 10.84 percent (for its intrastate water carrier operations). For the specific cargo types, Young Brothers proposes rate increases ranging from 0 to 24 percent.<sup>14</sup> Young Brothers also seeks to increase its minimum bill of lading by 24 percent. In essence, Young Brothers proposes to restructure its rates to move toward compensatory pricing.

As part of its Application, Young Brothers also proposes to establish: (1) an automatic fuel price adjustment clause if the price of diesel fuel increases or decreases by \$0.15 above or below the per-gallon base level; and (2) a minimum charge for platforms. In addition, Young Brothers proposes certain changes to its tariff language, including revisions to the definitions of "automobile" and "island agricultural products." The revisions to Tariff 5-A proposed by Young Brothers to effectuate the changes set forth in its Application are set forth in Exhibit YB-Ex-1 of its Application.

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<sup>14</sup>Specific examples of Young Brothers' proposed rate increases include:

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|--|---------------|
| Dry containers and non-automobile<br>roll on/roll off cargo  | No increase   |
| Refrigerated containers (reefers),<br>automobiles, straight load flat<br>racks and platforms           | 5.6% increase |
| Less than container load cargo,<br>refrigerated pallets, dry and<br>refrigerated mix cargo, and G-vans | 24% increase  |

Young Brothers filed its Application pursuant to HRS §§ 271G-16 and 271G-17, and HAR § 6-61-94. Young Brothers requests that the commission "[a]pprove such rates as will allow YB an opportunity to earn a fair rate of return on its investments, to go into effect without suspension on January 29, 2007."<sup>15</sup> In the alternative, Young Brothers states that "if a suspension and an evidentiary hearing are ordered by the Commission, [the Commission should] allow YB to update [its] financial information to reflect year-to-date results for the Comparison Year and Test Year 2007 and to base its rate increase on the projections revised accordingly."<sup>16</sup>

C.

Consumer Advocate's Protest

On January 12, 2007, the Consumer Advocate filed its Protest, recommending that the commission deny Young Brothers' Application, without prejudice.<sup>17</sup> In support of its position the Consumer Advocate asserts that: (1) Young Brothers' Application significantly exceeds and violates the terms of the 2001 and 2004 Stipulations approved by the commission; (2) Young Brothers' Application is unsupported by the evidence, and Young Brothers has failed to meet its burden of proof in showing that its proposed rate adjustments are just, reasonable, and consistent

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<sup>15</sup>YB's Application, at 84.

<sup>16</sup>Id.

<sup>17</sup>Consumer Advocate's Protest and Certificate of Service, filed on January 12, 2007 (collectively, "Protest").

with the public interest; (3) Young Brothers did not file a current cost of service study to support the cost allocations and reasonableness of its proposed rate increases; (4) Young Brothers did not provide certain information as required pursuant to HAR § 6-65-31(b); and (5) Young Brothers failed to address the concerns previously raised by the Consumer Advocate in Docket No. 05-0302, with respect to Young Brothers' proposal to implement a fuel adjustment surcharge.

If the commission is not inclined to deny Young Brothers' Application, the Consumer Advocate states that:

. . . YB should be required to re-file the application such that any proposed rate adjustment can take effect on or about the September 18, 2007, one-year after the effective date of the recent rate adjustment. In addition, the proposed increase in the re-filed application should take into consideration the cost impacts of the rate proposals on YB's customers, in particular the [less than container load] LCL customers if the proposal is targeted for LCL service and thus reflect a gradual movement towards compensatory pricing for YB's services. In this regard, YB should also be required to explain why a percent increase that exceeds the 5.5 percent maximum annual threshold is reasonable and how [Young Brothers] considered the customers' ability to pay the proposed increase in rates, especially the rates to be charged for LCL service.

Consumer Advocate's Protest, at 12 - 13 (footnote and text therein omitted). See also id., Section II, Summary Recommendation, at 32 - 34.

# 1.

## 2001 and 2004 Stipulations

The Consumer Advocate's primary contention is that Young Brothers' Application violates the terms of the 2001 and

2004 Stipulations approved by the commission (collectively, "Stipulations").<sup>18</sup> In this regard, the Consumer Advocate reasons as follows:

1. The Stipulations approved by the commission provide that the maximum annual increase threshold of 5.5% over a twelve-month period is adopted for any customer class or classes.

2. The Zone provides "[a] more streamlined regulatory process for the ultimate benefit of YB's ratepayers, which substantially eliminates regulatory lag for rate adjustments within a reasonable zone, and reduces the substantial costs associated with the regulatory process for the commission, the Consumer Advocate, and [Young Brothers]."<sup>19</sup> The Zone is akin to a general rate increase application, but allows rate adjustments to take effect upon at least forty-five days notice of a tariff filing.

3. The maximum annual percentage thresholds established by the Zone were intended to protect the public interest by allowing for the gradual movement toward charging compensatory rates for all customer classifications, i.e., cost-based rates.

4. By Decision and Order No. 22856, filed on September 15, 2006, the commission approved Young Brothers' most recent request filed under the Zone, thereby authorizing a 5.5% across the board increase in Young Brothers' rates, effective from September 18, 2006. Thus, Young Brothers' request

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<sup>18</sup>See Consumer Advocate's Protest, Section I(A), at 2 - 13.

<sup>19</sup>Decision and Order No. 19115, at 3.

in this regard represented the maximum increase allowed under the Zone for each type of customer class of service during a twelve-month period.

5. Young Brothers' Application seeking commission approval to increase its rates for certain commodity classifications<sup>20</sup> beyond the 5.5% annual threshold approximately 4.5 months after a 5.5% increase in rates was allowed to take effect on September 18, 2006, violates the terms of the Stipulations.<sup>21</sup> Moreover, Young Brothers fails to explain why its Application "is not a violation of the 2001 Stipulation and 2004 Stipulation terms, does not constitute rate shock, and is thus not in the public interest."<sup>22</sup>

6. Young Brothers fails to explain why it did not utilize the Zone to gradually move toward compensatory pricing for its LCL service over a five-year period under the Zone, in light of the need to mitigate the effect of rate shock on its customers. Young Brothers should have mitigated the impact of the need to charge compensatory rates for its LCL service by utilizing the Zone during the past five years, rather than

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<sup>20</sup>In particular, the Consumer Advocate notes that Young Brothers proposes to increase its LCL rates by 24%.

<sup>21</sup>The Consumer Advocate calculates the 4.5 month period as the time between September 18, 2006, the effective date of the 5.5% increase in rates under the Zone, and January 29, 2007, the proposed effective date of YB's Application. The Consumer Advocate also notes that even if the commission suspends the application pursuant to HRS § 271G-17(d), "the longest period for which the Commission could suspend the implementation of the proposed rates is six months, or July 29, 2007, also a date within one year of the effective date of YB's last rate increase." Consumer Advocate's Protest, at 9 n.7.

<sup>22</sup>Consumer Advocate's Protest, at 8.

seeking to implement a 24% increase approximately 4.5 months after the 5.5% across-the-board increase implemented in September 2006.

2.

Burden of Proof

The Consumer Advocate asserts that Young Brothers has failed in meeting its burden of proof in showing that its proposed rate adjustments are just, reasonable, and consistent with the public interest.<sup>23</sup> In particular, the Consumer Advocate contends that Young Brothers' test year revenue requirement may be overstated because the carrier failed to adequately demonstrate that the benefits expected to be realized from the purchase of new water transportation and infrastructure is incorporated in the test year revenue requirement.<sup>24</sup>

3.

Current Cost of Service Study

The Consumer Advocate contends that Young Brothers should be required to submit a current cost of service study such that the allocation factors represented in the study "reflect the current, normalized operations in order to properly allocate the costs of operation across all services, and ideally develop rates that are intended to be compensatory for each service line."<sup>25</sup> A

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<sup>23</sup>Consumer Advocate's Protest, Section I(B), at 13 - 32.

<sup>24</sup>Consumer Advocate's Protest, Section I(B)(2), at 15 - 27.

<sup>25</sup>Consumer Advocate's Protest, Section I(B)(3), at 28.



current study, the Consumer Advocate notes: (1) will allow for the gradual movement toward compensatory rates in order to protect the consumers' interests; and (2) must consider the test year cargo volumes and operating statistics to support the proposed rate adjustments.<sup>26</sup>

4.

Information Under HAR § 6-65-31(b)

HAR § 6-65-31(b), which specifies the documents and information a water carrier must file as part of an application seeking a general rate increase, states in relative part:

General rate increase - supporting documents and information.

. . . . .

(b) The application described in subsection (a) must be accompanied by the following documents and information:

. . . . .

(5) Depreciation schedule supporting the latest financial report and the projected results of operations;

. . . . .

(7) Rate base computation, including property and equipment of related companies. The carrier shall include in the computation the beginning and ending balances for each of the following ratemaking components:

. . . . .

(D) Breakdown of related companies' property or equipment investment allocated to the carrier, such as tugs. For each investment of

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<sup>26</sup>Consumer Advocate's Protest, Section I(B)(3), at 27 - 29.

related companies, the carrier shall specifically identify the original cost, accumulated depreciation, and the basis of allocation[.]

The Consumer Advocate contends that Young Brothers has not complied with the requirements of HAR §§ 6-65-31(b)(5) and -31(b)(7)(D).

With respect to HAR § 6-65-31(b)(5), the Consumer Advocate notes that while Young Brothers' Application includes a depreciation schedule, YB-Ex-6, "the amounts of depreciation reflected for both the recorded 2005 and projected 2007 do not agree with the depreciation expense line item as reflected on YB-Ex-2, page 3 (for 2005) and YB-Ex-7 and 8, page 3 (for 2007)."<sup>27</sup> Moreover, "it would appear that YB should have provided the supporting depreciation schedule not for the prior calendar year, 2005, but for the latest financial report, October 2006."<sup>28</sup>

For HAR § 6-65-31(b)(7)(D), the Consumer Advocate is unable to locate any schedule that provides this information, and if no such property or equipment exists, "a simple declaratory statement would remove any existing ambiguity or uncertainty regarding this requirement."<sup>29</sup>

5.

Fuel Adjustment Surcharge

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<sup>27</sup>Consumer Advocate's Protest, at 30.

<sup>28</sup>Consumer Advocate's Protest, at 30.

<sup>29</sup>Consumer Advocate's Protest, at 30.

The Consumer Advocate asserts that Young Brothers, in its Application, fails to address the Consumer Advocate's concerns, initially raised in Docket No. 05-0302, with respect to Young Brothers' proposal to implement a fuel adjustment surcharge.<sup>30</sup> For example, in the Consumer Advocate's view, Young Brothers has failed to demonstrate: (1) how changes in the price of fuel have impacted its ability to earn its authorized rate of return, especially with the ability to seek timely rate relief up to a maximum of 5.5% on an annual basis under the Zone; and (2) why the increase in its business resulting from the increase in demand for its water transportation service, "coupled with the various operating efficiencies that are expected with the modifications at each of the island ports and use of new and larger equipment cannot continue to offset increases in the price of fuel thereby eliminating the need for a fuel adjustment clause."<sup>31</sup>

D.

Young Brothers' Reply

On January 22, 2007, Young Brothers filed its Reply to the Consumer Advocate's Protest.<sup>32</sup> In its Reply, Young Brothers disagrees with the contentions raised by the Consumer Advocate in

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<sup>30</sup>See In re Young Bros., Ltd., Docket No. 05-0302, Consumer Advocate's Protest and Certificate of Service, filed on November 17, 2005.

<sup>31</sup>Consumer Advocate's Protest, at 31 - 32.

<sup>32</sup>Young Brothers' Reply to the Consumer Advocate's Protest; and Certificate of Service, filed on January 22, 2007, as supplemented on January 23, 2007 (collectively, "Reply").

its Protest. Noting its expectation that the commission will suspend the Application for investigation (in lieu of allowing the requests set forth in the Application to take effect on January 29, 2007), Young Brothers requests that the commission accept its Application for full consideration and investigation. "The merits of Young Brothers' requested tariff changes should be fully explored through public hearings, discovery, evidentiary hearings, cross examination, and briefs authorized pursuant to HRS Chapters 91 and 271G, and applicable rules and regulations."<sup>33</sup>

1.

2001 Stipulation and 2004 Stipulation

Young Brothers disagrees with the Consumer Advocate's underlying contention that its Application violates the terms of the Stipulations. Young Brothers specifically asserts:

1. Its Application is filed in compliance with HRS §§ 271G-16 and 271G-17, HAR chapter 6-65, and HAR § 6-61-94.

2. Under a plain reading of the Stipulations and the commission's decisions approving the Stipulations, the Zone was never intended to be Young Brothers' exclusive rate relief remedy, and the Consumer Advocate incorrectly assumes that the Zone is the exclusive procedural vehicle available for Young Brothers to seek rate relief. To the contrary, the Zone was intended to "eliminate the regulatory lag for modest increases and decreases and reduce the administrative costs associated with the regulatory process for the Commission, the

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<sup>33</sup>Young Brothers' Reply, at 3.

Division of Consumer Advocacy, and for [Young Brothers]."<sup>34</sup> The Zone was intended to allow for a streamlined regulatory process, eliminating regulatory lag for small and incremental rate increases, reducing costs and the regulatory administrative burden, and to allow Young Brothers "to continue to have an opportunity to earn a just and reasonable return on the average rate base as authorized by the Commission, without having to proceed through the general rate case in every instance."<sup>35</sup>

3. Nowhere in its Application for a Zone did Young Brothers state, explicitly or implicitly, that the Zone was intended to replace the general rate case in all instances. In addition, the 2001 Stipulation does not state that the Zone "would become the exclusive avenue for YB to seek a rate increase, nor did it state that YB would no longer have the right to file a general rate case or other full rate proceeding." Rather, from the outset, Young Brothers understood that it retained the legal right to proceed with a general rate case when necessary. The Zone, therefore, is another complementary option, separate from full rate case proceedings, and any procedural or substantive limitations contained in the Stipulations or in the commission's decisions approving the Stipulations are inapplicable herein.

4. The Stipulations are applicable only when Young Brothers files for rate flexibility within a reasonable

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<sup>34</sup>Young Brothers' Reply, at 5 (quoting Young Brothers' Application for a Zone, at 10).

<sup>35</sup>Young Brothers' Reply, at 5 - 6 (quoting Young Brothers' Application for a Zone, at 5).

zone, and not here, when it files an application pursuant to HRS §§ 271G-16 and 271G-17, HAR Chapter 6-65, and HAR § 6-61-94. Thus, the Stipulations are inapplicable to its Application that seeks the commission's approval to increase the rates for certain commodity classifications pursuant to a full general rate proceeding.

5. Young Brothers has the statutory right to proceed with a full rate proceeding under Hawaii law, and it has never, explicitly or implicitly, waived this right. Moreover, any such waiver, to be valid, would have to be intentional and voluntary.<sup>36</sup> There has been no such waiver in this instance, and the Consumer Advocate failed to provide any evidence of such a waiver.

6. As long as Young Brothers proceeds under a full rate case proceeding, such as with its Application, Young Brothers may seek to raise its rates more than 5.5% in a given twelve-month period. "Nowhere in HRS Chapter 271G, and [the] applicable rules and regulations, is Young Brothers prohibited from seeking an increase of its rates greater than 5.5 percent in a 12-month period under full rate case proceedings. The only limitation is that Young Brothers cannot do so *using the Zone Program's expedited procedures.*"<sup>37</sup>

7. On December 1, 2005, the commission, by Decision and Order No. 22154, denied Young Brothers' request to implement

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<sup>36</sup>Young Brothers cites to Assn' of Owners of Kukui Plaza v. Swinerton & Walberg Co., 68 Haw. 98, 108 (1985).

<sup>37</sup>Young Brothers' Reply, at 9 (*italics in original*).

a fuel price adjustment.<sup>38</sup> In Decision and Order No. 22154, the commission: (1) contemplated that Young Brothers should file an application for a general rate increase; and (2) acknowledged Young Brothers' statutory right to initiate full rate proceedings separate from and in lieu of the Zone.<sup>39</sup>

8. "Young Brothers is entitled to an opportunity to earn a fair rate of return on investments made in providing safe and adequate service, equipment and facilities[.]"<sup>40</sup> Young Brothers proposed rate adjustments are just and reasonable and do not constitute rate shock. Moreover, the Consumer Advocate's rate shock argument is not a proper justification for dismissing the Application, but instead, "is an argument that goes to the merits of the requested increase and

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<sup>38</sup>In re Young Bros., Ltd., Docket No. 05-0302.

<sup>39</sup>Young Brothers quotes the following language from pages 29 - 30 of Decision and Order No. 22154:

Approving YB's proposed new Fuel Price Adjustment without a full investigation of the impacts of YB's proposal on other cost items and revenue requirement components and rate elements such as rate of return in a general rate case proceeding, in this instance, would not be in the public interest. The public should have the opportunity to comment on YB's proposal, and the full impact of the proposal should be carefully considered in the context of a full rate proceeding.

. . . . .

To provide YB with as many options as possible given the commission's decision, the commission does not initiate an investigation into YB's rates by this order. The commission leaves it to YB to determine whether to file for an increase under its Zone, or whether to file a general rate application with the commission.

Decision and Order No. 22154, at 29 - 30 (emphasis in original).

<sup>40</sup>Young Brothers' Reply, at 10.

must be established by a preponderance of the evidence at a hearing on the merits of the requested increase."<sup>41</sup>

2.

Burden of Proof

In response to the Consumer Advocate's contention that Young Brothers, in its Application, has failed to meet its burden of proof, Young Brothers asserts:<sup>42</sup>

1. The Consumer Advocate's argument goes toward the weight of Young Brothers' evidence, "the ultimate arbiter of which is the Commission after a contested case hearing."<sup>43</sup> Young Brothers intends to meet its requisite burden of proof in the resulting contested case proceeding under HRS § 271G-17(d).

2. Young Brothers has met all of the requirements to prevent the rejection of its Application under HAR § 6-65-39.

3.

Current Cost of Service Study

Contrary to the Consumer Advocate's claim, Young Brothers notes that "in its Application at **YB-Ex-12**, YB filed a cost of service study for the test year summarizing

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<sup>41</sup>Young Brothers' Reply, at 12.

<sup>42</sup>Young Brothers' Reply, Section II, at 12 - 13. In addition, Young Brothers responds to the specific arguments raised by the Consumer Advocate in Section I(B)(2) of its Protest. See Young Brothers' Reply, Section II(A), at 13 - 22.

<sup>43</sup>Young Brothers' Reply, at 13 (footnote and text therein omitted).



operations without rate relief. In **YB-Ex-13**, YB filed a summary of operations with rate relief."<sup>44</sup>

4.

Information Under HAR § 6-65-31(b)

Contrary to the Consumer Advocate's contention, Young Brothers states that its Application contains the supporting information required by HAR § 6-65-31. Specifically:

1. The pertinent exhibits attached to Young Brothers' Application meet the requirements under HAR § 6-65-31(b)(5).

2. For HAR § 6-65-31(B)(7)(D), Young Brothers confirms that "such information was not included in the Application because YB does not have any such allocated property or equipment."<sup>45</sup>

5.

Fuel Adjustment Surcharge

In response to the Consumer Advocate's concerns, Young Brothers states:<sup>46</sup>

1. Young Brothers' request to implement an automatic fuel price adjustment clause is consistent with the commission's ruling in Decision and Order No. 22154 that its surcharge proposal be considered in the context of a full rate proceeding.

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<sup>44</sup>Young Brothers' Reply, at 23 (boldface in original).

<sup>45</sup>Young Brothers' Reply, at 27.

<sup>46</sup>Young Brothers' Reply, Section II(D), at 27 -38.

2. Young Brothers has addressed the concerns regarding its proposal to implement a fuel adjustment surcharge.

## II.

### Discussion

HRS § 271G-16 provides in relevant part:

**Rates, fares and charges of common carriers by water.** (a) It shall be the duty of every water carrier of passengers . . . .

(b) It shall be the duty of every water carrier of property to provide safe and adequate service, equipment, and facilities for the transportation of property and to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto, and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property.

(c) All charges made for any service rendered by any water carrier in the transportation of passengers or property or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any water carrier to make, give, or cause any undue or unreasonable preference or advantage to any particular person, locality, region, district, island, or description of traffic, in any respect whatsoever; or to subject any particular person, locality, region, district, island, or description of traffic to any unjust discrimination or undue or unreasonable prejudice or disadvantage in any respect whatsoever; provided that this subsection shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(d) Any person or body politic may make complaint in writing to the commission that any such rate, fare, charge, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the

commission shall be of the opinion that any individual rate, fare, or charge, demand, charged, or collected by any common carrier or carriers by water for transportation, or any rule, regulation, or practice whatsoever of the carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful rule, regulation, or practice thereafter to be made effective.

(e) In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of passengers or property by water carriers, and to prescribe classifications, regulations, and practices relating thereto, the commission shall give due consideration, among other factors, to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by the carriers at the lowest cost consistent with the furnishing of the service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide the service.

(f) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

HRS § 271G-16 (boldface in original).

HRS § 271G-17 states in relevant part:

**Tariffs of water carriers.** (a) Every water carrier shall file with the public utilities commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property. The rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information as the commission by regulations shall prescribe; and the commission may reject any tariff filed with it which is not in consonance with this section and with the regulations. Any

tariff so rejected by the commission shall be void and its use shall be unlawful.

(b) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting the rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a water carrier, except after forty-five days' notice of the proposed change filed and posted in accordance with subsection (a); provided that changes to a fuel surcharge approved by the commission may be made after thirty days' notice of the proposed change filed and posted in accordance with subsection (a). The notice shall plainly state the change proposed to be made and the time when it will take effect. The commission may in its discretion and for good cause shown allow the change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(c) No water carrier shall engage in the transportation of passengers or property unless the rates, fares, and charges upon which the same are transported by the carrier have been filed and published in accordance with this chapter.

(d) Whenever there is filed with the commission any schedule stating a new rate, fare, or charge, for the transportation of passengers or property by a water carrier or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the carrier may on its own initiative, or shall by order of the commission served prior to the effective date of the schedule, concurrently file a pro forma statement of account which shall be prepared under the same form and in the same manner as prescribed by the commission's uniform system of accounts.

The commission may upon complaint of any interested person or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, enter upon a hearing concerning the lawfulness of the rate, fare, or charge, or the rule, regulation, or practice, and pending the hearing and the decision thereon the commission, by delivering to the carrier or carriers affected thereby a statement in writing of its reasons therefor, may suspend the operation of the schedule and defer the use of the rate, fare, or charge, or the rule, regulation

or practice. From the date of ordering a hearing to investigate the lawfulness of the rate, fare, or charge, the commission shall have up to six months to complete its investigation. If the commission fails to issue a final order within the six-month period then the changes proposed by the carrier shall go into effect. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice, is just and reasonable.

(e) When a rate increase application is filed, . . . .

HRS § 271G-17 (boldface in original) (emphasis added).<sup>47</sup> See also HAR §§ 6-61-94 (water carrier tariff changes); 6-65-5 (water carrier tariff change - posting); and 6-65-30 (water carrier tariff changes or revisions).

HAR § 6-65-40, governing the suspension and investigation of tariff changes proposed by a water carrier, provides in relevant part:

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<sup>47</sup>In addition, HRS § 271G-23(a) provides:

**Hearings.** (a) All hearings, investigations, and proceedings shall be governed by chapter 91 and by rules of practice and procedure adopted by the public utilities commission, and in the conduct thereof, the technical rules of evidence need not be applied; provided that in all evidentiary hearings conducted pursuant to chapter 91 in which a carrier has the burden of justifying the reasonableness of its rates, fares, charges, or classifications, the burden of proof of the carrier in proving the reasonableness of expenditures, contracts, leases, or other transactions between the carrier and corporate affiliates of the carrier shall be satisfied only if the reliable, probative and substantial evidence is clear and convincing. No informality in any hearing, investigation, or proceeding, or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

HRS § 271G-23(a) (boldface in original).

(a) Upon the filing of a tariff or tariff change, the commission may:

- (1) Allow the tariff or tariff change, or any portion thereof, to take effect forty-five days after publication, filing, and posting of the proposed tariff or tariff change have all been completed, in accordance with this chapter; or
- (2) Suspend the operation of the tariff or tariff change, or any portion thereof, for investigation. The commission may schedule and conduct a hearing to aid in its investigation of the justness and reasonableness of the proposed tariff or tariff change.

.....

(c) A tariff suspension ordered by the commission may not exceed six months from the date of the issuance of the commission's order suspending the operation of the tariff. The tariff or tariff change will take effect, if the commission fails to issue a final order within the six-month period.

HAR § 6-65-40 (emphasis added).

#### A.

##### Consumer Advocate's Protest

The Consumer Advocate asserts that under its interpretation of the Stipulations: (1) within a twelve-month period under the Zone, the maximum annual increase in rates entitled to by Young Brothers is 5.5% for any customer class or classes; (2) Young Brothers' maximum 5.5% annual increase under the Zone for all customer classes took effect on September 18, 2006, by Decision and Order No. 22856; and (3) Young Brothers' Application seeking commission approval to increase its rates for certain commodity classifications beyond the 5.5% annual threshold approximately 4.5 months after a

5.5% increase in its rates on September 18, 2006, violates the terms of the Stipulations.

Young Brothers counters that under a plain reading of the Stipulations and the commission's decisions approving the Stipulations, the Zone was never intended to be Young Brothers' exclusive rate remedy. Instead, Young Brothers argues that it retains the legal right under Hawaii law to proceed with a full rate proceeding by filing an application for a general rate increase, and to seek to raise its rates by more than 5.5% within a given twelve-month period. Moreover, Young Brothers contends that it never intentionally and voluntarily waived this right, and there is no language in the Stipulations or the commission's decisions approving the Stipulations that explicitly or implicitly preclude this right.

Here, it appears that Young Brothers' Application to increase certain of its commodity rates within the twelve-month period between September 18, 2006 (the effective date of 5.5% maximum increase under the Zone) and September 17, 2007, is inconsistent with the spirit, intent, and terms of the Stipulations.<sup>48</sup>

During the 1990's, Young Brothers filed four general rate case applications, utilizing the 1993 - 1994, 1994 - 1995, 1996, and 1997 test years, and culminating in commission-approved

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<sup>48</sup>Young Brothers seeks to have its increase in rates take effect on January 29, 2007, without suspension by the commission. Young Brothers' Application, at 84. If the commission suspends Young Brothers' Application for investigation and an evidentiary hearing, the commission must issue its final order within six months from the date of the suspension Order, i.e., on or about July 27, 2007. HRS § 271G-17(d).

rate increases of 5.5%, 6%, 3.1%, and 3.71%, respectively, with the commission allowing Young Brothers to earn an 11.06% authorized rate of return in its most recent general rate case, Docket No. 96-0483. Thereafter, Young Brothers, on August 1, 2001, in Docket No. 01-0255, filed its Notice of Intent for Allowance of Rate Flexibility Within a Reasonable Zone or, in the Alternative, for a General Rate Increase ("2001 Notice of Intent"). In Paragraphs 8 and 9 of its 2001 Notice of Intent, Young Brothers stated in respective part:

(8) YB requires the allowance of rate flexibility within a reasonable zone or, in the alternative, another general rate increase in order to provide YB with the opportunity to obtain the additional revenues needed to provide relief from the rising costs and to earn its allowed rate of return on its rate base.

(9) Accordingly, YB intends to file an application asking for the allowance of rate flexibility within a reasonable zone or, in the alternative, for a general rate increase in order to obtain additional revenues necessary to earn its allowed rate of return on its rate base.

2001 Notice of Intent, at 4 (emphasis added).

On October 1, 2001, Young Brothers filed its Application for a Zone. Young Brothers: (1) sought to establish a practice relating to its rates that would allow it to continue to have the opportunity to earn its 11.06% authorized rate of return, without having to proceed through a general rate case in every instance; and (2) proposed a zone of up to 7.5% for rate increases, and 10% for rate decreases. As explained by Young Brothers, the benefits of the proposed zone were multi-fold:

First, it will provide for a more streamlined regulatory process for the ultimate benefit to YB's



ratepayers. It will eliminate much of the regulatory lag for rate adjustments within a reasonable zone and reduce the substantial costs associated with the regulatory process for the Commission, the Division of Consumer Advocacy, and [Young Brothers].

Second, it will improve the level of service to customers by providing YB greater rate flexibility, within acceptable limits, to be more responsive to customers' needs and meet the increasing competition primarily from interstate carriers who are not regulated by the Commission under the Hawaii Water Carrier Act.

Third, and most importantly, it will continue to ensure that there is reasonable protection of the public interest.

Young Brothers' Application for a Zone, at 8.

Young Brothers, in its Application for a Zone, cited to and described its four past general rate cases, and noted that "[i]n the past rate cases, [it] had spent between \$80,000 and \$200,000 per rate case in legal and consulting fees and had 2 to 3 employees fully dedicated to the regulatory proceedings."<sup>49</sup> More importantly, Young Brothers filed its application seeking commission approval to establish a zone of reasonableness. It did not file an application for a general rate increase.<sup>50</sup> Thus, Young Brothers focused its efforts on securing the commission's approval to establish a zone of reasonableness, in order to streamline the regulatory process and to establish a practice relating to its rates that would allow it to continue to have the opportunity to earn its 11.06% authorized rate of return, without having to proceed through a general rate case in every instance.

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<sup>49</sup>Young Brothers' Application for a Zone, at 10.

<sup>50</sup>Indeed, Young Brothers' Application for a Zone did not include any of the documents and information required under HAR § 6-65-31(b), governing general rate increase applications filed by water carriers.

On December 13, 2001, the Consumer Advocate filed its position statement, stating its non-objection to Young Brothers' proposal to establish a zone of reasonableness, subject to certain proposed revisions, including: (1) setting the maximum annual increase in rates at 5.5%, instead of 7.5%; (2) setting the maximum annual decrease in rates at 10%, instead of 7.5%, provided that non-compensatory rates did not result; and (3) authorizing the zone as a three-year pilot program.

On December 14, 2001, Young Brothers and the Consumer Advocate filed their 2001 Stipulation, which reiterated the multi-fold benefits of the Zone that were identified by Young Brothers. Paragraph 1 of the 2001 Stipulation then provided:

1. The Consumer Advocate will not oppose the Commission's approval of [Young Brothers'] proposed rate flexibility program provided that the zone of reasonableness be established as follows:
  - a. commencing with the effective date of the rate flexibility practice, the maximum annual increase threshold of 5.5% over a 12-month period be adopted for any customer class or classed in lieu of [Young Brothers'] proposed 7.5%, and
  - b. commencing with the effective date of the rate flexibility practice, the maximum annual decrease of 10% over a 12-month period for any customer class or classes be allowed on the condition that any decrease proposed for a given customer class does not result in non-compensatory rates for the customer class.

2001 Stipulation, at 6. On December 20, 2001, the commission, by Decision and Order No. 19115, approved the Zone, with specific

modifications and clarifications of the procedures related to the continuation of the Zone after the initial three-year period. The Zone commenced on December 20, 2001.

On December 6, 2004, Young Brothers and the Consumer Advocate filed their 2004 Stipulation, agreeing to continue the Zone for three additional years, with Young Brothers continuing its belief that "the zone of reasonableness concept will continue to allow for the streamlining of the regulatory process and improve its level of service to customers."<sup>51</sup>

Paragraphs 1 and 2 of the 2004 Stipulation state:

1. Subject to this Commission's approval, YB's practice of filing for rate flexibility within a zone of reasonableness (the "Practice") shall be continued for a second three (3) year period, for the period December 20, 2004 to December 20, 2007.
2. YB's Practice shall continue as follows:
  - a. the maximum annual increase threshold shall be 5.5% over a 12-month period for any customer class or classes, and
  - b. the maximum annual decrease shall be 10% over a 12-month period for any customer class or classes, on the condition that any decrease proposed for a given customer class does not result in non-compensatory rates for the customer class.

2004 Stipulation, at 6 (emphasis added). On April 22, 2005, the commission, by Decision and Order No. 21768, approved the 2004 Stipulation.

Accordingly, the commission finds that the plain meaning of the terms of the Stipulations document a voluntary agreement and compromise between Young Brothers and the Consumer Advocate, which the commission approved at

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<sup>51</sup>2004 Stipulation, 4.

Young Brothers' and the Consumer Advocate's request. Specifically, in exchange for a streamlined regulatory review process and the opportunity to obtain virtually automatic maximum annual rate increases of 5.5% over any twelve-month period under the Zone, Young Brothers expressly agreed to the parameters it and the Consumer Advocate established under the Stipulations. Thus, Young Brothers agreed to forego the opportunity to seek commission approval of additional rate increases that would take effect within the same twelve-month period established by the Zone.<sup>52</sup> Moreover, in Young Brothers' Application for a Zone, Young Brothers stated that the Zone would give it an opportunity to earn a just and reasonable rate of return, "without having to proceed through a general rate increase case in every instance."<sup>53</sup> Thus, Young Brothers' arguments that it never waived its right under Hawaii law to proceed with a full rate proceeding by filing an application for a general rate increase is without merit as it expressly agreed to the terms of the Stipulations and asked the commission to approve the Stipulations.<sup>54</sup>

With respect to Young Brothers' contention that the language in pages 29 - 30 of Decision and Order No. 22154 in

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<sup>52</sup>Young Brothers also compromised by agreeing to incorporate the Consumer Advocate's proposals to: (1) set the maximum annual increase in rates at 5.5%, instead of 7.5%; (2) set the maximum annual decrease in rates at 10%, instead of 7.5%, provided that non-compensatory rates do not result; and (3) establish the Zone as a three-year pilot program.

<sup>53</sup>Young Brothers' Application, at 5.

<sup>54</sup>Cf. Ass'n of Owners of Kukui Plaza v. Swinerton & Walberg Co., 68 Haw. 98, 110 (the court would not hesitate to declare a waiver or default if the defendant's conduct can be deemed inconsistent with a reliance on the contract).

Docket No. 05-0302 contemplated the filing of a general rate increase application, the commission disagrees. Under a plain reading of Decision and Order No. 22154, "[t]he commission le[ft] it up to YB to determine whether to file for an increase under its YB Zone, or whether to file a general rate application with the commission."<sup>55</sup> The commission did not authorize Young Brothers to file for both.

Young Brothers has benefited from the Zone by minimizing the time and expense associated with the filing and processing of general rate increase applications. To date, the commission has authorized three rate increases under the Zone, with the most recent rate increase being a 5.5% across the board increase that took effect on September 18, 2006. After having used the Zone to its benefit for several years, and shortly after obtaining a virtually automatic 5.5% across-the-board rate increase under the Zone, Young Brothers now seeks to also increase its rates in a general rate increase application before the expiration of the 12-month period it agreed to under the Zone. In the commission's view, to now authorize Young Brothers to increase certain of its commodity rates on January 29, 2007, or within six months thereafter, would be inconsistent with the expressed terms, as well as the spirit and intent of the Stipulations approved by the commission.

As a remedy for attempting to violate the Stipulations, the Consumer Advocate suggests that "YB should be required to re-file the application such that any proposed rate adjustment

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<sup>55</sup>Decision and Order No. 22154, at 30.

can take effect on or about September 18, 2007, one-year after the effective date of the recent rate adjustment."<sup>56</sup> While the commission concurs with the Consumer Advocate's view that the earliest effective date of any proposed rate increase approved by the commission would be September 18, 2007, the commission finds that requiring Young Brothers to re-file its application would be highly inefficient, impractical, and unnecessary under the circumstances.<sup>57</sup>

Instead, the commission will allow Young Brothers' Application to proceed.<sup>58</sup> Simply put, the Zone does not necessarily prevent Young Brothers from filing an application for a general rate increase in this instance; however, any rate increase approved by the commission shall not take effect until the expiration of the twelve-month period beginning on September 18, 2006, the date when the 5.5% maximum increase in rates took effect under the Zone.

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<sup>56</sup>Consumer Advocate's Protest, at 12.

<sup>57</sup>Under the commission's calculation, Young Brothers could re-file its application on or about February 1, 2007, seeking commission approval on or about March 18, 2007, following the expiration of the forty-five day statutory notice period. The commission, on or about Friday, March 16, 2007, would likely suspend the application for investigation, including the holding of statewide public hearings, up to a six-month period, i.e., until September 16, 2007. Such a scenario will: (1) in effect, instruct Young Brothers to re-file its application one-week from the date of this Order; and (2) delay the statewide public hearings, currently scheduled for February 2007.

<sup>58</sup>The 5.5% maximum annual increase in rates that took effect on September 18, 2006 pursuant to the Zone was based on Young Brothers' 2006 test year. See In re Young Bros., Ltd., Transmittal No. 06-0002, Order No. 22836, filed on September 11, 2006; and Order No. 22856, filed on September 15, 2006. By contrast, Young Brothers' Application utilizes the 2007 test year.

With respect to the other concerns raised by the Consumer Advocate in its Protest, the commission finds that:

1. Upon review of the record at this preliminary stage of the proceeding, Young Brothers appears to have sufficiently met the requirements of HAR § 6-65-31(b),<sup>59</sup> and its current cost of service study is set forth in the exhibits referenced by Young Brothers.

2. The Consumer Advocate's remaining arguments go toward the weight and sufficiency of the evidence presented by Young Brothers thus far in its Application, which support the suspension and investigation of Young Brothers' Application, in lieu of outright denial.<sup>60</sup> Young Brothers, as part of the ratemaking process under HRS chapter 271G, has the burden of proving that its proposals are just and reasonable in a hearing held by the commission, in accordance with HRS §§ 271G-17(d) and 271G-23(a).

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<sup>59</sup>Young Brothers notes that while it previously submitted to the commission its allocated expense schedule for the calendar year 2005 on March 22, 2006, the schedule was not included as an exhibit to its Application. Young Brothers acknowledges this inadvertent omission, and on January 23, 2007, filed the schedule as a supplement to its Protest. See Young Brothers' letter, dated January 23, 2007, with enclosures.

<sup>60</sup>Specifically: (1) the Consumer Advocate's argument that Young Brothers has failed to meet the requisite burden of proof; and (2) the Consumer Advocate's concerns with respect to Young Brothers' proposal to implement a fuel adjustment surcharge.

B.

Suspension, Investigation, and Public Hearings

As Young Brothers' Application merits further review and scrutiny by the commission and the Consumer Advocate, the commission, consistent with HRS § 271G-17(d) and HAR § 6-65-40, will suspend Young Brothers' Application for a period of six months from the date of this Order,<sup>61</sup> and opens an investigation to examine the merits of Young Brothers' Application.

To allow interested persons the opportunity to comment on Young Brothers' requests, the commission will hold statewide public hearings on Young Brothers' Application in February 2007.<sup>62</sup> In addition, to ensure the firsthand dissemination of the applicable Notice of Public Hearing or Hearings to affected customers and shippers, and to provide them with the opportunity to submit written comments to the commission and attend the public hearing or hearings to express their views to the commission, the commission will direct Young Brothers to prominently post copies of the applicable Notice of Public Hearing or Hearings at its port locations statewide; and distribute copies of the applicable Notice of Public Hearing or Hearings to its customers and shippers at its port locations statewide, following its receipt of the forthcoming Notices of

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<sup>61</sup>See supra note 3.

<sup>62</sup>The commission will provide the Parties with the Notices of Public Hearings, scheduled for publication in The Garden Island, Hawaii Tribune-Herald, Honolulu Star-Bulletin, The Maui News, and West Hawaii Today.



Public Hearings from the commission up to the date of the applicable public hearings.<sup>63</sup> Young Brothers shall also submit to the commission, with copies served upon the Consumer Advocate, signed statements from each port manager or authorized representative, confirming compliance with the above-noted tasks.<sup>64</sup>

C.

Information Designated as Confidential

At this juncture of the investigation, one of the commission's concerns with Young Brothers' Application is the extent and scope of information designated as confidential by Young Brothers. It appears that Young Brothers has designated items that do not appear to be confidential as confidential without supporting bases.<sup>65</sup>

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<sup>63</sup>This action is consistent with the requirements imposed by the commission upon Young Brothers' in In re Young Bros., Ltd., Docket No. 2006-0120. See Docket No. 2006-0120, commission's letter, dated May 30, 2006.

<sup>64</sup>See id.

<sup>65</sup>Young Brothers, for example, designates as confidential the following items (which are by no means an exhaustive list): (1) the monetary amount of its requested overall increase in its revenues at present rates (YB-DT-100, at 12; and YB-DT-500, at 16); (2) the monetary amount of its capital investments, past and projected (YB's Application, at 22, 71, and 73; YB-DT-100, at 7 and 12; YB-EX-301, page 1; YB-DT-500, at 10 - 11; YB-DT-500, at 14 and 16; and YB-DT-700 at 7); (3) information on its barges and tugs, including purchase/construction price (YB's Application, at 23 - 24; YB-DT-300, at 3, 9, and 11; YB-EX-302; YB-EX-303; and YB-DT-500, at 10 - 11 and 14); (4) capacity information, including its intrastate capacity information (YB's Application, at 20 - 21, 26 - 29, and 49 - 50; YB-DT-100, at 7; YB-EX-102; YB-DT-200, at 17 - 18; YB-DT-500, at 12 - 13; YB-DT-700, at 6; YB-EX-702; and YB-EX-703); (5) the monetary amount of its operating revenues at present rates without rate relief (YB's

Paragraph 5 of Stipulated Protective Order No. 23146, filed on December 18, 2006, provides:

5. If a party designates information as confidential pursuant to paragraph 4 above or 6 below, it shall produce the confidential information in accordance with the procedures described in paragraphs 11 through 14 below, and concurrently provide certain information in writing to the Commission and the Consume Advocate. If a party seeks to designate information as confidential, it must: (1) identify, in reasonable detail, the information's source, character, and location, (2) state clearly the basis for the claim of confidentiality, and (3) describe, with particularity, the cognizable harm to the producing party from any misuse or unpermitted disclosure of the information. If the Commission or any party challenges the claim of confidentiality of the information, the party claiming confidentiality shall bear the burden of proof in supporting its claim of confidentiality, and the Commission will determine whether: (1) the information is confidential and subject to protection under this protective order or (2) the challenged information must be disclosed by the producing party. Any challenge to the confidentiality of any information shall be made in accordance with paragraph 24 below.

Stipulated Protective Order No. 23146, Paragraph 5, at 3 - 4 (emphasis added). Young Brothers has made no specific showing to support the designation of confidentiality, as required by Paragraph 5 of Stipulated Protective Order No. 23146.

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Application, at 65 - 67; YB-Ex-13; and YB-DT-500, at 5 - 6); (6) the monetary amount of its test year operating expenses, including tug and diesel expenses (YB's Application, at 68 - 70; YB-Ex-5, page 6; YB-Ex-7, page 8; YB-Ex-8, page 8; YB-Ex-9; YB-Ex-11, page 6; YB-DT-200, at 9; and YB-DT-500, at 8 - 10 and 16); (7) the monetary amount of its commission-approved average depreciated rate base from its 1997 test year rate case (YB's Application, at 70); (8) the monetary amount of its test year rate base (YB's Application, at 70 - 71; and YB-DT-500, at 14); and (9) information on the calculation of its rate of return (YB's Application, at 72; YB-DT-100, at 12; YB-DT-400, at 12 - 13; and YB-DT-500, at 16 - 17).

In addition, Young Brothers' designation of certain information as confidential is inconsistent and confusing.<sup>66</sup> Moreover, Young Brothers' designation of the results of operation amounts and related information and figures used in calculating these amounts, as confidential, will unduly impair and restrict the commission's ability to openly discuss such information in its written decision, thereby affecting the commission's ability to timely issue its written decision, including the test year results of operation schedule and the accompanying change in rates (if any).<sup>67</sup>

Accordingly, the commission instructs Young Brothers to file by February 5, 2007: (1) the detailed information required pursuant to Paragraph 5 of Stipulated Protective Order No. 23146, with respect to the information on each page designated as confidential, for the commission's review and disposition, or in the alternative; (2) new pages to its Application and exhibits

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<sup>66</sup>Young Brothers, for example, designates as confidential the following (which by no means is an exhaustive list): (1) YB-DT-100 at page 12, designates as confidential the monetary amount of Young Brothers' proposed overall increase in its revenues at present rates, yet this information is disclosed in YB's Application, at pages 4 and 73; (2) YB's Application, at page 66, designates as confidential the monetary amount of its operating revenues at present rates without rate relief, yet this information is disclosed in YB-Ex-7, page 4; (3) YB's Application, page 69, contains percentage information that differs from the percentage information in YB's Application, confidential page 69, and more importantly, confidential page 69 is labeled confidential, yet all of the information is fully disclosed in non-confidential page 69; and (4) YB's Application, confidential page 74, is labeled confidential, yet all of the information is fully disclosed in non-confidential page 74.

<sup>67</sup>The commission also notes that YB-DT-200, confidential page 7, was inadvertently not filed with the commission. Young Brothers shall promptly file this missing page with the commission, with copies served upon the Consumer Advocate.

that disclose the information previously designated as confidential by Young Brothers. Said filing shall also address and remedy the inconsistencies noted by the commission.

D.

Proposed Stipulated Prehearing Order

The Parties shall submit a stipulated prehearing order to the commission by February 16, 2007, for the commission's review and consideration. At a minimum, in order for the commission to reasonably meet the six-month deadline to issue its written decision, the stipulated prehearing order submitted by the Parties shall provide that the last pleading filed in this proceeding, i.e., the Parties' simultaneous post-hearing reply briefs or their settlement agreement on the merits (i.e., stipulation), shall be filed by June 15, 2007. The proposed stipulated prehearing order should also state that the Parties shall file the original and ten copies of all pleadings and documents filed with the commission, consistent with the commission's letter, dated December 19, 2006.

In addition, Young Brothers must remain cognizant of the Consumer Advocate's expressed concerns with the lack of time to sufficiently conduct and complete its discovery in this proceeding, and to formulate a sound recommendation with respect to the merits of Young Brothers' Application.<sup>68</sup> Young Brothers, in response to the Consumer Advocate's concerns, represents that

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<sup>68</sup> See Consumer Advocate's Protest, at 33, n.48.

it is "prepared to work cooperatively and expeditiously with the Consumer Advocate to address its concerns and questions, being mindful of the agency's workload within the relatively short timeframe of a water carrier's general rate proceeding under HRS § 271G-17(d)[.]"<sup>69</sup> Young Brothers, in developing the schedule of proceedings with the Consumer Advocate, shall adhere to its representation in this regard.

E.

Updated Information

Young Brothers shall promptly update its Application to reflect its November and December 2006 data, consistent with YB-DT-500, page 3, and Section VIII(B) of its Application.<sup>70</sup>

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<sup>69</sup>Young Brothers' Reply, at 13.

<sup>70</sup>YB-DT-500 states in relevant part:

In the exhibits attached to this Application, Young Brothers compares test year data to the comparable actual data for the 12-month period November 2005 to October 2006 (the "Comparison Year").

. . . . .

As Young Brothers compiles November and December 2006 financial data, YB will submit updated exhibits to the Commission and the Consumer Advocate.

YB-DT-500, at 3.

Furthermore, Section VIII(B) of Young Brothers' Application provides:

VIII. CONCLUSION

. . . . .

B. Alternatively, if a suspension and an evidentiary hearing are ordered by the Commission, allow YB to update financial information to reflect year-to-date results for

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. Young Brothers' Application, filed on December 15, 2006, is suspended for a maximum period of up to six months from the date of this Order, and an investigation is instituted to examine the merits of Young Brothers' Application. Any increase in rates approved by the commission in this proceeding (if any) shall take effect no earlier than September 18, 2007.

2. Following its receipt of the forthcoming Notices of Public Hearings from the commission, Young Brothers shall, up to the date of the applicable public hearings: (A) prominently post copies of the applicable Notice of Public Hearing or Hearings at its port locations statewide; and (B) distribute copies of the applicable Notice of Public Hearing or Hearings to its customers and shippers at its port locations statewide. Young Brothers shall also submit to the commission, with copies served upon the Consumer Advocate, signed statements from each port manager or authorized representative, confirming compliance with the above-noted tasks.

3. Young Brothers shall file by February 5, 2007: (A) the detailed information required pursuant to Paragraph 5 of Stipulated Protective Order No. 23146, filed on December 18, 2006, with respect to the information on each page designated as confidential, for the commission's review and disposition, or in

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the Comparison Year and Test Year 2007 and to base its rate increase on the projections revised accordingly.

Young Brothers' Application, Section VIII(B), at 83 - 84.

the alternative, (B) new pages to its Application and exhibits that disclose the information previously designated as confidential by Young Brothers. Said filing shall also address and remedy the inconsistencies noted by the commission. The Consumer Advocate may file a response to Young Brothers' filing by February 12, 2007.

4. The Parties shall submit a stipulated prehearing order to the commission by February 16, 2007, for the commission's review and consideration. At a minimum, the stipulated prehearing order submitted by the Parties shall provide that the last pleading filed in this proceeding, i.e., the Parties' simultaneous post-hearing reply briefs or their settlement agreement on the merits (i.e., stipulation), shall be filed by June 15, 2007.

5. Young Brothers shall promptly update its Application to reflect its November and December 2006 data.

6. Young Brothers shall conform to the commission's orders set forth in Paragraphs 2 to 5, above. The failure to adhere to the commission's orders may result in further regulatory action as authorized by law, including the rejection or dismissal of Young Brothers' Application, without prejudice.

DONE at Honolulu, Hawaii JAN 26 2007.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By John E. Cole  
John E. Cole, Commissioner

APPROVED AS TO FORM:

Michael Azama  
Michael Azama  
Commission Counsel

2006-0396susp.sl



CERTIFICATE OF SERVICE

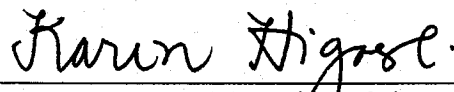
I hereby certify that I have this date served a copy of the foregoing Order No. 23222 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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\_\_\_\_\_  
Karen Higashi

DATED: JAN 26 2007