

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office
in Jefferson City on the 28th
day of October, 1994.

Katherine E. Rich, Movant on behalf)
of Richard McCracken and Paula Feurt)
for release of Commission Documents) CASE NO. EO-95-75
Relative to Commission Case No.)
ES-92-297.)

ORDER DENYING RELEASE OF DOCUMENTS

On September 16, 1994, Movant Katherine E. Rich (Movant) filed an application for release of documents in Case No. ES-92-297. A separate docket, Case No. EO-95-75, was established to handle this application. Movant states that she represents plaintiffs Richard McCracken and Paula Feurt in McCracken v. St. Joseph Light & Power Company, Case No. 93-0511-CV-SJ-8, which is presently pending in the United States District Court for the Western District of Missouri, and is set for trial on November 14, 1994. This civil case involves an electric incident which occurred at Oak Ridge Estates on May 5, 1992. Movant requests a copy of the full and complete file of the Commission's investigation of the incident at Oak Ridge Estates pursuant to § 386.480, RSMo. 1986, and Chapter 610 of the Missouri Revised Statutes. She states that she believes the Commission's files contain crucial information relevant to the litigation which cannot be obtained from any other source.

On September 22, 1994, St. Joseph Light & Power Company (SJLP) filed its response to Movant's application. SJLP states that it believes Movant already possesses a copy of all the material maintained by the Commission in its public case file, and therefore assumes that Movant is seeking additional material in the possession of the Commission which is not in the public case file, which would include, to the extent that it exists, notes, memoranda, and other documents reflecting the impressions

of investigators on the Staff of the Commission, or materials supplied by SJLP in response to requests from the Staff which Staff did not include in its public filings. SJLP maintains that Staff is prohibited from releasing this information under § 386.480, RSMo. 1986, absent an order by the Commission, and cites to a prior Commission order involving similar circumstances, The Staff of the Missouri Public Service Commission v. Laclede Gas Company, 28 Mo. P.S.C. (N.S.) 129 (1986). In the Laclede Gas case, the Commission used a three factor balancing test in deciding whether or not to release information which was not publicly filed with the Commission. These factors include the intimacy of the material, the broadness of the issuance of the information, and the wideness of the audience to which the information is released.

In Laclede Gas, the Commission released some but not all of the requested material, after determining that there was no reasonable expectation of privacy in the material which it ordered to be released. SJLP contends that it had a reasonable expectation that the information it provided to Staff would not be released to third parties, based on the wording of § 386.480, which clearly contemplates that some material will not become a part of the public record. SJLP states that it cooperated fully with the Staff investigators based on its expectation of privacy, and that failure to respect the expectation of privacy may hinder the future flow of information between Staff and SJLP, as well as between Staff and other regulated utility companies. In addition, SJLP also asserts that Movant has made no showing that she has been unable to obtain adequate discovery of the facts surrounding this incident through the discovery process available to civil litigants in the State of Missouri. Finally, SJLP claims that the material sought is likely to contain the same type of material which the Commission choose not to release in the Laclede Gas case.

On September 30, 1994, Staff filed its response to Movant's application. Staff repeats much of the information contained in the response filed by SJLP, including its understanding that Movant already possesses a copy of all the material in the public case file maintained by the Commission, and citation of the Laclede Gas case. The Staff then goes on to state its opposition to the release of non-public information regarding this incident based upon the following: (1) that the company had a reasonable expectation that the information it provided to Staff would not be released to third parties, and that failure to respect this expectation of privacy may hinder the flow of information between Staff and the company as well as other regulated companies; (2) that some of the information requested by Movant is in the form of internal Staff work papers and memoranda which did not receive the Staff review that a public report would have received; and (3) that Movant has made no showing that she is unable to obtain adequate discovery of the facts surrounding this incident through the discovery process available to civil litigants.

On October 6, 1994, Movant filed a reply to the responses of SJLP and Staff. Movant claims that she has been unable through the discovery process to obtain adequate discovery of significant facts which are contained only in the Commission's full and complete file, and that the arguments raised by SJLP and Staff must be balanced against her critical need for access to the full and complete file of the investigation in question. Movant then proceeds to outline three issues involving what she considers inconsistencies between positions taken by SJLP during Staff's investigation of the May 5, 1992 incident, and positions taken by SJLP during the course of the McCracken litigation. Attached to Movant's reply are portions of the deposition of Daryl Louis Canterbury, Chief Engineer of SJLP. Specifically, Movant raises three issues upon which she claims SJLP has changed its position: (1) whether the 1990 Edition of the

National Electrical Safety Code (NESC) applied to the utility installations involved in the incident (SJLP's position at time of Staff's investigation), or whether the 1961 Edition of the NESC applied (SJLP's position during McCracken litigation); (2) whether the proper use category for determination of the required clearance was an "over-the-road" clearance relating to truck traffic (SJLP's position at time of Staff's investigation), or whether the proper use category was "rural" (SJLP's position during McCracken litigation); and (3) that SJLP had no notice of construction of the graveled road at the accident site (SJLP's position at time of Staff's investigation), or that a marketing representative of SJLP had been provided a hand-drawn map of the subdivision being constructed at the accident site (SJLP's position during McCracken litigation).

The Commission, after a review of the various pleadings filed in this docket, the public case file in Docket No. ES-92-297, and the applicable statutes, finds as follows. Staff and SJLP both assert that Movant already possesses a copy of all of the material in the public case file maintained by the Commission in Case No. ES-92-297. Movant does not address this contention in her reply. To the extent that Movant is seeking material contained in the Commission's public case file, clearly she is entitled to obtain copies thereof upon payment of the fees charged for copying pursuant to § 386.300, RSMo. 1986. However, as it is likely that Movant is seeking access to non-public records of the Commission, this issue must also be addressed.

The Commission finds, as it also found in the Laclede Gas case, that § 386.480, RSMo. 1986 is the operative statute in answering the question posed by Movant's request. § 386.480 states as follows:

No information furnished to the commission by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection by the provisions of this chapter, or chapter 610, RSMo, shall be open to

public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. The public counsel shall have full and complete access to public service commission files and records. Any officer or employee of the commission or the public counsel or any employee of the public counsel who, in violation of the provisions of this section, divulges any such information shall be guilty of a misdemeanor.

§ 386.480 RSMo. 1994.

Since none of the information sought was revealed in the course of a hearing or proceeding, the only method by which the documents in question can be opened is by order of the Commission. The Commission in the Laclede Gas case utilized a three factor balancing test to weigh the issues of privacy rights versus the public's right to know. The factors used include the intimacy of the material in question, the broadness of the issuance of the information, and the wideness of the audience to which the information is released. In applying these factors to the facts of the Laclede Gas case, the Commission determined that some of the material sought should be released because there could be little or no reasonable expectation of privacy as to those materials. The materials released included photographs taken at the residence involved in the incident, statements from two tenants at the residence in question, and the depositions of seven Laclede Gas employees. As to the remaining materials, the Commission found that the company could reasonably have an expectation of privacy therein. The Commission also added, "The materials to be released themselves reveal substantially no more in regard to the matters in question than was revealed by Staff's report and Staff's complaint as filed in the casepapers and thereby already made public records open to public scrutiny." The Staff of the Missouri Public Service Commission v. Laclede Gas Company, 28 Mo. P.S.C. (N.S.) 129, 132 (1986). Thus this may also have been a factor in the Commission's decision.

In the present case Movant's request appears to be overbroad. She does not specifically designate the particular material sought, therefore it is difficult to specifically apply the three prong test of the Laclede Gas case. However, the Commission has reviewed the reasons given by Movant in support of her need for the material requested, as well as the portions of the deposition of Daryl Louis Canterbury attached to Movant's reply. A review of the deposition pages supplied to the Commission indicates that the witness does not deny telling Staff in 1992 that the height of the wire should be calculated in accordance with the 1990 Edition of the National Electric Safety Code, and does not deny telling Staff that the use category should be over-the-road. (Deposition of Canterbury at 307-308.) The Commission can locate no reference in the deposition transcript to testimony by this witness regarding what information was given to Staff during the course of its investigation, as to whether SJLP had notice of the construction occurring at the accident site. The deposition transcript does reveal, however, that the witness testified about a sketch drawn by a Mr. Walton and given to a Mr. McLarney. This testimony is consistently couched by the witness in terms of "it is my understanding," which may or may not mean that this witness became aware of the sketch subsequent to Staff's investigation. (Deposition of Canterbury at 206.)

The Commission is very aware, of course, that it does not have before it a complete transcript of the testimony of this witness, nor is it familiar with the issues involved in Movant's lawsuit; therefore the Commission could not rest its decision on this analysis alone. The Commission has therefore also extensively reviewed its public case file in Case No. ES-92-297, and finds that the information sought by Movant appears to be contained therein. Specifically, the Staff's Electric Incident Report explicitly refers to the 1990 Edition of the NESC, (Electric

Incident Report filed on October 9, 1992 at 7, 10-12), the use category, (Electric Incident Report filed October 9, 1992 at 7, 9, 11-13), and notice or lack thereof of construction at the accident site, (Electric Incident Report filed October 9, 1992 at 5, 14). Under the particular circumstances in this case, the Commission determines that SJLP's privacy interests, as well as other privacy interests which may be implicated by the material, outweigh the need for the information sought. The Commission also finds that the concern raised by Staff and SJLP regarding the impact of a decision to release non-public information on the future flow of information between Staff and utilities is a valid one. Although this raises a potential public policy issue, it is simply another factor which must be considered, and in an appropriate case an order authorizing the release of material may be the correct decision. This is not such a case.

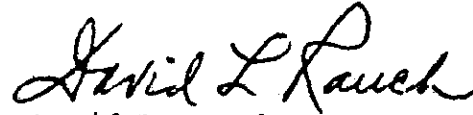
Nevertheless, it is possible that upon a review of the material contained in the Commission's public case file, Movant may come across references to specific material, the release of which Movant may then request. A more thorough analysis using the factors in the Laclede Gas case may then be made with respect to specific materials requested. Based upon the foregoing, the Commission finds that the material requested by Movant should not be released at this time.

IT IS THEREFORE ORDERED:

1. That the application for release of documents filed by Movant Katherine E. Rich on behalf of Richard McCracken and Paula Feurt be and is hereby denied, except insofar as Movant's request pertains to material contained in the public case file of Case No. ES-92-297.

2. That this order shall become effective on the date hereof.

BY THE COMMISSION

A handwritten signature in cursive script, reading "David L. Rauch".

David L. Rauch
Executive Secretary

(S E A L)

McClure, Perkins, Kincheloe,
and Crumpton, CC., Concur.
Mueller, Chm., Absent.