

**BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION**

<p>In Re Matter of</p> <p>Blaine-Bay Refuse, Inc. Motion to Amend Commission Order M.V.G. No. 656</p>	<p><b>BLAINE-BAY REFUSE, INC.'S REPLY MEMORANDUM IN SUPPORT OF BLAINE-BAY REFUSE INC.'S MOTION TO AMEND ORDER M.V.G. No. 656 AND MOTION TO SUPPLEMENT THE RECORD</b></p>
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COMES NOW, Blaine-Bay Refuse, Inc. (“Blaine-Bay”) by and through its attorneys, Adelstein, Sharpe & Serka LLP respectfully submit this reply in responding to the issues raised by Commission Staff and Sanitary Service Company, Inc.

**I.  
REPLY TO COMMISSION STAFF BRIEF**

A. Commission Staff generally recognizes the merits of Blaine-Bay’s motion to amend and recommends granting the motion amending Blaine-Bay’s certificate G-145 to add the additional area described.

The Commission Staff recognizes the merits of Blaine-Bay’s motion to amend and Blaine-Bay’s entitlement to service the beach areas set forth in its motion except for a couple of limited areas. The areas for which Blaine-Bay seeks

to serve in which the Commission Staff disagree on are properties abutting the waterfront on Point Whitehorn adjoining Holeman Road and Birch Bay Drive and the properties abutting the waterfront on Semiahmoo Bay and Drayton Harbor adjoining Semiahmoo Drive and Drayton Harbor roads. Blaine-Bay believes that there is ample justification to amend the certificate G-145 to include these specific areas.

B. The Southern Boundary of Blaine-Bay's Service Area Should Be Grandview Road Extended West at its Terminus to Point Whitehorn.

Commission Staff believes the southern boundary of the Blaine-Bay service area on Point Whitehorn should be Holeman Road. This boundary would exclude properties abutting Holeman Road and Birch Bay Drive and Point Whitehorn abutting the waterfront from Blaine-Bay's proposed service area boundaries.

(1) The most logical interpretation of Certificate G-145 is that the southerly boundary of the Blaine-Bay service area of Point Whitehorn to be "Grandview Road extended from its terminus west to Point Whitehorn."

The pertinent part of the Certificate G-145 states:

"Then south on Blaine Road to the Grandview Road; then west on the Grandview Road extended to Point Whitehorn; then north on Birch Bay Drive to Birch Point Road..." (Exhibit 4, Page 16)

Blaine-Bay concurs with the Commission Staff that Certificate G-145 describes Blaine-Bay's service area boundaries to be roads except where it refers to Point Whitehorn. The Certificate G-145 clearly describes the south boundary of the Blaine-Bay service area as Grandview Road extended to Point Whitehorn. Point Whitehorn is a geographic feature abutting the water. Thus, the description for the service area cannot be interpreted to being a closed service area bounded

by public roads, at least where it applies to Point Whitehorn. Thus, the entire Point Whitehorn area abutting the water should be considered within Blaine-Bay service area until it connects with Birch Bay Drive. Blaine-Bay contends that the plain language of the Certificate describes the south boundary as an extension of Grandview Road, at its terminus, west to the geographic feature Point Whitehorn abutting the water and cannot be interpreted any other way. It is not uncommon in legal descriptions to describe a line as an extension of an existing road. The order should supersede, as it relates to the service area, any other description of the service area.

Based on this interpretation, Blaine-Bay has provided refuse collection service to properties abutting the waterfront for the past thirty (30) years. Their basis for doing so is reasonable in light of the plain meaning of the description.

(2) Blaine-Bay has established a basis pursuant to RCW81.04.200 to amend the Certificate, to include the waterfront property of Point Whitehorn abutting Holeman Avenue and Birch Bay Drive and properties abutting the waterfront along Semiahmoo Drive and Drayton Harbor Road.

The Commission Staff does a good job of recognizing Blaine-Bay's right to amend the Certificate to include those properties within the service area where prior testimony established a need for service at the 1973 hearing. Based on that same theory, the Commission Staff was unwilling to recommend that the service area map be amended to include waterfront properties abutting Semiahmoo Drive and Drayton Harbor Road as there were no witnesses (who reside in these specific areas) who testified at the 1973 hearing of the need for service. However, the

Commission has authority to amend Blaine-Bay's Certificate if any one of the following grounds are established:

- (1) Changed condition since the issuance of the initial order; or
- (2) Result injuriously affecting the Petitioner which was not considered or anticipated at the former hearing; or,
- (3) That the effect of such order has been such as was not contemplated by the Commission or the Petitioner; or,
- (4) For any good and sufficient cause which for any reason was not considered and determined in such former hearing. RCW 81.04.200

Blaine-Bay has satisfied the grounds set forth in RCW 81.04.200 necessary for the Commission to amend the order to grant the entire relief requested, including the right to service Point Whitehorn and those waterfront properties abutting Semiahmoo Drive and Drayton Harbor Road. There is good and sufficient cause to amend the order to include the additional areas. The Findings of Fact and Conclusions of Law of the initial decision can easily be interpreted to have intended to grant Gifford the right to service properties abutting the waters of Point Whitehorn, Semiahmoo Bay and Drayton Harbor. (Exhibit 8)

It is our contention that the Administrative Law Judge and Commission did not contemplate that the 1973 decision precluded Gifford from providing refuse collection services on all waterfront properties. The south border of Blaine-Bay's service area is westerly on Grandview Road "extended to Point Whitehorn" a geographic area abutting the water. Secondly, the Administrative Law Judge

issued a finding in favor of Gifford extending the Certificate G-145 stating that the "Area for which the extension is requested is a large part of summer cottage and tourist resort area comprising the Birch Bay shores and south shore of Drayton Harbor" (emphasis mine). Finding Fact 7, Exhibit 8, Page 7. Thus, Gifford and the Commission intended the final order to allow Gifford to provide refuse collection services on the waterfront, taking into consideration that much of the testimony from residents in the proposed service area testified to the need of refuse collection service on the waterfront.

Gifford believed it had the right to provide refuse collection services to those properties on the shores of Birch Bay, Point Whitehorn, Drayton Harbor and Semiahmoo based on the testimony and findings of the Administrative Law Judge. Subsequently, Gifford and Blaine-Bay have been providing this needed refuse collection service to those properties abutting the shores of Birch Bay, Semiahmoo Bay, Point Whitehorn and Drayton Harbor Road since 1973, when no other collection service was available. There is "good and sufficient cause for this Commission to grant Blaine-Bay's motion to amend the service area to include those waterfront properties in Point Whitehorn, Semiahmoo Bay and Drayton Harbor Road which the Commission Staff does not believe should be a part of the service area.

## II.

## REPLY TO SANITARY SERVICE COMPANY, INC. BRIEF

A. The Nikula declaration with Exhibits A and B, Page 2, Lines 26-27, Page 3, Line 1-19, and Section E (Page 10) of Sanitary Service Company, Inc.'s brief should be stricken.

Sanitary Service Company, Inc.'s brief includes an attached declaration from Ed Nikula, employee of Sanitary Service Company, Inc. with Exhibits A & B. Furthermore, they refer to this declaration and exhibits on Page 2, Line 26-27, Page 3, Line 1-19 and Section E (Page 10) of their brief. This declaration with attached exhibits are not part of this record. Thus, the Nikula declaration with attached Exhibits A & B and the sections of Sanitary Service Company, Inc.'s brief which refers to the declaration Page 2, Line 26-27, Page 3, Line 1-19, Page 10, Section E, should be stricken and not be considered in rendering a decision.

B. Sanitary Service Company, Inc. does not dispute that the evidence established in the 1973 hearing on the Gifford Application clearly established a need for Gifford to be allowed to provide refuse collection service in the Birch Bay area not being provided by Sanitary Service Company, Inc.

Sanitary Service Company, Inc. cannot dispute that it was not servicing the Birch Bay area in 1973 and that there was a need for refuse collection service. Furthermore, they cannot change the testimony of the various witnesses which testified in support of Gifford's request. Rather than address the merits of the Blaine-Bay motion to amend, it seeks to dismiss the motion based on "technicalities," asserting that the request is "untimely" or that Petitioner "obtained precisely the authority requested."

However, the legislature established a process wherein the Commission can change final orders. RCW 81.04.200-210. If one accepted Sanitary Service Company, Inc.'s argument that one cannot "initiate an amendment request if Applicant received precisely the authority requested," then RCW 81.04.200-210 and WAC 480-09-815 and WAC 480-09-820 would have no meaning or effect. This authority grants the Commission power to change final orders previously rendered.

Here, granting Blaine-Bay's motion recognizes the status quo allowing Blaine-Bay to continue service properties in areas that they've been servicing since the initial order was entered in 1973. Gifford had begun providing this service at a time when Sanitary Service Company, Inc. was unwilling to provide refuse collection service in the Point Whitehorn, Birch Bay, Drayton Harbor areas. Granting Blaine-Bay's order would simply clarify their authority to provide continued service that Blaine-Bay believed was authorized since the initial request to extend the service area was granted in 1973.

C. Blaine-Bay has the right to request the relief set forth in its motion as established by RCW 81.04.200.

Sanitary Service Company, Inc. contends that it is "untimely" to file a motion to amend an order that was entered thirty (30) years ago. Sanitary Service Company, Inc. seeks to ignore the authority granted to Petitioners and this Commission to re-hear previously entered orders as set forth in RCW 81.04.200. This statute provides the earliest date that Petitioner can bring such a motion to the

Commission [two (2) years after from the date the order took affect]. This statute contemplates a considerable period of time between the entry of the order and requested change. Sanitary Service Company, Inc. concedes that RCW 81.04.200, by its literal terms, does allow a petition for rehearing anytime after expiration of two (2) year period from the date of the order. If the legislature wanted to prevent Petitioner such as Blaine-Bay from filing this motion, they would have established a deadline from which no further motions would be entertained. They chose not to do so. Thus, to dismiss Blaine-Bay's motion as being untimely would disregard the clear reading of RCW 81.04.200.

D. Petitioner has satisfied the standards set forth for re-hearing established in RCW 81.04.200.

Gifford and various other witnesses previously established that Sanitary Service Company, Inc. was not providing refuse collection service in the Birch Bay area and that there was sufficient need to grant Gifford's motion to extend his service area to provide the service. The Administrative Law Judge intended for Gifford to provide the service on waterfront properties at Birch Bay, Point Whitehorn, Semiahmoo and Drayton Harbor abutting the public roads as set forth in the Order M.V.G. No. 646. The exclusion of Gifford from serving waterfront property on the waterfront was not contemplated by the Petitioner (see Gifford declaration) or anticipated to be the outcome by the Administrative Law Judge. Findings of Fact, Conclusions of Law, and Order (Exhibit 8). It would make absolutely no sense to grant the Gifford motion after hearing the testimony in support of the need for refuse



collection service on the beach, and not allow those parties who testified to be serviced by Gifford. Furthermore, Blaine-Bay has provided good sufficient cause and reason to amend the prior order to change the service area boundaries as set forth in its petition.

E. Civil Rule 59 does not apply to the motion initiated by Blaine-Bay

Sanitary Service Company, Inc. makes an unsuccessful attempt to draw an analogy alleging that Blaine-Bay's motion is similar to a Civil Rule 59 motion for new trial or reconsideration. However, Civil Rule 59 applies to Civil Rules of Procedure for Superior Court and not to this forum. The validity of Blaine-Bay's motion is not measured against the criteria set forth in Civil Rule 59(1-9). However, it is interesting to note that one hand, Sanitary Service Company, Inc. alleges that Blaine-Bay's motion is untimely. Even CR 59, which cannot be considered as authority, has a deadline for bringing motions for new trial or reconsideration. The Civil Rule states that the motion must be served or filed not later than ten (10) days after the entry of a judgment, and considered within thirty (30) days after the entry of the judgment. CR59(b) Blaine-Bay's motion is to be considered under RCW 81.04.200 which does not have a deadline for initiating motions pursuant to this statute.

WAC 480-09-820, not Civil Rule 59, governs the requirements for filing a petition for a re-hearing or reconsideration of a decision made by the WUTC. This allows an aggrieved party to file a reconsideration after the close of the record and before entry of a final order. This administrative rule is not the authority upon which

Blaine-Bay's motion was filed. Blaine-Bay's motion is filed pursuant to RCW 81.04.200 which allow for parties to petition for changes of order previously granted so long as the motion is filed two (2) years after the effective date of the order.

F. Blaine-Bay's request to supplement the record should be granted.

Ironically, Sanitary Service Company, Inc. objects to Blaine-Bay's motion to supplement the record. At least Blaine-Bay has requested permission to supplement the record. Sanitary Service Company, Inc. does not even make an attempt to have the declaration of Ed Nikula and Exhibits A and B included within the record. Unlike Sanitary Service Company, Inc., Blaine-Bay's supplemental evidence has probative value and is relevant. Exhibit 1 is a map of Birch Bay that identifies the location of the various individuals who testified of the need for Gifford's service at the hearing on Gary D. Gifford's request to extend his service area in the Birch Bay area. Exhibit 2 includes the deeds of the various individuals who spoke at the public hearing. The deeds establish that the witnesses that testified at the Gary D. Gifford 1973 hearing owned waterfront property bisected from the remainder of their property by public roads. This information reaffirms that the witnesses needed refuse collection service in order to maintain the "waterfront property." The literal terms of the 1973 order may be construed to prevent Gifford from servicing these waterfront properties. The recorded deeds are credible, and are not altered in any manner.

Furthermore, Sanitary Service Company, Inc. alleges that this evidence is “stale.” However, this evidence does not change over time or become less credible. The deeds are relevant and have probative value and should be admitted.

G. Blaine-Bay and predecessors in interest have operated their business in Birch Bay area with the understanding that the Commission had approved an extended service area that allowed them to undertake refuse collection services for waterfront properties in the Birch Bay area, Drayton Harbor and Semiahmoo area.

Various property owners testified that there was a critical need for refuse collection service, not being provided by Sanitary Service Company, Inc. in 1973. The critical need for refuse collection service was raised by witnesses who owned waterfront properties bisected by public roads. As a result, the final decision was intended to allow Gifford to fulfill this critical need. The decision further describes that the proposed service area will include serving the “shores of Drayton Harbor” (Exhibit 8). Subsequently, the order was entered which further described the southwest boundary of the Gifford service area to be Point Whitehorn. It was reasonable for Gifford and successors in interest to believe that the authorized service area allowed them to collect refuse on the waterfront properties. If Gifford and successors had not provided this needed refuse collection service, there would have been a health hazard, as Sanitary Service Company, Inc. was not interested in providing the service (Page 5, Ex. 8). Blaine-Bay and predecessors have provided refuse collection service for the past thirty (30) years first as the sole purveyor, (Gifford declaration) then sharing the area with Sanitary Service Company, Inc. Gifford and successors were under the mistaken impression that the original order

allowed extending the service area included the right to provide service to waterfront properties in the Birch Bay/Semiahmoo/Point Whitehorn/Drayton Harbor areas located on both side of roads defined in the final order as the boundary of the service area. It was never the intent of Gifford or successors to violate an order.

## **V. CONCLUSION**

Blaine-Bay respectfully request that for the reasons stated herein that the Commission amend Certificate G-145 to add the additional territory abutting water bodies of Birch Bay, Drayton Harbor, Point Whitehorn and Semiahmoo as set forth in Exhibit "A" to Blaine-Bay's memorandum of authority and further rule that Order M.V.G. No. 656 defined the Blaine-Bay's southwest border of its service area to be Grandview Road from its terminus extended west to the tip of Point Whitehorn where it intersects with the water.

DATED this \_\_\_\_\_ day of April, 2004.

Respectfully submitted,

ADELSTEIN, SHARPE & SERKA LLP

By: \_\_\_\_\_  
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