

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

)	
In the Matter of)	DOCKET NO. TG-031817
)	
BLAINE-BAY REFUSE, INC.)	ORDER NO. 02
)	
Motion to amend Commission)	INITIAL ORDER GRANTING
order M.V.G. No. 656)	MOTION TO AMEND ORDER
)	M.V.G. No. 656, GRANTING
)	MOTION TO SUPPLEMENT THE
)	RECORD, AND DENYING
)	MOTION TO STRIKE.
.....)	

1 **Synopsis:** *This Order proposes to grant a motion that would amend a 1974 solid waste certificate of authority to conform with the evidence in the record of Hearing No. GA-405. This Order would also grant the Company’s motion to supplement the record in Hearing GA-405 and deny its motion to strike SSC’s Declaration of Ed Nikula and accompanying Exhibits A and B.*

2 **Nature of the Proceeding:** This is a motion by Blaine-Bay Refuse, Inc. (Blaine-Bay or Movant or Company) to amend the certificate of authority description in a 1974 Commission order to include areas that the Company believed were covered by that order and that the Company has been serving for the past 30 years.

3 **Procedural History:** On October 31, 2003, Blaine-Bay filed a Motion to Amend Order M.V.G. No. 656 in a related proceeding, Docket No. TG-030831.¹ The Commission assigned the Motion to Amend a separate docket number, Docket No. TG-031817, since it addressed a matter separate from that in Docket No. TG-030831, and it appeared that resolution of the issues in the Motion to Amend

¹ In re Application No. GA-079178 of Blaine-Bay Refuse, Inc. for Extension of Authority Under Certificate No. G-145, for a Certificate of Public Convenience and Necessity to Operate Motor Vehicles in Furnishing Solid Waste Collection Service.

would impact the course of the proceedings in Docket No. TG-030831. Notice of the Motion to Amend was published in the Commission's weekly Docket of November 17, 2003. Sanitary Service Company, Inc. (SSC) filed a timely protest to the docketed motion.

4 On January 8, 2004, the Commission convened a prehearing conference in this docket at Olympia, Washington, before Administrative Law Judge (ALJ) Karen M. Caillé. The parties agreed that the proceeding could be handled on a paper record and the ALJ set a briefing schedule. Exhibits Nos. 1-8 that had been marked for identification in Docket No. TG-030831 were incorporated by reference into this docket.

5 **Initial Order:** Subject to further review by the Commission pursuant to WAC 480-07-820 and 825, this Initial Order would grant Blaine-Bay's motion to supplement the record in Hearing No. GA-405, would deny Blaine-Bay's motion to strike SSC's Declaration of Ed Nikula and accompanying Exhibits A and B, and would grant Blaine-Bay's motion to amend Order M.V.G. 656 to include the territory requested.

6 **Appearances:** The following parties are represented as follows:

Movant Blaine-Bay Refuse, Inc. by Philip A. Serka, Attorney
Adelstein, Sharpe & Serka LLP
400 North Commercial Street
P.O. Box 5158
Bellingham, WA 98225-5158

Protestant Sanitary Service Co. by Polly L. McNeill
Summit Law Group PLLC
315 Fifth Ave. South, Suite 1000
Seattle, WA 98104

For Commission Staff

by Don Trotter
Assistant Attorney General
1400 S. Evergreen Park Drive S.W.
P.O. Box 40128
Olympia, WA 98504-0128

I. MEMORANDUM

A. Background

- 7 On October 8, 1971, the predecessor in interest to Blaine Bay Refuse, Gary D. Gifford (Gifford), applied for an extension of Certificate of Public Convenience and Necessity No. G-145 to include territory in the Birch Bay resort area of Whatcom County.² The application described a specific territory using named roads “that bound the area [b]eing applied for.”³ The application referenced a map and provided that the “the area shadowed on the map is the area in which I would like to be able to serve.”⁴
- 8 On January 21, 1974, after granting a rehearing to allow live testimony of shipper witnesses, the Commission entered Final Order M.V.G. No. 656, which granted the extension of Certificate No. G-145 (hereinafter referred to as Order).⁵ The geographic scope of the service area granted is set forth in Appendix A to the Order, Ex. 8 at page 16. The pertinent portion of Certificate No. G-145 reads as follows:

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

² Ex. No. 1, Application and related documents, pp. 2 and 2a (Territory to be served).

³ *Id.*, p. 2a

⁴ *Id.*, See also Ex. No. 4, First hearing notice and hearing documents, p. 78 (Ex. 1, Applicant’s Map)

⁵ Ex. No. 8, Proposed and Final Order and related documents. The Commission affirmed and adopted the Examiner’s Proposed Order M.V.G. No. 646 which granted Gifford’s extension application as the final order of the Commission, Final Order M.V.G. No. 656.

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 to Blaine Road; thence north along Blaine Road to the point of beginning.

9 This certificate language in Appendix A of the Order differs from the description of the service territory in Conclusion of Law (3) of the Order, Exhibit No. 8 at page 11, and the edited language of the Application, Exhibit No. 1 at page 2, by adding the word *extended* before “to Point Whitehorn.”

10 In September 1999, motivated in part by a Commission mapping project, SSC reviewed the boundaries of its certificated territory and discovered that Blaine-Bay was operating within the seaward perimeter of the roads used to define Blaine-Bay’s service territory in Certificate G-145.⁶ SSC advised Blaine-Bay of the situation and requested that Blaine-Bay cease operations in what SSC considered to be SSC’s exclusive territory.⁷ From September 1999 forward, SSC repeatedly renewed its request that Blaine-Bay cease operations in SSC’s alleged exclusive territory.⁸ On February 28, 2003, the parties met with Commission Staff for the purpose of reviewing draft territory maps.⁹ At the meeting Commission Staff confirmed that the boundary lines had not changed from the original order and that Blaine-Bay was on notice of the correct boundaries.¹⁰

11 On June 2, 2003, Blaine-Bay filed an Application No. GA-79178 for Extension of Certificate No. G-145 to add the property abutting the waters of Birch Bay,

⁶ SSC Memorandum in Opposition, Nikula Decl., ¶ 1. Blaine-Bay moves to strike the Nikula Declaration and attached exhibits because they are not part of this record. Blaine-Bay’s motion is denied. The Declaration and attached exhibits provide the Commission with historical background relevant to the issues in this proceeding.

⁷ *Id.*, Nikula Decl., ¶ 3 and Ex. A. to Decl.

⁸ *Id.*, Nikula Decl., ¶ 5 and Ex. B. to Decl.

⁹ *Id.*, Nikula Decl., ¶ 7.

¹⁰ *Id.*, Nikula Decl., ¶ 8.

Drayton Harbor, Point Whitehorn and Semiahmoo Bay.¹¹ In the application for extension, Blaine-Bay asserts that the prior extension was intended to include those areas, but that the legal description omitted them.¹²

- 12 On June 6, 2003, Blaine-Bay filed an application for temporary authority to operate in the areas defined in Application No. GA-79178. On August 11, 2003, the Commission granted the temporary certificate, but limited it to existing customers receiving service from Blaine-Bay in the requested territory, pending resolution of Application No. GA-79178.
- 13 On October 31, 2003, Blaine-Bay filed a Motion to Amend Order M.V.G. No. 656 based on the evidence in that record to include those areas that are the subject of the Application for Extension in Docket No. TG-030831. Although the Motion to Amend and the Application for Extension address the same subject matter, the Commission docketed the Motion to Amend as Docket No. TG-031817, so that the parties could address issues related to the original application separately from those associated with the Application for Extension.
- 14 On February 27, 2004, Blaine-Bay filed a Motion to Supplement the Record and a Supplemental Memorandum in Support of the Motion to Amend Order M.V.G. No. 656.
- 15 On March 29, 2004, SSC filed a Memorandum in opposition to Blaine-Bay's Motion to Amend Order M.V.G. No. 656 and Motion to Supplement Record. Likewise, on that date, Commission Staff filed a Response to Blaine-Bay's Motion to Amend Commission Order M.V.G. No. 656.
- 16 On April 12, 2004, Blaine-Bay filed a Reply Memorandum in Support of Blaine-Bay's Motion to Amend Order M.V.G. No. 656 and Motion to Supplement the Record.

¹¹ Docket No. TG-030831, Attachment A to application.

B. Applicable Statutes And Rules

17 Blaine-Bay brings this Motion to Amend Order M.V.G. No. 656 pursuant to RCW 81.04.200, Rehearing before the commission, RCW 81.04.210, Commission may change orders, WAC 480-07-870, Rehearing (formerly WAC 480-09-820(1)), and WAC 480-07-875 Amendment, rescission, or correction of order (formerly WAC 480-09-815). The full text of these statutes and rules are provided in Appendix B to this order.

C. Motion to Amend Order M.V.H. 656

18 The Commission issued its Order M.V.G. No. 656 on January 21, 1974, in Hearing No. GA-405. Blaine-Bay's Motion to Amend alleges that the authority granted by the Commission in the Order conflicted with the evidence introduced at the hearings on December 28, 1971, and June 12, 1973, that established that all of Birch Bay was in need of service. Blaine-Bay contends that the intent of the Order was to allow Applicant Gifford to provide solid waste disposal service to those lands abutting the water bodies of Birch Bay, Drayton Harbor, Point Whitehorn and Semiahmoo Bay. The basis for the Motion to Amend Order M.V.G. No. 656 is that the record and the Order in that case support a broader grant of operating authority than the Commission granted.

19 **Blaine-Bay's Position.** Blaine-Bay requests that the authority in existing Certificate No. G-145 be amended to include:

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

¹² Docket No. TG-030831, Attachment C to application.

6. All land on Point Whitehorn between the land located north of Grandview Road extended west to the Strait of Georgia and shoreland of Birch Bay.

20 Exhibit A to Blaine-Bay's Motion to Amend Order M.V.G. No. 656 depicts the additional territory.

21 Blaine-Bay argues that the record in Hearing No. GA-405 establishes the intent of the Applicant, Gary D. Gifford, and the intent of the Commission that Gifford service properties in Birch Bay abutting the water.¹³ In support of its position, Blaine-Bay cites portions of the Examiner's Proposed Order Granting Application,¹⁴ including the following:

- "The instant matter concerns an application for authority to provide garbage service to the Birch Bay resort area in Whatcom County. The territory sought to be served *includes a crescent enclosing Birch Bay*, and the types of service are year round residences, summer resorts, commercial establishments catering to vacationers, summer homes used on all weekends all year *and a state park*."¹⁵
- "Since it is a seaside resort area there are problems not common to more usual areas. Some of the uncommon facets are:

When there will be a good clam digging tide the influx is greater, resulting in vast amounts of clam shells which cause noisome odors quickly if not disposed of;

* * *

The thousands of feet of beach, except for the park, are privately owned, the owners must provide containers which will not be stolen, and Birch Bay is not a municipality;

* * *

¹³ Blaine-Bay's Memorandum of Authority, p. 4.

¹⁴Ex. 8, pp. 1-12, Order M.V. G. No. 646 in Hearing No. GA-405, the Findings of Fact, Conclusions of Law, and Examiner's Proposed Order Granting Application.

¹⁵ *Id.* at p. 2. (Emphasis Blaine-Bay's)

The only carrier who has ever given the service necessary to handle the problem is the applicant, for a two year period or less, and he was operating without authority.”¹⁶

- “The area is commonly known as the *Birch Bay Resort area*, an unincorporated village, and includes *Birch Bay State Park*.”¹⁷
- “The area for which the extension is requested is in large part a summer cottage and tourist resort area *comprising the Birch Bay shores and south shore of Drayton Harbor*.”¹⁸
- “As to the various resort owners and operators of commercial establishments, the evidence demonstrates through the following witnesses:

* * *

They generally reported that applicant’s services and rates were reasonable, that he provided Saturday, Sunday, Monday service, emptying the individual containers by the respective cottages, trailer or tent spaces, *and those on the beach*, that when needed, such as during clam tide times, he would come daily, and once or twice a week off season. . . .”¹⁹

- Finding of Fact 13 references the testimony of Fred Yates, a permanent resident of Birch Bay Village, a development at that time of 58 units. Mr. Yates testified that Gifford’s solid waste disposal service was satisfactory until stopped pending the extension application. Birch Bay Village is on the seaward side of Birch Point Road.²⁰

22 In further support of its position that the record demonstrates that it was the intention of Gifford and the Commission for Gifford to service the seaward sides

¹⁶ *Id.* at p. 4-5.

¹⁷ *Id.*, Finding of Fact (1) at p. 6. (Emphasis Blaine-Bay’s)

¹⁸ *Id.*, Finding of Fact (7) at p. 7. (Emphasis Blaine-Bay’s).

¹⁹ *Id.*, Finding of Fact (12) at p. 8. (Emphasis Blaine-Bay’s).

²⁰ *Id.*, Finding of Fact (13) at pp. 11-12.

of the roads forming the perimeter of his applied-for service area, Blaine-Bay references the testimony of shipper witnesses from the June 12, 1973, hearing. The following witnesses testified as to the need for solid waste disposal service on the beach: Herman Gischer, owner of Birch Bay Trailer Park (Ex. 7, p. 16), Robert Vogt, owner of Edgewater Resort (*Id.*, pp. 27 and 29), William Vogt, owner of Bay Center Resort (*Id.*, p. 40, ll. 10-16, 20), Norman C. Rauch, owner of eight cottages, at the north end of Birch Bay (*Id.* pp. 50, 51), Gordon Sullivan, owner of Birch Bay Swimming Pool, tavern, beauty salon, and twelve cottages (*Id.* p. 58, l. 20), Mrs. A. M. Richmond, owner of Idle Ease Resort (*Id.* p. 63), Fred Yates, resident of Birch Bay Village (*Id.* p. 82), and Earl W. Vogt, owner of Birch Bay Trailer Park and Sales (*Id.* pp. 87-88). In addition, Gary D. Gifford, the applicant, testified that one of the reasons for his filing the application was that he wanted the opportunity to service Birch Bay State Park, part of which is located between Birch Bay Drive and Birch Bay. (*Id.* pp. 93-106).²¹

23 Movant states that for over thirty years, Gifford and the successor, Blaine-Bay have provided refuse collection service in those areas of land abutting Birch Bay and Drayton Harbor, including Birch Bay Village. Blaine-Bay argues that these actions were consistent with the intent of the original applicant, Gifford, and his understanding of the authority granted.²² According to Blaine-Bay, it has always believed that its service area overlapped with SSC's service area, including those properties abutting the water.²³ Blaine-Bay maintains that the Commission intended to grant Blaine-Bay authority to service the waterfront property in the Birch Bay resort area consistent with the evidence of need submitted at the hearing on the Gifford request for certificate extension.

²¹ On February 27, 2004, Blaine-Bay moved to supplement the record with the Declaration of James Sands, Vice-President of Blaine-Bay, and attached Exhibit 1, a map that identifies the location of various individuals who testified at the June 12, 1973 hearing, and attached Exhibit 2, the deeds of the individuals that testified at the hearing.

²² Blaine-Bay's Memorandum of Authority, pp.11-12. *See also*: Declaration of Gary D. Gifford attached to Motion to Amend Order M.V.G. No. 656.

²³ Blaine-Bay's Supplemental Memorandum, p.6.

- 24 **SSC's Position.** SSC operates solid waste collection services pursuant to a certificate of public convenience and necessity issued by this Commission. SSC's Certificate No. G-14 authorizes solid waste collection services throughout much of Whatcom County, and SSC's certificated area includes the seaward perimeter of Birch Bay Drive, Point Whitehorn, the area known as Birch Bay Village, the coast of the Georgia Strait and the southern coast of Drayton Harbor, which is the territory sought by Blaine-Bay.
- 25 SSC argues that the Commission should not exercise its discretion to permit an amendment thirty years after an order was issued granting the applicant precisely the authority it sought because this will establish a dangerous precedent. In support of its position, SSC cites *In re Sure-Way Incineration, Inc.*²⁴ where the Commission previously expressed reluctance to allow an application to be amended after-the-fact. SSC argues that Blaine-Bay has not met its burden, as set forth in *Sure-Way*, of showing that no one could have misunderstood its application as intending to exclude the seaward territory.
- 26 Although SSC acknowledges that RCW 81.04.200, Rehearing before the commission, and RCW 81.04.210, Commission may change orders, would allow the relief Blaine-Bay seeks, SSC contends that allowing a certificate to be amended based on a proceeding that occurred thirty years ago is blatantly inequitable. In addition, SSC argues that Blaine-Bay has not met the standards for a rehearing under RCW 81.04.200. SSC contends that Blaine-Bay has not shown changed conditions since the order, or a result injuriously affecting petitioner which was not considered or anticipated at the former hearing, or that the effect of such order was not contemplated by the Commission or petitioner at the former hearing.

²⁴ Order M.V.G. No. 1533, Hearing No. Ga-868 (1992).

27 According to SSC, the evidence is now too stale to rely upon, and cannot be cured by Blaine-Bay's Motion to Supplement the Record. SSC moves to strike the evidence in the Motion to Supplement the Record, and suggests that instead the evidence should be presented in the application for extension filed by Blaine-Bay and should include a review of the circumstances as they exist today.²⁵

28 SSC contends that even if Blaine-Bay's Motion to Supplement the Record were granted, and the evidence relied upon in its Motion to Amend were viewed in the light most favorable to it, at most it supports amending the original application and/or order to allow service to the seaward side of Birch Bay Drive between Point Whitehorn and Shintaffer Road. SSC claims that there is no factual support whatsoever for permitting an expansion into the territories of Birch Bay Village and the Semiamoo area by way of an amendment. SSC contends that Blaine-Bay should be required to pursue its application for expansion if it wishes to obtain authority for those territories.

29 Lastly, SSC argues that Blaine-Bay's motion to Amend should be denied because the Company has been intentionally violating Commission regulations by operating outside its certificated area. SSC claims that Blaine-Bay continued operating in SSC's territory for three and one-half years, not applying for an extension until after the Commission confirmed the boundary.

30 **Staff's Position.** Commission Staff supports Blaine-Bay's Motion to Amend Order M.V.G., in part. Specifically, Staff agrees that Applicant proved entitlement to service the beach areas identified in items (4) and (5) and part of (6) at Paragraph 18 herein, but not items (1), (2), or (3).

31 Staff analyzes the existing certificate language of Certificate No. G-145 and concludes that the existing certificate permits service within the territory defined. That territory used named roads as the boundary. Accordingly, Staff concludes

²⁵ *Id.*

that 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 No. G-145 as written. Staff bases its interpretation on the certificate language that uses specific roads to delineate the outer boundary of that territory, statements in the application that “The Named Roads are the roads *that bound* the area Being applied for,” and “The area shadowed on the map is the area in which I would like to be able to serve,”²⁶ and the map the Applicant included as part of its extension application in Hearing No. GA-405, and entered as Exhibit 1 at that hearing.²⁷ Staff cites precedent from the Interstate Commerce Commission as support for its interpretation.²⁸

32 Staff also analyzes how to interpret the certificate language set forth in italics below:

. . .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. . .²⁹

33 Staff notes that Grandview Road itself does not go to the “tip” of Point Whitehorn. Staff observes that the map submitted by the Applicant in Hearing No. GA-405, shows a short unnamed connecting road in the area where Grandview Road ends. More detailed maps show that Holeman Avenue is the name of the short length of road connecting Grandview Road to Birch Bay Drive.³⁰ Staff proposes that Grandview Road be “extended” to include the portion of Holeman Avenue constituting the short stretch of road that connects

²⁶ Ex. No. 1, p. 2a.

²⁷ Ex. No. 4, p. 78.

²⁸ *I.C. Black & Sons Common Carrier Application*, 53 MCC 572 (1951), and *Washington, D.C., Commercial Zone, Ex Parte* No. MC-7, 48 MCC 460 (1948).

²⁹ Ex. No. 8, p. 16. Staff notes that this language is the language in Appendix A to the Commission’s final order, and Appendix A to the Examiner’s Proposed Order, Ex. No. 8, p. 12; however, it is not the language used in Conclusion of Law No. 3 in the Examiner’s Proposed Order, which is the same language as that in the application. *Ex. No. 1. p. 2.*

³⁰ Staff provides a copy of the map submitted with the application in Hearing No. GA-405 and a copy of a more detailed map of the area in an Appendix to its Response.

Grandview Road to Birch Bay Drive. Staff submits that this interpretation is consistent with the map filed by Applicant.

34 Staff also considers interpreting the “extended to” language as advocated by Blaine-Bay, namely extend Grandview Road west, all the way to the waterfront. Staff rejects this interpretation because it is inconsistent with Applicant’s map and because Birch Bay Drive does not connect to the point where Grandview Road would be extended. According to Staff, Blaine-Bay’s interpretation created a “gap” in the certificate language.

35 Staff concludes that 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, Point Whitehorn Road on the east, and Birch Bay Drive on the north.

36 Staff observes that based on the record in Hearing No. GA-405,³¹ it appears that the Applicant proved more than it asked for in Hearing No. GA-405. Staff notes that in similar circumstances, the Commission has granted the additional authority without requiring a new application.³² According to Staff, the Commission can consider the evidence in Hearing No. GA-405, and grant now whatever additional authority was proved in that case.

37 Staff relates that the record shows that SSC discontinued solid waste collection service to the general area at issue approximately eight years prior to the application in Hearing No. GA-405.³³ At the time of that application, SSC held a

³¹ The evidentiary record of Hearing No. GA-405 consists of the transcripts of the hearings (Ex. Nos. 4 and 7), and the exhibits admitted at the hearing that were numbered Exhibit No. 1, 2, and 3 (these exhibits are contained in the record in Ex. No. 4 at pp. 77-78, and Ex.7 at pp. 155-157.

³² Dutchman Marine, LLC d/b/a Lake Washington Ferry Service, et. al., Docket Nos. TS-001774 and TS-002055 (September 19, 2001)

³³ Ex. No. 4, p. 55.

federal contract to serve the air force base and military residences outside the air force base. SSC 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.³⁴ Staff's analysis of the Examiner's Proposed Order and the testimony of twelve persons testifying to the need for solid waste collection services parallels that of Blaine-Bay. Staff concludes that the testimony, read in conjunction with the map accompanying the Declaration of Mr. Sands,³⁵ supports the need for service to the beach, at least to the beach areas along Birch Bay Drive, until it reaches Birch Point Road.

38 In addition, Staff believes the record supports the need for service to Birch Bay Village. Mr. Yates, who resides in Birch Bay Village, testified in 1973 that he only began receiving service from SSC at his residence "after [the applicant] left."³⁶ Mr. Yates described that service as "entirely satisfactory."³⁷ Mr. Razore of SSC testified that his company did not provide service "vigorously" until after the first application hearing in Hearing No. GA-405 two years earlier.³⁸ Staff argues that 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.³⁹ According to Staff, the key date for considering this evidence is the year prior to the application, which was October 8, 1971. Mr. Yates did not receive service from SSC until after October 8, 1971.

³⁴ *Id.*, pp. 57-64.

³⁵ Exs. 1 and 2 to Blaine-Bay's Motion to Supplement Record filed February 27, 2004.

³⁶ Ex. No. 7, p. 82.

³⁷ *Id.*, pp. 80, 82.

³⁸ *Id.*, No. 7, p. 129.

³⁹ Order M.V. G. No. 1719, *In re Brent Gagnon, d/b/a West Waste and Recycling*, App. No. GA-763076 (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).

39 Finally, Staff considers whether the record supports need for service to the 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. Staff notes that the only witness testifying to this area, or close to it, was Mr. Carr, and according to Exhibit 1 of Mr. Sand's Declaration, attached to Blaine-Bay's Motion to Supplement the Record, his facility is not on the beach. Staff suggests 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 probable, that the Applicant would have been granted the entire area he requested including the beach. However, Staff does not include these areas in its recommendation, given the present posture of the case, and the fact that the beach areas were not included in the original application.

D. Discussion and Decision

40 Over thirty years ago, the Commission held a hearing to consider expansion of the service territory for Gifford's solid waste transportation Certificate, No. G-145. The evidence in the record of that hearing proved need for service beyond the territory described in the application. The area described in the application used roads to describe the service territory. The certificate issued by the Commission mirrors that description. As written, the certificate would exclude service to the waterfront side of the perimeter roads. In contrast, the testimony in the record supports the need for service along the waterfront, as does the Commission's Order.

41 The record supports Gifford's intention to serve the waterfront adjacent to the perimeter roads set forth in Certificate No. G-145. The testimony of witnesses Robert Vogt, William Vogt, Earl Vogt, Everett Borgkerd, Herman Gischer, Norman Rauch, Gordon Sullivan, Mrs. A.M. Richmond, and Fred Yates during the June 12, 1973, hearing, and the deeds of Robert Vogt, William Vogt, Earl

Vogt, and Everett Borgkert,⁴⁰ support such an interpretation. This evidence establishes that some of the properties that Gifford serviced at the time of his extension application were either directly on the water or bisected by the roads used to define the territory. The Declaration of Gary D. Gifford, accompanying Blaine-Bay's Motion to Amend confirms that intention, as well.

- 42 The record also suggests that the Order intended that Gifford serve the shores of the territory requested. The Order describes the territory to include "a crescent enclosing Birch Bay,"⁴¹ "Birch Bay State Park,"⁴² "a summer cottage and tourist resort area comprising the Birch Bay shores and south shore of Drayton Harbor."⁴³ Moreover, the record is replete with references to the problems of a seaside resort related to refuse from visitors, and the vast amounts of clam shells after a good clam digging tide, which cause "noisome" odors if not quickly collected.⁴⁴ It is also clear from the record that Gifford Refuse was the only company to provide refuse collection service in the area. SSC, which holds a certificate of authority to service the area, had stopped service to the area eight years before the application because it was uneconomical. Thus, the Commission concluded that "It is in the public interest and is required by *the present or future* public convenience and necessity" to grant the extension application.⁴⁵
- 43 For the past 30 years, Gifford and its successor Blaine-Bay, have served the Birch Bay resort area including the properties abutting the water on Birch Bay, Drayton Harbor and Semiahmoo Bay with the understanding that Order No. 656 granted them authority to do so.

⁴⁰ Ex. 2 to the Declaration of James Sands attached to Blaine-Bay's Motion to Supplement the Record.

⁴¹ Ex. No. 8, p.2.

⁴² *Id.*, p. 6, Finding of Fact (1). Birch Bay State Park is bisected by Birch Bay Drive.

⁴³ *Id.*, p. 7, Finding of Fact (7).

⁴⁴ Ex. No. 7, pp. 17, 27, 29, 36, 40, 51, 58, 82, 87, 88.

⁴⁵ Ex. No. 8, p. 11.

44 The Commission has discretion to re-examine the record in Hearing No. GA-405, and grant whatever additional authority the evidence in that record justifies. Under RCW 81.04.200, the Commission may rehear the matters involved after the expiration of two years from the date such order took effect. Additionally, RCW 81.04.210 provides that the Commission may at any time, upon notice and opportunity to be heard rescind, alter, or amend any order.

45 SSC argues that it would be inequitable for the Commission to exercise its discretion and amend Blaine-Bay's certificate thirty years later because the evidence is now too stale to rely upon, and cannot be cured by Blaine-Bay's Motion to Supplement the Record. Under the circumstances of this proceeding, the evidence in the record is not stale. It is the same record upon which the Commission based its original decision to grant overlapping authority. In this proceeding, the Commission must look at the record as it existed at the time it granted the authority in order to interpret the extent of the authority. It would be inappropriate for the Commission to look at the circumstances as they exist today because they are irrelevant to the circumstances that existed in 1974. Moreover, Blaine-Bay's Motion to Supplement the record with the deeds of the property owners who testified at the June 1973 hearing, and the map showing the location of those properties is relevant to this proceeding because it serves as a demonstrative exhibit that supports the testimony of the witnesses. Accordingly, Blaine-Bay's Motion to Supplement the Record should be granted and SSC's motion to strike the evidence in the Motion to Supplement the Record should be denied.

46 SSC also argues that Blaine-Bay has not met the standards for a rehearing under RCW 81.04.200. A review of the record in this proceeding reveals that the effect of the Commission's Order No. M.V.G. 656 was not contemplated by the Commission or Gifford. The record here establishes that the intention of Gifford and the intention of the Commission with respect to the extent of authority granted is inconsistent with the literal language of the certificate, an effect of the order that was not contemplated by the Commission or Gifford. However, even

assuming Blaine-Bay does not meet the standard for rehearing under RCW 81.04.200, the Commission may at anytime amend an order pursuant to RCW 81.04.210.

- 47 Commission Staff recommends that the language in Certificate No. G-145, “Grandview Road *extended* to Point Whitehorn,” be interpreted to include that portion of Point Whitehorn that is formed by Grandview Road on the south, Holeman Road on the West, Point Whitehorn Road on the east, and Birch Bay Drive on the north. Based on the record in this proceeding, such an interpretation would be inconsistent with the plain meaning of the certificate and evidence supporting Gifford’s intention to serve the beach areas of the perimeter roads listed in the certificate, and the Commission’s intention for Gifford to service the area. The plain meaning of “Grandview Road extended to Point Whitehorn,” should be interpreted as extending Grandview Road west at its terminus, in a straight line, to Point Whitehorn. This is the one area of the territory sought to be served which does not have a road that extends from Grandview to Point Whitehorn, thus Gifford could not describe it in terms of road boundaries. This interpretation is consistent with the evidence supporting Gifford’s intention to serve the beach areas of the perimeter roads.
- 48 Commission Staff supports Blaine-Bay’s Motion to Amend in part. Specifically, Commission Staff would include all land between Birch Point Road and Birch Bay, including Birch Bay Village, and all land between Birch Bay Drive and Birch Bay ending at the intersection of Birch Bay Drive and Holeman Avenue.
- 49 Staff recommends that these areas be included in Blaine-Bay’s authority because they are supported by witness testimony at the 1973 hearing. Based on the same theory, Staff is unwilling to recommend that the service area be amended to include the waterfront properties abutting Semiahmoo Drive and Drayton Harbor Road, because there were no witnesses from these areas who testified at the 1973 hearing.

50 SSC argues that the most the evidence in Blaine-Bay's supplemented Motion to Amend would support would be to allow service to the seaward side of Birch Bay Drive between Point Whitehorn and Shintaffer Road. According to SSC, "There is simply no factual support whatsoever for permitting an expansion into the territories of Birch Bay Village and the Semi-a-moo Area by way of an amendment."⁴⁶

51 The limitations that Staff and SSC would place upon Blaine Bay's certificate are inconsistent with the record in Hearing No. GA-405. The record and the Commission's Order establish that no one was providing service to the area proposed in Gifford's extension application.⁴⁷ The Commission's Order specifically recognized the risk of a serious health problem due to lack of service to the area.⁴⁸ Thus, the Commission granted the application and issued a certificate that includes, not only the area around Birch Bay, but also the area along Semiahmoo Bay and the south shore of Drayton Harbor. It would be inequitable to limit Blaine-Bay's certificate as suggested by Staff and SSC given the fact that SSC and Blaine-Bay have been servicing the same areas in harmony for the past twenty-five years. Granting Blaine-Bay's Motion to Amend recognizes the status quo by allowing Blaine-Bay to continue service in the areas it has been servicing since 1973.

52 Accordingly, Blaine-Bay's certificate No. G-145 is amended to include the following:

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

⁴⁶ SSC's Memorandum in Opposition to Blaine-Bay's motion to amend, p. 4.

⁴⁷ Ex. 8, p. 5.

⁴⁸ *Id.*

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 Strait of Georgia and shoreland of Birch Bay.

II. FINDINGS OF FACT

53 Having discussed above all matters material to this decision, and having stated the findings and conclusions, the summary findings of fact are set forth below. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions in this order are incorporated by this reference.

- 54 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, accounts, securities, and transfers of public service companies, including solid waste collection companies.
- 55 (2) Blaine-Bay Refuse, Inc., and its predecessor in interest, Gifford Refuse, have served the Birch Bay resort area for over thirty years, and recently learned that the description of the service territory in Certificate No. G-145, as written, would not include the seaward side of the perimeter roads defining the service territory.
- 56 (3) On October 31, 2003, Blaine-Bay filed a Motion to Amend the certificate of authority description in Order M.V.G. No. 656, entered on January 21, 1974, to include the areas that the Company believed were covered by that order and that the Company has been serving for the past 30 years.
- 57 (4) Sanitary Service Company, Inc. filed a timely protest to the docketed motion. SSC's Certificate No. G-14 authorizes services throughout much of Whatcom County, overlapping the service area defined in Blaine-Bay's certificate No. G-145. SSC contends that it is the exclusive provider of

solid waste services to the seaward perimeter of the named roads in Blaine-Bay's Certificate No. G-145.

- 58 (5) The record in this proceeding consists of the record in Hearing No. GA-405, Exhibit Nos. 1 through 8; supplemented with the Declaration of James Sands and accompanying Exhibit Nos. 1 and 2 attached to the Company Motion to Supplement the Record, and supplemented with the Declaration of Ed Nikula and accompanying Exhibits A and B attached to SSC's Memorandum in Opposition.
- 59 (6) The testimony of witnesses Robert Vogt, William Vogt, Earl Vogt, Everett Borgkerd, Herman Gischer, Norman Rauch, Gordon Sullivan, Mrs. A.M. Richmond, and Fred Yates during the June 12, 1973, hearing, and the deeds of Robert Vogt, William Vogt, Earl Vogt, and Everett Borgkert establish the need for service to the Birch Bay resort area, including the waterfront adjacent to the perimeter roads set forth in certificate No. G-145.
- 60 (7) The Commission's Order, Exhibit No. 8, pp. 1-11, describes the service area as encompassing the shores of the area requested in the extension application, recognizes the risk of a serious health problem due to lack of service in the area, establishes that Gifford Refuse was the only company to provide refuse collection service in the area; and recognizes that SSC stopped service to the area eight years before Gifford's extension application.
- 61 (8) The Commission's Order, granted Gifford's extension application and issued a certificate that includes not only the area along Birch Bay, but also the area along Semiahmoo Bay, and the south shore of Drayton Harbor.
- 62 (9) The record, as a whole, supports the conclusion that Gifford established the need for service to the area described in Certificate No. G-145,

including the seaward side of the perimeter roads used to define the service territory.

63 (10) Blaine-Bay's Motion to Amend M.V.G. Order No. 656 should be granted.

III. CONCLUSIONS OF LAW

64 Having discussed above all matters material to this decision, and having stated general findings and conclusions, the summary conclusions of law are set forth below. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions in this order are incorporated by this reference.

65 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this proceeding. *Title 81 RCW.*

66 (2) Blaine-Bay's Motion to Supplement the Record should be granted.

67 (3) Blaine-Bay's Motion to Strike the Declaration of Ed Nikula and accompanying Exhibits A and B should be denied.

68 (4) Blaine-Bay's Motion to Amend Order M.V.G. No. 656 should be granted and Certificate No. G-145 should be amended to include the territory on the seaward side of the perimeter roads used to define the service territory.

69 (5) Based on the above findings of fact and conclusions of law, the undersigned administrative law judge makes and enters the following order.

IV. ORDER

IT IS ORDERED That:

- 70 (1) Blaine-Bay's Motion to Supplement the Record is granted.
- 71 (2) Blaine-Bay's Motion to Strike the Declaration of Ed Nikula and
accompanying Exhibits A and B is denied.
- 72 (3) Blaine-Bay's Motion to Amend Order M.V.G. No. 656 is granted and
certificate No. G-145 is amended to include the territory described in
Paragraph 51 of this order.
- 73 (4) An amended Certificate of Public Convenience and Necessity shall be
issued to read in accordance with Appendix A, which is attached and, by
this reference, made a part of this order.

Dated in Olympia, Washington, and effective this 15th day of June, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

KAREN M. CAILLÉ
Administrative Law Judge

This is an Initial Order. The action proposed in this Initial Order is not effective until entry of a final order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any *Answer* to any Petition for Review may be filed by any party within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a *Motion to Reopen* a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Motion to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

One copy of any Petition, Motion, or Answer filed must be served on each party of record, with proof of service as required by WAC 480-07-150(9). WAC 480-07-145(2) and (3) provide that an original and twelve copies of any Petition, Motion, or Answer must be filed by mail delivery to:

**Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia Washington 98504-7250.**

APPENDIX A

SOLID WASTE COLLECTION SERVICE In the City of Blaine, Washington, and within a radius of one mile of said city limits in Whatcom County and in that portion of Whatcom County described as follows: Starting at the intersection of Blaine Road and Dakota Creek; thence south on Blaine Road to its intersection with Grandview Road; thence west on Grandview Road extended to the shoreline of Georgia Strait; thence northerly following the shoreline of Georgia Strait, Birch Bay, Semiahmoo Bay, and Drayton Harbor to its intersection with the centerline of Dakota Creek; thence easterly along the centerline of said creek to its intersection with Blaine Road, the point of beginning.

APPENDIX B

RCW 81.04.200 Rehearing before commission. Any public service company affected by any order of the commission, and deeming itself aggrieved, may, after the expiration of two years from the date of such order taking effect, petition the commission for a rehearing upon the matters involved in such order, setting forth in such petition the grounds and reasons for such rehearing, which grounds and reasons may comprise and consist of changed conditions since the issuance of such order, or by showing a result injuriously affecting the petitioner which was not considered or anticipated at the former hearing, or that the effect of such order has been such as was not contemplated by the commission or the petitioner, or for any good and sufficient cause which for any reason was not considered and determined in such former hearing. Upon the filing of such petition, such proceedings shall be had thereon as are provided for hearings upon complaint, and such orders may be reviewed as are other orders of the commission: PROVIDED, That no order superseding the order of the commission denying such rehearing shall be granted by the court pending the review. In case any order of the commission shall not be reviewed, but shall be complied with by the public service company, such petition for rehearing may be filed within six months from and after the date of the taking effect of such order, and the proceedings thereon shall be as in this section provided. The commission, may, in its discretion, permit the filing of a petition for rehearing at any time. No order of the commission upon a rehearing shall affect any right of action or penalty accruing under the original order unless so ordered by the commission.

RCW 81.04.210 Commission may change orders. The commission may at any time, upon notice to the public service company affected, and after opportunity to be heard as provided in the case of complaints rescind, alter or amend any order or rule made, issued or promulgated by it, and any order or rule rescinding, altering or amending any prior order or rule shall, when served upon the

public service company affected, have the same effect as herein provided for original orders and rules.

WAC 480-07-870 Rehearing. Any person affected by a final order may file a petition for rehearing. Public service companies may seek rehearing under RCW 80.04.200 or 81.04.200.

WAC 480-07-875 Amendment, rescission, or correction of order.

(1) Amendment or rescission. The commission may alter, amend, or rescind any order that it has entered, after notice to the public service company or companies affected and to all parties in the underlying proceeding, and after allowing an opportunity for hearing as in the case of complaints. Any order altering, amending, or rescinding a prior order will have the same effect as any other final order when served upon the public service company or companies affected.

(2) Correction. The commission may act on its own initiative or on the motion of any party to correct obvious or ministerial errors in orders. The commission may enter a corrected order or effect any corrections by notice or letter. The commission may direct the secretary to effect any corrections by notice or letter. The time for any available post-hearing review begins with the service of the correction, as to the matter corrected.