

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission)
Law Bureau Prosecutory Staff)

Complainant)

Vs.)

) Docket No. C-2011-2246921

Kelly Fink, Joe Fink, Jr., Claude J. Fink)
and Lois A. Fink, individually and jointly,)
t/d/b/a Fink Gas Company)

Respondents)

) PRELIMINARY OBJECTIONS

) Filed on behalf of:

) Kelly Fink,

) Respondent

) Counsel of Record for this Party:

) Linda L. Ziembicki, Esq.

) PA ID # 85102

) P.O. Box 535

) 900 East Main Street

) Rural Valley, PA 16249

) 724-783-7088

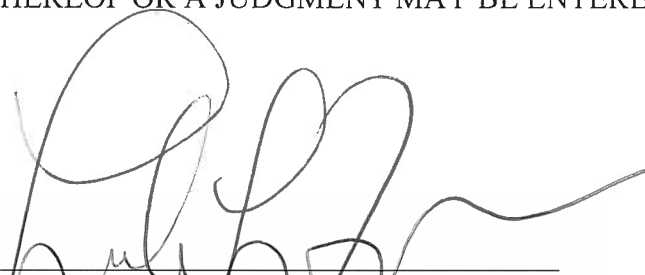
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t/d/b/a Fink Gas Company)	
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Respondents)	

NOTICE TO PLEAD

TO: Pennsylvania Public Utility Commission Law Bureau Prosecutory Staff

YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO THE ENCLOSED PRELIMINARY OBJECTIONS WITHIN TEN (10) DAYS FROM SERVICE HEREOF OR A JUDGMENT MAY BE ENTERED AGAINST YOU.



Linda L. Ziembicki, Esquire
PA ID # 85102
The Law Office of Linda L. Ziembicki
P.O. Box 535
900 Main Street
Rural Valley, PA 16249
724-783-7088

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PRELIMINARY OBJECTIONS TO COMPLAINT

AND NOW, comes the Respondent, Kelly Fink, by and through her attorney, Linda Ziembicki, and preliminarily objects to the Complaint as provided for by 52 Pa Code §5.101 and avers as follows:

COUNT 1: LACK OF COMMISSION JURISDICTION

1. 52 Pa Code §5.101 provides for the filing of a Preliminary Objection by Respondent to a Complaint for lack of Commission jurisdiction.
2. The Public Utility Commission has jurisdiction over public utilities.
3. Neither Fink Gas Company nor Kelly Fink is a public utility.
4. Public utilities are clearly defined under Pennsylvania Law.
5. Fink Gas Company is a family owned company that is an unincorporated natural gas business.
6. Fink Gas Company owns and operates eight wells in the Commonwealth, which were drilled on six different leases.

7. One of these eight wells is located in East Franklin Township and the other seven are located in Sugarcreek Township.
8. Said leases encompass approximately 405.44 acres, all of which are located in Armstrong County.
9. Part of the company assets that Kelly Fink and Mr. Fink, Jr. purchased was an old natural gas production system that provides natural gas to various select homes.
10. At the time of the purchase in April 2008, the distribution system was already in place.
11. The distribution system was put in place in 1969 with the transmission lines being completed in 1968.
12. The distribution system was designed and constructed only to serve certain homes on Camp and Ridge Roads.
13. The distribution system cannot feasibly serve others in the community without significant revisions to the system.
14. The system has no way to provide natural gas to anyone other than the current select group of homes.
15. No one outside of the current customers can be added on to the system.
16. In *Waltman v. Pennsylvania Public Utility Commission*, 142 Pa.Comwlth. 44, 596 A.2d 1221, 1223-24 (1991), *aff'd*, 533 Pa. 304, 621 A.2d 994 (1993), the court explained as follows: According to our Supreme Court, the test for determining whether utility services are being offered 'for the public' is whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to *any limited portion*

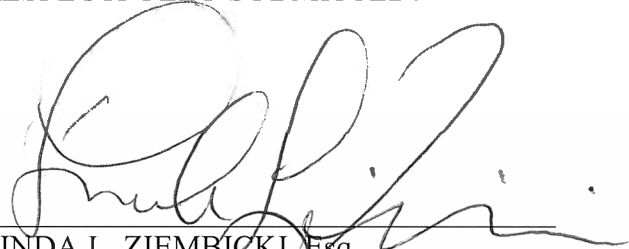
of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals. (emphasis added)

17. *Drexelbrook v. Pennsylvania Public Commission*, 418 Pa. 430, 435-36, 212 A.2d 237, 239 (1965) the commission reasoned that there are two factors which are relevant in determining whether a utility service is for the public. These include: (1) whether the service at issue is merely incidental to the service provider's non-utility business relationship with its customers, e.g., *Drexelbrook, supra* (a landlord supplying utility service only to his tenants is not a public utility); and (2) whether the utility facility was designed and constructed only to serve specific individuals so that the resulting service is not properly considered to be for the public, e.g., *Borough of Ambridge v. Pennsylvania Public Service Commission*, 108 Pa. Superior Ct. 298, 165 A.47 (1933).
18. The private or public character of a business does not depend upon the number of persons who actually use the service; rather, the proper characterization rests upon whether or not the service is available to all members of the public who may require the service. *C.E. Dunmire Gas Co., Inc. v. Pennsylvania Public Utility Commission*, 50 Pa. Commonwealth Ct. 600, 413 A.2d 473 (1980).
19. The fact that only a limited number of persons may have occasion to use a utility's service does not make it a private undertaking if the general public has a right to subscribe to such a device. *Masgai v. Pennsylvania Public Service Commission*, 124 Pa. Superior Ct. 370, 188 A. 599 (1936); *Borough of Ambridge, supra*. *UGI Utilities, Inc. v. Pennsylvania Pub. Util. Comm'n*, 684 A.2d 225, 229 (Pa. Commw. Ct. 1996).

20. Fink Gas offers natural gas to only a particular group of people.
21. The gas system cannot accept additional users, nor can it be modified to accept additional users.
22. Fink Gas does not solicit, advertise for, or accept new customers.
23. Fink Gas holds itself out to serve specific individuals already part of its system and does not serve the general public.
24. Members of the general public have no right or ability to subscribe to service provided by Fink Gas or Respondent.
25. Fink Gas Company is not a public utility.

WHEREFORE, Respondent respectfully requests that Complainants Complaint against her and the other Respondents be dismissed for lack of Commission Jurisdiction.

RESPECTFULLY SUBMITTED:

A handwritten signature in black ink, appearing to read 'Linda L. Ziembicki', is written over a horizontal line.

LINDA L. ZIEMBICKI, Esq.
Attorney for the Respondent,
Kelly Fink
P.O. Box 535
Rural Valley, PA 16249
724-783-7088
PA I.D. #85102

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CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing Preliminary Objections to Complaint upon the Complainant, by making service upon their counsel by U.S. Mail, as follows:

Pennsylvania Public Utility Commission
Attn: Terry Buda
P.O. Box 3265
Harrisburg, PA 17105-3265
717-783-3458 fax

Jason R. Lewis, Esq.
423 Market Street
Kittanning, PA 16201
724-543-7568 fax

Roger T. Mechling, Esq.
423 Market Street
Kittanning, PA 16201
724-543-1523 fax

Dated: 7/22/11



(SEAL)
LINDA L. ZIEMBICKI, Esq.
Attorney for the Respondent, Kelly Fink
P.O. Box 535
Rural Valley, PA 16249
724-783-7088
PA I.D. #85102

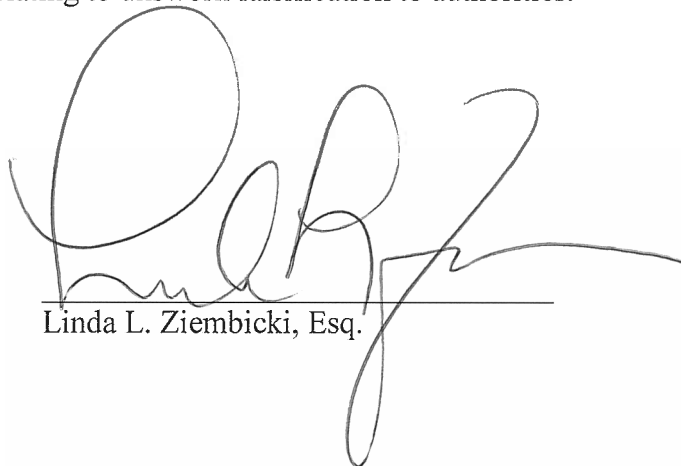
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VERIFICATION

I, Linda L. Ziembicki, Esquire, do hereby aver that I am the Attorney for Respondent, Kelly Fink, that I am authorized to make this verification on behalf of Respondent, Kelly Fink, that the statements made in the foregoing document are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

Date: 7/22/11



Linda L. Ziembicki, Esq.