REILLY, LIKE & TENETY
ATTORNEYS AT LAW
179 LITTLE EAST NECK ROAD NORTH
P.O. BOX 818
BABYLON, NEW YORK 11702

IRVING LIKE
BERNARD J. REILLY (1924-'92)
VINCENT C. TENETY

JANE G. CARBONARO

DANIEL J. KEANE,
OF COUNSEL

(631) 669-3000
FAX (631) 669-4122
E-MAIL: MAIL@RLTALAW.COM

CLOSING DEPARTMENT
FAX (631) 669-3063
E-MAIL: CLOSINGDEPT@RLTALAW.COM

March 20, 2007

Jaclyn A. Brilling, Secretary
Public Service Commission
Three Empire State Plaza
Albany NY 12223-1350

Re: Case 06-M-0878, and related rate cases

Dear Secretary Brilling:

I enclose five (5) copies of my letter to Judges Lynch and Phillips dated today. All other parties served by electronic mail.

Respectfully submitted.

REILLY, LIKE & TENETY

By: _____
IRVING LIKE

IL/dw - Enclosure

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March 20, 2007

Hon. Gerald L. Lynch
Administrative Law Judge
NYS Department of Public Service
Three Empire State Plaza
Albany NY 12223-1350

Hon. Michelle L. Phillips
Administrative Law Judge
NYS Department of Public Service
Three Empire Plaza
Albany NY 12223-1350

Dear Judges Lynch & Phillips:

This letter responds to KeySpan's reply received March 19, 2007 to the Wellington affidavit of March 8, 2007. The exhibits appended to KeySpan's reply do not contradict any of the statements in Wellington's affidavit. Intervenor Nicholson's testimony and exhibits should be admitted into the record of these proceedings, with no sanctions.

JUSTICE FREEDMAN'S ORDER

KeySpan errs in stating that the order of Justice Freedman dated April 6, 2006, (Appendix B) directed Lucetti and Wellington to "turn over " all documents relating to LILCO. It did not impose upon Wellington any duty to turn over any document.

In fact, that order directed them to make such documents "available". The order did not refer specifically to the LILCO December 27, 1993 report. It did not characterize that report or any document relating to LILCO as privileged, confidential, or sealed.

THE SHERER AFFIRMATION

The affirmation of KeySpan counsel James A. Sherer, Esq., dated March 19, 2007 describes the visit on May 4, 2006, made by KeySpan and insurance company counsel to the business premises of Lucetti and Wellington at 1591 Union Blvd, Bay Shore.

Paragraph 2 of the affirmation confirms that the order of Justice Freedman directed Lucetti and Wellington to make all documents relating to LILCO "available"

Paragraphs 3-5 describe the review of the documents, lasting five and one-half hours, and that Lucetti and Wellington led KeySpan and insurance company counsel to a file room and pointed out file cabinets and binders, and represented that the cabinets and binders

contained all the documents in their possession which related to LILCO and that were subject to Justice Freedman's April 6, 2006 order, and that counsel then reviewed the entirety of each binder and file cabinet that had been made available.

Paragraph 6 stated that Lucetti pointed out the locations of specific documents or folders they would find interesting.

Paragraph 7 of Sherer's affirmation states that he did not see the Memorandum, and that it was not produced.

Sherer's affirmation does not state that the Memorandum which states "Privileged and Confidential" along the top, was the December 27, 1993 LILCO report. It does not state that it was shown to Wellington. Nor does it state that the Memorandum was a document sealed by any Court.

If Sherer showed the December 27, 1993 report to Wellington, it means that it was available to KeySpan, and there was no need for Wellington to produce it.

Wellington, a victim of KeySpan's contamination, was under no duty, either under Justice Freedman's order, or the request of KeySpan counsel to turn over to KeySpan, any evidence he had innocently acquired of KeySpan's culpability, particularly, if such evidence was available to KeySpan, as it was.

WELLINGTON DEPOSITION

The Wellington deposition(Appendix C), was conducted on July 20, 2006, after the KeySpan visit to this premises. He was questioned by KeySpan and insurance company counsel. Wellington's testimony contains evidence proving that KeySpan having contaminated the premises in which Wellington had an interest, was bent on pursuing him to discover what evidence he had assembled of KeySpan's culpability.

KeySpan was concerned, that he might have evidence supporting a pollution claim against the Company. This was the argument made by KeySpan counsel, David Elkind, Esq., in October 2001, when he argued to Justice Gammerman in the Allianz insurance litigation, in the motion to seal the December 27, 1993 report that disclosure of its contents would give evidence to future plaintiffs suing KeySpan on pollution claims.

Several exhibits were identified during the course of Wellington's deposition. The LILCO December 27, 1993 report was not an exhibit, or referred to in any way.

No questions were asked, or testimony given, establishing that Wellington had any awareness of the December 27, 1993 report, or that it was a privileged, confidential, sealed report.

The Wellington affidavit of March 8, 2007, describes how he obtained a copy of that document in the year of May 2004.

Nothing in the Wellington deposition of July 20, 2006, (2 years later), contradicts any statement in his affidavit of March 8, 2007.

In his affidavit of March 8, 2007, Wellington states that he was unaware, when he copied it from the Court records, that it was privileged material. His deposition of July 20, 2006 discloses he was not asked how he obtained a copy of any LILCO document, let alone the December 27, 1993 report. It confirms that he was not made aware during his deposition that the December 27, 1993 report was privileged material.

Wellington's affidavit states that when he copied the December 27, 1993 report, he was not a party to the Allianz insurance litigation, or affiliated with any party or counsel thereto, and he was unaware that it was a privileged document sealed by the Court.

There is a threshold issue of whether Wellington, a non party to the litigation in which the order sealing the December 27, 1993 report was issued, and who was unaware of that order when he copied the document covered by the order, can be bound. The answer is negative.

The applicable rules are:

1. A fact-sensitive inquiry must be undertaken to determine whether persons not named in an injunction can be bound by its terms because they are acting in concert with an enjoined party. Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir.1979).

2. Those persons named in an injunction are considered "parties" for purposes of the rule providing that an injunction is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon persons in active concert or participation with them who receive actual notice. Madsen v. Women's Health Ctr., Inc. 512 U.S. 753, 775, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

3. The party seeking enforcement of an injunction against persons not named bears the burden of demonstrating that those persons are bound by the order. People of the State of N.Y. by Vacco v. Operation Rescue Nat'l, 80 F.3d 64, 70 (2d Cir.1996).

Judged by these rules, applied to the facts set forth in Wellington's affidavit, and deposition of July 20, 2006, and the exhibits relied on by KeySpan, Wellington was not bound, and KeySpan has not satisfied its burden of demonstrating that he was bound.

JUDGE SGROI'S DECISIONS

Judge Sgroi's decision and order of February 28, 2007. (Appendix A), is not dispositive of the issue of admissibility of Nicholson's testimony and exhibits in the pending PSC proceedings, except insofar as it enjoined Nicholson and his counsel from disseminating the

December 27, 1993 report, and directed them to turn over all copies to KeySpan's counsel, which was done.

It did not enjoin third parties who had acquired possession of that report from disseminating or using it.

Your Honors have the authority to issue an order unsealing the December 27, 1993 report, on the following grounds:

First, the order of the Supreme Court, New York County, March 1, 1999, which granted protective status provides in paragraph 7, that "Material designated as "Protected Material" ...shall not be used in any other litigation or for any other purpose without further order of a Court or administrative agency..."

Thus your Honors have the authority to admit the December 27, 1993 report into the evidentiary record.

Second, Judge Sgroi, although recognizing the fraud exception to the attorney client privilege rule, rejected it as justifying plaintiff's dissemination of the December 27, 1993 report, stating:

" However, here there is no factual basis for finding any probable cause that the 1993 strategy paper or the other documents that this Court has not yet ruled upon were prepared in furtherance of a fraud or a crime."

In the pending PSC proceeding, the Nicholson testimony and exhibits establish a factual basis for your Honor making a finding of such probable cause. (See page 5.)

Your Honors also may in your discretion exclude only the December 27, 1993 report from the record. The bulk of Intervenor's testimony and exhibits are based on documentary evidence, independent of the December 27, 1993 report, relevant and probative on the issue of imprudence.

It is noteworthy that KeySpan studiously avoided referring to Judge Sgroi's decision of February 7, 2007, denying its motion to dismiss the class action, in which the Court upheld the legal sufficiency of all plaintiff Nicholson's statutory and common law tort claims against KeySpan, including the unjust enrichment claim based on KeySpan's request in the PSC proceeding to recover the entire cost of the MGP site clean up from the rate payers.

THE BALANCING OF INTERESTS FAVORS ADMISSION OF INTERVENOR'S TESTIMONY AND EXHIBITS

Balancing the public's right to know, and the interest of the PSC in developing a full evidentiary record, and KeySpan's attorney/client privilege as to the December 27, 1993

report, should that document sealed by an order be found not to warrant continued protection, the order can be modified. In re Agent Orange Prod. Liab. Litig., 104 F.R.D. 559, 572 (E.D.N.Y.1985) (declassifying documents upon a showing "that the need for disclosure outweighs the need for further protection"), aff'd 821 F.2d 139 (2d Cir.1987). On motion of a party - - or of a non-party - - who can demonstrate a need to know, sealed documents may be unsealed pursuant to general policy and the terms of the protective order itself. In re Agent Orange Prod. Liab. Litig., 821 F.2d 139, 145 (2d Cir. 1987).

The documentary evidence presented by intervenor establishes the following KeySpan misconduct.

Misrepresentations as to MGP site remediation corporate policy and number of MGP sites to be remediated, costs of remediation and the damages to rate payers caused thereby.

Misrepresentations as to KeySpan fact sheets and public statements.

Concealment of the presence of carcinogenic contaminants in the Bay Shore MGP site plumes.

Your Honors should compare the gravity of harm, (non existent) resulting from the conduct of intervenor and his counsel with that of the conduct of KeySpan.

Intervenor and his counsel believing that the attorney/client privilege, did not apply, disseminated the December 27, 1993 report. Their motive was to aid judicial, regulatory, and political decision makers, in making decisions important to protecting lives, properties and the environment. The resultant publicity has induced KeySpan to undertake physical remediation.

KeySpan has asserted the privilege in order to suppress evidence whose disclosure would expose the company to pollution claims, and by extension to the current PSC proceedings, to a finding of imprudence.

It has done so, despite the fact that disclosure of the December 27, 1993 report in the PSC proceeding will not cause it any damage in any pending insurance company litigation, because it is protected in the latter litigation by the protected status of that report.

Given KeySpan's unclean hands, its request that sanctions be imposed on intervenor and his counsel, comes with ill grace. It is KeySpan who should be sanctioned for its bullying of Wellington, and continuing efforts to deprive the PSC, The Supreme Court of Suffolk County, and public decision makers of the facts they need to know to protect public health, property and the environment.

CONCLUSION

The Wellington affidavit supports the admission of all of Nicholson's direct and rebuttal testimony and exhibits into evidence in these proceedings.

Alternatively, only the December 27, 1993 LILCO report, and such portion of the testimony as refers specifically to that report should be excluded.

Respectfully,

REILLY, LIKE & TENETY

By: _____
IRVING LIKE

CC.: All parties by electronic mail.