

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
YOUNG BROTHERS, LLC) TRANSMITTAL NO. 20-0003
For Approval of Emergency Changes)
to its Sailing Schedule.)
_____)

ORDER NO. 37262

ADDRESSING CONFIDENTIAL REDACTIONS IN YOUNG BROTHERS, LLC'S
AUGUST 5, 2020 TRANSMITTAL NO. 20-0003 FILING

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
) TRANSMITTAL NO. 20-0003
YOUNG BROTHERS, LLC)
) ORDER NO. **37262**
For Approval of Emergency Changes)
to its Sailing Schedule.)
_____)

ADDRESSING CONFIDENTIAL REDACTIONS IN YOUNG BROTHERS, LLC'S
AUGUST 5, 2020 TRANSMITTAL NO. 20-0003 FILING

By this Order, the Public Utilities Commission ("Commission") directs YOUNG BROTHERS, LLC ("Young Brothers" or "YB"), to re-file by August 10, 2020, an unredacted version of its August 5, 2020 "Request for Further Extension of Adjusted Sailing Schedule; Potential Alternative Sailing Schedules,"¹ for the reasons set forth herein.

¹Tariff Transmittal No. 20-0003, for Approval of Emergency Changes to its Sailing Schedule - Request for Further Extension of Adjusted Sailing Schedule; Potential Alternative Sailing Schedules ("Transmittal No. 20-0003 August 5 Modification Request"); Attachment A (Confidential Information Log); Attachment B (narrative description of the 3 YB-proposed alternative sailing schedule scenarios, filed with redactions); Attachment 1a (summary of financial schedules, rate base schedules, net operating income schedules, and other supporting schedules associated with Alternative Scenario 1); Attachment 1b (rate design proposal associated with Alternative Scenario 1); Attachment 2a (summary of financial schedules, rate base schedules, net operating income schedules, and other supporting schedules associated with Alternative Scenario 2, redacted in its entirety); Attachment 2b (rate design proposal associated with Alternative Scenario 2, redacted in its entirety); Attachment 3a

I.

BACKGROUND

A.

Procedural History

On April 24, 2020, YB filed Transmittal No. 20-0003² as a short-notice Transmittal pursuant to Hawaii Administrative Rules ("HAR") §§ 16-601-111 and -112 and §§ 16-605-5, -30, -40, and -41, seeking Commission authority to modify its Commission-approved sailing schedule, as follows:

1. Sailings between Honolulu and Kahului will be reduced from three sailings to two, where the Wednesday/Thursday (from Honolulu to Kahului) and Thursday/Friday (from Kahului to Honolulu) sailings will be eliminated.
2. Sailings between Honolulu and Hilo will be reduced from two sailings to one, where the Saturday/Monday

(summary of financial schedules, rate base schedules, net operating income schedules, and other supporting schedules associated with Alternative Scenario 3, redacted in its entirety); and Attachment 3b (rate design proposal associated with Alternative Scenario 3, redacted in its entirety)," filed on August 5, 2020 (collectively, the attachments to the Transmittal No. 20-0003 August 5 Modification Request are referred to as the "Potential Alternative Sailing Schedules").

YB's Tariff Transmittal No. 20-0003 and related extension and modification requests and relevant public comments that have been filed regarding the Transmittal are available at: <https://puc.hawaii.gov/main/yb-tariff-transmittal-no-20-0003-for-approval-of-emergency-changes-to-its-sailing-schedule/>.

²Transmittal No. 20-003; Exhibit 1; Verification; and Certificate of Service, filed April 24, 2020 ("Transmittal No. 20-0003"), available at: <https://puc.hawaii.gov/wp-content/uploads/2020/04/Young-Brothers.Trans-No.-20-0003.pdf>.

(from Honolulu to Hilo) and Monday/Wednesday (from Hilo to Honolulu) sailings will be eliminated.

3. Sailings between Honolulu and Kaunakakai will be reduced from two sailings to one as well as modifying the days of departures and arrivals, where the Sunday/Monday and Tuesday/Thursday (from Honolulu to Kaunakakai) and Monday/Tuesday and Wednesday/Thursday (from Kaunakakai to Honolulu) sailings will be eliminated and replaced with Saturday/Sunday (from Honolulu to Kaunakakai) and Sunday/Monday (from Kaunakakai to Honolulu) sailings.
4. Sailings between Honolulu and Kaumalapau will be modified by changing the one sailing from a Tuesday/Wednesday (Honolulu to Kaumalapau) and Wednesday/Thursday (Kaumalapau to Honolulu) to Saturday/Sunday (Honolulu to Kaumalapau) and Sunday/Sunday (Kaumalapau to Honolulu) sailings.

YB requested an effective date of May 5, 2020, for the changes to its sailing schedule.

In Order No. 37128, filed on May 4, 2020, the Commission temporarily and conditionally approved Young Brothers' emergency request to change its sailing schedule as set forth in Transmittal No. 20-0003 for a 30-day period.³ During that 30-day period, the Commission required YB to provide additional information to the Commission based on questions raised by the Consumer Advocate, which included updates on YB's financial condition and actions it is taking to minimize impacts on Neighbor Island customers.

³Order No. 37128, "Approval of Young Brothers' Temporary, Emergency Changes to its Sailing Schedule," filed on May 4, 2020 ("Order No. 37128"), available at: [https://puc.hawaii.gov/wp-content/uploads/2020/05/TRANSMITTAL-NO.-20-0003.YB .pdf](https://puc.hawaii.gov/wp-content/uploads/2020/05/TRANSMITTAL-NO.-20-0003.YB.pdf).

On May 22, 2020, YB submitted a report providing the Commission with information about its financial condition pursuant to Order No. 37128.⁴

On May 28, 2020 YB filed its request to extend the sailing schedule temporarily approved in Order No. 37128, for a ninety (90) day period, stating that "the continuation of the adjusted sailing schedule is critical and necessary to help mitigate against the impending cash shortfall and the severe losses that Young Brothers is projected to suffer through at least 2020."⁵

However, on June 3, 2020, YB filed a separate request seeking approval of new sailing schedule adjustments which would (1) change the date of its sailing between Honolulu and Hilo from a Tuesday departure from Honolulu, to a Saturday departure

⁴"YB Report Pursuant to Order No. 37128," filed on May 22, 2020. Previously, YB had also submitted a "Response to COVID-19 Financial and Procedural Update Request," on May 5, 2020, in Docket No. 2019-0117, which also provided the Commission with information regarding its financial condition.

⁵Transmittal No. 20-0003, for Approval of Emergency Changes to its Sailing Schedule - Request for Extension of Adjusted Sailing Schedule," filed on May 28, 2020 ("Transmittal No. 20-0003 May 28 Extension Request") at 2. available at: <https://puc.hawaii.gov/wp-content/uploads/2020/04/Transmittal-No.-20-0003.Young-Brothers-LLC.2020-05-28.pdf>.

Separately, on June 2, 2020, the Commission filed Order No. 37161 in Docket No. 2020-0084, instituting an investigation into YB's current financial condition, including to address its current access to funding and contingency plans in light of its dire financial situation.

from Honolulu, such that the barge arrives in Hilo on Monday, (2) add a second weekly sailing to Kaunakakai, and (3) change its arrival in Kaumalapau to Wednesday (instead of Sunday).⁶

On June 3, 2020, the Commission issued Order No. 37166,⁷ approving:

(1) An extension through June 11, 2020, of YB's sailing schedule changes originally set forth in Transmittal No. 20-0003, filed on April 24, 2020, and approved in Order No. 37128;

(2) A 30-day extension effective June 12, 2020,⁸ of the sailing schedule changes originally set forth in Transmittal No. 20-0003 regarding the sailing schedule from Honolulu to Kahului, Maui, which eliminated the Wednesday sailing out of

⁶See Transmittal No. 20-0003, Young Brothers, LLC, for Approval of Emergency Changes to its Sailing Schedule - Modification to Adjusted Sailing Schedule," filed on June 3, 2020, requesting modifications to its sailing schedule change extension request, filed on May 28, 2020 ("Transmittal No. 20-0003 June 3 Modification Request"), at 1-3, available at: <https://puc.hawaii.gov/wp-content/uploads/2020/04/Transmittal-No.-20-0003.Young-Brothers-LLC-for-Approval-of-Emergency-Changes-to-its-Sailing-Schedule-Modification-to-Adjusted-Sailing-Schedule.2020-06-03.pdf>.

⁷Order No. 37166, "Approving a Brief Extension and Adjustments to Young Brothers' Temporary, Emergency Changes to its Sailing Schedule," filed June 3, 2020 ("Order No. 37166"), available at: <https://puc.hawaii.gov/wp-content/uploads/2020/04/Transmittal-No.-20-0003.Order-No.-37166-6-3-2020.pdf>.

⁸To align the expiration of this sailing schedule change with the others discussed in 3), below.

Honolulu (reducing three weekly sailings from Honolulu to Kahului down to two weekly sailings), and resulted in the following:

- Monday afternoon departure from Honolulu, and a Tuesday morning arrival in Kahului; and
- Thursday afternoon departure from Honolulu, and a Friday morning arrival in Kahului;⁹ and

(3) YB's requested new sailing schedule adjustments, set forth in its Transmittal No. 20-0003 June 3 Modification Request, for 30 days, effective June 12, 2020, which (a) change YB's sailing between Honolulu and Hilo from a Tuesday departure from Honolulu, to a Saturday departure from Honolulu, such that the barge will arrive in Hilo on Monday, (b) add a second weekly sailing to Kaunakakai, and (c) change YB's barge arrival in Kaunalapau to Wednesday (instead of Sunday).¹⁰

On June 29, 2020, YB filed its Cost Savings Report pursuant to Order No. 37166, detailing the costs associated with the sailing schedule changes approved in that Order.¹¹

On July 6, 2020, YB filed a letter with the Commission requesting that the Commission approve YB's "request to extend the

⁹See Tariff Transmittal No. 20-0003 at 7.

¹⁰See Transmittal No. 20-0003 June 3 Modification Request.

¹¹YB "Tariff Transmittal No. 20-0003 - Application of Young Brothers, LLC for Approval of Emergency Changes to its Sailing Schedule - Filing of Cost Savings Report," filed on June 29, 2020 ("Cost Savings Report"), available at: <https://puc.hawaii.gov/wp-content/uploads/2020/08/YB.Transmittal-No.-20-0003.Filing-of-Cost-Savings-Report-6-29-2020.pdf>.

currently approved adjusted sailing schedule (currently set to expire on July 12, 2020) for at least 90 days.”¹²

On July 7, 2020, YB filed a Motion for Leave and Emergency Rate Relief in Docket No. 2019-0117.¹³ In support of its Motion for Relief, YB stated that its primary reasons for its intrastate operating losses reported in 2019 through 2020 to date are attributable to a decline in intrastate cargo volumes and higher operating expenses (primarily due to increase in labor and labor-related costs).¹⁴ The Commission has scheduled an

¹²Tariff Transmittal No. 20-0003 - Application of Young Brothers, LLC for Approval of Emergency Changes to its Sailing Schedule - Request for Further Extension of Adjusted Sailing Schedule,” filed on July 6, 2020, at 1 (“Transmittal No. 20-0003 July 6 Extension Request”), available at: <https://puc.hawaii.gov/wp-content/uploads/2020/04/Letter-to-PUC-re-YB-Request-for-Ext-of-Adj-Sailing-Sch.pdf>. The “currently approved” sailing schedule YB refers to in its Transmittal No. 20-0003 July 6 Extension Request is as set forth in Order No. 37166.

While YB’s Transmittal No. 20-0003 July 6 Extension Request is dated “July 2, 2020,” due to YB’s late submission of this filing after Commission operating hours, it was not processed and filed until the next business day, Monday, July 6, 2020 (Friday, July 3, 2020, was a state and federal holiday, in recognition of Independence Day on Saturday, July 4, 2020).

¹³Docket No. 2019-0117, “Young Brother, LLC’s Motion for Leave and for Emergency or Temporary Rate Relief; Memorandum in Support of Motion; Exhibits A-B; Declaration of Jeremiah Ana; Declaration of Christopher Edwards; and Certificate of Service,” filed July 7, 2020 (“Motion for Relief”).

¹⁴Motion for Relief at 20.

evidentiary hearing on YB's Motion for Relief for August 14, 2020 in Docket No. 2019-0117.¹⁵

The Commission issued an information request to YB on July 8, 2020,¹⁶ inquiring about any safety measures that YB has taken since its Hilo Barge Incident.¹⁷

On July 10, 2020, the Commission issued non-docketed Order No. 37211, approving a conditional extension of Young Brothers' adjusted sailing schedule until August 17, 2020, which, in recognition of the ongoing impact of Young Brothers' adjusted sailing schedule on its customers and the public, emphasized the importance of YB exploring all opportunities to continue uninterrupted cargo service to the islands of the State.¹⁸

¹⁵See Docket No. 2019-0117, "Notice of Evidentiary Hearing," filed on July 30, 2020. Because of the interconnectedness of YB's sailing schedule with its request for emergency rate relief, the Commission anticipates that information about the sailing schedules will be raised at the evidentiary hearing.

¹⁶See Commission's PUC-YB-IR-101, filed on July 8, 2020, available at: https://puc.hawaii.gov/wpcontent/uploads/2020/04/TransmittalNo.20-0003_FINALPUC-IR-101_7-8-2020_ci.pdf.

¹⁷See Docket No. 2020-0084, Young Brothers, LLC's Updates Regarding the Hilo Barge Incident, dated June 29, 2020.

¹⁸Order No. 37211, "Approving a Conditional Extension of Young Brothers' Adjusted Sailing Schedule," filed on July 10, 2020 ("Order No. 37211"), available at: <https://puc.hawaii.gov/wp-content/uploads/2020/04/Transmittal-No.-20-0003-Order-No.-37211.pdf>. In conjunction with its Motion for Relief, the Commission directed YB to include in its rate design proposal a robust analysis of alternatives to the current adjusted sailing schedule that would seek to address YB's cost concerns but also move towards restoration of the pre-COVID sailing schedule for the

On August 5, 2020, Young Brothers filed its Transmittal No. 20-0003 August 5 Modification Request, although much of the Potential Alternative Sailing Schedule documents were redacted and filed under confidential seal.

B.

Redactions in YB's Potential Alternative Sailing Schedules

As noted above, large portions of YB's Potential Alternative Sailing Schedules were filed under confidential seal on August 5, 2020. YB's Potential Alternative Sailing Schedules identify the following three alternatives:¹⁹

- **Alternative Scenario 1** - "Maintain the currently approved adjusted sailing schedule indefinitely or until such time that cargo tonnage volumes justify resuming the pre-COVID sailing schedule";
- **Alternative 2** - Redacted; and
- **Alternative 3** - Redacted.

Citing to "the difficulty it has had in balancing the dual objectives of addressing YB's cost concerns, but also moving towards a restoration of the pre-COVID sailing schedule[,]"

benefit of customers, as discussed above. The deadline for that rate design proposal will be addressed outside of the instant Order in conjunction with YB's Motion for Relief.

¹⁹Potential Alternative Sailing Schedules, Attachment B.

YB ultimately requests that the current adjusted sailing schedule "be extended through December 31, 2020 or until it has been determined that cargo volumes are increasing on a normal, recurring basis, and will generate sufficient revenues to offset the fixed operating expenses burden of adding another sailing to the affected ports over an extended period."²⁰

II.

DISCUSSION

A.

Legal Standard

In Transmittal No. 20-0003, Young Brothers cited HAR §§ 16-601-111 and -112 and §§ 16-605-5, -30, -40, and -41 as the relevant authority for the Commission's review of its requested relief. In Order No. 37128, the Commission found that it had the authority to grant the requested relief in an expedited manner, pursuant to Hawaii Revised Statutes ("HRS") § 271G-17(b), which states that "[t]he [C]ommission may in its discretion and for good cause shown allow [a tariff] 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

²⁰Transmittal No. 20-0003 August 5 Modification Request at 2- 3.

instances or by general order applicable to special or peculiar circumstances or conditions.” HAR § 16-605-41(a) further states:

Short notice tariff filing. (a) The commission may grant a request for a change or addition to tariffs on less than forty-five days' notice if it finds that an emergency exists and the applicant carrier has proven that any delay in implementing the change or addition will result in substantial damage to the carrier or its shipper. The carrier shall include in its application a full statement of the need for implementing the change or addition on less than forty-five days' notice.

HRS Chapter 92F, the Uniform Information Practices Act (“UIPA”), provides that “All government records are open to public inspection unless access is restricted or closed by law.”²¹ While there are exceptions to public disclosure, these are limited under the UIPA.²² In pertinent part, HRS § 92F-13(3) provides an exception for “[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate function[.]”

The Office of Information Practices (“OIP”), which administers the UIPA, explains:²³

²¹HRS § 92F-11(a).

²²See HRS § 92F-13. See also, *id.* at § 92F-11(b).

²³OIP, Open Records Guide to Hawaii's Uniform Information Practices Act, June 2015, at 20-21; see also, Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 388-89, 846 P.2d 882, 892 (1993) (stating that “examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function” include “[t]rade secrets or confidential commercial and financial information.”).

Exception 3 - The Frustration Exception

(HRS § 92F-13(3))

An agency may withhold access to records that, by their nature, must be confidential in order for the agency to avoid frustration of a legitimate government function. To withhold a record under this exception, an agency must identify a legitimate government function of the agency and show how disclosure of the record would frustrate the agency's ability to perform that function. Examples of records that might be included under this exception are:

. . . .

(6) **Confidential business information**, which includes trade secrets or confidential commercial and financial information where there is a likelihood of substantial competitive harm. For example, information may be withheld if disclosure would allow competitors to selectively underprice, estimate profit margins or determine market and supply weaknesses.

The OIP has established a three-part test for determining whether information may be withheld under HRS § 92F-13(3): "[F]or information to be exempt from disclosure under the confidential commercial and financial information exemption of the UIPA, it must meet the definitions of 'confidential' . . . and 'commercial or financial,' and then disclosure must frustrate a legitimate government function[.]"²⁴

²⁴OIP Op. Ltr. No. 98-2 (April 24, 1998), at 8. The OIP specifically notes that the UIPA's requirements exceed that of its federal counterpart, the Freedom of Information Act ("FOIA"). Id. at 10 ("Note that under FOIA, once commercial or financial information is found to be confidential or privileged, the agency is not required to disclose it. Under the UIPA, however, Hawaii state and county agencies must go one additional step and show that this confidential commercial or financial information, if disclosed, would also frustrate an agency's legitimate government function.") (citations omitted).

However:

[A] record does not automatically fall within the exception whenever a government agency or private party asserts that the record is confidential commercial or financial information, disclosure of which would frustrate a legitimate government function. Rather, an agency or other person seeking to keep the record confidential must provide facts to establish that the record meets the definitions of "confidential" and "commercial or financial," and that the record's disclosure would in fact frustrate a legitimate government function.²⁵

In this regard, "[a] determination of whether information qualifies as 'confidential commercial or financial information' under these tests is fact-intensive, and the conclusion varies from one factual situation to another."²⁶ Likewise, "[d]etermination of whether disclosure of information would result in the frustration of a legitimate government function involves a similarly factual inquiry."²⁷

"[C]ommercial and financial information is 'confidential' if its disclosure would likely: (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position

²⁵OIP Op. Ltr. No. 01-02 (April 12, 2001), at 4.

²⁶OIP Op. Ltr. No. 01-02 at 5.

²⁷OIP Op. Ltr. No. 01-02 at 5.

of the person from whom the information was obtained."²⁸
In addition to these two factors, the OIP has adopted a third consideration: "withholding the information to protect a governmental interest in administrative effectiveness."²⁹

When financial information is "required to be provided by the government, . . . 'there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future.'"³⁰ However, "where it can be established that, although a law requires submittal of information to an agency, the information submitted may be unreliable, or the agency may be unable to compel disclosure in a timely manner,

²⁸OIP Op. Ltr. No. 97-4 (April 22, 1997), at 5 (citing Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974)).

²⁹OIP Op. Ltr. No. 02-07 (August 26, 2002), at 16-17 (citing Judicial Watch, Inc. v. Export-Import Bank, 108 F.Supp.2d 19, 28-29 (D.C. Cir. 2000)). The Judicial Watch court described this factor as "withholding the information to protect a governmental interest in administrative efficiency and effectiveness;" however, the OIP elected to remove the word "efficiency" when it adopted this consideration. Id. at 17 ("The OIP adopts the federal test for administrative effectiveness as appropriate for an agency's invocation of the Frustration Exception. The OIP declines to include the term 'efficiency' at this time, however, as the phrase 'administrative efficiency' may be overbroad and may encourage invoking of the Frustration Exception in inappropriate situations.").

³⁰OIP Op. Ltr. No. 02-07 at 12 (citing Nat'l Parks, 498 F.2d at 770).

the presumption that the Frustration Exception is inapplicable may be rebutted.”³¹

In determining whether disclosure is likely to cause substantial competitive harm, the OIP has instructed:³²

[A]lthough conclusory and generalized allegations of competitive harm are insufficient to prove the likelihood of substantial competitive harm, neither must there be proof of actual competitive harm. Substantial competitive harm is present when (1) the submitter faces actual competition, and (2) there is a likelihood of substantial competitive harm.

Additionally, “[m]undane information about a business, or information that is publicly available, is not considered confidential commercial or financial information.”³³ “Similarly, citations to UIPA case law or OIP opinions that recognize and discuss in general terms the concept of confidential commercial or financial information and the competitive harm standard are not

³¹OIP Op. Ltr. No. 02-07 at 13. However, the OIP “does not condone nor support the [submitter’s] violation of legal mandates to submit [information] unless the [agency] deems the record confidential[,]” and states that “[i]t would be absurd to conclude that the UIPA and other public record laws such as FOIA were meant to encourage such law violations in order to keep information from the public.” Id. at 15.

³²OIP Op. Ltr. No. 04-12 (July 9, 2004), at 6 (citing OIP Op. Ltr. No. 02-07); see also, OIP Op. Ltr. No. F17-02 at 8 (“As a general rule, determining whether a UIPA exception to disclosure applies requires factual findings as to what type of information is being withheld, which cannot be based on mere conclusory assertions.”); GC Micro Corporation v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994).

³³OIP Op. Ltr. No. F17-02 at 8-9 (citing OIP Op. Ltr. No. 92-17 (September 2, 1992)), at 12-13).

adequate to establish that specific information factually qualifies under that standard.”³⁴ Rather, the party asserting this UIPA exception “needs to provide specific and direct evidence of the potential for competitive harm in order to provide a basis for ‘beneficial scrutiny’ of its allegations.”³⁵

In addition, the “[c]ompetitive harm analysis is limited to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive positions.”³⁶ The OIP instructs that “[i]mportantly, however, where a commercial information submitter does not face any competition in the first place - for example where a contract is not awarded competitively, but rather is awarded to a single company - the threshold requirement for the ‘competitive harm prong’ protection of the information is lacking

³⁴OIP Op. Ltr. No. F17-02 at 9.

³⁵OIP Op. Ltr. No. F-17-02 at 9.

³⁶Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1195 (9th Cir. 2011) (quotation marks and ellipses omitted; emphasis in original); Pub. Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (“Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from . . . embarrassing publicity[.]”).

and the information cannot be withheld under a competitive harm theory.”³⁷

Submission, and redaction, of YB’s confidential information in Transmittal No. 20-0003 is subject to Protective Order No. 37219, which governs YB’s non-docketed filings through the calendar year ending December 31, 2021.³⁸ Protective Order No. 37219 expressly states that it is governed by the UIPA and “[i]n the event any provision of this Protective Order conflicts with any provision of the UIPA, the UIPA shall control.”³⁹

Pursuant to Protective Order No. 37219:

5. If [YB] seeks to designate information, whether written, oral, electronic, or in some other form, as confidential information, it shall notify the Commission and the Consumer Advocate that the information includes confidential information. [YB] 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 [YB] from any misuses or unpermitted disclosure of the information.⁴⁰

³⁷OIP Op. Ltr. No. 92-17 at 12 (citing Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988)).

³⁸Protective Order No. 37219, filed July 15, 2020 (non-docketed).

³⁹Protective Order No. 37219 at 6.

⁴⁰Protective Order No. 37219 at 7.

B.

YB Fails To Justify Its Redactions To Its
Potential Alternative Sailing Schedules

Turning to YB's Transmittal No. 20-0003 August 5 Modification Request, the Commission finds that YB has not sufficiently justified the redactions to its Potential Alternative Sailing Schedules.

First, the Commission observes that Attachment A to YB's Transmittal No. 20-0003 August 5 Modification Request, the Confidential Information Log, does not provide sufficient information as contemplated by Protective Order No. 37219 or HRS § 92F-13(3) (as elaborated by the OIP). Both the basis for confidentiality and the alleged cognizable harm arising from public disclosure are asserted in generalized terms that are inconsistent with the OIP's guidance that "conclusory and generalized allegations" are insufficient to prove the likelihood of competitive harm. In essence, it is unclear from Attachment A how public disclosure of the Proposed Alternative Sailing Schedules will result in cognizable harm to YB and what that actual harm to YB may be.

Second, as stated by the OIP, the "competitive harm analysis" is intended to address potential harm flowing from the use of proprietary information from actual competitors. As YB is the sole provider of intrastate water carrier services,

this severely dilutes any argument based on competitive harm. For example, it is unclear what harm could arise from an "unfair advantage" to "competitors" or "potential competitors" when YB does not have any actual competitors for intrastate water carrier services in Hawaii.⁴¹

Third, YB makes assertions that public disclosure may affect its future collective bargaining agreements and related negotiations.⁴² However, it is unclear from Attachment A how publicly redacting two of the three sailing alternatives (in their entirety) will prevent cognizable harm to YB related to its future collective bargaining efforts (or, stated differently, how public disclosure of the alternative sailing schedules would significantly harm YB's future collective bargaining efforts). The Potential Alternative Sailing Schedules are being placed before the Commission for consideration.⁴³ If the Commission were to ultimately approve one of the two redacted alternative sailing

⁴¹See Young Brothers' homepage, "Company Overview," available at: <https://htbyb.com/company-overview/> ("We are the only regularly scheduled common carrier authorized by the State of Hawaii to transport your goods over water from one island to another.")

⁴²See Transmittal No. 20-0003 August 5 Modification Request, Attachment A.

⁴³The Commission presumes that YB would not have proposed all three of the alternative sailing schedules if YB did not intend for the Commission to consider them.

schedules, it would then become public and, presumably, have a similar impact on YB's future collective bargaining efforts.⁴⁴

Fourth, upon review of the Proposed Alternative Sailing Schedules, YB has excessively redacted materials beyond the reasonable scope of what is contemplated under Protective Order No. 37219 and provided for under the UIPA. For example, the entirety of YB's two new alternative sailing schedules are redacted, including narrative descriptions, such that the public and customers are unable to see any information about alternatives 2 and 3.

In approving an extension of YB's modified sailing schedule through August 17, 2020, Order No. 37211 ordered YB to "include in its rate design proposal, a robust analysis of alternatives to the current adjusted sailing schedule that would seek to address YB's cost concerns but also move towards restoration of the pre-COVID sailing schedule for the benefit

⁴⁴Furthermore, the Commission observes that YB has, on recent occasions, candidly stated that its financial situation is "extremely dire" and has indicated that it "will soon be unable to pay its expenses or continue operations." See YB "Notice Regarding Young Brothers, LLC's ('Young Brothers' or the Company') Liquidity Crisis and Potential Suspension of Operations," filed May 26, 2020, available at: <https://puc.hawaii.gov/wp-content/uploads/2020/05/YB-Letter-to-PUC-05.26.2020.pdf>. It would seem that such information, which YB has publicly disclosed, would have a more significant impact on YB's future collective bargaining negotiations than the details of the adjusted sailing schedules as proposed in alternatives 2 and 3 of the Proposed Alternative Sailing Schedules.

of customers"⁴⁵ YB's Transmittal No. 20-0003 August 5 Modification Request purports to provide YB's "analysis of several additional alternative scenarios to the current adjusted sailing schedule,"⁴⁶ but then redacts the two alternatives in their entirety from public view.

The Commission finds that this level of redaction is inconsistent with Protective Order No. 37219 and the UIPA, which are intended to promote transparency in administrative agency proceedings and provide, to the greatest extent possible, public disclosure of government records. While certain aspects of the alternative proposals, such as cost estimates, may qualify for protection from public disclosure, the Commission is not persuaded that the wholesale redaction of the entire alternative sailing schedule, including even a conceptual description, is justified or consistent with the UIPA.

Furthermore, the Commission observes that similar information pertaining to YB's existing modified schedule, to which YB seeks an extension, is not redacted.⁴⁷ This further

⁴⁵Order No. 37211 at 16-17.

⁴⁶Transmittal No. 20-0003 August 5 Modification Request at 1.

⁴⁷For example, Attachments 1a and 1b are unredacted and provide information about YB's current modified schedule, which it seeks to extend. However, Attachments 2a, 2b, 3a, and 3b, which contain the same information about YB's two proposed alternative sailing schedules are redacted in their entirety.

undermines the support for redacting information about the alternative sailing schedules, as it is unclear, from this record, why relevant information relating to an existing modified sailing schedule may be public, but the same relevant information relating to alternative sailing schedules must be protected. Such inconsistent treatment effectively precludes the public from the opportunity to meaningfully understand and compare the Proposed Alternative Sailing Schedules. Moreover, the Commission notes that similar information about sailing schedules has been submitted by YB, unredacted, in prior filings.⁴⁸

In sum, in weighing the public interest in transparency and access to government records and YB's interest in protecting confidential business information from public disclosure, the Commission finds, after reviewing the record and considering the attendant circumstances, that YB has failed to meet its burden to justify its redactions to its Proposed Alternative Sailing Schedules. It is unclear from YB's confidentiality log (Attachment A) how public disclosure of this information will result in a cognizable harm to YB. Additionally, even if public disclosure of portions of the Proposed Alternative Sailing Schedules may somehow harm YB competitively, this does not explain why the entirety of alternative proposals 2 and 3 must be redacted

⁴⁸See Cost Savings Report.

(including conceptual descriptions), nor does it provide sufficient detail for the Commission to understand the nature and scope of harm to YB that may arise.

Finally, to the extent YB maintains that the alternative sailing schedules 2 and 3 must be kept confidential, the Commission has concerns about how this assertion of confidentiality may impact YB's pending Motion for Relief in Docket No. 2019-0117. As noted above, in its Motion for Relief, YB cites as the primary causes for relief: (1) a decline in revenues and (2) an increase in operating costs. YB's sailing schedules directly impact its revenues and, to the extent that YB is now asserting that it may also impact future operating costs through collective bargaining agreements, this raises concerns about the ability for the Commission to freely probe these issues at the evidentiary hearing that is scheduled for YB's Motion for Relief.

For example, this kind of blanket approach to redacting entire proposed sailing schedules has the potential to unnecessarily complicate the evidentiary hearing by requiring the Parties and Commission to navigate around large swaths of redacted information in the record, or alternatively, require that the Commission consider closing portions of the hearing to the public. Consistent with the UIPA and with the demonstrated public interest

in this proceeding,⁴⁹ it is the Commission's intent to make this hearing as publicly accessible as possible and it does not intend to close the proceeding from the public unless absolutely necessary.⁵⁰ To the extent information must be redacted from public disclosure, there must be a stronger showing that such redactions are justified in accordance with Protective Order No. 37219 and the UIPA and are narrowly tailored to protect truly confidential business information.

⁴⁹As YB is aware, YB's sailing schedules are a topic of pressing public concern. The Commission has received a multitude of comments over the past 5 months expressing the effect of YB's adjusted sailing schedule on YB customers and the public, urging YB to revert back to its unadjusted schedule.

⁵⁰As the Commission has stated during previous hearings (see, e.g., transcript for evidentiary hearing held in Docket No. 2018-0433 (Application for Approval of Maui Electric Company, Ltd.-Paeahu Solar LLC Power Purchase Agreement), dated December 4, 2020): The Commission does **not** intend to close any portion of this hearing, unless, pursuant to Oahu Publications Inc. v. Ahn, 133 Hawaii 482, 331 P.3d 460 (2014):

- (i) The closure serves a compelling interest;
- (ii) There is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and
- (iii) There are no alternatives that would adequately protect the compelling interest.

III.

ORDERS

THE COMMISSION ORDERS:

The Commission directs YB to re-file an unredacted version of its August 5, 2020 "Request for Further Extension of Adjusted Sailing Schedule; Potential Alternative Sailing Schedules," by August 10, 2020.

DONE at Honolulu, Hawaii AUGUST 7, 2020.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By James P. Griffin, Chair By Jennifer M. Potter, Commissioner

APPROVED AS TO FORM:

Mark Kaetsu By Leodoloff R. Asuncion, Jr., Commissioner
Mark Kaetsu
Commission Counsel

Transmittal No. 20-0003.ljk

CERTIFICATE OF SERVICE

Pursuant to Order No. 37043, the foregoing order was served on the date of filing by electronic mail addressed to the following parties:

DEAN NISHINA
EXECUTIVE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
dnishina@dcca.hawaii.gov

JEFFERY T. ONO, ESQ.
DAVID Y. NAKASHIMA, ESQ.
WATANABE ING LLP
JOno@wik.com
DNakashima@wik.com

Counsel for YOUNG BROTHERS, LLC

JEREMIAH ANA
PRESIDENT
KRIS NAKAGAWA
VICE PRESIDENT OF EXTERNAL AND LEGAL AFFAIRS
YOUNG BROTHERS, LLC
jana@htbyb.com
knakagawa@htbyb.com

(Courtesy copy)

FILED

2020 Aug 07 PM 13:13

PUBLIC UTILITIES
COMMISSION

The foregoing document was electronically filed with the State of Hawaii Public Utilities Commission's Document Management System (DMS).