

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Application of)	DOCKET TG-081576
)	
FREEDOM 2000, LLC d/b/a CANDO)	
RECYCLING AND DISPOSAL,)	ORDER 05
)	
For a Certificate of Public)	
Convenience and Necessity to Operate)	FINAL ORDER GRANTING
Motor Vehicles in Furnishing Solid)	APPLICATION, ON CONDITION
Waste Collection Service)	
.....)	
)	
In the Matter of the Application of)	
)	DOCKET TG-091687
POINTS RECYCLING AND)	
REFUSE, L.L.C. d/b/a POINT)	
RECYCLING AND REFUSE)	ORDER 02
COMPANY)	
)	
For a Certificate of Public)	FINAL ORDER DENYING
Convenience and Necessity to Operate)	APPLICATION
Motor Vehicles in Furnishing Solid)	
Waste Collection Service)	
.....)	

1 **SYNOPSIS.** *In this Order, the Commission grants the application of Freedom 2000 to provide solid waste collection service in Point Roberts, Washington, on condition that the company initiate service within 45 days, and denies the application of Point Recycling to provide on-call drop box and special clean up service in the same territory.*

2 **PROCEEDINGS.** This consolidated proceeding involves two overlapping applications for solid waste collection service in Point Roberts, Washington. Freedom 2000, LLC d/b/a Cando Recycling and Disposal (Freedom 2000) filed an application with the Washington Utilities and Transportation Commission (Commission) in Docket TG-081576 to provide solid waste collection and source-segregated recycling service to residences and businesses in Point Roberts. Points

Recycling and Refuse, L.L.C. d/b/a Point Recycling and Refuse Company (Point Recycling) filed an application in Docket TG-091687 to provide on-call special cleanup and drop box service only in Point Roberts.

3 **APPEARANCES.** Donald L. Anderson, Eisenhower & Carlson, PLLC, Tacoma, Washington, represents Freedom 2000. Arthur Wilkowski, owner/operator, Point Roberts, Washington, appeared *pro se* representing Point Recycling. Jennifer Cameron-Rulkowski, Assistant Attorney General, Olympia, Washington, represents Commission Staff.¹

4 **BACKGROUND.** Both Freedom 2000 and Point Recycling seek to provide service in Point Roberts, Washington, an isolated and unincorporated community of Whatcom County located at the southernmost tip of the Tsawwassen Peninsula, just south of Delta, British Columbia, Canada.² Point Roberts is the only American territory on the peninsula, and occupies about 4 square miles of area, which does not abut the United States mainland. From Whatcom County, it can be reached only by travelling through Canada or crossing Boundary Bay.³ There are approximately 2000 housing units in Point Roberts, with about one third occupied by full-time residents.⁴

5 ***Solid Waste Collection and Disposal in Whatcom County.*** Any certificated solid waste collection company operating in Point Roberts is subject to the provisions of the Whatcom County Code (Code) relating to solid waste collection, as well as the County's Comprehensive Solid Waste Management Plan (Waste Management Plan or

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See, RCW 34.05.455.*

² Exh. No. 44 at 2; *see also* Exh. Nos. 45-46.

³ Exh. No. 44 at 2; *see also* Exh. Nos. 45-46.

⁴ Exh. No. 91, October 15, 2008, Comment of Diana Wadley, Regional Solid Waste Planner and Grant Officer, Washington State Department of Ecology, concerning application of Freedom 2000.

Plan) adopted pursuant to RCW 70.95.080. Point Roberts is a part of a county-wide solid waste and recycling collection district.⁵ The Code includes a universal service ordinance, also known as a service level ordinance, which mandates solid waste and recycling collection for “owners of developed property within the recycling and collection district.”⁶ However, it also provides that any person may seek an exemption from the mandatory collection requirement by filing an affidavit that states:

I swear or affirm that I should be exempt from the requirements of universal recycling and solid waste collection because I am disposing of my waste in an environmentally sound way.⁷

- 6 The Code also provides that certificated haulers must collect and transport garbage from single-family residences that request such service in unincorporated areas of the County. However, the Code provides an exception for Point Roberts: “In Point Roberts only, seasonal vacation or weekend residents will be encouraged to participate in recycling and have the option of on-call service.”⁸ Further, the Code also requires every-other-week collection of source separated recyclables from “all residences in unincorporated portions of Whatcom County that receive regularly scheduled garbage collection.”⁹ As with garbage collection, the Code varies the requirement for collection of recyclables in Point Roberts: “In Point Roberts only, single-family residences are defined as permanently year-round occupied buildings and every-other-week recycling does not have to be on the same day as garbage pickup.”¹⁰

⁵ Whatcom County Code, § 8.11.010.

⁶ *Id.*, § 8.11.020.

⁷ *Id.*, § 8.11.030(B).

⁸ *Id.*, § 8.10.040(A).

⁹ *Id.*, § 8.10.050(A).

¹⁰ *Id.*

- 7 This combination of mandatory service with exceptions and exemptions has a particularly strong impact on solid waste collection in Point Roberts. Of the 2000 residences that are potential collection customers, only a third of these are estimated to be full-time residents required to take service. As of July 2009, the County had granted 590 exemptions from mandatory solid waste and recycling collection in Point Roberts.¹¹ Only 350 households in Point Roberts elected to use solid waste service, with a small portion of these customers requesting curbside recycling service.¹² We can only assume that the remainder of the households are either seasonal residences or the owners have not complied with the universal service ordinance. The County recently recognized that there are “operational barriers” in providing curbside solid waste and recycling in Point Roberts. These barriers include having to drive through two border crossings to get from Point Roberts to the U.S. mainland for required waste disposal, the small number of collection customers in Point Roberts, and the recent contraction of recycling markets.¹³
- 8 The County’s Waste Management Plan, adopted in 1999, describes the current collection and disposal system in Whatcom County, as well as the administration and enforcement of the solid waste collection and disposal system in the County. The Plan describes transfer station facilities in the County as part of the solid waste collection and disposal system, and identifies a transfer station in Point Roberts

¹¹ Exh. No. 91, August 22, 2008, letter from David W. Danner, Executive Director, Washington Utilities and Transportation Commission, to Barbara Brenner, Whatcom County Council, Exh. BB-22 to October 26, 2009, comment by Arthur Wilkowski concerning application of Freedom 2000. *See also* Whatcom County’s Website, which has a page concerning issue and answers regarding garbage collection in Point Roberts, last updated on July 7, 2009: <http://www.co.whatcom.wa.us/publicworks/solidwaste/ptrobertsanswers.jsp#different>. The Commission takes official notice of this fact. *See* WAC 480-07-495(2).

¹² Exh. No. 91, October 6, 2008, letter from Arthur Wilkowski, Point Recycling, to the Whatcom County Council, Exh. CC-18 to October 26, 2009, comment by Arthur Wilkowski concerning application of Freedom 2000.

¹³ Exh. No. 12.

operated by the certificated carrier under a lease with the County.¹⁴ Transfer stations are intended to service self-hauling residential and commercial customers.¹⁵ The transfer station in Point Roberts also receives compacted residential and commercial waste collected by the area's certificated carrier.¹⁶

9 The Waste Management Plan recognizes the statutory jurisdiction of the Commission and describes the County's service level ordinance as requiring mandatory collection of residential solid waste and source separated recycling.¹⁷ It recommends that the County continue to request that the Commission regulate solid waste collection companies operating in the County consistent with County ordinances and the Plan.¹⁸ It also recommends the County retain its ordinances establishing the County solid waste collection district, universal service, and service levels.¹⁹

10 The County is in the process of amending and updating its Waste Management Plan. In May 2009, a preliminary draft was submitted for Commission review by the Department of Ecology.²⁰ In June 2009, Commission Staff prepared a review of the

¹⁴ Exh. No. 96, Whatcom County Comprehensive Solid Waste Management Plan, at 9-1 (1999). A transfer station is defined as "a staffed, fixed supplemental facility used by persons and route collection vehicles to deposit solid wastes into transfer trailers for transportation to a disposal site." RCW 36.58.030. Transfer stations are exempt from Commission regulation when a county comprehensive solid waste plan considers transfer stations a part of the disposal site. RCW 36.58.050.

¹⁵ Exh. No. 96, Whatcom County Comprehensive Solid Waste Management Plan, at 9-1 (1999).

¹⁶ *Id.*

¹⁷ *Id.*, at 12-2 to 12-3; 12-5 to 12-18.

¹⁸ *Id.*, at 12-19, Recommendation 12-3.

¹⁹ *Id.*, at 12-21 to 12-22, Recommendations 12-13 and 12-14.

²⁰ May 11, 2009, filing in Docket TG-090718 by Diana Wadley, Solid Waste Planner and Coordinated Prevention Grant Officer, Northwest Regional Office, Washington Department of Ecology, submitting Whatcom County Solid Waste Management Plan, 2008. The Commission takes official notice of the draft plan filed with the Commission. *See* WAC 480-07-495(2).

financial impact of the draft plan on ratepayers.²¹ The draft plan filed with the Commission does not propose a change to the service level ordinance or exemptions from mandatory service.

11 ***State jurisdiction over solid waste collection and disposal.*** The Commission has jurisdiction over the rates, charges, and services of solid waste collection companies in the state, except for those companies operating under contract in a town or city, or solid waste collection services provided by a municipality.²² Solid waste collection companies must not haul solid waste for compensation in the state without first obtaining a certificate of public convenience and necessity from the Commission.²³ In regulating solid waste companies, the Commission must require solid waste collection companies to comply with local solid waste management plans and related ordinances applicable in the company's franchise area.²⁴

12 If the Commission finds that an existing certificated solid waste company is "unable or unwilling to provide the required service," the Commission may issue a certificate "to any qualified person or corporation in accordance with the provisions of RCW 81.77.040." If the Commission determines that an existing company is unable or unwilling to provide service:

The utilities and transportation commission shall notify the county legislative authority within sixty days of its findings and actions and if no qualified garbage and refuse collection company or companies are available in the proposed solid waste collection district, the county legislative authority may provide county garbage and refuse collection services in the area and charge and collect reasonable fees therefore.

²¹ June 11, 2009, letter from David W. Danner, Executive Director and Secretary, Washington Utilities and Transportation Commission, to Penni Lemperes, Solid Waste Specialist, Whatcom County Solid Waste Specialist, Docket TG-090718.

²² RCW 81.77.020, RCW 81.77.0201, RCW 81.77.030.

²³ RCW 81.77.040.

²⁴ RCW 81.77.030(5); RCW 81.77.040.

13 If the Commission notifies a county that there is no qualified solid waste carrier to serve a particular area, the county may contract with any company it selects for collection and disposal of solid waste.

14 ***Solid Waste Collection in Point Roberts.*** Point Recycling began providing solid waste collection service in Point Roberts in 1999 as a certificated hauler subject to the Commission's jurisdiction after purchasing the prior solid waste company, together with its assets and Commission-issued solid waste certificate G-155.²⁵ Point Recycling also operates the transfer station in Point Roberts under a lease with the County. The County renewed its lease agreement with Point Recycling in April 2009.²⁶ The lease agreement provides that:

The County also reserves the right to terminate the lease prior to the end of the lease term for reasons of public necessity, which it must determine in good faith, including but not limited to the following: 1) failure of the Company to maintain its certification as a WUTC-licensed collector and hauler of garbage for Point Roberts, so long as that is the requirement of the County as set forth in the pertinent plans and ordinances of the County pertaining to solid waste collection....²⁷

15 Since early 2000, Point Recycling, through its owner and manager, Arthur Wilkowski, has pursued changes in the design of the solid waste collection system in Point Roberts before the Whatcom County Council, its Solid Waste Advisory Council, and this Commission, asserting that the current system is not economically viable or feasible.²⁸ In particular, Point Recycling has consistently argued that the mandatory service requirements and exemptions from service contained in the Code, as well as the County's failure to enforce the Code, have created a barrier to viable service in Point Roberts, given its unique geography and small residential

²⁵ Exh. No. 44 at 10; Exh. No. 46 at 2.

²⁶ Exh. No. 14.

²⁷ *Id.*, License and Lease Agreement, Section III.O.

²⁸ Exh. Nos. 44-46; *see also*, generally, Exh. No. 91.

population.²⁹ Point Recycling asserts that only a small portion (17 percent) of households in Point Roberts use certificated solid waste collection service, and a small portion of those customers elect to use curbside recycling service.³⁰ Those potential customers that remain either have exemptions or do not comply with the universal service ordinance.

- 16 In 2001, Point Recycling filed a tariff revision with the Commission to modify its approved tariff to eliminate the curbside recycling program. The Commission denied the company's request, finding that the proposed tariff changes were contrary to state law. The Commission found that the Code and the Waste Management Plan require mandatory residential recycling, and that the Commission is required by statute to ensure that certificated solid waste carriers comply with local solid waste management plans and ordinances.³¹
- 17 Mr. Wilkowski continued to pursue modification of the County's solid waste collection system. The interactions between Mr. Wilkowski and the County at County Council meetings, Solid Waste Advisory Committee meetings and correspondence by e-mail and letter became more and more contentious.³² Mr. Wilkowski also attempted to require Point Roberts' residents to comply with the County service level ordinance, which also created frustration for residents in Point Roberts.³³

²⁹ Exh. Nos. 18, 32, 33, and 44, at 10-11; Wilkowski, TR. 102:16 – 103:9, 103:21 – 104:8, 125:1-21.

³⁰ Exh. Nos. 44, 14.

³¹ See *WUTC v. Points Recycling and Refuse, LLC*, Docket TG-010202, Order Rejecting Tariff Filing (March 28, 2001).

³² Exh. Nos. 44-48. See also Exh. No. 91 in which there are numerous documents concerning these interactions.

³³ Exh. No. 48.

DOCKET TG-091687
ORDER 02 (Consolidated)

- 18 Beginning in 2006, the Commission began a series of enforcement actions against Point Recycling for its failure to file annual reports and pay regulatory fees for calendar years 2006 and 2007, including two penalty assessments and a complaint to revoke Point Recycling's certificate.³⁴ The Commission dismissed the complaint after Point Recycling complied with the requirements for filing annual reports and paying fees.³⁵ Again, in September 2008, the Commission issued a penalty assessment against Point Recycling for failing to file its 2008 annual report.³⁶ Point Recycling filed the report with the Commission on December 1, 2009.³⁷
- 19 In February 2008, Point Recycling ceased providing curbside recycling service after its recycling truck broke down.³⁸ In April 2008, the County notified the Commission that the company had ceased providing curbside recycling service required by ordinance, and requested the Commission revoke Point Recycling's certificate for failure to comply with the Waste Management Plan and Code.³⁹ The County indicated in its letter that it had given the company 60 days notice to cure its non compliance. The Commission interpreted the County's letter as a formal complaint. In May 2008, after pursuing efforts with the County to modify the Plan and Code, Point Recycling again filed tariff changes with the Commission seeking to eliminate curbside recycling service.⁴⁰ On June 27, 2008, the Commission suspended the

³⁴ See Exh. Nos. 51-55; *see also* Eckhardt, TR. 182:4 – 186:1.

³⁵ See Exh. No. 56.

³⁶ Exh. No. 57.

³⁷ Exh. No. 50.

³⁸ Exh. No. 49, May 23, 2008, letter from Arthur Wilkowski, Owner/Operator of Point Recycling to Commission Secretary, filed in Docket TG-080913.

³⁹ April 18, 2008, letter from Frank Abart, Director, Whatcom County Public Works Department, to Penny Ingram, Washington Utilities and Transportation Commission, filed in Docket TG-081089.

⁴⁰ Exh. No. 49. Point Recycling also filed tariff revisions in Docket TG-080914 relating to the definition of Alternative Daily Landfill Cover, but later withdrew this filing.

company's tariff filings, and consolidated the filings with the County's complaint, setting the matters for hearing.

- 20 On August 26, 2008, Freedom 2000 filed an application with the Commission to provide curbside recycling service in Point Roberts in Docket TG-081576. Point Recycling filed a protest to the application. After an initial prehearing conference, the presiding administrative law judge held the application in abeyance pending the adjudication of the consolidated complaints against Point Recycling.⁴¹
- 21 On November 26, 2008, three customers filed a formal complaint against Point Recycling, requesting the Commission cancel the company's certificate. This complaint was consolidated with the previously consolidated cases.⁴²
- 22 After the parties had filed written testimony in the consolidated proceeding, engaged in discovery and in mediation, the company filed a letter with the Commission on May 23, 2009, voluntarily relinquishing its solid waste certificate, G-155, and requesting that the Commission cancel the certificate.⁴³ Point Recycling included with its request a letter it sent to its customers explaining that the company intended to cease certificated solid waste operations as of July 1, 2009.
- 23 On June 17, 2009, the Commission granted Point Recycling's request to cancel its certificate and closed the consolidated complaint dockets as moot.⁴⁴ Point Recycling ceased providing solid waste collection service in Point Roberts as of July 1, 2009.

⁴¹ *Application of Freedom 2000*, Docket TG-081576, Order 01, Prehearing Conference Order Granting Intervention; Notice of Continued Prehearing Conference (December 9, 2008).

⁴² *Coe, et al. v. Points Recycling and Refuse, LLC, and Whatcom County*, Docket TG-082129, filed November 26, 2008.

⁴³ Exh. No. 17.

⁴⁴ Exh. No. 16: *WUTC v. Points Recycling and Refuse, LLC*, Docket TG-080913, *Whatcom County v. Points Recycling and Refuse, LLC*, Docket TG-081089; *Coe, et al. v. Points Recycling and Refuse, LLC*, Docket TG-082129 (consolidated), Order 11, Final Order Granting Request To Cancel Certificate And Closing Dockets Without Further Action As Moot (June 17, 2009).

- 24 **PROCEDURAL HISTORY OF THIS PROCEEDING.** On June 23, 2009, after Point Recycling relinquished its certificate, Freedom 2000 amended its application to provide full solid waste and recycling services in Point Roberts.⁴⁵ On July 9, 2009, the administrative law judge presiding in Freedom 2000's application for curbside recycling service dismissed Point Recycling's protest to the application as no longer valid – only a certificate holder may protest an application – and suspended the adjudicative proceeding to allow the amended application to proceed.⁴⁶
- 25 After filing the amended application, Freedom 2000 filed information with the Commission to supplement its application. In addition, the Commission received several comments from customers responding to Freedom 2000's application.⁴⁷ The Commission considered the application, its supporting information and public comments at its July 16, 2009, open meeting. By written memorandum and oral testimony, Staff recommended denying the application and advising the County that no solid waste carrier was qualified to serve Point Roberts under RCW 36.58A.050.⁴⁸ The Commission took no action on Freedom 2000's application and provided more time for the applicant to satisfy Staff's concerns with regard to its fitness to serve.
- 26 In response, Freedom 2000 submitted additional information to the Commission supporting its application. Customers also reacted by filing additional comments. At the July 30, 2009, open meeting, Staff reported that Freedom 2000 was close to completing the documents necessary to support its application and recommended the Commission take no action and give the applicant more time to file supporting information.

⁴⁵ Exh No. 1.

⁴⁶ *Application of Freedom 2000*, Docket TG-081576, Order 03 - Initial Order Dismissing Protestant and Intervenor; Suspending Adjudicative Proceeding (July 9, 2009).

⁴⁷ *See* Exh. No. 91.

⁴⁸ July 16, 2009, Commission Staff Memorandum, filed in Docket TG-081576.

DOCKET TG-091687
ORDER 02 (Consolidated)

- 27 Eventually, Freedom 2000 completed its application to Staff's satisfaction, and the Commission published notice of the application on its August 14, 2009, Transportation Docket.⁴⁹ During the 30-day protest period provided by rule,⁵⁰ no carrier filed a protest to Freedom 2000's amended application or an overlapping application. However, it came to Staff's attention that Whatcom County personnel had provided incorrect information about the end of the protest period to carriers interested in providing service. As a result, Staff recommended that the Commission renote the application on the Transportation Docket. The Commission did so after considering the matter at its September 24, 2009, open meeting.⁵¹
- 28 On October 26, 2009, within 30 days of renoting Freedom 2000's application,⁵² Point Recycling filed an application in Docket TG-091687 to provide solely drop box and special cleanup services within Point Roberts. Notice of Point Recycling's application was published in the Commission's November 3, 2009, Transportation Docket, and no protests were filed on its application.
- 29 On December 4, 2009, the Commission consolidated the two applications for hearing, given the requirements of *Ashbacker Radio v. FCC*⁵³ and WAC 480-70-011,⁵⁴ under which the Commission must jointly consider overlapping applications for authority.

⁴⁹ Such notice initiates the period in which certificated carriers can protest the application. *See* WAC 480-70-106.

⁵⁰ *Id.*

⁵¹ The Commission renoted the application on its September 24, 2009, Transportation Docket.

⁵² The filing on October 26 is considered filed within 30 days of the September 24 filing, as the 30th day fell on Saturday, October 24.

⁵³ 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed.108 (1945).

⁵⁴ WAC 480-07-011 provides:

- (1) The commission may consolidate applications for certificated authority for joint consideration if:
 - (a) The authority requested in the applications overlaps in whole or in part; and
 - (b) The subsequent application was filed within thirty days of the mailing date of the application docket notice of the original application.

In its consolidation order, the Commission set the applications for a hearing scheduled for December 29, 2009, in Olympia, Washington. The Commission also provided notice of a public comment hearing to be held in Olympia on the same date.

30 On December 29, 2009, the Commission held an evidentiary hearing concerning the two applications before Chairman Jeffrey D. Goltz, and Commissioners Patrick J. Oshie and Philip B. Jones. The Commissioners were assisted on the bench by Administrative Law Judge Ann E. Rendahl. The Commission heard testimony from witnesses for each company, David Gellatly for Freedom 2000 and Arthur Wilkowski for Point Recycling. Freedom 2000 presented three shipper support witnesses, and Point Recycling presented one support witness. Commission Staff presented three witnesses: Nicki Johnson, Regulatory Analyst, concerning Freedom 2000's financial fitness; David Pratt, Assistant Director – Transportation Safety, concerning Freedom 2000's regulatory fitness; and Gene Eckhardt, Assistant Director – Water and Transportation, concerning Point Recycling's regulatory fitness and compliance history before the Commission. With the exception of three exhibits that were addressed during the hearing, the parties stipulated to the admission of a number of exhibits prior to hearing.

31 One witness, Ms. Shannon Tomsen, testified at the public comment hearing concerning the need for solid waste and recycling service, and opposing Point Recycling's application.

32 During the hearing, the Commission issued bench requests to Freedom 2000 and Staff concerning certain regulatory compliance matters and Whatcom County's Comprehensive Solid Waste Management Plan. The parties' responses to these bench requests have been admitted as exhibits in the proceeding.

MEMORANDUM

A. Standard of Decision.

33 In evaluating applications for authority to provide solid waste collection service, the Commission must consider the standards and factors established in RCW 81.77.040. The statute provides, in relevant part:

A solid waste collection company shall not operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. To operate a solid waste collection company in the unincorporated areas of a county, ***the company must comply with the solid waste management plan prepared under chapter 70.95 RCW in the company's franchise area.***

Issuance of the certificate of necessity must be determined on, but not limited to, the following factors: ***The present service and the cost thereof for the contemplated area to be served; an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal, set out in an affidavit or declaration; a statement of the assets on hand of the person, firm, association, or corporation that will be expended on the purported plant for solid waste collection and disposal, set out in an affidavit or declaration; a statement of prior experience, if any, in such field by the petitioner, set out in an affidavit or declaration; and sentiment in the community contemplated to be served as to the necessity for such a service.***

When an applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, the commission may, after notice and an opportunity for a hearing, issue the certificate only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission or if the existing solid waste collection company does not object.

In all other cases, the commission may, with or without hearing, issue certificates, or for good cause shown refuse to issue them, or issue them for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted such terms and conditions as, in its judgment, the public convenience and necessity may require.⁵⁵

34 Statements of public need for the proposed service must be established through the testimony of members of the public who actually require service: These witnesses

⁵⁵ RCW 81.77.040 (emphasis added).

DOCKET TG-091687
ORDER 02 (Consolidated)

must be independent witnesses knowledgeable about the need for service in the territory in which the applicant seeks authority.⁵⁶

- 35 In addition, we must determine whether an applicant is fit, willing and able to provide the service for which it seeks authorization – including regulatory and financial fitness.⁵⁷ Past illegal conduct, however, is not a bar to granting an application; an applicant must demonstrate its ability and motivation to comply with the law, and the Commission must determine if the applicant is likely to comply.⁵⁸
- 36 An applicant for solid waste authority must demonstrate that it can finance the proposed operations for a reasonable period, until they either become profitable or demonstrate that operations are not feasible: The applicant is not required to demonstrate the proposed operations are certain to be profitable.⁵⁹
- 37 In this case, no certificate holder currently provides service in Point Roberts, as Point Recycling has relinquished and the Commission has cancelled its certificate.

⁵⁶ See *Application of Richard & Helen Asche, Bremerton-Kitsap Airporter, d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection*, App. No. D-2444, Order M.V.C. No. 1443, Commission Decision and Order Granting Exceptions, in Part; Modifying Proposed Order; Granting Application in Part, at 3-4 (May 1984). Here, and elsewhere in this Order, we cite cases relating to various transportation companies other than solid waste companies. They are relevant because, in relevant respects, the statutory framework, if not the actual language, is similar to that relating to solid waste companies.

⁵⁷ See *Application of Ryder Distribution Resources, Inc.*, Application GA-75154, and *Application of Stericycle of Washington, Inc.*, Application GA-77539, Order M.V.G. No. 1761, Final Order Modifying Initial Order; Granting Application, As Amended, at 5 (Aug. 1995); see also *Application of Ludtke-Pacific Trucking, Inc.*, Docket TG-011675, First Supplemental Order; Commission Order and Decision Granting Application, ¶ 12 (April 2002).

⁵⁸ *Application of Sureway Medical Services, Inc.*, Application No. GA-75968, Order M.V.G. No. 1663, Commission Decision and Order Granting Review; Modifying Initial Order; Granting Amended Application, in Part, on Condition, at 7-8 (Nov. 1993).

⁵⁹ *Sureway*, Order M.V.G. No. 1663 at 19.

Cancellation of a certificate creates an unserved territory.⁶⁰ Thus, we need not apply the standards relating to applications for territory already served by an existing carrier.

B. Freedom 2000's application

- 38 Freedom 2000, through its owner and operator David Gellatly, requests authority to provide full solid waste collection service in Point Roberts, including residential and commercial solid waste collection, residential curbside source segregated recycling, and drop box services, to replace the services Point Recycling used to provide to the community. Mr. Gellatly is pursuing the application as a good business opportunity and a means to turn Point Roberts into a green community.⁶¹ Mr. Gellatly asserts that Point Roberts has the opportunity to be a model community with zero waste, like Vancouver, Canada. In addition, Point Roberts is close to a large recycling market in Canada.⁶²
- 39 In filing its amended application, the company provided a statement of the assets to be used in providing service, an equipment list, a statement of prior experience in the field, as well as a proposed tariff, based on the prior operator's filed tariff.⁶³ As Commission Staff reviewed the application, it required the company to supplement its application through October 2009 by providing additional information concerning start up business plans, financial information, and efforts to come into compliance.⁶⁴

⁶⁰ *Application of R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal*, Cause No. GA-845, and *Application of Seattle Disposal Co. d/b/a Rabanco Companies*, Cause No. GA-851, Order M.V.G. No. 1402, Commission Decision and Order Granting Exceptions; Affirming Proposed Order, with Modifications at 10-11 (July 1989).

⁶¹ Gellatly, TR. 61:13-15.

⁶² *Id.*, at 61:19 – 62:9.

⁶³ Exh. Nos. 1, 3.

⁶⁴ *See* Exh. Nos. 2, 4-9, 13, 26-29, 71-72.

- 40 ***Financial Fitness & Ability.*** Regarding financial fitness and ability, Freedom 2000 filed initial and supplemental information regarding its pro forma budget and estimated revenues and expenses.⁶⁵ Initially, Mr. Gellatly provided revenue and expenses information based on the assumption that the company would be operating the transfer station in Point Roberts, stating that “If the county does not Provide [sic] Freedom 2000 with a lease for the Transfer Station, Freedom 2000 will be unable to provide services as outlined in this application and will be forced to withdraw.”⁶⁶ Later, the company removed this condition of its application, and provided budget assumptions for operations with and without the transfer station.⁶⁷ While the company recognizes that its service will likely be more profitable if it also operates the transfer station, it reports that it can still be a profitable business without control of the transfer station.⁶⁸
- 41 Freedom 2000 based its revenue and expense or cost assumptions on information from the prior operator’s annual reports, tariff, and operating information.⁶⁹ Specifically, the company assumes revenue from serving 31 commercial customers, about 60 to 70 percent of the 335 residential solid waste and recycling customers previously served by Point Recycling, and income from pass-through disposal and drop box service.⁷⁰ It presented its projected costs for administration, labor, disposal and processing, facilities, indirect labor, business taxes, and vehicles.⁷¹ The company

⁶⁵ See Exh. Nos. 1, 2, 4, 5.

⁶⁶ Exh. No. 27 at 6.

⁶⁷ Exh. Nos. 2, 7, 26.

⁶⁸ Exh. Nos. 13, 26; Gellatly, TR. 72:2-6, 81:23 – 82:6.

⁶⁹ Gellatly, TR. 55:7-15; *see also* Exh. No. 2 at 5-6.

⁷⁰ Gellatly, TR. 67:22 – 68:7, 81:1-22, 82:24 – 83:11; *see also* Exh. No. 2 at 5-6.

⁷¹ Exh. No. 2 at 6-8; *see also* Exh. No. 4.

DOCKET TG-091687
ORDER 02 (Consolidated)

responded to additional questions by Commission Staff in clarifying these assumptions.⁷²

42 Mr. Gellatly initially identified \$25,000 in assets: \$10,000 of cash on hand and \$15,000 in trucks and trailers.⁷³ He later amended the application to indicate an additional \$50,000 in back-up financing and additional vehicles, bringing the assets on hand to \$97,696.90.⁷⁴ The company owns a pickup truck, which it intends to use to collect recyclables until the company obtains a special recycling trailer.⁷⁵ After it is granted a certificate, it intends to purchase the trailer from a Minnesota manufacturer and expects to receive the trailer within 30 days from the date of purchase.⁷⁶ The company also owns a single axle roll off container vehicle and six drop box containers.⁷⁷ The container truck and containers are still registered in Canada, and are parked in Point Roberts, but not in use.⁷⁸ The company also intends to purchase a single axle garbage truck with an 18-20 yard packer within a week of the grant of authority, and to order appropriate containers for customers before beginning operations.⁷⁹ The pickup and roll-off trailer were purchased by Mr. Gellatly and his family and are considered part of the assets of the company.⁸⁰

⁷² Exh. Nos. 71-72.

⁷³ Exh. No. 1 at 6.

⁷⁴ Exh. No. 2 at 5; Exh. No. 6; Gellatly, TR. 57:5-9.

⁷⁵ Exh. No. 2 at 7.

⁷⁶ *Id.*, at 7, 16.

⁷⁷ *Id.*, at 5; Exh. No. 6; Gellatly, TR. 58:3-8.

⁷⁸ Gellatly, TR. 66:5-25.

⁷⁹ Exh. No. 1 at 7; Exh. No. 2 at 3.

⁸⁰ Exh. No. 71.

- 43 Mr. Gellatly recognizes that the business is a start-up company and makes certain assumptions for starting operations. He anticipates that he could initiate service within 30 days of the Commission granting authority, and, in a worst case scenario, within 45 days.⁸¹ He modified the budget assumptions for the application to remove revenue and expenses for operating the transfer station, understanding that the Commission has no jurisdiction over the transfer station.⁸² While Mr. Gellatly asserts that operations without the transfer station would be marginal, they would still remain profitable. He hopes to begin negotiations with the County about leasing the transfer station soon after obtaining solid waste authority.⁸³
- 44 After reviewing the company's financial information, Staff witness Nicki Johnson asserts that the company has made reasonable efforts to estimate its finances under the proposed operations and finds the company to be financially fit to provide service.⁸⁴ Ms. Johnson has no concerns about the company's proposals for equipment to provide service.⁸⁵ On cross-examination, Ms. Johnson stated that neither Staff nor the company have conducted an analysis to determine if the company's customer levels are realistic.⁸⁶
- 45 **Prior experience.** Mr. Gellatly has never operated a solid waste collection company, but has been involved in the transportation industry much of his working life.⁸⁷ Mr. Gellatly has worked as a freight courier, drove buses for a year, and worked for Brink's Canada Limited for 15 years as a driver, guard, and in various managerial and

⁸¹ Exh. No. 2 at 3-4, 17.

⁸² See Exh. No. 13.

⁸³ Gellatly, TR. 61:3-9; Exh. No. 2 at 3; Exh. No. 13.

⁸⁴ Johnson, TR. 145:4-17.

⁸⁵ *Id.*, at 146:3-13.

⁸⁶ *Id.*, at 147:22 – 148:5.

⁸⁷ Exh. No. 1 at 2, 5.

DOCKET TG-091687
ORDER 02 (Consolidated)

sales positions.⁸⁸ While a manager for Brinks, Mr. Gellatly was responsible for overseeing 55 to 80 trucks and vans.⁸⁹ Mr. Gellatly has also held ownership in several transportation companies, including armored car service, trucking operations and construction and demolition waste (J-Man Trucking).⁹⁰ Mr. Gellatly has operated fire department equipment as a volunteer for more than 17 years and served as the Fire Chief in Point Roberts for 10 years.⁹¹ Through his experience in the transportation industry, Mr. Gellatly has experience in maintaining driver safety and equipment maintenance and safety records.⁹²

46 Staff believes that Mr. Gellatly is fit to provide service even without prior solid waste collection experience, as he has trucking experience.⁹³

47 Mr. Wilkowski and persons in the community raise concerns that Mr. Gellatly has no prior experience operating a regulated solid waste company, and are wary of whether he will be able to successfully operate the business.⁹⁴

48 ***Regulatory Fitness & Ability.*** The amended application states that Mr. Gellatly has not been cited for violation of state laws or Commission rules, and that he is the person in Freedom 2000 responsible for ensuring compliance with state laws and rules, and any federal rules governing transportation companies.⁹⁵ In supplemental information submitted to Commission Staff, Mr. Gellatly reports on the status of its

⁸⁸ *Id.*

⁸⁹ Gellatly, TR. 52:14-22.

⁹⁰ *Id.*, at 43:3-8.

⁹¹ Exh. No. 1 at 5; Gellatly, TR. 42:1-17.

⁹² Exh. No. 1 at 5; Gellatly, TR. 43:21 – 44:6, 52:23 – 63:3, 77:1 – 79:20, 84:12-19.

⁹³ Johnson, TR. 145:18 – 146:2.

⁹⁴ Wilkowski, TR. 211:25 – 212:9; Exh. No. 18; Exh. No. 91.

⁹⁵ Exh. No. 1 at 2, 8; *see also* Exh. Nos. 27-28.

Department of Licensing registration, applications for a United States Department of Transportation (USDOT) number, state common carrier operating authority, Uniform Carrier Registration (UCR), insurance requirements, and Department of Ecology registration for transportation of recyclable materials.⁹⁶

49 Mr. Gellatly has lived in Point Roberts since 1986.⁹⁷ He has been active in the community as a volunteer for the Fire Department. Mr. Gellatly has business experience in Point Roberts; he owns and operates the Point Roberts Currency Exchange, a money exchange business through which he has daily contact with business customers in Point Roberts.⁹⁸

50 The Whatcom County Public Works Department filed a letter with the Commission asking the Commission to “diligently review Freedom 2000’s fitness and ability to accomplish the proposed work in a lawful, responsible, and environmentally sound manner” by considering a number of items, including past violations to determine whether there is a problematic pattern on non compliance.⁹⁹

51 Both Commission Staff and Point Recycling raise concerns about Freedom 2000’s regulatory fitness, including prior non-compliance. David Pratt, Assistant Director for Transportation Safety, questioned whether Freedom 2000 had complied with requirements for obtaining a USDOT registration number. He also testified that he had checked but could not verify whether Freedom 2000 had maintained its registration with the Washington Department of Licensing, or obtained an active Unified Business Identifier (UBI) from the Secretary of State’s Office. Both of these are required before the Commission may issue a certificate.¹⁰⁰ While the Secretary of

⁹⁶ Exh. No. 2 at 13-16; *see also* Exh. Nos. 8, 9, 29.

⁹⁷ Gellatly, TR. 40:19-22.

⁹⁸ *Id.*, at 40:23 – 41:17, 43:8-13.

⁹⁹ Exh. No. 11.

¹⁰⁰ Pratt, TR. 157:19 – 158:17; *See also* Exh. 81.

State's Office administratively dissolved the corporation on December 1, 2009, for failing to file its annual list of officers and renew its license, the agency reinstated the company after it paid the license fees and provided the necessary annual report information.¹⁰¹ Freedom 2000 has also corrected any motor carrier registration non-compliance by filing an application with the Federal Motor Carrier Safety Administration on January 4, 2010, for a USDOT number.¹⁰² The USDOT database now reflects that Freedom 2000 has an active USDOT number.¹⁰³

52 Mr. Pratt and Mr. Wilkowski raise concerns about Freedom 2000's ability to comply with state laws and rules governing solid waste companies given allegations about past non-compliance by companies with which Mr. Gellatly has been associated.¹⁰⁴ Mr. Wilkowski complained to the Commission in August 2008 about possible illegal solid waste hauling in Point Roberts by Mr. Gellatly or Mr. Calder through a company named Light Weight Recyclers.¹⁰⁵ The Commission investigated the allegations and found that Mr. Gellatly and Mr. Calder were operating three transportation companies in or around Point Roberts: Light Weight Recycling, J-Man Trucking and Triple K Trucking.¹⁰⁶ None of the companies were registered with the Washington State Department of Licensing, Secretary of State's Office, or Commission, and none held USDOT numbers.¹⁰⁷ Beyond notifying Mr. Gellatly and Mr. Calder of the requirements for complying with state law, the Commission Staff did not seek enforcement action against Mr Gellatly, Mr. Calder or the various

¹⁰¹ See Exh. Nos. 92, 93.

¹⁰² See Exh. No. 94.

¹⁰³ *Id.*; See also Exh. No. 95.

¹⁰⁴ Pratt, TR. 159:15-18, 162:20 – 163:21; Wilkowski, TR. 66:5 – 67:3, 171:24 – 172:13.

¹⁰⁵ Exh. No. 30 at 2, 10.

¹⁰⁶ *Id.*, at 2-8, 11-24.

¹⁰⁷ *Id.*, at 4-6.

companies, as the Staff did not have sufficient independent evidence to demonstrate statute or rule violations.¹⁰⁸

53 In comments filed with the Commission regarding the Freedom 2000 application, Mr. Wilkowski questioned Mr. Gellatly's compliance with state laws governing businesses and regulated businesses, and asserted that he has created confusion by using multiple business names and licenses in the State and Canada.¹⁰⁹

54 In response to questions about these companies at the hearing, Mr. Gellatly stated that Light Weight Recycling was never a company; it was just a name. He stated that the name was created in response to being referred to as a "lightweight."¹¹⁰ Mr. Gellatly confirmed that J-Man Trucking exists and is a partnership between himself and Mr. Calder, in which he has an ownership interest, and Mr. Calder runs the day-to-day operations.¹¹¹ He is not aware of whether Mr. Calder has obtained a USDOT number for the company or whether the company has been or is registered with the UCR program.¹¹² J-Man Trucking has not been registered with the Department of Ecology as a transporter of recyclables.¹¹³ Further, Mr. Gellatly stated that he has no relationship with Triple K Trucking, and that Mr. Calder is Triple K Trucking.¹¹⁴

¹⁰⁸ *Id.*, at 8.

¹⁰⁹ Exh. No. 91, September 14, 2009, letter from Arthur Wilkowski to Dave Danner, Director, Washington Utilities and Transportation Commission.

¹¹⁰ Gellatly, TR. 76:21 – 77:3, 80:4-18; *See also* Exh. No. 30 at 11, Mr. Gellatly's June 20, 2007, response to the Staff's initial investigation of illegal hauling by Light Weight Recycling. In the letter, Mr. Gellatly describes creating the name and posting an advertisement as a test of the market for recyclables in Point Roberts, as well as a means to frustrate Mr. Wilkowski. The correspondence from Mr. Gellatly during the investigation and comments filed in this proceeding indicates there is a continuing conflict and lack of respect between these two individuals.

¹¹¹ Gellatly, TR. 77:24 – 78:14.

¹¹² *Id.*, at 78:15-21, 79:1-12.

¹¹³ *Id.*, at 78:22-25.

¹¹⁴ *Id.*, at 79:13-20.

- 55 Before the Commission grants a certificate to Freedom 2000, Mr. Pratt asserts that the Commission will have to verify that the company's UBI account and USDOT numbers are active.¹¹⁵ Before issuing the permit, the Commission will need to determine if Freedom 2000 has the necessary insurance.¹¹⁶ Mr. Pratt has reservations about the Commission granting Freedom 2000 operating authority. He asserts that there appears to be a pattern of non-compliance with state law and regulation and is concerned that it would remain the same if the Commission were to grant the company a certificate.¹¹⁷ While he recognized that these concerns may not be sufficient to deny the application, some of the facts raise concerns about the applicant's regulatory fitness and he would recommend strong conditions if the Commission granted the permit.¹¹⁸ These conditions include assurances of continued compliance with all regulations, such as reporting requirements, a short window to come into compliance if the company is found to be in violation, and harsh outcomes for violations.¹¹⁹
- 56 ***Sentiment in the community as for the need for such a service.*** To demonstrate need for its proposed services in Point Roberts, Freedom 2000 offered the testimony of Ben Lazarus, a business owner and resident of Point Roberts, Sheelah Oliver, a resident of Point Roberts and employee of PR Petroleum, a gas station there, and Shelley Damewood, a resident of Point Roberts and part-owner of a security storage business in Point Roberts.

¹¹⁵ Pratt, TR. 157:22 – 158:17.

¹¹⁶ *Id.*, at 158:21 – 159:14.

¹¹⁷ *Id.*, at 162:20 – 163:21.

¹¹⁸ *Id.*, at 163:22 – 164:22.

¹¹⁹ *Id.*, at 177:22 – 178:9.

DOCKET TG-091687
ORDER 02 (Consolidated)

- 57 Mr. Lazarus, owner of Westwind Marine, a pleasure craft repair facility, testified that having commercial solid waste service would be an advantage.¹²⁰ Mr. Lazarus has lived in Point Roberts for five years.¹²¹ Though he was not certain there was a need for residential solid waste or recycling service, he indicated it would be “good.”¹²² Mr. Lazarus never used residential solid waste or curbside recycling service, as he disposed of his residential waste through the Westwind Marine commercial solid waste service.¹²³
- 58 Similar to Mr. Lazarus, Ms. Oliver has never used residential solid waste or curbside recycling service. Rather, she disposes of the waste at the gas station where she works.¹²⁴ Ms. Oliver paid Point Recycling for the additional waste in the commercial service by giving Mr. Wilkowski a check periodically.¹²⁵ Ms. Oliver stated, however, that there is a need for residential service.¹²⁶ Ms. Oliver has lived in Point Roberts since 1975.¹²⁷
- 59 On cross-examination, Ms. Oliver agreed with Mr. Wilkowski that dumping of garbage at the gas station has always been a problem. When she opens the station in the morning, she may find bags or boxes of garbage next to the pumps.¹²⁸ The station

¹²⁰ Lazarus, TR. 46:10-15.

¹²¹ *Id.*, at 45:10-11.

¹²² *Id.*, at 45:25 – 46:9.

¹²³ *Id.*, at 45:22-24, 46:3-5, 46:25 – 47:9.

¹²⁴ Oliver, TR. 48:19 – 49:8.

¹²⁵ *Id.*, at 49:7-8, 50:3-8.

¹²⁶ *Id.*, at 49:18-20.

¹²⁷ *Id.*, at 48:15-16.

¹²⁸ *Id.*, at 50:9-17.

DOCKET TG-091687
ORDER 02 (Consolidated)

has had to lock its commercial drop box to prevent people from putting their garbage in it.¹²⁹

60 Upon questioning by Staff Counsel, Ms. Oliver stated that she would not use residential service if it was offered, as she has a fear of rodents, and is concerned that having garbage near the house will attract them.¹³⁰ The service station did use Point Recycling's commercial solid waste service, but now takes garbage to the transfer station every Monday in a truck.¹³¹

61 Prior to Point Recycling discontinuing service, Ms. Damewood was a Point Recycling customer and received both residential solid waste and curbside recycling service.¹³² Ms. Damewood asserts there is a need for the services and would use them if they were offered.¹³³ Under cross-examination, Ms. Damewood agreed that she had used J-Man Trucking to remove construction waste from a construction site at her business and deliver gravel to the site.¹³⁴ She also agreed that she is a Commissioner on the Point Roberts Parks Board, and that the Board had just finished a construction project, for which it hired J-Man Trucking to remove construction waste.¹³⁵

62 Another resident of Point Roberts, Shannon Tomsen, testified at the public comment hearing that she would like to have residential solid waste and recycling service restored.¹³⁶ Within two to three weeks after service was discontinued, she had mice

¹²⁹ *Id.*, at 50:18-21.

¹³⁰ *Id.*, at 51:3-14.

¹³¹ *Id.*, at 51:15-24.

¹³² Damewood, TR. 85:24 – 86:1, 86:5-6.

¹³³ *Id.*, at 86:2-4, 7-13.

¹³⁴ *Id.*, at 87:7-21.

¹³⁵ *Id.*, at 88:2-13.

¹³⁶ Tomsen, TR. 234:12-22; *see also* Exh. No. 91, Letter and August 25, 2008, Bellingham Herald article, both submitted at December 29, 2009, public comment hearing.

in the house.¹³⁷ Currently, she and her husband self-haul the garbage to the transfer station. She described the self-hauling situation in Point Roberts as co-operative self-hauling, where some neighbors help others who are not able to transport the waste to the transfer station on their own.¹³⁸ While Ms. Tomsen agreed that a number of residents will always want to self-haul their garbage, there are others who would like the service to be restored.¹³⁹

63 The Commission also received comments from the public concerning Freedom 2000's application. Although the summary of public comments indicates that nine commenters were in favor of the application, two were opposed and seven undecided, from reviewing the comments, it appears that six were in favor, 15 opposed and seven undecided.¹⁴⁰ Mr. Wilkowski filed three letters in comment on the Freedom 2000 application, including a letter with close to 400 pages of attachments concerning the recent history of Point Recycling's disputes with the County, Commission and residents.¹⁴¹ About 20 percent of the comments expressed frustration with the County's handling of solid waste collection in Point Roberts, requesting the County modify its Plan to allow garbage service in Point Roberts to work more effectively.

64 ***Parties' Positions on the Application.*** In closing statements at the hearing, Freedom 2000 asserted that it is a willing, able and qualified applicant who seeks to meet a unique and problematic niche market.¹⁴² Freedom 2000 understands that if the Commission grants it a certificate, the responsibility for making it work is on the

¹³⁷ *Id.*, at 237:5-11.

¹³⁸ *Id.*, at 236:16-25.

¹³⁹ *Id.*, at 238:12 – 239:3.

¹⁴⁰ *See* Exh. No. 91, comments regarding Docket TG-081576.

¹⁴¹ As Point Recycling has filed a competing application, these letters were not included in the counts of those for and against the application.

¹⁴² Anderson, TR. 208:6-8.

company and there is no guarantee of a profit.¹⁴³ The company seeks an opportunity to serve the community, and notes that the citizens have nothing at risk except a viable service. Although the owner is not a solid waste hauler, he has great familiarity with the Point Roberts community, has fleet experience, business experience and acumen, assets, financing and a viable plan for operations, and wants to provide a commitment to serve the community.¹⁴⁴ Freedom 2000 is willing to accept certain conditions, such as establishing a reasonable start date, compliance with state laws and rules, and coming to the Commission for a rate case in the “mid-term future.”¹⁴⁵

65 Mr. Wilkowski argued that the Commission should deny both applications in order to prompt the County to change the solid waste collection system in Point Roberts, and to get things back on track. He asserted that within six months the County could contract with a Canadian company to collect and transport the solid waste from Point Roberts.¹⁴⁶

66 Staff recommends the Commission grant Freedom 2000’s application with certain conditions, and deny Point Recycling’s application on the basis of past and current non-compliance.¹⁴⁷ Staff argues further that granting Point Recycling’s application is not in the public interest as the two companies would likely compete in the area of drop box service, which may well result in a reduction of reasonably priced service to consumers, or cause Freedom 2000 to withdraw its application.¹⁴⁸ If the Commission chooses to grant neither application and finds there is no qualified company available to provide solid waste collection service, the responsibility would revert to the County

¹⁴³ *Id.*, at 208:9-23.

¹⁴⁴ *Id.*, at 208:24 – 210:10.

¹⁴⁵ *Id.*, at 210:11 – 211:2.

¹⁴⁶ Wilkowski, TR. 211:4 – 213:15.

¹⁴⁷ Cameron-Rulkowski, TR. 215:21 – 216:9.

¹⁴⁸ *Id.*, at 216:3-15.

under RCW 36.58A.030.¹⁴⁹ Following such a finding, the County could provide the service itself or contract with a private company to provide the service.¹⁵⁰

67 ***Discussion and Decision.*** After considering all of the testimony and evidence concerning Freedom 2000's financial and regulatory fitness to provide solid waste collection service in Point Roberts, and the need for such service, we find it appropriate to grant the application, but on condition that the company initiate service quickly – within 45 days. While we have reservations concerning the company's ability to remain in compliance with state laws and rules and about the viability of solid waste collection operations in Point Roberts under the current County ordinances, we find that Freedom 2000 is fit, willing and able to provide solid waste collection service in Point Roberts and that we should give the company the opportunity to serve customers who request that service.

68 The company has demonstrated it is financially fit – it has sufficient assets on hand and has, or will have, the necessary equipment to provide solid waste collection service in Point Roberts. It has nearly \$97,000 in initial assets to start up the company, and Staff reports that the company's budget assumptions are reasonable to begin operations. These budget assumptions do not include operation or control of the transfer station in Point Roberts, as Point Recycling currently leases the station from the County. However, Mr. Gellatly claims that the company's operations would continue to be profitable even without control of the transfer station. Mr. Gellatly, the company owner, is a long-time resident of Point Roberts, not a newcomer. He is active in the community and currently operates a business in the area in which he has daily contact with other business owners.

69 Although the company appears to be well established to start up operations, as Commissioner Jones discusses in his dissent, we are concerned that the current situation in Point Roberts creates an unsustainable market for curbside collection of solid waste and recycling. The small resident population and large number of

¹⁴⁹ *Id.*, at 216:16-22.

¹⁵⁰ *Id.*, at 216:20-24.

summer residents – with its variable waste stream – make it difficult for a carrier to maintain regular operations. The County’s universal service ordinance is significantly diluted by ordinances providing exceptions for seasonal residents and an option for residents to obtain exemptions from universal service. These ordinances, together with significant non compliance and a lack of enforcement, create a barrier for any certificated solid waste collection company to develop a sustainable customer base. The geographic location of Point Roberts, requiring transportation through two border crossings for a one-way trip to the U.S. mainland increases the costs of disposal operations for any carrier operating in the area. All of these circumstances combine to create a unique and problematic service territory.

70 The failure of the County to recognize and address the detrimental impact of its County-wide ordinances and policies on solid waste collection in the small community of Point Roberts has created a very difficult situation. We are further frustrated by the County’s conspicuous absence from this application proceeding.¹⁵¹ However, our ability to address the issue of solid waste collection in Point Roberts is limited to determining if there is a qualified carrier to provide service: We have no jurisdiction to address the underlying policies and requirements for solid waste collection in Point Roberts in a comprehensive manner, something the residents in Point Roberts have requested from the County. We can only hope that the recent events in Point Roberts will result in some further attention by the County.

71 In addition to these issues, it is clear that the debate about solid waste and recyclable collection in Point Roberts, initiated by Mr. Wilkowski with the County, has escalated and polarized members of the small customer base. The comments filed in response to both applications, including the extensive comments and documents filed by Mr. Wilkowski, reveal the acrimony between Mr. Gellatly and Mr. Wilkowski, Mr. Wilkowski and the County, and the strong alliances of customers or residents either in support of or against Mr. Wilkowski.¹⁵² Some customers simply want renewed service and do not care which carrier provides service. There is a danger that this

¹⁵¹ Eckhardt, TR. 206:7-19.

¹⁵² See Exh. Nos. 32-34, 44-46, 91.

public dispute will further dilute the number of customers who seek to use a formal collection service. If Mr. Gellatly has the business acumen he testified he has, he will likely need it to address the divisiveness and breakdown in service resulting from the formal complaints against Point Recycling and the company's termination of service.

- 72 Despite our reservations, however, we must determine whether a company is financially fit by considering whether it can finance the proposed operations for a reasonable time, not whether it is certain to become profitable.¹⁵³ Based on the evidence and the testimony, including that of Ms. Johnson, we find that Freedom 2000 is financially fit to provide the proposed service.
- 73 Staff recommends the Commission establish a deadline for the company to initiate service, noting the company has indicated it could begin service in 30 to 45 days of a Commission order granting authority. Staff also recommends the Commission require the company to file a rate case a year after an initial start-up period to ensure financial fitness. The company agrees to these conditions.¹⁵⁴
- 74 We decline to impose a condition requiring Freedom 2000 to file a rate case within one year. If the company determines that its revenues are not sufficient, it may request the Commission grant increased rates for service, and the Commission would then determine whether the company's rates are fair, just, reasonable and sufficient.¹⁵⁵ Granting a certificate to an applicant is not a guarantee that the operations will be profitable; it merely provides a company the opportunity to provide service, at its own risk. Freedom 2000 requests the opportunity to undertake this risk, and we find it appropriate to allow Freedom 2000 to do so.
- 75 We do find it appropriate, however, to establish a deadline for the company to initiate service. We find that 45 days from the effective date of this Order is a suitable time

¹⁵³ *Sureway*, Order M.V.G. No. 1663 at 19; *see also Ryder*, Order M.V.G. No. 1761, at 9.

¹⁵⁴ Anderson, TR. 210:11-18.

¹⁵⁵ RCW 81.28.010; RCW 81.28.030.

frame for the company to take the necessary steps to start up operations, including advertising for service, ordering necessary equipment, ensuring it has the necessary insurance in place, and completing and filing a tariff of rates and charges. The company has committed to this time frame in exhibits filed with the Commission. If the company does not meet this timeframe for initiating service, we will rescind this conditional grant of authority in a subsequent order.

- 76 As to regulatory fitness, the Commission must determine whether the Company is in compliance with state laws and rules, and is willing and able to continue to do so. In prior cases, the Commission has determined that past and current violations are relevant for determining regulatory fitness, but that past violations are not an absolute bar to a finding of fitness.¹⁵⁶ Further, “the Commission will consider whether the violations are repeated or flagrant, whether corrective action was promptly taken, and whether the applicant can now provide credible assurances of compliance.”¹⁵⁷
- 77 The record in this proceeding demonstrates that Freedom 2000 is currently in compliance with the requirements for the Commission to grant a certificate, and is working to maintain its continued compliance, correcting non-compliance when it is discovered. We share Staff’s concerns, however, about the company’s willingness and ability to remain in compliance. There is sufficient information in the record to conclude that Mr. Gellatly has not always complied with statutory and regulatory requirements for business operations. Staff’s investigation of allegations of illegal solid waste hauling in Point Roberts, as well as testimony during the hearing, indicates that J-Man Trucking, a trucking business in which Mr. Gellatly has an ownership interest, was not licensed to operate in the state and continues to operate without proper registration, whether from the Department of Licensing, USDOT, state Department of Ecology, or through the Unified Carrier Registration system.¹⁵⁸

¹⁵⁶ *Ryder*, Order M.V.G. No. 1761, at 5.

¹⁵⁷ *Id.*, at 5-6.

¹⁵⁸ Ex. No. 30; *see also* Gellatly, TR. 78:15 – 79:12; Damewood, TR. 87:7 – 88:13; Pratt, TR. 171:24 – 172:13.

78 Further, Mr. Gellatly allowed his corporate registration with the Secretary of State's office to lapse and failed to maintain an active USDOT number for Freedom 2000. Mr. Gellatly corrected these issues, and given the length of time from when Freedom 2000 initially filed its application until our hearing in December, these lapses are understandable. However, these lapses, together with the non-compliance of J-Man Trucking, creates concern that Freedom 2000's operations may fall into a pattern of non-compliance. While we do not find Mr. Gellatly's past behavior a bar to finding Freedom 2000 to be fit to provide service, we expect Mr. Gellatly to bring all of his operations, including J-Man Trucking, into compliance with state law. Failure to do so will result in penalties, suspension or cancellation for Freedom 2000, or action to classify J-Man Trucking as a common carrier subject to regulation.

79 We decline to adopt Staff's recommendation for conditions on the grant of authority to ensure that Freedom 2000 maintains its compliance with state laws and rules governing business operations. Staff seeks assurances of compliance, and suggests regular reporting from the Company,¹⁵⁹ as well as strong penalties for non compliance,¹⁶⁰ and a performance bond.¹⁶¹ We decline to require a performance bond from the company, as such a bond may substantially increase the costs of operation. Similarly, we do not impose a condition of reporting, as the Commission has robust authority to obtain information from regulated companies.¹⁶² Instead, we direct Staff to request relevant information from the company, as necessary, to enable the Commission to appropriately oversee the company's operations. Should there be a dispute about obtaining such information, Staff may bring such a dispute to the Commission for resolution.

¹⁵⁹ Pratt, TR. 178:1-9.

¹⁶⁰ *Id.*

¹⁶¹ Eckhardt, TR. 193:16-17.

¹⁶² See RCW 81.04.020; RCW 81.04.070; RCW 81.04.080; RCW 81.04.090; RCW 81.04.100; RCW 81.77.030; RCW 81.77.080.

- 80 In any event, the Commission has adequate enforcement mechanisms to ensure performance, including administrative penalty assessments of \$100 per violation,¹⁶³ penalties of \$1,000 per violation which are pursued through formal complaint, as well as suspension and cancellation for failure to maintain proper insurance,¹⁶⁴ and suspension or cancellation for a variety of actions.¹⁶⁵
- 81 In addition to financial and regulatory fitness, the Commission must determine that the public convenience and necessity require the service, *i.e.*, that the “sentiment in the community contemplated to be served” demonstrates a need for such service.¹⁶⁶ It is clear from the record that some members of the community have identified an unmet need for the service, though the scope of that need is somewhat unclear given the relatively few members of the public who testified.
- 82 It may be that this limited support is due in part because of economic situation any solid waste company will face in Point Roberts. As we have discussed above, not everyone is required to use curbside collection service. Due to the exceptions to, and allowed exemptions from, the County’s universal service ordinances, many residents, property owners, and visitors in Point Roberts self-haul their garbage and recycling to the transfer station. The recent disruption in service may further reduce the number of potential customers for curbside collection. Despite these issues, we find there is a need for service, albeit small. Freedom 2000 understands the economic circumstances in which it seeks to provide service and should be given an opportunity to provide that service.

¹⁶³ See RCW 81.04.405. “Each and every such violation shall be a separate and distinct offense and in case of a continuing violation every day's continuance shall be and be deemed to be a separate and distinct violation.”

¹⁶⁴ See WAC 480-70-186.

¹⁶⁵ See WAC 480-70-161.

¹⁶⁶ RCW 81.77.040.

83 While we have concerns about the viability of the solid waste collection system in Point Roberts and Freedom 2000's willingness and ability to comply with state laws and rules, we cannot justify denying Freedom 2000's application on the basis of these concerns. Freedom 2000 has demonstrated that it has reasonable finances to start operations and commits to remain in regulatory compliance. Further, we impose conditions on the grant of authority. Even with our concerns, we find it in the public interest to grant authority to the company to fill the unmet need Point Roberts residents have expressed for curbside solid waste and recycling service. As Mr. Eckhardt acknowledged, the only downside to granting Freedom 2000 a certificate is that the business may fail, and customers will be no worse off than they are currently.¹⁶⁷ Granting the application can only benefit those customers who choose to sign up for service. The company recognizes that it is taking a risk, but is doing so to pursue a business opportunity, with no guarantee of profit.¹⁶⁸

84 In sum, we grant Freedom 2000's application to provide residential and commercial solid waste collection, and residential curbside recycling service in Point Roberts, subject to the condition that the company initiate operations quickly by providing residential solid waste collection service within 45 days, complying with all regulatory requirements for starting service. If the company cannot initiate service by this deadline, our conditional grant of authority will be rescinded. If the company fails to comply with this Order, state law or regulations, not limited to those in Title 81 RCW or WAC 480-70, the Commission will pursue appropriate enforcement action, either by seeking penalties, or suspension or cancellation of Freedom 2000's certificate.

¹⁶⁷ Eckhardt, TR. 202:25 – 203:12.

¹⁶⁸ Anderson, TR. 208:9-23; 210:18-24.

C. Point Recycling's Application

85 Point Recycling, through its owner and operator Arthur Wilkowski, requests authority to provide only on-call special clean up and drop box service¹⁶⁹ for solid waste and recyclables within Point Roberts.¹⁷⁰ The application is limited to these on-call services, as the company believes there is not sufficient customer volume to support full curbside collection services.¹⁷¹ Mr. Wilkowski claims there is “an urgent need for on-call services by many members of the community.”¹⁷² He seeks to provide a service option to the community.¹⁷³

86 ***Financial Fitness & Ability.*** As we stated above, an applicant must demonstrate that it has the financial ability to provide the proposed service, identify its assets, establish its costs of operation and facilities and demonstrate the financial feasibility of the operation. Point Recycling provided a statement of its assets and available equipment in its application, and supplemented this with information about projected revenue and costs.¹⁷⁴ The company also provided a proposed tariff with its application.¹⁷⁵

¹⁶⁹ Wilkowski, TR. 110:24 – 111:5. Mr. Wilkowski defines these services as “On-call requests for drop boxes, roll-off boxes, detachable containers, as well as pickup services with pickup truck where someone has a couch or a fridge or something like that from a household that they need help hauling to the dump.”

¹⁷⁰ Exh. No. 31; Point Recycling simultaneously filed applications for expedited temporary authority, temporary authority and permanent authority to provide this limited service. As the Commission denied Point Recycling's applications for expedited temporary and temporary authority, we address only the application for permanent authority in this Order. *See In The Matter of the Application of Points Recycling And Refuse, LLC, to Operate as a Solid Waste Collection Company Under Expedited Temporary and Temporary Authority*, Docket Nos. TG-091685 and TG-091686, Order 01, Order Denying Application For Expedited Temporary Authority and Temporary Authority For Solid Waste Collection (Nov. 16, 2009).

¹⁷¹ Exh. No. 31.

¹⁷² *Id.*

¹⁷³ Wilkowski, TR. 114:19-21.

¹⁷⁴ Exh. No. 31 at 5, 8.

- 87 Based on historical data from when Point Recycling was a certificated carrier, Mr. Wilkowski estimates that the revenue for drop box and special clean up services will be about \$8,000 per year.¹⁷⁶ Mr. Wilkowski plans to provide service using existing equipment from the company's current operations.¹⁷⁷ Estimating administrative and office expenses of \$2,000, direct labor costs of \$5,000 and fuel and truck expenses of \$1,000, Mr. Wilkowski states that after a base-year of operations, the allocated expenses will exceed revenue.¹⁷⁸ The projected revenue for the service matches the amount included in the company's most recent annual report for 2008.¹⁷⁹
- 88 Mr. Wilkowski claims the service may not be economically viable or profitable due to unlicensed Canadian drop box companies operating in Point Roberts, but that he seeks to provide an essential service with rates that cover the direct costs and a reasonable allocation of overhead.¹⁸⁰ Staff witness Johnson reviewed Point Recycling's cost projections and available assets, and analyzed the company's overall financial fitness to provide service.¹⁸¹ Ms. Johnson found that Point Recycling is financially fit to provide the proposed operations. Although the company's application materials project that allocated expenses will exceed revenues after the first year of operations, Ms. Johnson found that Point Recycling is still financially fit

¹⁷⁵ *Id.*, at 12-33.

¹⁷⁶ *Id.*, at 8.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Exh. No. 50 at 8. While Point Recycling continues to operate the transfer station in Point Roberts, revenue from the transfer station is not considered for purposes of determining financial feasibility for the proposed service.

¹⁸⁰ Exh. No. 31 at 8.

¹⁸¹ Johnson, TR. 142:13-21.

because it can apply for general rate increase to cover expenses and have an opportunity to earn a fair rate of return.¹⁸²

89 **Prior experience.** Mr. Wilkowski has extensive experience in the solid waste industry, as an employee in Whatcom County's Public Works Department, manager of two regulated solid waste collection companies – Nooksack Valley Disposal Company and San Juan Sanitation – and as the owner and operator of Point Recycling since 1999.¹⁸³

90 **Regulatory Fitness & Ability.** The record in this proceeding shows that Point Recycling, through its owner Mr. Wilkowski, violated state laws and rules governing solid waste collection companies while it was a certificated company, and continues to do so after the company relinquished its certificate. As discussed in the background section above, Point Recycling failed to submit its annual report and regulatory fees to the Commission from 2006 through 2008, requiring the Commission to issue three penalty assessments for these violations.¹⁸⁴ The company filed its annual reports and paid its fees for calendar years 2006 and 2007 only after the Commission issued a complaint to revoke the company's certificate.¹⁸⁵

91 In February 2008, Point Recycling ceased providing curbside collection of source segregated recycling, violating both a County ordinance mandating collection of recyclables and its Commission-approved tariff.¹⁸⁶ Point Recycling's action prompted the County to file a complaint with the Commission requesting the Commission cancel the company's certificate. In May, 2008, the company requested a tariff revision to remove curbside recycling from its tariff. The Commission

¹⁸² *Id.* at 146:14 – 147:9.

¹⁸³ Exh. No. 31 at 4; Exh. No. 44 at 15; Exh. No. 46 at 2.

¹⁸⁴ *See* Exh. Nos. 51-54, 57.

¹⁸⁵ Exh. Nos. 55, 56.

¹⁸⁶ Exh. No. 49.

suspended this tariff filing and consolidated the filing with the County's complaint. When three customers also filed a complaint requesting cancellation of the certificate, the complaint was consolidated with the other cases. During the course of the proceeding, Point Recycling failed to respond to a motion to compel information relating to vehicle maintenance, financial feasibility of the company's curbside recycling business, a detailed breakdown of the income paid to employee salaries, and disposal expenses and revenues.¹⁸⁷ Point Recycling relinquished its certificate instead of providing this financial information.¹⁸⁸ The Commission cancelled solid waste certificate G-155, held by Point Recycling, on June 17, 2009.¹⁸⁹ Point Recycling ceased providing service as of June 30, 2009.

- 92 Testimony in the hearing demonstrates that Point Recycling has been providing drop box and special cleanup service illegally since the company relinquished its permit in June of 2009.¹⁹⁰ Mr. Wilkowski knew that providing drop box service without a certificate was illegal, but felt compelled to help his former customers.¹⁹¹ Point Recycling provided drop box service using the rates from the company's former tariff.¹⁹² Mr. Wilkowski also claims that "Point Roberts is a free for all," with Canadian companies and Mr. Gellatly providing illegal drop box services.¹⁹³
- 93 Despite the history of non compliance discussed above, Mr. Wilkowski notes in his application that the company has been cited for "minor violations on record under G-

¹⁸⁷ See Exh. No. 15; Wilkowski, TR. 118:10 – 119:18.

¹⁸⁸ Wilkowski, TR. 119:19 – 120:6.

¹⁸⁹ Exh. No. 16.

¹⁹⁰ Slater, TR. 93:25 – 94:12, 95:22 – 96:9, 97:25 – 99:12; Wilkowski, TR. 111:10 – 113:1, 132:20 – 133:20.

¹⁹¹ Wilkowski, TR. 132:20 – 133:20.

¹⁹² *Id.*, at 112:15-113:1, 133:10-12.

¹⁹³ *Id.*, at 133:1-4.

DOCKET TG-091687
ORDER 02 (Consolidated)

155”.¹⁹⁴ Letters Mr. Wilkowski has filed with the Commission indicate that he has little respect or regard for Commission staff, County personnel, customers or Point Roberts residents, and blames the County, the Commission and others for his problems.¹⁹⁵

94 ***Sentiment in the community as for the need for such a service.*** Point Recycling presented one witness, Tony Slater, to demonstrate the need for its proposed service in Point Roberts. Mr. Slater has lived in Point Roberts since 1996 and operates Neptune Enterprises, a small construction company specializing in home remodeling.¹⁹⁶ Neptune Enterprises used Point Recycling’s special clean up and drop box services when the company was still operating under its certificate.¹⁹⁷ If Point Recycling’s application were granted, Neptune would need these services immediately.¹⁹⁸

95 Mr. Slater used to use residential solid waste collection and curbside recycling service, but then filed for an exemption and now self-hauls garbage to the transfer station.¹⁹⁹ Since he is working, he can just as easily transport his residential waste to the transfer station in his truck. If he retires, he may stop doing that and take residential service, including curbside recycling, which is important to his wife.²⁰⁰

¹⁹⁴ Exh. No. 31 at 4.

¹⁹⁵ See Exh. Nos. 17, 18, 33, 44, 46-49; See generally, Exh. No. 91; See in particular, August 25, 2008, article from Bellingham Herald, quoting Mr. Wilkowski as referring to the Commission as “the epitome of paper-pushing indifferent dictatorial bureaucrats.” At the hearing, when given the opportunity to retract this statement, Mr. Wilkowski expressed some glee in his phrasing. See Wilkowski, TR. 130:11:18.

¹⁹⁶ Slater, TR. 90:8-10, 90:2-24, 92:7-18.

¹⁹⁷ *Id.*, at 90:11-15.

¹⁹⁸ *Id.*, at 90:16-22.

¹⁹⁹ *Id.*, at 91:3-14.

²⁰⁰ *Id.*, at 91:3-8, 91:14-15, 97:1-17.

- 96 On cross-examination, Mr. Slater indicated that most of the waste from his business is construction and demolition waste, about 10 to 20 percent of which is recyclable.²⁰¹ He also stated that he has continued to hire Point Recycling for drop box service at his construction sites since July, when Point Recycling's certificate was cancelled.²⁰² He pays a tonnage charge for the weight of the waste as well as a hauling charge. He assumes the waste goes first to the transfer station and then to Bellingham.²⁰³
- 97 If both applications were granted, Mr. Slater would prefer to continue taking service from Point Recycling because he is familiar with that service and is apprehensive of change. If he had no choice, and only Freedom 2000's application was granted, he would use Freedom 2000's service.²⁰⁴
- 98 The Commission received comments from the public concerning Point Recycling's application. Although the summary of public comments indicates that 33 commenters were in favor of the application, 16 were opposed and 2 undecided, from reviewing the comments, it appears that 33 were in favor, 16 opposed and 8 undecided.²⁰⁵ Mr. Wilkowski filed nine letters in comment on his own application, many addressing the solid waste situation in Point Roberts. These letters are not included in the count of those in favor or opposed. About 30 percent of the comments expressed frustration with the County's handling of solid waste collection in Point Roberts, requesting the County modify its Plan to allow garbage service in Point Roberts to work more effectively.
- 99 ***Parties' Positions on the Application.*** Mr. Wilkowski argues that the current solid waste system design in Point Roberts is not economically feasible, and that the

²⁰¹ *Id.*, at 92:21 – 93:10.

²⁰² *Id.*, at 93:25 – 94:12, 95:22 – 96:9, 99:1-12.

²⁰³ *Id.*, at 97:25 – 98:20.

²⁰⁴ *Id.*, at 94:13 – 95:21.

²⁰⁵ *See* Exh. No. 91, comments regarding Docket TG-091687.

Commission should not grant a certificate to provide full solid waste and recycling services until the County creates a new, viable plan for the area.²⁰⁶ Mr. Wilkowski asks that the Commission grant his application so that he can serve on-call customers in Point Roberts until the County provides a new plan.²⁰⁷ In closing statements, Mr. Wilkowski argued that the Commission should deny both applications in order to prompt the County to act to change the solid waste collection system in Point Roberts. He asserted that within six months the County could contract with a Canadian company to collect and transport the solid waste from Point Roberts, which might provide the lowest cost option for residents.²⁰⁸

100 Freedom 2000 is opposed to the application and asserts that, if the Commission grants Point Recycling's application, it will withdraw its application for service.²⁰⁹

101 Staff recommends the Commission deny Point Recycling's application on the basis of past and current non-compliance.²¹⁰ Staff argues further that granting Point Recycling's application is not in the public interest as Point Recycling would likely compete with Freedom 2000 in the area of drop box service, which may well result in a reduction of reasonably priced service to consumers, or cause Freedom 2000 to withdraw its application.²¹¹

102 ***Discussion and Decision.*** We deny Point Recycling's application for drop box and special clean up services in Point Roberts, finding that the company does not meet the standards for regulatory fitness.

²⁰⁶ Exh. No. 32.

²⁰⁷ Exh. Nos. 31, 33, 34.

²⁰⁸ Wilkowski, TR. 211:4 – 213:15.

²⁰⁹ Gellatly, TR. 73:18 – 74:3.

²¹⁰ Cameron-Rulkowski, TR. 215:21 – 216:9.

²¹¹ *Id.*, at 216:3-15.

- 103 Though, based on this evidence, we find that there is an unmet need for drop box and special clean up service in Point Roberts, we question whether there is a need for more than one certificated carrier to provide the service. In prior cases, the Commission has considered the issue of competition in a solid waste market to be a question of whether granting competing authority is in the public interest. Specifically, the Commission has considered “whether the entry of an additional carrier, who has demonstrated public need for its services, will result in damage to carriers that causes a reduction to unacceptable levels of available reasonably price service to consumers.”²¹²
- 104 Applying this principle to Point Recycling’s application, we find that granting authority to two carriers to provide drop box and special clean up service would likely result in a reduction of service to customers at a reasonable price. Both Mr Wilkowski and Staff’s witness, Mr. Eckhardt, agreed that allowing both carriers to provide service would likely result in a dilution of service and divisive effect to customers, such that Freedom 2000 would not provide any service in Point Roberts.²¹³ Thus, while we find there is an unmet need for drop box and special clean up service in Point Roberts, granting authority to two carriers would not be in the public interest. As Freedom 2000 seeks to provide full service in Point Roberts and Point Recycling seeks to provide a more limited service, all things being equal, the public interest requires that we deny Point Recycling’s application.
- 105 In any event, we find that Point Recycling is not fit, willing and able to comply with state laws and rules, and that together with our concerns about diluting service to customers, we must deny Point Recycling’s application.
- 106 As discussed throughout this Order, Point Recycling and its owner, Mr. Wilkowski, has a history of, and a consistent pattern of, non compliance. Several of the violations are repeated, for example, the failure to file annual reports and pay fees, and operation

²¹² *Ryder*, Order M.V.G. No. 1761 at 14.

²¹³ Wilkowski, TR. 126:3 – 127:16; Eckhardt, TR. 187:23 – 188:18; *see also* Gellatly, TR. 73:18 – 74:3.

without authority after relinquishing his certificate. Some of the violations are flagrant: Mr. Wilkowski knew he was violating County ordinance or state law. We concur with Commission Staff that Mr. Wilkowski and Point Recycling are likely to continue to violate state laws and rules, and find that Point Recycling is not fit to provide the service it requests. For this reason, and our finding that the public interest does not justify granting more than one carrier authority to provide service in Point Roberts, we deny Point Recycling's application.

FINDINGS OF FACT

- 107 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:
- 108 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate the rates, rules, regulations, practices, and accounts of public service companies, including solid waste collection companies.
- 109 (2) On August 26, 2008, Freedom 2000 filed an application with the Commission for a certificate of public convenience and necessity to provide curbside source separated recycling collection service in Point Roberts, Washington. Freedom 2000 amended its application on June 23, 2009, requesting authority to provide full solid waste collection service (residential and commercial solid waste collection, residential recycling collection, and drop box service).
- 110 (3) Point Recycling was a solid waste collection company serving Point Roberts, Washington through certificate G-155, subject to Commission jurisdiction until the company relinquished its certificate and ceased providing service as of July 1, 2009.

- 111 (4) On October 26, 2009, within the 30 day protest period of Freedom 2000's amended application, Point Recycling filed an application with the Commission for a certificate of public convenience and necessity to provide only on-call drop box and special clean up services in Point Roberts.
- 112 (5) The applications filed by Freedom 2000 and Point Recycling overlap, as both seek to provide service in Point Roberts, and both seek to provide drop box and special clean up service.
- 113 (6) Point Roberts is an isolated and unincorporated area of Whatcom County, Washington, located at the southernmost tip of the Tsawwassen Peninsula, south of Delta, British Columbia, and accessible only by traveling through Canada or across Boundary Bay. Point Roberts is about 4 square miles in area, with 2000 housing units, with about one-third occupied by full-time residents.
- 114 (7) Since Point Recycling ceased providing solid waste and recycling collection service, there is a need for the collection of residential and commercial solid waste, residential recyclables, and drop box and special clean up services in Point Roberts, Washington.
- 115 (8) Freedom 2000 and Point Recycling have demonstrated sufficient financial resources to initiate operation of the proposed services, and have provided the required information to the Commission regarding the cost of the proposed services and facilities to be used, assets and equipment on hand to be used in providing service, and a statement of prior experience.
- 116 (9) The testimony and evidence identify concerns about the ability of Freedom 2000 and Mr. Gellatly to come into compliance with state laws and rules, and with the compliance history of J-Man Trucking, a company in which Mr. Gellatly has an ownership interest.
- 117 (10) Point Recycling has a history of non compliance with state laws and rules, including failing to file annual reports and pay regulatory fees, operating in

violation of County ordinances, and most recently, operating solid waste collection service, via drop boxes, without a certificate.

CONCLUSIONS OF LAW

- 118 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:
- 119 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings.
- 120 (2) Whatcom County ordinances mandate residential solid waste and curbside recycling collection from every residence in the County, but allow individuals to apply for exemptions from the universal service requirements. The ordinances also provide exceptions for seasonal homeowners in Point Roberts.
- 121 (3) The geography and small resident population of Point Roberts, combined with the solid waste collection ordinances established by Whatcom County, make for a problematic service territory for a solid waste collection company.
- 122 (4) The Commission must determine whether an applicant is financially fit by considering whether the applicant can finance the proposed operations for a reasonable period, not whether the operations are certain to become profitable.
- 123 (5) Although there is uncertainty in the record about whether the proposed operations of both Freedom 2000 and Point Recycling would be profitable, both applicants have shown that they can finance the proposed operations for a reasonable period, and are financially fit to provide service.
- 124 (6) Granting solid waste collection authority to both Freedom 2000 and Point Recycling is not in the public interest, as allowing both carriers to provide drop box and special clean up services would likely result in a reduction of

service to customers at a reasonable price, a dilution of service and a divisive effect to customers.

- 125 (7) An applicant must demonstrate that it is fit, willing and able to comply with state laws and rules: While past illegal conduct is not a bar to granting an application, the Commission must determine whether the applicant is motivated to comply and likely to remain in compliance.
- 126 (8) Although the record raises concerns about Freedom 2000's regulatory fitness and ability to continue to comply with state laws and rules, the company has shown intent to come into compliance sufficient to find the company fit, willing and able to provide service. The Commission should address these concerns through strict enforcement of violations.
- 127 (9) Point Recycling is not fit, willing and able to provide service: The company, through its owner Mr. Wilkowski, has repeatedly and flagrantly violated state law and rules, requiring Commission action. The company and its owner are not motivated to comply and are not likely to comply with state laws and rules.
- 128 (10) Freedom 2000 has met the requirements for the Commission to grant a certificate of public convenience and authority to provide solid waste collection service, but that grant of authority should be conditioned on the company initiating operations quickly to meet the needs of residents in Point Roberts. As a condition of the grant of authority, Freedom 2000 must initiate operations by providing residential solid waste and recycling collection service within 45 days, complying with all regulatory requirements for starting service. If the company cannot initiate service by this deadline, the conditional grant of authority will be rescinded.
- 129 (11) The Commission should retain jurisdiction over the subject matter and the parties to this proceeding to effectuate the terms of this Order. *RCW Title 81.*

ORDER

THE COMMISSION ORDERS:

- 130 (1) The application filed by Freedom 2000, LLC, d/b/a Cando Recycling and Disposal, for solid waste collection service in Point Roberts, Washington, is granted, subject to the condition established in this Order.
- 131 (2) The application filed by Points Recycling and Refuse, LLC, d/b/a Point Recycling and Refuse, for solid waste collection service in Point Roberts, Washington, is denied.
- 132 (3) The Commission retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective January 27, 2010.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

DISSENT

Applications of Freedom 2000 & Point Recycling:
Dockets TG-081576 & TG-091687
Dissenting Opinion, Commissioner Philip B. Jones

PHILIP B. JONES, Commissioner (dissenting):

- 133 I respectfully dissent from the majority opinion for the following reasons. Both applicants have failed to demonstrate in this record that either can operate as a solid waste and recycling hauler on a sustainable, long-term basis in the Point Roberts area under Whatcom County's present ordinances and policies. Since the Commission approved in June the relinquishment of certificate G-155, held by Points Recycling and Refuse, LLC, d/b/a Point Recycling and Refuse, LLC (Point Recycling), I believe the primary burden now lies with the County to re-assess its policies and ordinances regarding the Point Roberts area and to attempt to develop a framework for a more sustainable recycling and solid waste policy for its residents.
- 134 All parties recognize that the Point Roberts area is unique in many respects. The area is located on the southernmost tip of the Tsawwassen Peninsula just south of Delta, British Columbia in Canada and is therefore geographically contiguous with Canada. Many of the homeowners in Point Roberts are Canadian citizens who maintain second homes in the area and only have a need for seasonal service. In general, the area is small, isolated, and has a small population to service.
- 135 Although it is part of Whatcom County in the state of Washington, a solid waste hauler in Point Roberts requires four border crossings on a round-trip journey between Point Roberts and Bellingham to transport waste for disposal. Such a round-trip journey requires several hours: Unexpected road congestion or long border crossings can reduce operational efficiencies.

- 136 The County has granted 590 exemptions from mandatory collection in Point Roberts under Section 8.11.030 of the County Code.²¹⁴ Point Recycling has stated that, at most, it was able to sign up a fraction of the 350 solid waste customers for recycling service before the company discontinued that service in early 2009. It is extremely challenging to develop a viable business plan when the County has granted so many exemptions from mandatory service.
- 137 Under these unique and difficult circumstances, it is hard to make a good business case for a company to provide high-quality, sustainable solid waste and recycling collection service. Although solid waste collection companies are highly regulated by the Commission and must serve the needs of the residents of the community which they serve, these companies need to operate within the framework of a long-term plan and ordinances that provide consistent and predictable regulation. The current policies of Whatcom County do not allow that. The County could address several areas in current ordinance, policies, or enforcement.
- 138 Further, the County owns and operates the Johnson Road transfer station in Point Roberts. The County has leased its operations to Point Recycling since 1999, and recently renewed the lease. Self-hauling of solid waste and recyclable materials to the transfer station is allowed by County Code and has always had its supporters in Point Roberts. Since the termination of solid waste collection service in June, 2009, some residents are likely to continue to self haul, even if the Commission grants collection authority to another company. The transfer station also accepts waste from drop box and special clean up services. In fact, Point Recycling admitted on the record that it has been providing some of these services in violation of state law since it clearly no longer has a certificate to collect and transport solid waste.²¹⁵ If we were to grant the application of Freedom 2000, LLC d/b/a Cando Recycling and Disposal (Freedom 2000), the resulting situation, in which two competing haulers are operating in the Point Roberts area – one with a G-certificate for curbside garbage and recycling

²¹⁴ See Majority Opinion, n. 11, taking official notice of the fact from Whatcom County's Website: <http://www.co.whatcom.wa.us/publicworks/solidwaste/ptrobertsanswers.jsp#different>.

²¹⁵ Wilkowski, TR. 132:20 – 133:20.

service, and one with a lease from the County to operate the transfer station, is not a viable framework. Therefore, I believe the County needs to address the issue of the operation and lease of the transfer station and a carrier providing curbside solid waste and recycling service in a more integrated fashion.

139 The public interest is not best served by providing a “temporary fix” through granting Freedom 2000’s application, on condition, because I am not persuaded that this company could sustain its business operations more than a year based on this record. Moreover, I am not persuaded that the current policies of the County would allow for a sustainable business case to be developed. Although I recognize that Freedom 2000 would be a “start-up” organization in both financial and operational terms, I am not convinced the County’s regulatory framework will allow it to succeed, even it executes perfectly on its business plan. I recognize that the Commission, in prior decisions, has found that it cannot determine financial fitness by looking at whether an applicant’s proposed service is likely to be profitable, only whether the applicant can finance its operations for a reasonable period.²¹⁶ However, there is a difference between considering the fitness of a carrier and its ultimate ability to provide service, where the Commission must determine whether a carrier is fit, willing and able to provide service before granting a certificate. Under the circumstances presented in the record in this proceeding, I would find it difficult to determine whether any applicant is able to provide service in Point Roberts.

140 I am especially concerned about the substantial time and effort it will take to “win back” the previous subscribers of curbside service who have grown accustomed to self-hauling to the transfer station, and may likely continue to do so in the future. The applicant will have to devote substantial resources in communication and marketing with these previous customers, which could distract the management of Freedom

²¹⁶ *Application of Sureway Medical Services, Inc.*, Application No. GA-75968, Order M.V.G. No. 1663, Commission Decision and Order Granting Review; Modifying Initial Order; Granting Amended Application, in Part, on Condition, at 7-8 (Nov. 1993); *see also Application of Ryder Distribution Resources, Inc.*, Application GA-75154, and *Application of Stericycle of Washington, Inc.*, Application GA-77539, Order M.V.G. No. 1761, Final Order Modifying Initial Order; Granting Application, As Amended, at 9 (Aug. 1995).

2000 from the myriad challenges of a start-up organization. I would be more comfortable in considering the application of an existing carrier in Whatcom County, such as Sanitary Services, to provide service in the Point Roberts area, since they could “piggyback” this service on its existing vehicle fleet and service territory and make a better business and operational case. Yet the Commission received no formal application for Point Roberts from one of the well-established, existing carriers who serve resident in other areas of Whatcom County.

141 In summary, I believe the Commission should direct our Executive Director and Secretary to send a letter to the County pursuant to RCW 36.58A.030 that we believe that neither applicant is qualified and able to offer high-quality, sustainable service under the present regulatory framework in the County. This would follow on to Mr. Danner’s previous letter to the County, dated June 18, 2009, in which he stated that the Commission would solicit applications from companies interested in providing service in Point Roberts but concluded by stating: “If no qualified company is found, the Whatcom County Council may pursue its other options regarding recycling and refuse collection in Point Roberts.”²¹⁷ This statute allows “county legislative authority [to] provide county garbage and refuse collection services in the area and charge and collect reasonable fees therefore.”²¹⁸ I believe we find ourselves at the point in time now. It is time for the County to address the unique issues posed by the Point Roberts area seriously and in an integrated, comprehensive way.

PHILIP B. JONES, Commissioner

²¹⁷ June 18, 2009, letter from David W Danner, Executive Director and Secretary, Washington Utilities and Transportation Commission, to Council Members, Whatcom County, filed in Commission Docket TG-081089 on June 19, 2009.

²¹⁸ RCW 36.58A.030.

DOCKET TG-081576
ORDER 05 (*Consolidated*)

PAGE 53

DOCKET TG-091687
ORDER 02 (*Consolidated*)

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.