

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
YOUNG BROTHERS, LIMITED)
For Approval to Treat General)
Excise Tax Settlement Payment as)
Regulatory Asset and Include)
Unamortized Balance in Rate Base)

Docket No. 2008-0039

DECISION AND ORDER

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DEPT. OF COMMERCE AND
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STATE OF HAWAII

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_____)	

DECISION AND ORDER

By this Decision and Order, the commission grants YOUNG BROTHERS, LIMITED's ("YB") request for approval to treat a General Excise Tax ("GET") settlement payment as a regulatory asset to be amortized over a 5 ¾ year period, but denies YB's request to reflect the unamortized balance of the regulatory asset in rate base for rate setting purposes.

I.

Background

YB is a Hawaii corporation and an authorized common carrier by water under the Hawaii Water Carrier Act,¹ codified in HRS Chapter 271G. It is currently authorized by the commission to transport property by barge between the islands of Oahu, Hawaii, Kauai, Maui, Molokai, and Lanai in Hawaii.²

¹HRS § 271G-1 (1993).

²Application, at 2-3.

A.

Application

On February 21, 2008, YB submitted an Application³ seeking commission approval as follows:

[T]o treat as a regulatory asset those payments [YB] agreed to make to the State of Hawaii Department of Taxation (the Tax Department) in settlement of a dispute, in light of certain statutory exemptions, regarding the extent of [YB's GET] and use tax liability. [YB] also seeks [c]ommission approval to include in its rate base the unamortized balance of the proposed regulatory asset. This Application is made pursuant to sections 271G-7 and 271G-18 of [HRS] and sections 6-61-74 and 6-61-110 and subchapter 6, chapter 6-65, [HAR].

Application, at 1-2.

YB states that, prior to the fall of 2001, it paid public service company tax ("PSC tax") on its income, pursuant to chapter 239, HRS. The PSC tax was based on the income earned in the year prior, and therefore, was not necessarily proportional to the taxpayer's income or activities for the year in which the payment is made.⁴ Following the terrorist attacks on September 11, 2001, the Twenty-First Legislature, during the Third Special Session of 2001, enacted S.B. No. 6, (signed into

³Application of Young Brothers, Limited for Approval to Treat General Excise Tax Settlement Payment as Regulatory Asset and Include Unamortized Balance in Rate Base; Exhibits YB-EX-1 through YB-EX-4; Verification; Certificate of Service; and confidential material filed on February 21, 2008, (collectively, "Application").

YB served copies of the Application on the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party to this proceeding, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

⁴Application, at 3.

law as Act 9), amending chapter 239, HRS, to subject transportation service providers, such as YB, to the GET in lieu of the PSC tax.⁵ YB states:

Under declining economic conditions, the [GET] is considered favorable to transportation service providers because the tax is based on actual income in the current tax period, in contrast to the PSC tax, which is based on a prior year's gross income.

Application, at 4.

YB collected GET from its customers for the months of October, November, and December 2001.⁶ It paid to the Tax Department the amount collected in October 2001 but withheld payment of the amounts collected in November and December 2001.⁷ Subsequently, based on the advice of tax experts, YB treated its cargo services as exempt from the GET and ceased charging its customers the tax for that service.⁸ YB sought and received from the Tax Department a refund of the GET paid for the month of October 2001 and placed the refund, as well as the amounts collected in November and December 2001 in a separate account.⁹

In 2003, the Tax Department undertook a GET audit of YB which spanned several years. By letter dated September 9, 2003, the Tax Department proposed to disallow, in full, the GET exemption claimed by YB.¹⁰ In June 2007, YB and

⁵Application, at 4.

⁶Response to CA-IR-4, at 1-2.

⁷Response to CA-IR-4, at 1-2.

⁸Application, at 5.

⁹Response to CA-IR-4, at 1-2.

¹⁰Application, at 5-6.

the Tax Department agreed upon a settlement which was memorialized in two closing agreements ("Closing Agreements").¹¹ On July 1, 2007, YB commenced collecting GET from its customers at the rate provided under the Closing Agreements.¹²

YB seeks commission approval to treat the settlement payments as a regulatory asset and to include in its base rate the unamortized balance of the proposed regulatory asset.¹³

YB states:

During 2002 to 2007 when [YB] refrained from collecting any [GET], its customers in essence enjoyed a holiday from these assessments (until July 2007). Had [YB] continued collecting the taxes during that period, [YB] would in effect have suffered no financial detriment because of the pass-through nature of the assessment—that is, the taxes would have been collected from customers then paid to the Tax Department. Similarly, by not collecting [GET] from its customers during this period, [YB] did not achieve and did not intend to achieve any financial benefit for itself.

. . . .

Without regulatory asset treatment of the amount involved in its settlement with the Tax Department, [YB] will have no recovery recourse for a one-time expense it could have avoided by continuing to collect taxes from its customers, and will in effect be punished for pursuing a course of action that ultimately proved beneficial to its customers.

Application, at 15-16.

¹¹Application, at 6.

¹²Application, at 8.

¹³Application, at 9.

YB also seeks inclusion in rate base that portion of the proposed regulatory asset that is unamortized throughout the 5 ¾ year period (representing the interval from October 2001 to June 2007).¹⁴

B.

Consumer Advocate's Statement of Position

On September 29, 2008, the Consumer Advocate filed its Statement of Position, in which it stated that it does not object to YB's request to treat the net settlement amount¹⁵ as a regulatory asset, but does object to including the unamortized balance in rate base.

The Consumer Advocate acknowledges that:

YB's actions were intended to benefit customers by reducing the rate charged for cargo handling services. As a result, the Consumer Advocate believes that [YB] should not be harmed as a result of the settlement [The] Consumer Advocate's primary recommendation is for the [c]ommission to allow YB to establish a regulatory asset [of the net settlement amount] and amortize the amount over a period of time. The amortization should commence in the next rate adjustment filing (i.e., general or zone rate filing) and be recognized in determining the revenue requirements for that filing. This will enable YB to recover the amount of [GET] that would have been collected from customers if YB had not taken the exemptions.

Statement of Position, at 5-6.

¹⁴Application, at 16.

¹⁵The net settlement amount is the full settlement, reduced by the amount already collected from customers between October and December 2001.

However, the Consumer Advocate objects to authorizing YB to record the amount to be recognized in rate base when determining rates.¹⁶ The Consumer Advocate notes:

Since the regulatory asset is not used or useful in the provision of YB's intra-island transportation services, allowing rate base treatment would put an unfair burden on ratepayers. Moreover, the settlement represents a cost, which, in the normal course of business is expensed, not capitalized. Thus, while the Consumer Advocate will not oppose some amount of the settlement being reflected as a regulatory asset, the Consumer Advocate opposes any amount being allowed rate base treatment.

Statement of Position, at 6.

With regard to ratemaking treatment, the Consumer Advocate notes that YB's Application "did not intend to trigger any immediate modifications or adjustments to its existing rates. Rather, YB proposed to reflect the [c]ommission's finding on YB's instant request in [YB's] next general rate case or zone-of-reasonableness decision. This appears reasonable."¹⁷

The Consumer Advocate concludes:

Based upon the above, the Consumer Advocate hereby states that it:

1. Does not object to YB's request for [c]ommission authorization to record a regulatory asset for the net settlement amount, to be recovered from [YB's] intrastate customers through rates over a period of 5 $\frac{3}{4}$ years, commencing with [YB's] next rate adjustment filing; and

¹⁶Statement of Position, at 6.

¹⁷Statement of Position, at 7 (quotations marks omitted).

2. Objects to YB's request to reflect the unamortized balance of the regulatory asset in rate base for rate setting purposes.

Statement of Position, at 7.

C.

YB's Response

On October 7, 2008, YB submitted a reply to the Statement of Position. With regard to the Consumer Advocate's objection to YB's request to reflect the unamortized balance of the regulatory asset in rate base for rate setting purposes, YB points out that "in its Application at page 17, without inclusion in rate base, the settlement sum involved would represent capital otherwise unavailable to [YB] and its shareholder for investment purposes. And that sum would have been available for investment purposes, had Young Brothers continued to collect GET from its customers during 2002 to early 2007, the period covering its dispute with the [Department of Tax]." ¹⁸

II.

Discussion

YB requests that the commission treat the GET settlement payment as a regulatory asset to be amortized over a 5 ¾ year period (the interval between October 2001 and June 2007

¹⁸Reply of Young Brothers, Limited to Division of Consumer Advocacy's Statement of Position, filed on October 7, 2008, at 2.

when YB should have been paying GET on its cargo service revenues). The commission acknowledges that the GET is a pass through tax, thus by deciding to refrain from collecting monies for GET from customers during the period from October 2001 and June 2007, YB did not obtain any financial benefit for itself. In other words, YB's actions benefited its customers by reducing ratepayer expenses, while YB gained no financial benefit due to the GET being a pass through tax. The commission concludes that by taking the aggressive stance with regard to the GET exemption and settlement, YB benefited its customers substantially. Therefore, the commission agrees with the Consumer Advocate that "[YB] should not be harmed as a result of the settlement that required YB to pay [] back taxes to [the Tax Department]."¹⁹

The commission also recognizes that with tax disputes, significant changes on a tax authority position may only be realized a number of years later; too late to initiate a rate change to correct for the change in circumstances in a timely manner. This may lead to a higher degree of risk faced by the utility, especially if the utility takes an aggressive posture in interpreting tax laws; a posture which may lead to decreased costs for ratepayers. Thus, in order to circumvent any action which would discourage any utility from taking an aggressive stance when it benefits ratepayers, the commission finds the Consumer Advocate's recommendation to allow YB to establish a regulatory asset of the net settlement amount and amortize the amount over 5 $\frac{3}{4}$ years (representing the interval

¹⁹Statement of Position, at 5.

from October 2001 through June 2007), commencing in the next rate adjustment filing, is reasonable.

With regard to YB's request to reflect the unamortized balance of the regulatory asset in rate base for rate setting purposes, the commission notes that there are two general tests commonly applied by regulatory commissions in determining the propriety of including specific items in rate base, which are: (1) the used and useful concept; and (2) the prudent investment concept.²⁰ As noted by the Consumer Advocate, since the regulatory asset is "not used or useful in the provision of YB's intra-island transportation services, allowing rate base treatment would put an unfair burden on ratepayers."²¹ Moreover, the settlement represents a cost, which, in the normal course of business is expensed, not capitalized. The second test, the prudent investment concept, is not applicable here.

In sum, based on the specific facts and circumstances presented here, the commission grants YB's request to record the net settlement amount as a regulatory asset and recover it from intrastate customers through rates over a period of 5 ¾ years and denies YB's request to reflect the unamortized balance of the regulatory asset in rate base for rate setting purposes.

²⁰ROBERT L. HAHNE AND GREGORY E. ALIFF, MATTHEW BENDER & COMPANY, INC.'S ACCOUNTING FOR PUBLIC UTILITIES § 4.03 (2005).

²¹Statement of Position, at 6.

III.

Orders

THE COMMISSION ORDERS:

1. YB's request to record the net GET settlement payment as a regulatory asset and recover it from intrastate customers through rates over a period of 5 ¼ years, commencing with YB's next rate adjustment filing is approved.

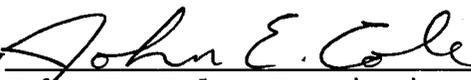
2. YB's request to reflect the unamortized balance of the regulatory asset in rate base for rate setting purposes is denied.

3. This docket is closed.

DONE at Honolulu, Hawaii DEC 10 2008.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

By 
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


Jodi L.K. Vi
Commission Counsel

2008-0039.laa

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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