

**ELECTRIC INDUSTRY RESTRUCTURING
AND THE REGULATION OF ELECTRIC SERVICE PROVIDERS:
THE ROLE OF THE FAIR HOUSING ACT**

By:

**Roger D. Colton
Fisher, Sheehan and Colton
Public Finance and General Economics (FSC)
34 Warwick Road, Belmont, MA 02478
617-484-0597 / 617-484-0594 (fax)
rcolton101@aol.com**

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As attention turns away from state regulation as the sole constraint on utility behavior in this increasingly competitive world, consumers may well focus on federal statutes such as the Fair Housing Act as an alternative form of providing consumer protections. And they may well like what they see. The Fair Housing Act prohibits not only purposeful discrimination, but also practices which, even when applied equally to all without any intent to discriminate, have the practical *effect* of discriminating against protected groups. Protected groups include race, color, religion, sex, familial status, or national origin, as well as disability status.

This Fair Housing analysis will be particularly important to low-income households. It is a sad reality today that low-income payment-troubled customers tend to disproportionately involve households marked by racial, ethnic and gender-based characteristics. Low-income households tend to be disproportionately female-headed, tend to be disproportionately Black or Hispanic, and tend to disproportionately involve disabled persons. Policies directed toward these low-income consumers, or which tend to adversely affect these consumers, will thus likely implicate the classes of persons entitled to protection under the Fair Housing Act.

Utilities should be aware of their responsibilities in this regard. As utilities enter a more competitive environment, they must take care to tread softly when affecting the rights of residential customers. Actions taken in the name of cutting costs, getting stricter with credit and collections, or reducing service, run the risk of getting utilities into hot water. Since public utility service is a necessary incidental service to housing --one cannot have habitable housing without having utility service as well- - just as the provision of homeowners' insurance was found to be covered by the Fair Housing Act anti-discrimination provisions, so, too, will the provision of utility service likely be found to be covered.

THE POTENTIAL FAIR HOUSING APPLICABILITY TO PUBLIC UTILITIES

The Fair Housing Act applies to public utilities through any of three different theories.

Essential to Habitability of Premises

First, the Act not only makes it unlawful to discriminate directly in the provision of housing, but makes it unlawful, as well, "to discriminate against any person. . .in the provision of services or facilities in connection with the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin."¹¹ The statute separately prohibits discrimination against the handicapped in the provision of "services."¹²

In construing this statutory language via regulations, the Department of Housing and Urban Development (HUD), itself, has made clear that the reach of the statute includes the provision of utility service. HUD regulations state that actions covered by the statute include:

any conduct relating to the provision of. . .services and facilities in connection [with housing] that otherwise makes unavailable or denies a dwelling to persons. This includes. . .refusing to provide municipal services. . .[A person] discriminatorily denied utility services to her household is as equally deprived of housing as if she had been refused access to the apartment itself.¹³

The last line of the regulation, referring to "deprived of housing," is the key. The statutory language refers to "restricting housing choices." The Fair Housing Act constrains activities which affect the provision of fair housing. Such activities include:

- o Any actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin which restrict housing choices or the availability of housing choices; or
- o Any actions, omissions, or decisions which have the effect of restricting housing choices on the basis of race, color, religion, sex, disability, familial status or national origin.

From the perspective of dealing with utilities, a house (or apartment or other dwelling unit) without utility service (including either home energy or water, but not telephone) will be found to be

¹¹ 42 U.S.C. §3604(a), (b) (1995).

¹² 42 U.S.C. §3604(f)(1), (2) (1995).

¹³ 24 C.F.R. §100 *et seq.* (1992).

uninhabitable under nearly all state law. A "warranty of habitability" is almost universally recognized by case law or by statute. Only five states have not formally recognized the warranty. Moreover, in publicly-assisted housing, as well as public housing, too, the continuation of heat, electricity and water is considered an essential element of the habitability of the premises.

The line of reasoning leading to the applicability of the Fair Housing Act to the provision of public utility service is thus clear. It consists of three related observations: (1) the Fair Housing Act applies to "services in connection with" the provision of housing; (2) the Fair Housing Act prohibits discriminatory actions which intentionally, or in a *de facto* fashion, restrict housing choices or deprives a person of housing based on prohibited grounds; and (3) the provision of heating, electricity and water is considered an essential element in the habitability of a premises. As a result, actions regarding the provision of utility services may make housing unavailable, restrict housing choices, or deprive a person of housing in contravention of the FHA if undertaken on a prohibited basis.

Standing in Shoes of Property Owner

A second line of reasoning which leads to the conclusion that the Fair Housing Act applies to public utilities as a service provided "in connection with" housing involves the conclusion that utilities often stand in the shoes of the property owner. This reasoning finds its genesis in the court case *Clifton Terrace Associates v. United Technologies*.¹⁴⁾ In that case, the plaintiff, the owners of a low-income housing project, brought suit against the defendant, a seller and servicer of elevators, for its refusal to negotiate a contract to service the elevators in the project, whose tenants were largely black, handicapped or elderly. The plaintiff alleged violations of, amongst other things, the Fair Housing Act. The District Court dismissed plaintiff's claims under the FHA, finding that the "provision of services. . .in connection with [having] language of §3604(b) is directed at owners and landlords, and, significantly, municipal services such as garbage collection."¹⁵⁾

On appeal, the D.C. Circuit affirmed the District Court on reasoning which would support a tenant challenging a utility policy against tenant billing, stating:

Like public utilities, municipalities often are the sole source of a service essential to the habitability of a dwelling. In the case of such an absolute monopoly, ultimate control over the service in question resides with the municipality or utility rather than with the provider of housing and such a "sole source" could conceivably violate the §3604(b) rights of the tenants without any immediate action by the landlord.¹⁶⁾

The *Clifton* court stands for the proposition that where the provider of service is a practical monopoly,

¹⁴⁾ 929 F.2d 714 (D.C.Cir. 1991)

¹⁵⁾ 728 F.Supp. 24, 29 - 30 (D.D.C. 1990).

¹⁶⁾ 929 F.2d at 720.

by definition the landlord has no alternative and the discriminating monopoly effectively stands in the shoes of the landlord. The landlord having no alternative but to submit to the discrimination of the provider, the tenant's remedy is against the service provider. Thus, even under the restrictive reasoning of the *Clifton* court, it is likely that a tenant (or landlord) may state a claim for discrimination against a provider of utility service to residential housing.^{17\}

Protection of Housing Quality

The third and final approach to applying the Fair Housing Act to public utilities involves use of the protection of housing quality contained in §3604(b) rather than the other statutory provisions of the Act which protect access to housing. Section 3604(b) of the Act prohibits discrimination against members of protected categories "in the terms, conditions, or privileges of sale or rental of a dwelling."^{18\}

While it seems self-evident that the provision of utility services directly affects the "quality" of a person's housing, the proposition can be quantified through examination of court cases seeking damages for the unlawful denial of utility service. These damage cases establish the propositions that: (1) the reduction in quality in housing with reduced or denied utility service is real; and (2) the reduction in quality can be quantified.

The housing quality approach is important because it establishes that the Fair Housing Act would apply not only to the absolute denial of utility services, but would apply to the reduction in level of service, or to an adverse change in the terms or conditions under which service is provided, as well.

THE FAIR HOUSING ACT

The Fair Housing Act of 1968,^{19\} as amended in substantial part in 1988, is a legislative enactment enforcing, with exceptions, a policy of equal access to all types of housing for classes of persons within its protection. To this end, the Act prohibits not only purposeful, intentional discrimination, but also practices which, applied equally to all without any intent to discriminate, have the practical effect of discriminating against groups protected by the Act. The Act, in other words, looks at discrimination from the perspective of the victim and concludes that one who is excluded from a type of housing by a policy suffers the impact of that exclusion irrespective of the intent of the practice.

The Protected Classes

The Fair Housing Act prohibits discrimination on the basis of race, color, religion, sex, familial status,

^{17\} See also, *Southend Neighborhood Improvement Association v. County of St. Clair*, 743 F.2d 21207, 1210 (7th Cir. 1984); *Mackey v. Nationwide Insurance Company*, 724 F.2d 419, 424 (4th Cir. 1984).

^{18\} 42 U.S.C. §3604(b) (1995).

^{19\} 42 U.S.C. §§ 3610 *et seq.*

or national origin. In addition, the Act bans discrimination based on disabilities. Relevant issues with the two more recent additions to the FHA --disability status and familial status-- are discussed below.^{\10\}

Disability Status

The Fair Housing Act, as it applies to persons with disabilities, is intended to accomplish three purposes: (1) to end segregation of the housing available to people with disabilities; (2) to give people with disabilities the right to choose where they wish to live; and (3) to require reasonable accommodation to their needs in securing and enjoying appropriate housing. Under the principle of "reasonable accommodation," the Act "would require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling."^{\11\} The House Report states further that "to the extent that terms, conditions, privileges, services or facilities operate to discriminate against a person because of a handicap, elimination of the discrimination would be required in order to comply with the requirements of this subsection."^{\12\}

Under the Fair Housing Act, "handicapped" means:

- o a physical or mental impairment which substantially limits one or more of such person's major life activities;
- o a record of having such an impairment; or
- o being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance.

Families with Children

Until the Fair Housing Amendments Act of 1988 took effect, no federal statute provided comprehensive protection to families with children when those families suffered discrimination in housing. While some constitutional law had developed protecting familial status under the constitutional right to privacy, because of the need for state action to bring a constitutional challenge, the rights were of limited impact; purely private action was not reached.

The term "familial status" means one or more individuals (who have not attained the age of 18 years) who are domiciled with a parent or a person having legal custody of the individual or who are domiciled with a person designated by the parent or other person having such custody with the written

^{\10\} This discussion is not in any way intended to be a comprehensive discussion of Fair Housing law. That discussion could take volumes.

^{\11\} H.R. Rep. No. 711, 100th Cong., 2d Sess. 22, at 25 (1988).

^{\12\} *Id.*, at 23-24.

permission of such parent or other person. The term also encompasses persons who are pregnant as well as persons who are seeking to obtain legal custody of any individual who has not attained the age of 18 years.

While the Act does not prohibit discrimination based on marital status, it clearly prohibits discrimination against single parents or those who have a child born out of wedlock. It also clearly prohibits discrimination against single fathers, as well as single mothers, who have custody of their children.

Discrimination Under the Act

Despite occasional references in cases and comments to the contrary, the FHA prohibits practices which are neutral in form, but which disproportionately impact upon protected groups, as well as actions motivated by invidiously discriminatory motives. The Supreme Court has indicated a disparate impact standard under the FHA, and nearly every Federal Circuit has directly so held.¹³⁾

Some confusion has been caused by statements appearing in some cases that a violation of the Act (and not merely the establishment of a *prima facie* case) may be established upon a showing of disparate impact, *plus* some other factors.¹⁴⁾ These cases should be construed within the context that whatever the legal standard purportedly relied upon, as a practical matter, it is unlikely that any court would find a violation on a showing of disparate impact alone, without considering the defendant's reasons for its policy or the alternatives available to it (at least where the defendant is a private party). In today's society, a society in which discrete groups continuously hold the bottom positions on the economic continuum, nearly every policy will disproportionately affect protected groups. Accordingly, the kinds of considerations implicated by the "plus factors" are likely to play a part in every court's decision.

In having some courts require plaintiffs to prove more in order to make their case under FHA, the "plus factors" include:

1. Strength of the showing of impact;
2. Any evidence of discriminatory intent;
3. The defendant's action in adopting the policy; and
4. Whether the plaintiff seeks to compel the defendant to take affirmative action or merely

¹³⁾ Annotation, "Evidence of Discrimination Effects Alone As Sufficient to Prove Violation of the FHA" 100 A.L.R.Fed. 97 (1990). *See also*, Milslein, et al, "FHA of 1988 - What It Means For People with Mental Disabilities," 23 Clearinghouse Rev. 128, 133 (1989). *See also*, 114 Cong. Rec. 5221-5222 (1968) (proposal to require showing of discrimination intent rejected).

¹⁴⁾ *See e.g.*, *Dreher v. Rana Management*, 493 F.Supp. 930 (ED NY 1980); *MetroHousing Dev. Corp. v. Arlington Heights*, 588 F.2d 1283, *cert. den'd*, 434 U.S. 1025 (7th Cir. 1977).

to restrain interference with individual property owners.

Even for courts which do not formally adopt these considerations, like factors are bound to enter the decisionmaking process.^{\15\} Recent cases have devalued the importance of the second factor, "some proof of discriminatory intent," so the analysis is reduced to a familiar balancing of the defendant's interest in the policy against its discriminatory impact, with the *proviso* that, if the policy only seeks to enjoin interference with the transactions between landlords and tenants, it is entitled to less deference.

Governmental entities, however, may not justify a discriminatory housing policy on any grounds.^{\16\}

Business Necessity

Until recently, it seemed clear that the defendant, at least in the employment context seeking to justify a policy which has discriminatory effects had the burden to prove both that the policy was compelled by a legitimate business necessity and that no less discriminatory alternative to the policy was available. Indeed, more relevantly, courts in housing cases have given little weight to asserted business necessity defenses, particularly if the defendant is a state actor.^{\17\}

FAIR HOUSING AND A RESTRUCTURED ELECTRIC INDUSTRY

The advent of deregulation in the electric and natural gas industries can be expected to open up new opportunities for discrimination to occur while at the same time cutting off opportunities for complaint resolution. To the extent that there may have been, in the past, the obligation or the right for aggrieved parties to avail themselves of administrative avenues before pursuing matters in the courts, in the future, the public utility commission may no longer operate as a forum for addressing complaints against a local energy provider. Moreover, it is unlikely that utility commissions will allow themselves to become arbiters of complaints based in Fair Housing theories. Thus, the importance of acknowledging activities of utilities as governed by the Fair Housing Act, and taking steps to *prevent* practices that are discriminatory before complaints can arise, is now heightened.

Anticipated as part of the deregulation process is the ability of many competing utility suppliers to enter new service territories and, through this competitive process, theoretically, offer more favorable terms and conditions to the customers they are hoping to acquire. Will all consumers and geographic territories be courted by these competing suppliers or will some be left out? And, if some will be left out, then which consumers will they be?

^{\15\} See e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2nd Cir. 1988).

^{\16\} See e.g., *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); see also, *Brown v. Artery Organization, Inc.*, 654 F.Supp. 1106 (D.D.C. 1987).

^{\17\} McCormack, "Business Necessity in Title VIII: Employment Discrimination Doctrine Into the Fair Housing Act," 54 *Fordham L.Rev.* 563, 580 (1986).

At the same time new competitors may be entering service territories of the local utility companies, the local utility companies (who are the existing owners of the wires or pipes by which all electricity and natural gas flows to residential consumers) may be reducing the service territories in which they supply energy. Perhaps they will become distribution companies only. Perhaps they will elect to supply energy to some consumers but not to others. Again, the question arises, if some consumers will be left out, then which ones will they be? Are lower income neighborhoods, which often have a concentration of African American, Latino, or other non-white consumers, considered to be less profitable and, as a result, or for other reasons, less desirable territories for new suppliers to acquire and old ones to retain? Could the payment problems of some neighborhood residents cause suppliers to take a broad brush and eliminate entire neighborhoods from their service territories?

Finally, will low-income households --disproportionately including classes of persons protected by the Fair Housing Act-- be subjected to increasingly stricter credit and collection procedures? Will they be called upon to post cash security deposits more frequently? Will they be subjected to limited service options such as prepayment meters or service limiter adapters? Will they be given shorter payment plans through which to retire arrears? Or be allowed to incur smaller arrears before having their service disconnected for nonpayment?

SUMMARY

As the electric and natural gas industries enter a new era of competition and perhaps deregulation, consumers will be seeking new avenues of redress against unreasonable and oppressive actions. Complaints that have historically been brought against utilities in administrative proceedings can be expected to be reformulated into causes of action brought pursuant to consumer protection and civil rights statutes. The Fair Housing Act is one such statute that is available to provide substantial consumer protections.