

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

- 06-M-0878 - Joint Petition of National Grid PLC and KeySpan Corporation for Approval of Stock Acquisition and other Regulatory Authorizations.
- 06-G-1185 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of The Brooklyn Union Gas Company for Gas Service.
- 06-G-1186 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of KeySpan Gas East Corp. d/b/a Brooklyn Union of L.I. for Gas Service.

DETERMINATION ON APPEAL OF
PRIVILEGED COMMUNICATION DETERMINATION

(Issued July 14, 2009)

This is an Appeal of a Ruling issued in the above captioned proceeding on January 21, 2009.¹ In that Ruling, Administrative Law Judge (ALJ) Gerald L. Lynch determined that certain documents requested by the Petitioner, Mr. Charles Luchetti, should not be made public because they were claimed to be privileged and the privilege had not been waived. This determination upholds the ALJ's Ruling.

BACKGROUND AND INTRODUCTION

At a Public Statement Hearing in Riverhead, New York, on Tuesday, January 9, 2007² the Petitioner, Mr. Charles Luchetti offered comments with regard to the proposed National Grid/KeySpan Merger.³ At that time the Petitioner presented the

¹ Pursuant to 16 NYCRR §6-1.1(d), the Secretary to the Commission hears appeals from determinations under the Freedom of information Law.

² The Public Statement Hearing in this case is alternatively referred to as having taken place in Smithtown and/or Hauppauge on January 10, 2007. The transcript of this hearing states "Evans K. Griffing Building, Riverhead Co. Center Auditorium, 300 Center Drive, Riverhead, New York, Tuesday, January 9, 2007, 1:00 p.m."

³ Cases 06-M-0878, 06-G-1185, and 06-G-1186 – National Grid/KeySpan – Merger and Multi-Year Gas Rate Plans and Alternative One-Year Gas Rate Cases, transcript at 209 – 220.

ALJ in that case with a package of documents that he referred to as an internal report from LILCO and a 1996 report.⁴

When an ALJ is presented with materials at a public statement hearing, the procedure followed by the Department of Public Service (DPS) Office of Hearings and Alternative Dispute Resolution (OHADR) is to send the original materials to central files for inclusion in the formal case file and to retain a copy for the ALJ's use. At the time the Commission is offered final recommendations in cases such as these, the practice is that the judge(s) summarize all the public comments and offer suggestions about what action, if any, the Commission should take in response to such comments.

In a letter dated February 16, 2007, the ALJ informed the Petitioner that one or more of the documents in the package included information that KeySpan⁵ claimed was subject to the attorney-client privilege and that KeySpan had not waived the privilege.⁶ The ALJ also stated that at least one court had ruled this information

⁴ Id. at 212. The Appellate Court refers to this document as "the December 1993 Report." LILCO v. Allianz Underwriters Ins. Co., 301 A.D.2d 23, 27 (1st Dept. 2002).

⁵ KeySpan Energy Co. is a holding company formed by the 1998 merger of Brooklyn Union Gas Company, the nation's fourth largest natural gas utility, and the non-nuclear electric-generating assets of Long Island Lighting Co. (LILCO). In addition to providing gas and electricity service to millions of New Yorkers, KeySpan was, in 1998, involved in developing energy projects and markets both in the United States and abroad. It also held investments in other energy companies and facilities. <http://www.keyspanenergy.com>.

⁶ Cases 06-M-0878, 06-G-1185, and 06-G-1186 – National Grid/KeySpan, letter of ALJ Lynch to Mr. Charles Luchetti, (including an e-mail attachment dated January 17, 2007) dated February 16, 2007.

privileged⁷ and that this information would not be included in the record or considered in the proceeding(s) unless the Petitioner established that it had been properly obtained. On January 21, 2009, in response to the Petitioner's oral request for a copy of the December 1993 Report, the ALJ issued a Ruling stating that the referenced document was exempt from disclosure. On February 23, 2009, the Petitioner appealed this Ruling.

ARGUMENTS OF THE PARTIES

The Petitioner argues that the aforementioned document was excluded from consideration in the above-entitled case(s) on a claim of privilege without an in camera review, and that this exclusion violates a June 26, 2008 Court Order.⁸ He alleges the documents are exempt from the privilege "because of the ongoing criminal enterprise, to

⁷ The information referred to is an internal report coauthored by LILCO's Environmental Engineering Department and Legal Department, entitled "Manufactured Gas Plant Sites: Hempstead Gas Plant, Bay Shore Gas Plant--Investigation Summary and Remediation Strategy Recommendations" (hereinafter, together with its transmittal memorandum, the December 1993 Report). The December 1993 Report, which was marked "Privileged and Confidential--Attorney Work Product--Attorney-Client Communication," analyzed the federal and state statutory and regulatory framework relevant to MGP sites in New York, discussed the anticipated action of the regulatory agencies concerned, summarized the results of LILCO's investigation of the environmental damage at the two sites, set forth several remediation options for each site and the estimated cost of each option, and offered recommendations for the option to be implemented for each site and the strategy to be pursued in negotiations with the regulators. The recommendations made in the December 1993 Report were based on a combination of factors, legal as well as scientific and economic. LILCO v. Allianz, supra at 27.

⁸ The Petition includes a copy of a document that bears no designation as to its nature, appears to be signed by Helen E. Freedman, J.S.C., New York County, bears the Judge's name stamp and a date stamp of the County Clerk's Office of June 30, 2008. The document reads as follows: "Upon the foregoing papers, it is ordered that this motion *is denied inasmuch as putative intervenors do not have standing in this case. The Court notes that the document at issue is not sealed. The First Department, has, however, determined that it is privileged in this action. Whether that privilege status applies in the Suffolk County case is subject to determination by the Court there.*" The portion provided in italics is in handwriting.

defraud the rate payers, in addition, to the continuing public health threat...” and alleges that the public interest outweighs the purpose and intent of the privilege. He further alleges that withholding of these documents is discriminatory, an abuse of power, a violation of fundamental constitutional rights, and a “violation of common decency.”⁹

The petition includes a copy of an affidavit of Walter Wellington dated March 24, 2007 that was submitted in the current proceedings.¹⁰ The document provides an explanation of how Mr. Wellington obtained a copy of the December 1993 LILCO Report. Specifically, sometime after May 2004, Mr. Wellington copied various documents, including the LILCO Report, from the records of the Clerk’s Office of the Supreme Court, New York County Courthouse at 60 Centre Street, New York, New York. The affidavit states that the LILCO Report was attached to an affirmation, dated July 21, 1999, of Alan Rutkin, counsel for Associated Gas & Electric Insurance Services, Ltd. (AEGIS).¹¹ A copy of the Rutkin Affirmation is also included in the petition.¹²

ALJ Lynch states that, subsequent to the public statement hearing, and upon returning to Albany, he sent a letter to Mr. Luchetti dated February 16, 2007, explaining that one or more of the documents in the package included information that KeySpan claimed was subject to the attorney-client privilege and that KeySpan advised

⁹ Cases 06-M-0878, 06-G-1185, and 06-G-1186 – National Grid/KeySpan, Appeal of Ruling, Letter of Mr. Charles Luchetti, February 19, 2009.

¹⁰ The Affidavit of Walter Wellington, March 27, 2007, states that he is one of the plaintiffs in a lawsuit against KeySpan defendants, pending in Supreme Court, Suffolk County, Index No. 06-34907. The Affidavit is neither signed nor notarized.

¹¹ AEGIS, along with numerous insurance companies is a defendant in an action brought by LILCO for a declaration that the insurers had to defend and indemnify the utility as to environmental damage at sites of the utility’s plants. See LILCO v. Allianz, *supra*.

¹² The Affirmation of Alan S. Rutkin was submitted In Support of Certain Defendants’ Memorandum in Opposition to Plaintiffs’ Cross Motion for a Protective Order, Long Island Lighting Company v. Aetna, et al., Index No. 97/604715, Justice Ira Gammerman, Part Calendar No. 13459.

that it had not waived the privilege.¹³ The ALJ stated that one or more courts previously determined this information was privileged,¹⁴ along with two prior determinations in the above-entitled proceedings.¹⁵ On January 17, 2007, the ALJ issued an e-mail ruling, stating, among other things, “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(s), 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 convincingly that such information was properly obtained by it.”

On January 21, 2009, in response to the Petitioner’s oral request for a copy of the December 1993 Report, the ALJ issued a Ruling stating that the referenced document was exempt from disclosure.

DISCUSSION

The 18-page Appeal consists of a two-page letter from the petitioner to the Secretary to the Commission, a copy of the ALJ’s February 16, 2007 letter and e-mail Ruling, and a copy of the ALJ’s January 21, 2009 Ruling. The balance of the Appeal is comprised of the Rutkin affirmation (July 21, 1999); an April 26, 2005 non-final order of the New York County Supreme Court; a Notice of Entry dated May 4, 2005; the Wellington affidavit (March 27, 2007); and a copy of a denial of a motion for lack of standing dated June 26, 2008. This list is little more than a random compilation of papers, the relevance of which is not explained in the two-page letter of Mr. Luchetti nor in any other part of the Appeal. In short, no attempt is made to “connect the dots” – that

¹³ Cases 06-M-0878, 06-G-1185, and 06-G-1186 – National Grid/KeySpan, letter of ALJ Lynch to Mr. Charles Luchetti, (including an e-mail attachment dated January 17, 2007) dated February 16, 2007.

¹⁴ LILCO v. Allianz, *supra* at 27.

¹⁵ Cases 06-M-0878, 06-G-1185, and 06-G-1186 – National Grid/KeySpan, Ruling on Objection to Discovery (December 20, 2006); and Ruling on Motion for Reconsideration (January 11, 2007).

is, to identify or explain the relevance of the various attachments to the allegations made in the Appeal.

The Petition offers no explanation of how the exclusion of the document in question violates a June 26, 2008 Court Order. The Court Order, Attachment 2 of the Petition, denies disclosure of the document to the “putative intervenors” (who are not identified), citing the First Department action, and as such, undermines one of the basic premises of the appeal.

The Appeal offers no arguments to support or substantiate the allegations made in the two-page letter, to wit, the existence of an ongoing criminal enterprise, an attempt to defraud rate payers, and a continuing public health threat. Further, the Appeal contains no arguments to support or substantiate the allegation that the public interest outweighs the purpose and intent of the privilege, or that withholding of the documents is discriminatory, an abuse of power, a violation of fundamental constitutional rights, or a violation of common decency. The Appeal does not identify the documents which the Petitioner seeks to be returned to him, except to state “(dated December 27th 1993 and related).”¹⁶ The Appeal presents no arguments to establish clearly and convincingly that the Petitioner properly obtained the December 1993 Report.

The only attempt at substantiation set forth in the Appeal is the Affidavit of Walter Wellington in which the Affiant states that, sometime after May 2004 he made a copy of the December 1993 Report at the Supreme Court, New York County Courthouse, and that on January 10, 2007, at the Public Statement Hearing in Hauppauge he gave a

¹⁶ ALJ Lynch identifies the document which is the subject of Mr. Luchetti’s July 2008 oral request as, “That document comprises a one-page cover memorandum dated December 27, 1993 that bears the words ‘Privileged and Confidential’ and a 20-page report (the report). The cover page of the report states: ‘Privileged and Confidential – Attorney Work Product – Attorney-Client Communication’; ‘Manufactured Gas Plant Sites – Hempstead Gas Plant – Bay Shore Gas Plant’; ‘Investigation Summary and Remediation Strategy Recommendations’; ‘Environmental Engineering Department and Legal Department’; ‘December 27, 1993’.”

copy of the Report to Mr. Irving Like¹⁷. Mr. Wellington's affidavit states that he gave Mr. Like the Report "at about the time Mr. Charles Luchetti, presented a group of documents, including the LILCO report, to ALJ Lynch, as part of his comments for inclusion in the public record...." The Appeal does not state whether the Petitioner received the Report from Mr. Wellington, nor does it offer an explanation as to how the Petitioner came into possession of the Report.

However, the Appellate Division, First Department case¹⁸ that ALJ Lynch refers to in several rulings in this matter¹⁹ explains the chain of events – and litigation – leading to the inadvertent public disclosure of the Report by LILCO. Briefly, in that case, LILCO sued a group of insurers (defendants) in Supreme Court, New York County, for a declaration that the insurers had to defend and indemnify the plaintiff utility as to environmental damage at sites of the utility's plants. In a prior federal court action seeking substantially the same relief (the Federal Action), LILCO had inadvertently turned over the December 1993 Report to defendants as part of a production comprising hundreds of thousands of documents.²⁰ After LILCO produced the December 1993 Report, and before any proceedings addressed to the merits of the action were conducted, the Federal Action was dismissed for lack of diversity jurisdiction, however, the insurers sought to use the Report to defend against LILCO's claims for defense and indemnification. LILCO then commenced the declaratory action in Supreme Court.

Of direct relevance in this matter is the fact that the trial court, among other things, denied the utility's cross-motion for a protective order to prevent the use of the

¹⁷ Mr. Irving Like is an attorney representing Mr. Nicholson, an active party to the above-entitled proceedings.

¹⁸ LILCO v. Allianz. Co., *supra*.

¹⁹ Cases 06-M-0878, 06-G-1185, and 06-G-1186 – National Grid/KeySpan, Ruling on Objection to Discovery (December 20, 2006); and Ruling on Motion for Reconsideration (January 11, 2007).

²⁰ LILCO v. Allianz, *supra*, at 28.

December 1993 Report and require its return to LILCO. The utility appealed. The Appellate Court reversed and granted the protective order.²¹

The Appellate Court held that LILCO established in its initial cross motion for a protective order that it did not waive any privilege attaching to the December 1993 Report by inadvertently disclosing it in the Federal Action. The affirmations of LILCO's attorneys attested that LILCO had always regarded the December 1993 Report as a privileged attorney-client communication, that LILCO had used a screening process in preparing its document production in the Federal Action, and that the production of the Report among hundreds of thousands of other documents had been an inadvertent error. LILCO further established that, upon learning of the inadvertent disclosure of the Report from the London Defendants' summary judgment motion in this action, it had promptly invoked the privilege, demanded the return of the document, and sought a protective order when its demand was refused.

In the interim between LILCO's inadvertent disclosure and the Appellate Division's granting of a protective order²² the Report was apparently available to the public at the Supreme Court, New York County Courthouse at 60 Centre Street, New York, N.Y. for viewing and copying in accordance with the Freedom of Information Law, Public Officers Law §87.

While Public Officers Law §87 generally provides the public access to agency records, §87(2) (a) provides for the exception from disclosure of records or portions thereof that: "are specifically exempted from disclosure by State or Federal statute" In this case, the record in question is a product of the attorney-client privilege which is recognized as exempt in Civil Practice Law & Rules §4503. Further, Civil Practice Law & Rules §3101(b) provides: "upon objection by a person entitled to assert

²¹ LILCO v. Allianz, *supra* at 27.

²² And thereafter, as Walter Wellington's Affidavit states that "sometime after May 2004, I . . . copied various documents including the LILCO report from the records of the Clerk's office."

the privilege, privileged matter shall not be obtainable." Moreover, Civil Practice Law & Rules §3101(c) provides: "the work product of an attorney shall not be obtainable."

It is well settled in New York that corporations are entitled to the benefits of the attorney-client privilege.²³ A corporation is entitled to the same treatment as any other 'client' – no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought, it may protect itself from disclosure, absent its waiver thereof.²⁴

However, the attorney-client privilege is not limitless.²⁵ The communications must relate to a fact of which the attorney was informed, an opinion on law, or legal services or assistance in some legal proceeding.²⁶ The Supreme Court has stated that the attorney work product privilege protects items such as interviews, statements, memoranda, correspondence, briefs, mental impressions and personal beliefs conducted, prepared or held by an attorney.²⁷ Not every manifestation of a lawyer's labors comes within the work product privilege. Rather, in Hoffman v. Ro-San Manor, 73 A.D. 2d 207, 211 (1st Dept. 1980), the Court held that the exemption is limited to those items that are uniquely the product of a lawyer's learning and professional skill, such as material that reflects his legal research, analysis, conclusions, legal theories or strategies.

In this case, the Appellate Court noted that the document was "an internal report coauthored by LILCO's Environmental Engineering Department and Legal Department" which was marked "Privileged and Confidential--Attorney Work Product--Attorney-Client Communication". Moreover, that "the recommendations made in the December 1993 Report were based on a combination of factors, legal as well as scientific

²³ See Rossi v. Blue Cross and Blue Shield of Greater New York, 73 N.Y.2d 588, 542 N.Y.S.2d 508, 540 N.E.2d 703 (1989).

²⁴ Radiant Burners, Inc., v. American Gas Association, et al., 320 F.2d 314, 324 (1963).

²⁵ Matter of Priest v. Hennessy, 51 N.Y. 2d 62, 68 (1980).

²⁶ People v. Belge, 59 A.D. 2d 307, 309 (4th Dept., 1977).

²⁷ Hickman v. Taylor, 329 U.S. 495 (1947).

and economic.”²⁸ I conclude that the report in question contains the work product of an attorney because it contains the legal research of the lawyer who was a member of the team preparing the report.

In Bluebird Partners, LP v. First Fidelity Bank NA, et al., 248 A.D. 2d 219, 225 (1st Dept., 1998), the Court held that the work product privilege is waived upon disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary. The Court did not state that the entity seeking to assert the privilege had made a reservation of rights when it disclosed the privileged material to a third party; rather, the Court simply held that a waiver had not occurred and required the referee to redact privileged material before turning records over to the adverse party (Id., at 225).

Here, there was no waiver of the privilege by LILCO. The company inadvertently made the Report public – along with hundreds of thousands of other documents. LILCO further established that, upon learning of the accidental disclosure of the Report, it promptly invoked the privilege, demanded the return of the document, and sought a protective order when its demand was refused. I therefore conclude that LILCO did not waive the privilege when it unintentionally made the 1993 Report public.

CONCLUSION

For the reasons set forth above, the ruling of the ALJ is affirmed.

(SIGNED)

JACLYN A. BRILLING
Secretary

²⁸ LILCO v. Allianz, supra at 27.