

DECISION MEMORANDUM

TO: COMMISSIONER KJELLANDER
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COMMISSION SECRETARY
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LEGAL

FROM: MATT HUNTER
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DEPUTY ATTORNEYS GENERAL

DATE: NOVEMBER 25, 2020

SUBJECT: IN THE MATTER OF SUEZ WATER IDAHO INC.'S APPLICATION FOR AUTHORITY TO INCREASE ITS RATES AND CHARGES FOR WATER SERVICE IN IDAHO; CASE NO. SUZ-W-20-02.

On September 30, 2020, Suez Water Idaho, Inc. (“SUEZ” or “Company”) filed an Application requesting authorization to raise the rates it charges for water service.

On November 12, 2020, the Intermountain Fair Housing Council, Inc. (“IFHC”) filed a timely petition to intervene pursuant to procedural Rules 71 through 73. On November 18, 2020, the Company filed a motion in opposition to IFHC’s petition to intervene. On November 19, 2020, IFHC filed a response to the Company’s motion in opposition to IFHC’s petition. On November 20, 2020, the Company filed a motion in support of its motion in opposition to IFHC’s petition to intervene.

IFHC’S PETITION TO INTERVENE

Noting that it is a “private, nonprofit organization organized under the laws of the State of Idaho,” IFHC stated that its “mission is to ensure open and inclusive housing for all people, and to advance equal access to housing for all persons without regard to race, color, sex, religion, national origin, familial status, sexual orientation, gender identity, source of income, or disability.” IFHC Petition at 2. The organization seeks to “eradicate discrimination based on the above-listed statuses, which are protected under the federal Fair Housing Act, 42 U.S.C. § 3601 *et seq* [“FHA”],” and provides education on the FHA and assistance in filing complaints under the FHA. *Id.*

IFHC asserted that the Company’s proposed rate increase “will likely constitute a disparate impact upon ratepayers in violation of the FHA and other laws and regulations which prohibit housing discrimination.” *Id.* IFHC also asserted the Company’s failure to provide notice of the proposed rate increase in “languages commonly spoken in SUEZ’s service area” might constitute “disparate treatment in violation of the FHA and other laws and regulations which prohibit housing discrimination.” *Id.* at 3. Granting IFHC’s intervention would “enable IFHC to have a material impact on the matters at issue in this proceeding and would allow it to provide further input on possible violations of the FHA and other laws and regulations which prohibit housing discrimination that will result in the event that the proposed rate increase is approved.” *Id.*

SUEZ’S MOTION IN OPPOSITION TO IFHC’S PETITION TO INTERVENE

On November 18, 2020, SUEZ filed a motion in opposition to IFHC’s petition to intervene. While acknowledging the Commission broadly allows intervention by interested persons, the Company asserted that “[i]njecting complicated, contentious, and irrelevant legal issues into a ratemaking proceeding can impede rather than facilitate a process designed to result in rates that are fair, just, and reasonable.” SUEZ Motion in Opposition at 1-2. The Company noted the FHA applies to “activities related to selling, renting, or financing dwellings” and “does not apply to SUEZ Water, or to utility ratemaking proceedings by investor-owned utilities.” *Id.* at 2.

Noting that the Commission’s procedural rules give the Commission discretion to deny intervention “to prevent disruption, prejudice to existing parties, or undue broadening of the issues, or for other reasons,” the Company argued that allowing IFHC to intervene would unduly broaden the issues in the proceeding. *Id.* at 4; *see* IDAPA 31.01.01.073. Specifically, the Company noted IFHC “does not express an interest in, or position regarding, any of the utility ratemaking issues addressed in” the Company’s Application; instead, IFHC alleges the rate increase would “constitute housing discrimination on the basis of protected classes.” SUEZ Motion in Opposition at 5. The Company asserted the FHA applies to persons engaged in the business of renting, selling, or financing dwellings—not to investor-owned public utilities or ratemaking proceedings. *Id.* at 6-7.

Regarding IFHC’s assertion that SUEZ’s customer notices may have violated the FHA because they were not provided in languages commonly spoken in the Company’s service area, the Company noted that neither the Commission nor the Company is subject to the FHA’s notice requirements because neither are engaged in housing-related activities. The Company also noted

that its customer notices complied with the Commission's procedural rules. *See* IDAPA 31.01.01.125.

Finally, SUEZ argued that because IFHC's petition states only general allegations common to nearly any other rate case, IFHC is really alleging that the ratemaking process and the Commission's notice requirements violate the FHA. SUEZ noted IFHC's petition "does not identify any specific aspect of SUEZ Water's Application that implicates its interests..." nor does it "identify anything specific to SUEZ Water's notice of the Application, but rather contends generally that notices given in English violate the [FHA]." *Id.* at 8.

SUEZ stated that while the IFHC is free to argue that the FHA applies to utility ratemaking, "those arguments should be made to the political branches, to a court, or perhaps (at most) in an independent proceeding in this Commission." *Id.* at 9. SUEZ concluded that the issues in this case would be unduly broadened if IFHC were allowed to intervene, distracting parties from the merits of SUEZ's Application.

IFHC'S RESPONSE TO SUEZ'S MOTION IN OPPOSITION

On November 19, 2020, IFHC filed a response to SUEZ's motion in opposition. IFHC's stated purpose in filing the Response was to correct "several gross misrepresentations [by SUEZ] with regards to the application of the [FHA]." IFHC Response at 2.

First, IFHC disagreed with SUEZ's claim that the FHA does not apply to SUEZ because the Company is not engaged in activities related to selling, renting, or financing dwellings. IFHC asserted the FHA also covers discrimination related to the provision of services in connection with residential real estate transactions. *See* 24 C.F.R. § 100.5(b). IFHC noted that it is "well settled in federal courts" that the FHA "applies to a wide range of actions affecting housing." IFHC Response at 3. IFHC cited the following language from the Eleventh Circuit Court of Appeals: "[The FHA] prohibits a wide range of conduct, has a broad remedial purpose, and is written in decidedly far-reaching terms. The statute does not contain any language limiting its application to discriminatory conduct that occurs prior to or at the moment of the sale or rental." *See Georgia State Conference of the NAACP v. City of LaGrange, Georgia*, 940 F.3d 627, 631 (11th Cir. 2019). IFHC noted that the *City of LaGrange* court found that basic utility services like water, gas, and electricity "are closely tied to the sale or rental of a dwelling, and...are essential to the habitability of a dwelling..." IFHC Response at 3-4; *see* 940 F.3d at 634. IFHC asserted that in *City of LaGrange* the Court found that the water, gas, and electric services at issue in the case

fell within the scope of the FHA. Citing *City of LaGrange* and other federal authorities, IFHC stated that “it is clear that SUEZ’s contention that the FHA does not apply to the matters before the Commission are erroneous.” IFHC Response at 4.

Second, IFHC disputed SUEZ’s assertion that IFHC’s Petition “presents issues entirely outside the scope of the proceeding” and that admitting IFHC would unduly broaden the issues in the proceeding. *Id.* IFHC explained that its “purpose in seeking intervention is to raise issues concerning the public interest, specifically whether the rate increase that SUEZ is seeking will violate the ratepayer’s fair housing rights.” *Id.* IFHC argued that this issue is within the scope of the proceeding. Additionally, IFHC argued that including it in the proceeding would potentially help the parties avoid litigation by addressing FHA-related issues before there is a violation.

Finally, IFHC disagreed with SUEZ’s assertion that its customer notices complied with Commission rules and did not implicate the FHA. IFHC noted that procedural Rule 125.03 requires that the information in customer notices must be “easily understood.” *See* IDAPA 31.01.01.125.03. IFHC also cited procedural Rule 125.06, which states that the purpose of procedural Rule 125 is to “encourage wide dissemination to customers of information concerning proposed rate changes for utility services.” *See* IDAPA 31.01.01.125.06. Because a significant portion of the population in SUEZ’s service territory are non-English speakers or have limited English proficiency, IFHC argued there is “no foundation for the argument that the public notices issued [by SUEZ]... complied with [procedural Rule 125] if they were all issued in English....” IFHC Response at 6.

IFHC argued that SUEZ’s customer notices implicate the FHA’s prohibition against discrimination in the “terms, conditions, or privileges in the provision of services in housing on the basis of race, color, religion, sex, familial status, or national origin.” *Id.* (quoting 42 U.S.C. § 3604(b)) (internal quotation marks omitted). IFHC noted that 42 U.S.C. § 3604(b) of the FHA was implicated because SUEZ failed to provide meaningful notice to non-English-speaking ratepayers and ratepayers of limited English proficiency—thereby discriminating against them.

SUEZ’S MOTION TO ACCEPT REPLY IN SUPPORT OF MOTION IN OPPOSITION TO IFHC’S PETITION TO INTERVENE

On November 20, 2020, SUEZ filed a “Motion to Accept Reply in Support of Motion in Opposition to Intermountain Fair Housing Council’s Petition to Intervene.” The purpose of this filing was to answer several of IFHC’s arguments in its November 19, 2020 response.

First, SUEZ asserted that the sole case cited by IFHC in support of the proposition that the FHA applies to this proceeding—*Georgia State Conference of the NAACP v. City of LaGrange, Georgia*—is not binding on Idaho because it is an Eleventh Circuit case; nor is it applicable to SUEZ or its proposal in this proceeding. In the *City of LaGrange* case, the city was the “sole provider of electricity, gas, and water to its residents.” SUEZ Motion to Accept Reply at 2. If a resident failed to pay any debt to the city, the city denied utility services to the resident. SUEZ noted that the Eleventh Circuit in *City of LaGrange* “held that the City’s denial of services rendered housing unavailable to certain residents and could therefore be viewed as a violation of the [FHA].” *Id.* at 3. SUEZ contrasted these facts with the Company’s Application, which “seeks a rate increase, to be applied equally among all customer classes, in accordance with utility ratemaking proceedings.” *Id.* SUEZ asserted the proceeding “has nothing to do with the sale or rental of a dwelling, the denial of sale or rental of a dwelling, or anything else related to the sale or rental of a dwelling.” *Id.* SUEZ concluded that IFHC “does not cite to any caselaw, HUD regulation, or other authority that applies the [FHA] to a general rate case brought by an investor-owned utility.” *Id.* at 4.

Second, SUEZ argued that while IFHC stated that SUEZ’s Application and customer notices may have a disparate impact on protected classes, IFHC failed to even address the pleading requirements for a disparate-impact case. *See* SUEZ Motion in Opposition at 7 n.2 (describing caselaw and federal regulations regarding pleading requirements for disparate-impact claims). SUEZ asserted that IFHC must meet these pleading requirements.

Third, SUEZ urged the Commission not to wait “to determine whether IFHC seeks to inject irrelevant issues into this proceeding.” SUEZ Motion to Accept Reply at 5. While the Commission may dismiss an intervenor from a proceeding if it turns out that it has no direct and substantial interest in the proceeding, SUEZ noted the Commission already knows what IFHC’s interests are: “it alleges that the proposal, and the notice provided, violates the [FHA].” *Id.* SUEZ asserted that the Commission should deny IFHC admission as an intervenor rather than allowing irrelevant issues to disrupt the proceeding.

STAFF ANALYSIS

Regarding whether IFHC’s Petition to Intervene should be granted or denied, Staff makes no recommendation. Under procedural Rule 74, the Commission will grant intervention if 1) the petition to intervene shows direct and substantial interest in any part of the subject matter of

the proceeding, and 2) intervention will not unduly broaden the issues. IDAPA 31.01.01.074. The Commission may place reasonable conditions upon a person granted intervention. *Id.* “If it later appears that an intervenor has no direct or substantial interest in the proceeding, or that the intervention is not in the public interest, the Commission may dismiss the intervenor from the proceeding.” *Id.* Historically, the Commission has liberally applied procedural Rule 74, granting nearly all petitions to intervene.

COMMISSION DECISION

1. Does the Commission wish to grant or deny IFHC’s Petition to Intervene?
2. If the Commission wishes to grant IFHC’s Petition to Intervene, does the Commission wish to place any conditions upon IFHC’s admittance as an intervenor?



Matt Hunter
Deputy Attorney General

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