

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of

BLAINE-BAY REFUSE, INC.

Motion to amend Commission order
M.V.G. No. 656

DOCKET NO. TG-031817

RESPONSE ON BEHALF OF COMMISSION STAFF
TO BLAINE-BAY REFUSE, INC.'S
MOTION TO AMEND COMMISSION ORDER M.V.G. NO. 656

March 29, 2004

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I. OVERVIEW

1 Over thirty years ago, the Commission held a hearing on a solid waste
transportation certificate application. The evidence in the record of that hearing
proved need for service beyond the specific territory applied for. No one at the
hearing objected to that additional evidence, but the Commission's Order limited the
grant of certificate authority to the area stated in the application.

2 It appears the Applicant may have believed it had received a certificate for the
broader territory. In any event, this issue came to a head only recently, and an
application has been filed for the additional territory. (Docket No. TG-030831.) The
instant docket arises on the Applicant's motion to amend that thirty-year old
Commission order, based on the evidence contained in that record.

3 Commission Staff believes the Commission has discretion to re-examine the
record in that old docket and grant whatever additional certificate authority the
evidence in that record justifies. The Commission Staff recommends the Commission
exercise that discretion in this case.

4 Based on Staff's analysis of the record, additional certificate authority should
be granted, but that additional authority is less extensive than that argued for by
Blaine-Bay in its Motion.

II. SUMMARY

5 Blaine-Bay Refuse, Inc. ("Blaine-Bay") has filed a "Motion to Amend Order M.V.G. No. 656" (Motion.) The Commission issued its Order M.V.G. No. 656 (Order) on January 21, 1974, in Hearing No. GA-405. The basis for the Motion is that the record and the Order in that case support a broader grant of operating authority than the Commission granted. Blaine-Bay asks for the authority in existing Certificate No. G-145 be changed to add:

- (1) All land between Drayton Harbor Road and Drayton Harbor
- (2) All land between Semiahmoo Drive and Drayton Harbor
- (3) All land between Semiahmoo Drive and Semiahmoo Bay
- (4) All land between Birch Point Road and Birch Bay
- (5) All land between Birch Bay Drive and Birch Bay
- (6) All land on Point Whitehorn between the land located north of Grandview Road extended west to the Straight of Georgia and shoreland of Birch Bay

(Motion at 2, lines 1-5.)

6 Commission Staff supports Blaine-Bay Refuse's Motion to Amend Order M.V.G. No. 656, in part. Specifically, Staff agrees the Applicant proved entitlement to serve the beach areas identified in items (4) and (5) above, and part of (6), but not (1) or (2) or (3).

7 Because Staff's conclusion is based on the record in Hearing No. GA-405 and specific objective information supplied by Blaine-Bay in its Motion, there do not

appear to be material facts in dispute. The record in that case was “incorporated by reference into this docket.” Prehearing Conference Order in Docket No. TG-031817 (January 14, 2004) at ¶ 7.

8 Staff therefore requests the Commission to enter an order reissuing Certificate No. G-145 to include all land between Birch Bay Drive and Birch Bay, and all land between Birch Point Road and Birch Bay. The Commission should construe the language in Certificate G-145 that states “Grandview Road extended to Point Whitehorn” to mean the area formed by Grandview Road on the south, Holeman Road on the west (*i.e.*, Grandview Road “extended”), Point Whitehorn Road on the east, and Birch Bay Drive on the north.

III. ISSUES PRESENTED

9 As a threshold matter, it is necessary to first interpret Certificate G-145 before considering whether that certificate should be amended. Accordingly, the legal issues can be separated into two categories:¹

¹ Commission Staff considered the issue whether a statute of limitation or the doctrine of laches might apply to bar Blaine-Bay’s Motion. We located no limitation statute that applies.

Laches is generally defined as a neglect to bring an action, coupled with the lapse of time and other circumstances, which causes prejudice sufficient for equity to bar that action. 27A Am. Jur. 2d *Equity* § 140 (1996). Laches does not apply to the Commission as an agency of state government because “a general rule prevails that laches does not apply to state government actions ...” *Id.* at § 155. However, laches could apply as between Sanitary Service and Blaine-Bay. That is, Sanitary Service could argue that laches bars Blaine-Bay from filing its Motion which seeks to amend a Commission order that is thirty years old, when (arguably) such a motion could have been filed by Blaine-Bay (or

1. How to Interpret the Existing Certificate Language of Certificate G-145:
 - a. **The Road Boundary Issue:** Does the language contained in Certificate G-145 permit service to the waterside of Birch Bay Drive, Birch Point Road, Semiahmoo Drive and Drayton Harbor Road?
 - b. **The “Extended to” Language Issue:** How should the language in Certificate G-145 that refers to “Grandview Road extended to Point Whitehorn” be interpreted?

2. How to deal now with the Record in Hearing No. GA-405:
 - a. Does the Commission have discretion to grant broader authority than what was granted in 1971, assuming the record in that prior proceeding supports a broader grant?
 - b. If so, does the record in Hearing No. GA-405 support a grant of authority broader than what was requested in the application in that case?

IV. ARGUMENT

A. How Certificate No. G-145 Should Be Interpreted As Written

1. The Road Boundary Issue

10 The part of Certificate No. G-145 pertinent to this issue defines the geographic scope of the service area in dispute as follows:

its predecessor in interest) thirty years ago, or the same arguments could have been made at the Commission hearing in 1973.

“Generally, laches depends on particular facts and circumstances of each case.” *Lopp v. Peninsula School Dist.* 401, 90 Wn.2d 754, 759, 585 P.2d 810 (1978)(citations omitted). Here, while one could argue that Blaine-Bay has waited too long to make its arguments, the same argument could be made that Sanitary Service has also waited too long to assert its rights (*i.e.*, file a complaint to bar Blaine-Bay from operating beyond its certificate).

In the context of this case, Staff believes the lack of action by Sanitary Service offsets the lack of action by Blaine-Bay, and consequently, laches should not bar the instant Motion.

GARBAGE AND REFUSE COLLECTION SERVICE ... In that portion of Whatcom County described as follows: Starting at the intersection of the Blaine Road and Hall Road; thence south on the Blaine Road to the Grandview Road; thence west on the Grandview Road extended to Point Whitehorn; thence north on Birch Bay Drive to Birch Point Road, thence west on Birch Point Road to Semiahmoo Drive; thence north on Semiahmoo Drive to Drayton Harbor Road; thence east on Drayton Harbor Road to Blaine Road; thence north along Blaine Road to the point of beginning.

Exhibit No. 8, page 16 (Appendix A to the Final Order in Hearing No. GA-405.)

11 This certificate language describes a territory, and uses specific roads to delineate the outer boundary of that territory. Service on the “inside” of that boundary is permitted, but service on the “outside” of that boundary, *i.e.*, on the waterside of the named roads, is not permitted.

12 Accordingly, Certificate No. G-145 does not permit service on the waterside of Birch Bay Drive, Birch Point Road, Semiahmoo Drive, or Drayton Harbor Road.

13 While there does not appear to be a dispute about this interpretation, it is well supported nonetheless. First, the application in Hearing No. GA-405 confirms the roads form the boundary of the territory being requested. In that application, the Company stated: “The Named Roads are the roads *that bound* the area Being [sic] applied for.” (Exhibit No. 1, page 2a (Emphasis added.) Because the roads in Certificate No. G-145 are the boundaries of the area being applied for; the area beyond the outer edge of that boundary cannot be served.

14

The map the Applicant included as part of its application in Hearing No. GA-405, and entered as Exhibit No. 1 in that case, also confirms Staff's interpretation. Exhibit No. 4, page 78 is an excerpt of that map, and it shows the red shaded area as the area the Applicant requested. The Applicant included this map in its application and offered it into evidence as its own exhibit. (Exhibit No. 4, pages 16-17, which are Transcript pages 8-9.) As Exhibit No. 4, page 78 shows, the area of the map shaded in red lines by the Applicant does not include the area on the waterside of Birch Bay Drive, Birch Bay Drive, Birch Point Road, Semiahmoo Drive and Drayton Harbor Road.

15

At the time of its application, the Applicant appeared to agree that the shaded area was the limit of the territory it was applying for: "The area shadowed on the map is the area in which I would like to be able to serve." (Exhibit No. 1, page 2a, Item 11, last sentence.)

16

The available case law confirms the Staff's interpretation. While no Commission cases were located that address the precise interpretive issue presented here, useful precedent from the Interstate Commerce Commission was located. For example, in *I.C. Black & Sons Common Carrier Application*, 53 MCC 572 (1951), the certificate at issue authorized the transport of lumber in a defined territory, which was from points in the state of Arkansas "bounded by a line beginning in Texarkana,

Ark., and extending in a northerly direction to Pine Bluff, Ark., thence in a southerly direction along U.S. Highway 65 to the Arkansas-Louisiana State Line, and thence along the southern boundary of Arkansas to Texarkana.”

17 The ICC concluded that “Operations conducted by petitioners ... from points in Arkansas north of a straight line extending between Texarkana and Pine Bluff were beyond the scope of the authority granted ...” 53 MCC at 575.

18 In *Washington, D.C., Commercial Zone, Ex Parte* No. MC-7, 48 MCC 460 (1948), the ICC considered the description of commercial zones within which carriers could operate. In some instances, the ICC used highways to describe commercial zone boundaries. In this connection, the ICC noted: “The question is also raised whether the areas adjacent to both sides of a boundary highway are included in the zone. As set forth in our findings the zone is described as an area ‘within a line.’ Where a highway is chosen as the line, the outer edge of the highway is the limit of the zone.” 48 MCC at 464.

19 In sum, the Commission should interpret Certificate G-145 as permitting service within the territory defined. That territory uses named roads as the boundary. Accordingly, service to areas on the “outside,” *i.e.*, the waterside of Birch Bay Drive, Birch Point Road, Semiahmoo Drive and Drayton Harbor Road, is not authorized by Certificate G-145 as written.

2. The “Extended to” Language Issue

20 The part of Certificate No. G-145 pertinent to this issue states:

... thence south on the Blaine Road to the Grandview Road; *thence west on the Grandview Road extended to Point Whitehorn*; thence north on Birch Bay Drive to Birch Point Road ...

Exhibit No. 4, page 16. (Emphasis added.)

21 The issue is how to interpret the certificate language in italics above. The first problem is: What language is to be interpreted? The language quoted above from Certificate G-145 is the same language contained in Appendix A to the Commission’s Final Order in Hearing No. GA-405, but it is *not* the language used in Conclusion of Law No. 3 in the Commission’s Proposed Order in that docket, which was adopted in the Final Order. Conclusion of Law No. 3 states:

... thence south on the Blaine Road to the Grandview Road; *thence west on Grandview Road to Point Whitehorn*; thence north on Birch Bay Drive to Birch Point Road ...

(Page 11 of the Proposed Order in Hearing No. GA-405, Conclusion of Law No. 3, found in Exhibit No. 8 at 11.)²

²Staff does not believe the reference to “Point Whitehorn” in the application in GA-405 meant “Point Whitehorn Road.” A comparison of the application as originally filed versus the language docketed shows that “Road” was added to the term “Drayton Harbor” but not “Point Whitehorn.” (Compare Exhibit No. 1 at page 2a with page 4.)

Moreover, the language does not say “thence north *on* Point Whitehorn,” suggesting a road, but rather “to Point Whitehorn,” suggesting a geographic location, not a road.

22 In other words, the “extended to” terminology appears in the certificate
language, which was literally adopted in Order M.V.G. No. 656, but it is not included
in the key Conclusion of Law also adopted in that same Order, that supported the
grant of that certificate.

23 This discrepancy between the language in the Certificate and the language in
Conclusion of Law No. 3 is not explained in the record in Hearing No. GA-405, or the
Commission’s Order itself, but both descriptions are consistent with a grant of
authority to serve at least some part of the geographic area called Point Whitehorn.

24 The problem is that Grandview Road itself does not go to the “tip” of Point
Whitehorn. The map submitted by the Applicant in Hearing No. GA-405, shows a
short unnamed connecting road in the area where Grandview Road ends. Thus, the
map (Exhibit No. 4, page 78) shows that Grandview Road proceeds past the street
named “Pt. Whitehorn Rd” where it meets the short unnamed road that connects
Grandview Road, to “Birch Bay Drive.” Birch Bay Drive continues in a northeasterly
direction from that point towards Point Whitehorn Road.

25 More detailed maps show that “Holeman Avenue” is the name of the short
length of road connecting Grandview Road to Birch Bay Drive. Included in the

Accordingly, “Point Whitehorn” should be interpreted to mean Point Whitehorn itself, or a
part of Point Whitehorn. Point Whitehorn appears to be defined geographically as the area west of Pt.
Whitehorn Road.

Appendix to this Response are: 1) a copy of the map submitted with the application in Hearing No. GA-405; and 2) a copy of a more detailed map of the area showing Holeman Avenue and other named roads in the area.

26 The issue then becomes how far should Grandview Road be “extended?” Staff believes Grandview Road should be extended to include the portion of Holeman Avenue constituting the short stretch of road that connects Grandview Road to Birch Bay Drive. This interpretation is consistent with the map filed by the applicant: Exhibit No. 4, page 78. That map shades in red lines an area that includes a part of Point Whitehorn bounded by Grandview Road on the south side, Birch Bay Drive on the north side, Point Whitehorn Road on the east side, and Holeman Avenue on the west side.

27 Another interpretation of the “extended to” language is that advocated by Blaine-Bay, namely, extend Grandview Road west, all the way to the waterfront, *i.e.*, to the “tip” of Point Whitehorn. However, that interpretation is inconsistent with the Applicant’s map filed in Hearing No. GA-405. In addition, it does not make sense in connection with the certificate language that follows (“thence north on Birch Bay Drive ...”), because Birch Bay Drive does not connect to the point where Grandview Road would be extended under Blaine-Bay’s interpretation. In other words, Blaine-Bay’s interpretation creates a “gap” in the certificate language.

28 It is true the Commission could have used specific road names to accomplish
the same result as Staff concludes is appropriate. However, the same is true of a
more broad interpretation of where Grandview is to be “extended.”

29 In sum, the most defensible interpretation of the “extended to Point
Whitehorn” language is one that is consistent with the map filed by the Applicant. In
similar contexts, maps are used to interpret an ambiguous written territorial
description.³

30 Accordingly, the language in Certificate No. G-145 referring to Grandview
Road “extended to Point Whitehorn” should be interpreted to refer to the portion of
Point Whitehorn that is formed by Grandview Road on the south, Holeman Road on
the west, (*i.e.*, Grandview Road “extended”), Point Whitehorn Road on the east, and
Birch Bay Drive on the north.

**B. Whether The Evidence In The Record In Hearing No. GA-405 Was
Sufficient To Grant Authority Broader Than What Was Requested, And If It
Was, What Can Be Done About It Now?**

1. Summary

31 Under Staff’s interpretation of the operating rights granted by the
Commission in Hearing No. GA-405, those operating rights are more limited than the
rights Blaine-Bay is now seeking in its Motion.

³ By analogy, and as a general rule, maps that are referenced in a deed control over ambiguous or conflicting language in the deed itself. 23 Am. Jur. 2d, *Deeds*, § 64 (1983.)

32

Under typical circumstances, to obtain additional rights, an application to extend Certificate No. G-145 would be required. Blaine-Bay has filed such an application in Docket No. TG-030831. However, based on the discussion that follows, it appears that the Applicant proved more than it asked for in Hearing No. GA-405. In similar circumstances, the Commission has granted the additional authority without requiring a new application. The Commission has discretion to do the same in this case.

2. The Commission Has Granted Additional Authority Based On The Proof At Hearing, Because The Available Protestants Participated In That Hearing

33

The Commission has granted operating rights greater than an applicant has requested, so long as the record supported it, and the available Protestants participated. A case on point is *Application of Dutchman Marine, LLC d/b/a Lake Washington Ferry Service, et al.*, Docket Nos. TS-001774 and TS-002055 (September 19, 2001.)

34

In the Commission's Initial Order in that case, the Commission proposed to grant authority in addition to that requested by the applicant in its application. The Commission did not require a new or amended application be re-docketed because the persons who might have participated in the re-docketed hearing were already participants in the case. Initial Order at 9. The Commission adopted the Initial

Order as the Commission's Final Order. Final Order, Docket Nos. TS-001774 and TS-002055 (October 19, 2001.)⁴

35 Similarly, Sanitary Service Company participated in the Hearing in GA-405, and is the only protestant in the instant docket. Accordingly, the Commission can consider the evidence in Docket No. GA-405, and grant now whatever additional authority was proved in that case.

3. The Record In Hearing No. GA-405 Shows the Applicant Proved The Need For Additional Service To The Waterside Of Birch Bay Drive and Birch Point Road

36 The evidentiary record of Hearing No. GA-405 consists of the transcripts of the hearings (*see* Exhibit Nos. 4 and 8), and the exhibits admitted at the hearing that were numbered hearing Exhibit Nos. 1, 2 and 3 (these exhibits are contained in the record in Exhibit No. 4 at pages 76-78.)

37 That record shows Sanitary Service discontinued solid waste collection service to the general area at issue approximately eight years prior to the application in GA-

⁴ It is true that the additional authority at issue in *Dutchman Marine* was indeed docketed, but it was docketed for another applicant who was participating in the consolidated hearings. However, Staff believes the rule of *Dutchman Marine* is that if the proof supports the additional grant, and the Protestants participated in the proceeding, the Commission has discretion to grant the additional authority, particularly if no party objected to the additional proof.

In any event, Blaine-Bay's Motion to Amend was docketed, and Sanitary Service, the Protestant in Hearing No. GA-405, remains the only protestant. And the record in Hearing No. GA-405 shows Sanitary Service made no objection to the scope of the evidence offered by the Applicant in that hearing. Accordingly, the Commission does not need to be concerned about the rights of any other solid waste collection company, if it decides to grant Blaine-Bay's Motion to Amend.

405. Exhibit No. 4, Page 55. At the time of that application, Sanitary Service held a federal contract to serve the air force base and military residences outside the air force base. Sanitary Service was also serving six individual residences in the vicinity of the air force base, but it was offering service to no other residences or commercial locations in the territory requested by the Applicant. Exhibit No. 4, Pages 57-64.

38 In Proposed Order M.V.G. No. 646, the Commission's Hearings Examiner described the area for which the extension is requested as a summer cottage and tourist resort area comprising the Birch Bay shores and south shore of Drayton Harbor. He further described the area as a Seaside resort with problems not common to usual areas, including thousands of feet of privately owned beach for which owners must provide containers. (Exhibit No. 8, Pages 4 and 7.) This is a clear reference to the waterfront areas now at issue.

39 In Finding of Fact No. 12 of his Proposed Order, the Hearings Examiner stated that they (the various resort owners and operators of commercial establishments) generally reported that the applicant provided Saturday, Sunday, and Monday service, emptying the individual containers by the respective cottages, trailer or tent spaces, *and those on the beach...*" (Exhibit No. 8, Page 8)(emphasis added.)

40 The issue then, is the extent to which the Applicant proved the need for service to the waterfront in the record in Hearing No. GA-405.

41 The record contains testimony of 12 persons testifying to the need for solid waste collection services. For many of these witnesses, Blaine-Bay now supplies deeds for the purpose of specifically identifying the service location of several of these witnesses. Blaine-Bay has spotted these locations on the map that is attached as Exhibit 1 to the Declaration of Mr. Sands (filed with Blaine-Bay's February 20, 2004 Supplemental Memorandum).

42 For other witnesses, Blaine-Bay does not supply deeds, yet nonetheless includes their names on the same map that is Declaration Exhibit 1, indicating a specific location.

43 We summarize the testimony of record below, adding references to the deeds recently supplied by Blaine-Bay. All page references are to Exhibit No. 7:

1. Herbert Gischer - (Exhibit No. 7, Pages 11-24)
 - Has a store and trailer park "right in the center of Birch Bay." (Page 12)
 - Self-hauls garbage using a pickup truck and trailer. (Page 19)
 - Wants to get out of the garbage hauling completely. (Page 20)
 - Does not specifically mention the beach, but refers to the problem of shellfish rotting in garbage cans, "so they have to be taken care of." (Page 17)
 - No deed filed in Blaine-Bay's Supplemental Memorandum, but Mr. Gischer's name is on the Declaration Exhibit 1.

2. Robert Vogt - (Exhibit No. 7, Pages 25-34)
 - In Birch Bay, he has the Edgewater Resort. (Page 25)
 - Needed service so he bought his own garbage truck. (Page 26)

- Would rather get out of the garbage hauling business. (Page 26)
- Needs service to cans on the beach. (Page 27, 29)
- Deed filed in Blaine-Bay's Supplemental Memorandum in Blaine-Bay's Supplemental Memorandum. Mr. R. Vogt is noted on Declaration Exhibit 1.

3. William Vogt (Exhibit No. 7, Pages 35-46)

- Has Bay Center Resort with cottages, store, gas station, and drive-in (Page 35)
- He has his own garbage packer truck. (Page 36)
- He has a thousand feet of beach and he has cans for the beach. (Page 36)
- There is a need for adequate garbage service (Page 38), he doesn't need pickup because he has his own truck. He got his truck because of the lack of service that resulted when the Applicant was required to stop service. (Page 37)
- He speaks generally about the problem of beach cabin goers who leave trash on the weekend and there is no service. (Page 41) He also refers to residences off the beach, and the need for service. (Page 44)
- Deeds filed in Blaine-Bay's Supplemental Memorandum (One deed mentions Birch Bay – another copy also mentions Drayton Harbor Road.) Mr. W. Vogt is noted on Declaration Exhibit 1.

4. Vera Trueblood – (Exhibit No. 7, Pages 46-48)

- Owns a private residence by the airbase. (Page 47)
- Self-hauls garbage; wants service. (Page 47)
- No mention of beach
- No deed filed in Blaine-Bay's Supplemental Memorandum. Ms. Trueblood is not noted on Declaration Exhibit 1. It is unclear from the map where the airbase is located.

5. Norman C. Rauch (Exhibit No. 7, Pages 48-55) & (Barbara Rauch Page 56)

- Lives at the "north end" of Birch Bay at Norm's Cottages. (Page 49)
- Purchased a van to self-haul garbage. (Page 54)

- Would “definitely take advantage of” garbage service because he “doesn’t want to have anything to do with the garbage.” (Page 54)
- No mention of beach
- Deed filed in Blaine-Bay’s Supplemental Memorandum. Mr. Rauch is noted on Declaration Exhibit 1.

6. Gordon Sullivan – (Exhibit No. 7, Pages 57-61)

- Has the Birch Bay Swimming Pool, Workshop Tavern, and leases a building for a beauty parlor, “all down next to the golf course at the center of the bay.” (Page 57)
- Also takes care of 12 cottages next to the Golf Course. (Page 57)
- Puts no cans on the beach because people steal them. (Page 58)
- Waste collected under an arrangement with an employee of the golf course. But he has trouble with this periodically. (Page 60, 61)
- Also self-hauls (Page 61)
- Deed filed in Blaine-Bay’s Supplemental Memorandum. Mr. Sullivan is noted on Declaration Exhibit 1.

7. Mrs. A. M. Richmond – (Exhibit No. 7, Pages 62-67)

- Owns the Idlesse Resort “right on the bay.” (Page 62)
- Self-hauls (by her son or grandchildren), but it is not satisfactory. (Page 63)
- She “most definitely” needs more adequate garbage service. (Page 64)
- No deed filed in Blaine-Bay’s Supplemental Memorandum, but “Richmond” is noted on Declaration Exhibit 1, right below Mr. Rauch.

8. Mike Carr – (Exhibit No. 7, Pages 67-73)

- Manager of American Campgrounds on “Drake Harbor Road” (We assume this refers to Drayton Harbor Road and the name is misspelled in the transcript.) (Page 68)
- Campground has a store, tent and trailer sites. (Page 68)
- Self-hauls garbage or finds someone to help depending on how much they have. He “definitely” needs service. (Page 69)
- Refers to his business “on the Bay” but states his location is “a mile

back up around the road.” (Page 69. 72-73)

- No deed filed in Blaine-Bay’s Supplemental Memorandum. However, Mr. Carr and the “American Campground” are noted on Declaration Exhibit 1, inland midway between Drayton harbor and Birch Bay, on Harbor View Road.

9. Everett Borgker – (Exhibit No. 7, Pages 74-77)

- Has residence on the corner of Shintaff[er] Road and Birch Bay Drive “right on the beach.” (Page 74)
- Currently self-hauls his garbage in his car, but he does not like it. (Page 74 and 75)
- Deed filed in Blaine-Bay’s Supplemental Memorandum. Mr. Borgker is noted on Declaration Exhibit 1.

10. Fred Yates – (Exhibit No. 7, Pages 78-84)

- Resides in Birch Bay Village. (Page 78)
- Service there “has been a good service”; “entirely satisfactory.” (Page 80, 82.) But the residence service [from Sanitary Service] started after the Applicant stopped serving [due to lack of a certificate]. (Page 82)
- Had service to residence from Sanitary a couple of years. (Page 82)
- Has a four-unit apartment at “the other end” of Birch Bay with a little house alongside. (Page 79)
- Bought a trailer to self-haul, but he does not like it: “always unsatisfactory.” (Page 79-80)
- Says “it [garbage service] is quite a mess around the resort areas.”
- Deed filed in Blaine-Bay’s Supplemental Memorandum was for Mr. Yates’ residence, but not for the apartment and house “at the other end” of Birch Bay. Mr. Yates’ Birch Bay Village residence is noted on Declaration Exhibit 1, but the apartment and other house are not

11. Earl Vogt – (Exhibit No. 7, Pages 84-89)

- Has Birch Bay Trailer Park & Sales. (Page 85)
- Has his own packer truck for garbage, about 7 years. (Page 86)
- Plans to continue using his packer truck. (Page 88)

- Expressed need for daily service to the beach in Birch Bay generally. (Page 87)
- Deed filed in Blaine-Bay's Supplemental Memorandum (the deed mentions Drayton Harbor Road but the map attached to the deed shows a lot for "E. Vogt" bordering on Birch Bay Drive and Harbor View Road.)

12. Kenneth Williams - (Exhibit No. 7, Pages 89-92)

- Private residence on Harbor View Road. (Page 89)
- Self-hauls to dump that he doesn't "crave to do too much." (Page 90)
- No specific mention of beach or beach service
- No deed filed in Blaine-Bay's Supplemental Memorandum. Mr. Williams is not noted on Declaration Exhibit 1

44 This testimony, read in conjunction with the map provided in Exhibit 1 to the Declaration of Mr. Sands (filed with Blaine-Bay's February 20, 2004 Supplemental Memorandum in support of its Motion), shows supporting testimony for service to the beach, at least to the beach area along Birch Bay Drive, until it reaches Birch Point Road.

45 The peninsula that begins at that location (*i.e.*, to the south of Birch Point Road) is a neighborhood called Birch Bay Village. The only witness supporting service there was Mr. Yates. He testified he lived in the Village, but he said garbage service was now satisfactory. (*See* summary outline above for Mr. Yates.)

46 This testimony still supports the Applicant, however, because Mr. Yates was testifying in 1973. In an application for overlapping general solid waste authority,

the Commission examines service by the incumbent certificate holder during a period prior to the application. Evidence of post-application improvements in service by the incumbent is not considered. Order M. V. G. No. 1719, In re Brent Gagnon, d/b/a West Waste and Recycling, App. No. GA-76306 (August 1994); Order M. V. G. No. 1526, In re Superior Refuse Removal Corporation, App. No. GA-849 (November 1991); In re Anthony DiTommaso d/b/a DiTommaso Bros. Garbage Service, App. No. GA-508 (November 1975); Order M. V. G. No. 726, In re Anthony J. DiTommaso, App. No. GA-449 (February 1975).

47

Accordingly, the key date for considering this evidence is the year prior to the application, which was October 8, 1971. Exhibit No. 1, Page 1.⁵ Mr. Yates testified that he only began receiving service from Sanitary Service at his residence “after [the applicant] left.” (Exhibit No. 7, Page 82.) Mr. Razore of Sanitary Service that his company did not provide service “vigorously” until after the first application hearing in GA-405 two years earlier. (Exhibit No. 7, Page 129.) As a result of that post-

⁵ The approximately two-year period that elapsed between the time of the application and the final order was due in large part because the Applicant appeared *pro se* at the first scheduled hearing with letters of support, but no supporting witnesses. Rehearing was ultimately awarded. (See, e.g., Exhibit No. 5: Findings of Fact, Conclusions of Law, and Examiner’s Proposed Order Denying Application (March 3, 1972); Exhibit No. 4 at Pages 22-23; and Exhibit No. 6, Pages 10-12: Order Granting Motion for Reopening of Hearing for the Presentation of Further Evidence (April 20, 1973)). At the second, reopened hearing, the Applicant was represented by counsel and presented several witnesses. (See Exhibit No. 7.)

application effort, Sanitary built up the service “from 14” to “60 to 80” in the summer. (*Id.*, Page 129-30.)

48 The Commission should not consider Sanitary Service’s post-application conduct. The record supports the conclusion that the Applicant in Hearing No. GA-405 proved the need for service to Birch Bay Village.

49 A more difficult question is presented with respect to the beach area north of the west end of Birch Point Road, *i.e.*, the beach side of Semiahmoo Drive and the beach side of Drayton Harbor Road. The only witness testifying to this area (or close to it) was Mr. Carr, and according to Blaine-Bay’s Declaration Exhibit 1, his facility was not on the beach. Having said that, if the 1971 application at issue had been unopposed, and had it applied for the beach areas now at issue, it is possible, if not likely, that the Applicant would have been granted the entire area he requested, including the beach.

50 However, given the present posture of the case, and the fact that the beach areas were not included in the original application, Commission Staff is not prepared to go that far.

IV. CONCLUSIONS

51

For the reasons stated above, the Commission Staff recommends the Commission amend Certificate G-145 to add the additional authority described in Part II above, paragraphs 6-8.

DATED this 29th day of March, 2004.

Respectfully submitted,

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APPENDIX

- First page:** Copy of Exhibit No. 4, Page 78, Map of territory requested by the Applicant in Hearing No. GA-405. The original shows the shaded area in red.
- Second page:** Copy of a map showing the names of streets in the Point Whitehorn/Grandview Road area (in more detail than the first page described above)