STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 06-M-0878 - Joint Petition of National Grid PLC and KeySpan Corporation for Approval of Stock Acquisition and other Regulatory Authorizations.

CASE 06-G-1185 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York for Gas Service.

CASE 06-G-1186 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island for Gas Service.

RULING ON MOTION FOR REVOCATION OF PARTY STATUS FOR INTERVENOR NICHOLSON

(Issued April 26, 2007)

MICHELLE L. PHILLIPS and GERALD L. LYNCH
Administrative Law Judges:

By motion submitted January 30, 2007, KeySpan Corporation (KeySpan) and National Grid plc (National Grid) (collectively the Petitioners) request that Mr. Robert V. Nicholson's intervenor status in these proceedings be revoked. In the alternative, the Petitioners request that Mr. Nicholson's attorney, Mr. Irving Like, be disqualified from continuing to represent Mr. Nicholson in these proceedings and that Mr. Nicholson be required to refrain from further discovery in these proceedings. The motion is primarily based on Mr. Nicholson's and Mr. Like's treatment of certain of KeySpan's privileged documents.

The Petitioners argue that Mr. Nicholson and his attorney, having acquired documents which they knew or should have known to be privileged communications, at a minimum, had a

duty under CPLR §4503 to refrain from publicly disclosing said documents.[1] The Petitioners assert that relevant case law and Commission precedent justify revocation of Mr. Nicholson's intervener status.[2] The Petitioners claim that, by publishing the privileged material and simultaneously seeking rulings from the Administrative Law Judges (ALJs) and the State Supreme Court, Mr. Nicholson and his counsel basically "thumbed their noses at the Commission and its processes."[3]

The Petitioners contend that revocation of party status is justified because Mr. Nicholson and his counsel have obtained and reviewed KeySpan's privileged information and, as a result, any evidentiary presentations made by Mr. Nicholson will be unavoidably tainted. They also state that it does not matter how the information was obtained because KeySpan has not waived the privilege. The Petitioners add that by basing testimony on the privileged memorandum, Mr. Nicholson and his counsel "flagrantly disregarded" the presiding officers' rulings that the privileged memorandum was not part of the public record in these proceedings.[4]

The Petitioners assert that revoking Mr. Nicholson's party status is not unfair or unreasonable because Mr. Nicholson has asserted no relationship with KEDNY and is not a customer of KEDLI. The Petitioners contend that Mr. Nicholson's stated interest – that he has a class action lawsuit pending against KeySpan – will not be negatively affected by dismissing him from

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[1] KeySpan and National Grid's Motion for Revocation of Party Status for Intervenor Robert V. Nicholson (Petitioners' Motion), pp. 3-8.

[2] Id. at 8-9. The Petitioners allege that "analogous circumstances" existed in Lipin v. Bender, 193 A.D.2d 454 (1st Dept. 1993)(upholding the propriety of case dismissal as a remedy for misconduct that involved taking and use of the adversary's privileged documents).

[3] Id. at 9.

[4] Id. at 10-11.

these proceedings. They add that his dismissal may save other active parties "the burden and inconvenience" of responding to his testimony.[5] Based on their assertion that Mr. Nicholson has never been qualified as an expert in any proceeding to testify on environmental issues and "his resume does not indicate that he has any professional qualifications or experience that justify allowing him to opine on KEDLI's [site investigation and remediation (SIR)] costs or [manufactured gas plant (MGP)] management practices," the Petitioners conclude that revoking his party status will not adversely affect the record.[6]

The Petitioners also argue that, "in addition to demonstrating a lack of regard for applicable laws and regulations, the submissions by Mr. Nicholson in this proceeding to date reveal a casual disregard for factual accuracy that provides further support for revoking Mr. Nicholson's party status."[7] They cite three examples from Mr. Nicholson's December 26, 2006 Motion for Reconsideration to demonstrate this "disregard for factual accuracy."[8] The Petitioners assert that the magnitude of the financial considerations presented by its merger and rate requests, along with the rigorous procedural schedule, do not justify requiring the parties to expend their limited time and resources refuting Mr. Nicholson's baseless and unsupported factual allegations and legal claims.

With respect to their alternative request to disqualify Mr. Like and to preclude further discovery by Mr.

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[5] Id. at 11.

[6] Id. at 12.

[7] Id.

[8] Id. at 12-13. According to the Petitioners, the examples include Nicholson's unsupported allegations that there have been violations of law and insurance policy notice provisions; erroneous claims that the insurance litigation had terminated; and unsupported conjectures regarding KeySpan's motives for supporting efforts to retain privileged information.

Nicolson, the Petitioners argue that "there is no question that Mr. Like has obtained documents that he knew or should have known to be privileged in this proceeding and made them publicly available." They claim that, under similar circumstances, "New York's courts have held both that the improperly obtained materials should be suppressed, and that the attorney who obtained the information should be disqualified. Matter of Beiny, 129 A.D. 2d 126, 517 N.Y.S. 2d 474 (1st Dept. 1986), rehearing denied, 132 A.D. 2d 190, 522 N.Y.S. 511 (1st Dept. 1987), app. dismissed, 71 N.Y.S. 2d 994, 524 N.E. 2d 879, 529 N.Y.S. 2d 277 (1988), CPLR §3103, 4503."[9] The Petitioners assert that the present facts are made more egregious because "by basing Mr. Nicholson's pre-filed testimony on KeySpan's privileged materials, and including those materials in his exhibits, Mr. Like ignored rulings from the Presiding Officers upholding KeySpan's objections to producing the privileged materials and holding that they would not be considered part of the record in these proceedings."[10] The Petitioners contend that since the Commission's regulations (16 NYCRR 2.1) require attorneys appearing before the Commission to adhere to the same standards as attorneys appearing in New York State Courts, disqualifying Mr. Like for his improper use of KeySpan's privileged materials is appropriate.

The Petitioners also claim that any further discovery propounded by Mr. Nicholson will be tainted by his review of privileged materials.[11] The Petitioners cite to several cases in support of their assertion that, "under New York law, courts issue protective orders denying or limiting discovery that is 'improper', 'oppressive', 'overbroad', 'burdensome', or that

[9] Id. at 14.

[10] Id.

[11] Id.

seeks privileged information."[12] They contend that the fact that Mr. Nicholson has improperly obtained and made public KeySpan's privileged information without its consent fully justifies the issuance of an order cutting off further discovery. They argue that such an order will not unduly prejudice Mr. Nicholson as the Petitioners have already responded to 314 of his discovery requests and have provided thousands of pages of internal documents concerning the investigations and remediation of its former MGP sites and its incurrence of SIR costs.[13]

In response to the Petitioners' Motion, Mr. Nicholson argues that his standing to participate in these proceedings is not predicated upon being a ratepayer, but on whether he can contribute to the development of the record. He contends that his discovery requests and testimony have contributed to the record's development and it is fair and in the public interest that his contentions be heard and his discovery not be restrained prior to the cut-off date applicable to all intervenors. He adds that even if the Petitioners' assertions regarding his testimony were correct, the appropriate redress would be to exclude irrelevant documents or assign them little probative weight and to allow the Petitioners to cross-examine or rebut such evidence.[14]

In support of his assertion that the instant motion cannot be entertained until his interlocutory appeal is decided, Mr. Nicholson asserts that the First Amendment protects his dissemination of the information because "neither Intervenor nor his counsel are aware that the December 27, 1993 report was originally unlawfully obtained or released in breach of a legal

[12] Id. at 15.

[13] Id.

[14] Nicholson Memorandum in Opposition to Petitioners' Motion (Nicholson memo), pp. 1-2. The disposition of Mr. Nicholson's pre-filed direct testimony and appendix of exhibits is addressed in a separate ruling.

obligation."[15] According to Mr. Nicholson, since he and his counsel were not parties to the case wherein the privilege was upheld, they are not bound to respect the privilege and can make free use of the document.[16] Mr. Nicholson adds that *in camera* review of the documents must be conducted as the documents are evidence of "intentional violation of the Superfund law" and "of fraud".[17]

Mr. Nicholson claims that the Petitioners' reliance on CPLR §4503 is misplaced because his counsel was not counsel to any party to the insurance company litigation.[18] He therefore concludes that no confidential communication within the meaning of CPLR §4503 was disclosed.[19]

Mr. Nicholson argues that his ability to conduct discovery should not be banned because "his requests have produced extensive documentary evidence relevant to the issue of prudency."[20] He adds that he does not present himself as an expert who will opine on prudency or reasonableness of any costs incurred by KEDLI. He contends that his discovery, testimony and exhibits establish "KeySpan's failure to satisfy its burden of proving prudency."[21]

DISCUSSION

The Commission's regulations (16 NYCRR 2.1) expressly provide that:

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[15] Id. at 3. See also Id., pp. 2-4.

[16] Id., pp. 4-5.

[17] Id. The arguments on pages 2-5 are now moot; an order denying Mr. Nicholson's interlocutory appeal was issued March 23, 2007. A confirming order was also issued.

[18] Long Island Lighting Co. et al v. Allianz, 310 A.D.2d 23 (2002).

[19] Id. at 3, 6.

[20] Id.

[21] Id. at 7.

> A party's case may be presented personally or through a representative. A party's representative need not be an attorney, but all persons appearing before the commission must conform to the standards of conduct required of attorneys appearing before the courts of the State of New York. Any person signing a pleading or brief or entering an appearance in any proceeding will be considered to have agreed to conform to those standards. A failure to conform to those standards will be grounds for exclusion from that and any later proceeding.

The Petitioners do not point to any agency rulings that rely on 16 NYCRR 2.1 to revoke party status due to a violation CPLR §4503 but instead rely on court cases. Therefore, we will start first with the cases they cite.

We conclude that the cases cited by the Petitioners[22] establish that the use of improperly or irregularly obtained attorney-client privileged information violates CPLR §4503 and subjects the offending person(s) to sanctions. In Lipin v. Bender, the sanction of dismissal was upheld because the plaintiff's initial acquisition of the privileged information was improper, her misconduct was persistent[23] and she would carry her improperly acquired knowledge into any new attorney-client relationship.[24] In Matter of Beiny, the trustee's motion for disqualification was granted on appeal because suppression alone could not assure that counsels' tainted knowledge of attorney-client privileged information, which was also acquired

[22] Lipin v. Bender and Matter of Beiny, supra. The Petitioners also cite Proceeding on Motion of the Comm'n as to the Rates, Charges, Rules and Regulations of Con. Ed. Co. of NY, Inc. for Elec. Serv., 2005 N.Y. PUC LEXIS 1 (Jan. 3, 2005) which involved the exclusion of a party (an individual and his company) from a portion of a proceeding (settlement discussions) due to a violation of Commission Rule 3.9.

[23] The plaintiff read documents she knew to be confidential attorney documents, then concealed and took the documents, then copied them, and, then, even after being ordered by the court to return the documents, made and kept her notes on the documents. Lipin v. Bender, 84 N.Y.2d 562, 569-570 (1994).

[24] Lipin v. Bender, 84 N.Y.2d 562, 572-573 (1994).

improperly, would not subtly influence counsels' future action. These cases, however, do not support the Petitioners' assertion that it is irrelevant how the privileged information was acquired. Still, this is due to the fact that relief was sought under CPLR §3103 which, in relevant part, expressly authorizes the court to suppress information "improperly" obtained.

Mr. Nicholson argues that how he obtained the privileged information matters.[25] He also claims the Petitioners' reliance on CPLR §4503 is misplaced because his counsel was not counsel to any party to the insurance company litigation and therefore no confidential communication within the meaning of CPLR §4503 was disclosed. It is well-established, however, that the mere fact that confidential documents have been obtained does not abrogate the protections afforded by the attorney-client privilege. R.G. Egan Equipment, Inc. v. Polymag Tek, Inc., 195 Misc.2d 290, 291, 758 N.Y.S.2d 763 (N.Y. Sup. Ct. 2002); CPLR §4503. There must be a showing that the holder of the privilege waived the privilege (Egan, *supra*; CPLR §4503); here, the privilege was not waived by its holder (Allianz, *supra* at 32; Petitioners' Motion at 10, n. 13).

Therefore, for purposes of determining whether Mr. Nicholson and Mr. Like violated CPLR §4503, we conclude that it does not matter how the privileged information was obtained. What matters is whether Mr. Nicholson and Mr. Like knew or should have known the December 1993 Report was attorney-client privileged and, if so, did one or both disclose the information. It is beyond dispute that Mr. Nicholson and Mr. Like knew or

[25] In support of his arguments that his interlocutory appeal must run its course before this ruling could be issued, Nicholson asserts that neither he nor his counsel is "aware that the December 27, 1993 report was originally unlawfully obtained or released in breach of a legal obligation." This argument is moot because a decision denying the appeal has issued; it is also unconvincing for the reason discussed *infra*.

should have known that the December 1993 Report was attorney-client privileged. The Appellate Division decision indicates that the document is marked "Privileged and Confidential."[26] In addition, Mr. Nicholson and Mr. Like both knew that the December 1993 Report was attorney-client privileged because our rulings in these proceedings repeatedly upheld KeySpan's objection (based on the attorney-client privilege) against Mr. Nicholson's efforts to compel the document's disclosure.[27]

We now turn to whether one or both men disclosed the privileged information. Here, it is also beyond dispute that (1) Mr. Nicholson allowed the privileged information to be posted to his public web site and submitted testimony and an appendix of exhibits in these proceedings which referred to and included the privileged December 1993 Report and (2) Mr. Like emailed it to all active parties on more than one occasion.[28] On the basis of the foregoing, we agree that both Mr. Nicholson and Mr. Like disclosed an attorney-client privileged document in contradiction to the CPLR's requirement that such information "shall not be disclosed."

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[26] Allianz, *supra* at 27. In addition, a recent opinion in Mr. Nicholson's pending Suffolk County litigation, issued January 19, 2007, denied Mr. Nicholson's request for disclosure, again noting that the document has been held to be protected by attorney-client privilege. See Petitioners' Motion, Appendix F, page 3 of 5.

[27] Cases 06-M-0878 et al., Ruling on Objection to Discovery, issued December 20, 2006, Ruling on Motion for Reconsideration, issued January 11, 2007, and an email ruling issued January 17, 2007 at 3:58 p.m.; see also Allianz, *supra*, and Nicholson v. KeySpan, Index No. 17458-2006 (N.Y. Sup. Ct. January 19, 2007)(attached to Petitioners' Motion as Appendix F).

[28] Mr. Like served Mr. Nicholson's testimony and appendix of exhibits and his interlocutory appeal (which included the report as an attachment on all active parties), and he notified active parties that the report could be downloaded from Mr. Nicholson's website on January 14, 2007 (see Petitioners' Motion, Appendix E).

Revocation of Party status

The Petitioners assert that 16 NYCRR 2.1 authorizes the revocation of Mr. Nicholson's party status if there is a violation of CPLR §4503. They further argue that revocation of his party status is justified because (1) any evidentiary presentations made by Mr. Nicholson will be unavoidably tainted; (2) he disregarded our rulings concerning the privileged report; (3) he has asserted no relationship with KEDNY, is not a customer of KEDLI, and his stated interest will not be negatively affected by granting the requested relief; and (4) his submissions to date contain factual inaccuracies.

As we stated previously, since the Petitioners do not point to any agency rulings that rely on 16 NYCRR 2.1 to revoke party status, we will turn to the cases they cite for guidance.[29] We note, at the outset, that in Lipin v. Bender, 84 N.Y.2d 562 (1994), the Court of Appeals observed (at 569) that dismissal is a "drastic" sanction.

The Petitioners state that Mr. Nicholson's evidentiary presentations will be unavoidably tainted and therefore revocation of party status is both necessary and justified. A similar problem was present in Lipin, but it was only one of several reasons relied upon by the Court of Appeals to affirm the lower courts. The Court of Appeals decision also points, *inter alia*, to the fact that the plaintiff initially concealed then took the privileged information and continued to engage in persistent misconduct thereafter. Here, there has been no demonstration that Mr. Nicholson obtained the documents improperly[30] or, as discussed *infra*, that his misconduct has been

[29] Thus, for our purposes, we are treating dismissal as the functional equivalent of revoking party status.

[30] How the information was obtained was not relevant to determining whether CPLR §4503 was violated but, in accord with the cases relied upon by the Petitioners, may be considered when deciding on sanctions.

persistent. In addition, as the Lipin decision observes (at 572-3), other sanctions have been employed to address a concern like the one expressed by the Petitioners.

Next, it is not clear that the second and fourth reasons offered by the Petitioners to justify revoking party status should be attributed primarily to Mr. Nicholson. Instead, it is more appropriate to attribute them to his representative, who, as an attorney, should have advised Mr. Nicholson of the legal implications of our rulings and how he could respond thereto, and was the person who actually signed and submitted the memoranda with which the Petitioners take issue.

The third justification offered by the Petitioners is not persuasive. As Mr. Nicholson correctly notes, standing to participate in these proceedings is not predicated upon being a ratepayer but on whether the intervention of any person can contribute to the development of the record or is otherwise fair and in the public interest.[31] As a rule, participation in our proceedings is favored.

Based on all of the foregoing, we decline to revoke Mr. Nicholson's party status or exclude him from these proceedings.[32] However, to limit the extent to which Mr. Nicholson might unfairly benefit from his actions, we direct Mr. Nicholson not to use, refer to, or rely on the December 1993 Report or any information obtained from that document in these proceedings for any purpose. Any further dissemination of privileged or confidential information by Mr. Nicholson will result in his exclusion for all Public Service Commission (PSC) proceedings.

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[31] 16 NYCRR 4.3(c)(1).

[32] This decision was not made lightly and should **not** be construed by Mr. Nicholson as condoning his disclosure of attorney-client privileged information.

Disqualification of Mr. Like

The Petitioners assert that 16 NYCRR 2.1 authorizes Mr. Like's disqualification if there is a violation of CPLR §4503. They further argue that disqualification is justified because Mr. Like: (1) obtained information he knew to be privileged and disclosed it in violation on CPLR §4503; (2) ignored our rulings; (3) disregarded the processes of both this agency and the state courts by releasing the information while seeking rulings in both venues; (4) presented factual inaccuracies in his submissions in these proceedings; and (5) will taint any further discovery by virtue of his review of the privileged information.[33] KeySpan also reports the following actions by Mr. Like, asserting that they are additional examples of behavior that warrants serious sanctions: (a) Mr. Like waited almost 2 months to comply with the January 17, 2007 email ruling which instructed all active parties that "any information previously accorded privileged status by a New York Court will not be taken into the record or considered in any way in these proceeding, and that we will not consider any pleadings based in whole or in part on such information, unless the party offering the information can establish clearly and convincing that such information was properly obtained by it"[34]; (b) he misrepresented to Supreme Court Justice Sgroi that the December 1993 Report had been accepted into the public record of these proceedings; and (c) in an e-mail sent January 12, 2007 at 4:51 p.m. responding to an e-mail from Judge Lynch confirming the conversation he had with Mr. Like at the Smithtown Public Statement Hearings, Mr. Like stated he did not deliver documents (including the December 1993 report) to Suffolk County, but in his February 12, 2007

[33] The Petitioners state that Mr. Like apparently has already used the report to draft discovery requests. Petitioners' Motion, p. 5, n. 5.

[34] This point is addressed in a companion ruling.

Affirmation submitted to the New York Supreme Court in Suffolk County at ¶¶ 105-108, Mr. Like affirmed under oath that he had disseminated the report to several Suffolk County officials.[35]

Mr. Nicholson responds that his counsel should not be disqualified.

The Petitioners do not point to any agency rulings that rely on 16 NYCRR 2.1 to disqualify counsel so we will again turn to the cases they cite for guidance. In Matter of Beiny, the trustee's motion for disqualification was granted on appeal because suppression alone could not assure that counsels' improperly acquired and tainted knowledge would not subtly influence their future action. Here, we are presented with a somewhat different situation in that there has been no clear showing that Mr. Like obtained the privileged document improperly. There has, however, been a clear demonstration that Mr. Like's subsequent misconduct, like the plaintiff in Lipin, has been persistent.

As already stated, Mr. Like repeatedly emailed the December 1993 Report to all active parties in these proceedings and provided it to the PSC and the ALJs, disclosing attorney-client privileged information in contradiction to the CPLR's requirement that such information "shall not be disclosed." Mr. Like apparently believed that his actions were justified but he has not produced any court decision or order approving, authorizing or affirming his act of disclosing the report. In fact, the most recent decision of which we are aware ordered Mr. Nicholson and Mr. Like, *inter alia*, to turn over any copies of the report in their possession to KeySpan's attorney, delete any

[35] KeySpan's Response to Mr. Like's Submission of the Wellington Affidavit, emailed 3/19/07 at 4:33 p.m., pp. 7-9. The Affirmation actually states "Plaintiffs" disseminated the report. ¶105.

copies of it from computers or electronic devices, and remove it from any internet and websites they control.[36]

The Petitioners' second and third justifications provide additional support for granting the requested sanction. The ruling issued on January 17, 2007[37] instructed all active parties that "any information previously accorded privileged status by a New York Court will not be taken into the record or considered in any way in these proceeding, and that we will not consider any pleadings based in whole or in part on such information, unless the party offering the information can establish clearly and convincing that such information was properly obtained by it. Mr. Like subsequently filed and served testimony and an appendix of exhibits in these proceedings which referred to and included the privileged December 1993 Report. Apparently, Mr. Like believed he would be able to establish clearly and convincing that he properly obtained the privileged information and was therefore justified in using it. Still, given our previous discovery rulings and the Allianz decision, the option chosen by Mr. Like was unreasonable. When one also considers that Mr. Like had discovery rulings pending in the Suffolk County court case and a then-pending interlocutory appeal here, his chosen option amounts to an unnecessary and self-interested disregard for our rulings and for the administrative process and the agency's resources. In short, Mr. Like could have redacted any privileged information, thereby advancing and preserving his client's interests and position while simultaneously respecting the previous discovery rulings, court decisions, pending court rulings and legal precedent.

[36] Nicholson v. KeySpan, Index No. 17458-2006 (N.Y. Sup. Ct., February 28, 2007).

[37] Mr. Nicholson's interlocutory appeal of this ruling was denied by order issued March 23, 2007.

Instead, Mr. Like chose an option that was detrimental to all who did not agree with his legal interpretations.

The fourth justification offered by the Petitioners is that Mr. Like presented factual inaccuracies in his Motion Requesting Reconsideration. These statements have already been address in our ruling on that motion. However, the examples cited by KeySpan and summarized above (items b and c) are additional examples of behavior that is particularly troubling and continual and therefore provides additional support for disqualification.

We also note that Mr. Like's compliance with other commission rules (namely, 16 NYCRR 3.5(f) and 3.6(d)) has been inconsistent at best.[38] These factors ordinarily might not have been raised at this time but we have noticed that even when such oversights are highlighted, the noncompliance often has continued. The rules at issue are designed to ensure the equitable administration our proceedings and the development of a complete record. When they are not followed, it hinders the ability of all parties to participate fully and fairly in our proceedings. That they are repeatedly not followed indicates a further lack of consideration for the administrative process and the rights of others participating in that process.

In light of all of the foregoing, we conclude that Mr. Like should be disqualified from participating in these

[38] Mr. Like repeatedly served motions, responses, and other documents as unreadable attachments, despite notification of the problem, requests that he correct the problem and even instruction on how to correct the problem. The unreadable attachments have been sent to one of the presiding judges (repeatedly) and at least one other active party. He has also submitted replies in contravention to 3.6(d)(3). (See, e.g., his e-mail replies on January 5, 2007 and April 10, 2007 concerning his motions for reconsideration and for permission to enter the Bay Shore site, respectively). There is also the non-compliance with 16 NYCRR 4.5(3)(iii), discussed in a companion ruling.

proceedings. We recognize that disqualification from our proceedings is rare but it seems to be the only meaningful and effective response to Mr. Like's habitual and continuous disregard for the applicable Commission regulations and for the administrative process. We reach this conclusion in large part because, like the plaintiff in Lipin, Mr. Like's behavior has been persistent. At every point where Mr. Like could have chosen a less prejudicial or more respectful course of action, he did not. When reminded of applicable rules, it had little or no apparent impact on his choices. He continually chose to assume that his legal theories would prevail and opted for the course of action that would serve his client's interests to the detriment of others'. His decision to attempt to enter into the record of these proceedings testimony and an appendix of exhibits that disclose attorney-client privileged information was perhaps his most egregious action because, in addition to ignoring precedent and the CPLR, it unnecessarily burdened the agency's resources and the administrative process. Mr. Like's subsequent attempts to defend that action reveal a series of acts and inconsistent statements that leave us no reason to believe that anything short of disqualification will prevent such behavior in the future in these proceedings. Under the circumstances, a directive to disqualify Mr. Like from further participation or representation in these proceedings is warranted. Accordingly, Mr. Like and others at his firm are not permitted to provide representation, directly or indirectly, in these proceedings to Mr. Nicholson or any other person or entity. Mr. Like is not permitted to further participate in these proceedings in any other manner, except to the extent of appealing his disqualification therefrom.

Request to Preclude Further Discovery by Mr. Nicholson

With respect to the Petitioners' alternative request to preclude further discovery by Mr. Nicholson, the Petitioners argue that any further discovery will be tainted by his review of the privileged information. Mr. Nicholson, on the other hand, contends that his discovery requests have contributed to the record's development and that fairness and the public interest dictate that his discovery not be restrained prior to the cut-off date applicable to all intervenors.

Mr. Nicholson's contention is incorrect, but we decline to preclude Mr. Nicholson from conducting further discovery, subject to the limitations set forth above.

NEXT STEPS

Mr. Nicholson should provide us immediately with his direct contact information. The active parties list will be updated to remove contact information for Mr. Like and replace it with information for Mr. Nicholson. The Judges' active parties e-mail distribution list will similarly be updated. If Mr. Nicholson obtains other counsel, he should promptly provide us with relevant contact information.

(Signed) Michelle L. Phillips

(Signed) Gerald L. Lynch