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IDAHO PUBLIC UTILITIES COMMISSION

**BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION**

IN THE MATTER OF APPLICATION OF SUEZ
WATER IDAHO INC. FOR AUTHORITY TO
INCREASE ITS RATES AND CHARGES FOR
WATER SERVICE IN THE STATE OF IDAHO

Case No. SUZ-W-20-02

**ADA COUNTY'S MOTION TO
COMPEL PUBLIC DISCLOSURE
OF CERTAIN DOCUMENTS
MARKED AS CONFIDENTIAL,
PROPREITARY AND TRADE
SECRET**

In response to the Public Utilities Commission staff's discovery request number 6, and 71, Suez responded with a blanket marking of the documents as "confidential, proprietary, and trade secret information protected from public inspections, examination, or copying under Idaho Code sections 74-106, 107, and 48-801" with no further explanation. In response to Ada County's discovery requests, Suez again responded by making a blanket assertion that the responses were confidential, proprietary, and trade secrets pursuant to the public records act and the trade secrets act. Suez has failed repeatedly to specifically explain why the aforementioned documents are marked as "confidential, proprietary, and trade secret information."

Idaho Public Utilities Commission Rule 31.01.01.004 states: “Except as provided by statute and Rules 26, 52, 67, 233, and 287, all materials filed with the Commission pursuant to these rules and all materials issued by the Commission pursuant to these rules are public documents subject to inspection, examination and copying.” According to Rule 31.01.01.004.067 trade secrets, as defined by the public records act, and confidential information exempt under sections 74-104 through 109 of the Public Records Act are exempt from disclosure. The entity claiming the exemption is required to cite “the specific grounds and legal authority for that assertion.” *Id.* Suez has failed to provide the specific grounds for these assertions.

I. THE PUBLIC RECORD ACT PRESUMPTIONS AND BURDEN OF PROOF

As part of the rate increase case, the Commission Staff requested Suez “to provide copies of the cost/benefit analysis, internal rates of return, or similar analysis for each capital project included in the Company’s response to Request No. 5.” Suez responded to this request with the examples of several projects and the underlying rationale for the projects. The entire response was marked as confidential, proprietary and a trade secret. After reviewing the documents, it is very difficult to ascertain why any of the records are being hidden from the public’s inspection, review and copying. Similarly, the Commission Staff requested Suez “provide the source documents that show the additions and refunds impacting the advance account for years 2016 through June 30, 2020. . . Please provide a schedule of Advances for Construction showing project names, dates, amounts and accounts used. Suez responded with 1,895 pages and claimed that all of the pages were “confidential, proprietary or a trade secret.” Again, after reviewing the 1,895 pages of documents, it is very difficult to ascertain why any of these documents are not accessible for public inspection, review and copying. Suez provided a similar response to Ada County’s request for production of documents. Again, a review of the 505 pages of supposedly confidential, proprietary

and trade secret documents leaves one puzzled as to why such a claim is being made, especially when these documents are being used as a justification for a rate increase.

The Idaho Public Records Act ensures that government records are accessible to the public for review, inspection and copying. The Idaho Supreme Court has interpreted the statute's language as "very broad scope" and must be interpreted to favor access. *Dalton v. Idaho Dairy Products Commission*, 107 Idaho 6, 11, 684 P.2d 983, 988 (1984). By statute there is a presumption that all records of state and local agencies¹ are public records and open for inspection, and the Public Utilities Commission, as an agency, must presume so under I.C. § 74-102(1) and narrowly construe every exemption to the disclosure presumption. *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 914 P.2d 21, 25 (1996). The Commission should order disclosure of Suez's documents unless it is "obvious" that the records are exempt from disclosure. *Id. See also Wade v. Taylor*, 156 Idaho 91, 97, 320 P.3d 1250, 1256 (2014).

In order for the Commission to allow Suez to withhold the records from public inspection, review, and copying, Suez bears the burden to show cause and prove that withheld records actually fit within a narrowly construed exemption. *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002). This burden can only be met by making a "specific demonstration" proving that the exemption it relied on truly applies to the requested records. *Ward v. Portneuf Medical Center, Inc.*, 150 Idaho 501, 504 n.3, 248 P.3d 1236, 1239 n.3 (2011). The Commission must order disclosure if the agency does not meet its burden. See *Dalton*, 107 Idaho at 10, 684 P.2d at 987.

¹ State agency includes "every state officer, department, division, bureau, commission and board" with the only exception being the state militia and the historical society library and archives. Idaho Code § 74-101(15). See also Office of the Attorney General Idaho Public Records Law Manual.

II. ARGUMENT

1. Suez's Unsupported Vague Exemptions Violate the Public Records Act

The Public Records Act and the Commission rules mandate that a specific reason for the claim of an exemption and the statutory authority for such claim of exemption be applicable in each case. Suez has asserted the vague unspecified exemptions of confidential, proprietary and trade secret and offered no explanation for the sweeping exemptions it asserts. This is contrary to the Idaho Supreme Court's ruling that the entity claiming the exemption has the burden to show cause and prove that withheld records actually fit within a narrowly construed exemption to the Act. *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002).

Suez is asking the public to pay higher rates because of several projects. These projects were based on assumptions outlined in the documents that Suez is attempting to keep hidden from public inspection. Ada County would like to file portions of these documents as part of Ada County's testimony in this rate case so interested members of the public can inspect the documents and determine whether there was a sufficient basis for the projects, and the requested rate increase. Ada County is well aware that it can file the documents under seal; however, because there is no reasonable justification for keeping the documents out of the public purview, the "confidential, proprietary and trade secret" designation of the documents should be removed until such time as Suez meets its burden of being specific regarding why the documents are exempt from public inspection. If Suez cannot provide justification, the documents should be disclosed to the public as part of this rate case.

In addition, the responses to request number 71 contains reimbursement records and multiple copies of a "special facilities" agreement as well as orders from the Commission. Furthermore, there are emails, with multiple parties, between Suez and a private entity, and various

consultants. Again it is difficult to understand how these documents are confidential, proprietary and contain trade secrets. Suez is asking ratepayers to pay more for its services and those paying the bill deserve to have an accounting of how Suez has expended funds prior to a requirement that ratepayers pay more. Because there is no reasonable justification for keeping the documents out of the public purview, the confidential designation of the documents should be removed until such time as Suez meets its burden of being specific regarding why the documents are exempt from public disclosure. If Suez cannot provide justification, the documents should be available to the public as part of this rate case.

Finally, in response to Ada County's request for production of documents, Suez deems 505 pages as "confidential, proprietary and trade secret." Again, the documents provided disclose who benefits from Suez's projects, as well as the customers that are not beneficiaries but are paying the project costs. Again, there are questions related to the underlying assumptions for the projects that Suez chose to embark on. Suez has not met its burden regarding being specific regarding why the public is not allowed to view the documents as part of this rate case. Absent such justification, the documents should be part of the documents that the public can review during this rate case.


III. CONCLUSION

Without the Commission making determination regarding whether the documents qualify as trade secrets, are confidential and/or proprietary, the Commission should not make a decision in this rate case. This is similar to the Idaho Supreme Court's decision in *La Bella Vita, LLC v. Shuler*, 158 Idaho 799, 353 P.3d 420, (2015), where the Court determined that summary judgment should not be granted when the factual issues of whether documents are confidential or constitute a trade secret preclude the granting of summary judgment. Ada County requests that the Commission determine whether the designation of "confidential, proprietary, and trade secret" is

appropriate for the aforementioned documents by requiring Suez to meet its burden to justify why the public cannot view the documents as part of this rate case. Ada County would like the public to have access to these documents so that the public can make an informed decision regarding whether the rate increase is justified and cannot do so as long as the documents are hidden under the vague veil of “confidential, proprietary and trade secret.”

DATED this 12th day of March, 2021.

JAN M. BENNETTS
Ada County Prosecuting Attorney

By: 

Lorna K. Jorgensen
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March 2021, I served the foregoing document on all parties as follows:

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