



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

Bp8# 2246921

July 12, 2012

Rosemary Chiavetta, Secretary  
Pa. Public Utility Commission  
2<sup>nd</sup> Floor, 400 North Street  
P.O. Box 3265  
Harrisburg, PA 17105

Re: Pennsylvania Public Utility Commission, Law Bureau Prosecutory  
Staff v. Kelly Fink, Claude Joseph Fink, Jr., Claude J. Fink and  
Lois A. Fink, individually and jointly, t/d/b/a Fink Gas Company;  
Docket No. C-2011-2246921

Dear Secretary Chiavetta:

Enclosed please find the original and three copies of the Law Bureau Prosecutory  
Staff's Answer to Respondent's Motion for Summary Judgment, Law Bureau Prosecutory  
Staff's Brief in Support of Answer requesting Denial of Motion for Summary Judgment,  
and Certificate of Service.

Sincerely,

Terrence J. Buda  
Assistant Counsel  
Law Bureau Prosecutory Staff

Enclosure

cc: As per Certificate of Service  
Heidi Wushinske, Assistant Counsel  
Whitney Snyder, Legal Intern

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission :  
Law Bureau Prosecutory Staff :  
:  
Complainant :  
:  
v. :  
:  
Kelly Fink, Claude Joseph Fink, Jr., :  
Claude J. Fink and Lois A Fink, :  
Individually and jointly, t/d/b/a Fink Gas :  
Company :  
:  
Respondents :

Docket No. C-2011-2246921

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**LAW BUREAU PROSECUTORY STAFF'S ANSWER REQUESTING DENIAL  
OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT**

AND NOW, this 12th day of July 2012, comes the Pennsylvania Public Utility Commission Law Bureau Prosecutory Staff (Prosecutory Staff), by its counsel, and files this Answer to Respondent Claude J. Fink and Lois A. Fink's Motion for Summary Judgment, pursuant to 52 Pa. Code § 5.102(b) requesting denial of entry of summary judgment. Prosecutory Staff hereby represents as follows:

1. Admitted.
  
2. Denied. By way of further response, it is denied that no genuine issues of material fact exist as to whether Respondents should be dismissed from this matter. Specifically, Respondents could be liable for refunding customer's rates under 66 Pa. C.S. § 1312(a) from June 15, 2007 to February 26, 2008. It has not yet been determined whether these refunds will be required. Moreover, Claude J. and Lois A. Fink never received authorization from the Commission to transfer Fink Gas Company, and without the required authorization the transfer of authority is inoperative, and the legal status of Fink Gas Company is still in issue.
  
3. Denied. By way of further response, Respondents are not entitled to judgment as a matter of law because there are genuinely disputed material facts regarding whether the Commission will require a refund of unlawfully collected rates, and Respondent's current status as a public utility based on the unauthorized transfer of authority.

**WHEREFORE**, Law Bureau Prosecutory Staff respectfully requests that the Honorable Commission issue an order denying Respondents Claude J. Fink and Lois A. Fink's Motion for Summary Judgment.

Respectfully submitted,



Terrence J. Buda  
Assistant Counsel

Heidi Wushinske,  
Assistant Counsel

Whitney Snyder  
Legal Intern

Pennsylvania Public Utility Commission  
Law Bureau Prosecutory Staff

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Dated: July 12, 2012

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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COMMISSION  
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Pennsylvania Public Utility Commission :  
Law Bureau Prosecutory Staff :

Complainant :

v. :

Docket No. C-2011-2246921

Kelly Fink, Claude Joseph Fink, Jr., :  
Claude J. Fink and Lois A Fink, :  
Individually and jointly, t/d/b/a Fink Gas :  
Company :

Respondents :

**LAW BUREAU PROSECUTORY STAFF'S BRIEF IN SUPPORT OF  
ANSWER REQUESTING DENIAL OF MOTION FOR SUMMARY JUDGMENT**

Summary judgment dismissing Claude J. and Lois A. Fink from this proceeding should be denied because there are genuinely disputed material facts. First, Respondents may be personally liable for refunding any portion of rates that they collected within the statute of limitations that were unjust and unreasonable. Second, there are genuinely disputed material facts regarding the status of the transfer of Fink Gas's assets by Claude J. and Lois A. Fink. Therefore, Respondents' motion for summary judgment should be denied.

Summary judgment is only appropriate when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d). Genuine issues of material fact exist as to Respondents Claude J. and Lois A. Fink in this proceeding. Specifically, these Respondents may be liable for refunding

rates collected by Respondents operating a de facto gas company, if the Commission determines that a refund should occur under 66 Pa. C.S. § 1312(a). Law Bureau Prosecutory Staff (Prosecutory Staff) has requested that the Commission order this refund in Paragraph 29 of its Complaint against all Respondents collectively. The transfer between Claude J. and Lois A. Fink and the other Respondents of the assets collectively referred to as “Fink Gas Company” is inconsequential as to these refunds. Because no separate entity holding these assets existed, Respondents may be personally liable because they personally held and controlled these assets. Accordingly, since Respondents Claude J. and Lois A. Fink may be personally liable, depending on unresolved issues of material fact, Respondents are not entitled to judgment as a matter of law.<sup>1</sup>

The Commission has the power to order a utility to refund unjust or unreasonable rates paid by any customer.

If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of

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<sup>1</sup> It should be noted that although Respondents fail to argue in their brief that the statute of limitations has run on some of the counts in the Complaint, Prosecutory Staff acknowledges that this issue may exist. Pursuant to 66 Pa. C.S. § 1314, actions for penalties or prosecutions must be brought within three years from the date when the liability arose. However, a refund to customers for rates is not a penalty, and the action for recovery of these rates is not a prosecution. Instead, these actions are subject to a four year statute of limitations. 66 Pa. C.S. § 1312(a).

such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest . . .

66 Pa. C.S. § 1312(a). Prosecutory Staff has requested that the Commission find that the rates charged to the customers of the Fink Gas Company by the Respondents, for natural gas utility service, provided without a certificate of public convenience, are unjust and unreasonable, and order refunds to the Respondents' customers, to the extent legally permissible. Complaint, p. 9.

Failure to hold a certificate of public convenience does not absolve a utility of the legal responsibility to refund rates collected unlawfully. In *Popowsky v. Pa PUC*, the Commonwealth Court held that any rate charged by a de facto utility is unlawful. *Popowsky v. Pa. PUC*, 647 A.2d 302,307 (Pa. Commw. 1994). The Court reasoned that since there is no lawful rate except the last tariff published, and a public utility may not charge any rate other than that lawfully tariffed, if a company does not have a tariff, any rates charged are unlawful. *Id.* (citing 66 Pa. C.S. §§ 1101, 1303; *Bell Telephone Co. v. Pa. PUC*, 417 A.2d 827, 828-29 (Pa. Cmmw. 1980)). Accordingly, the uncertificated public utility in *Popowsky* could not collect on bills unpaid by customers. In this case, Respondents may be ordered to refund rates collected unlawfully under the *Popowsky* holding.

The holding from *Popowsky* was later applied by the Commission with respect to refunding rates paid to a de facto water company, and the Commission held that a factual record is necessary to decide the question of refunds. In *D's Water Co.*, the Commission refused to grant a certificate of public convenience *nunc pro tunc*, because it did not want

to allow the de facto water company to avoid claims for refunds of rates that were illegally collected. *Application of D's Water Company for the Right to Offer, Furnish, Render or Supply Water Service to Eighteen Single Family Residential Dwellings and Six Apartment Buildings in the Borough of Palmerton, Carbon County, Pa.*, Docket No. A-210103, at 7, 18-19 (Order entered March 3, 2003). Because no record evidence was developed as to the effect of refunds, the Commission agreed with the ALJ not to grant ratepayer rebates at that time because factual evidence was needed to make this determination. *Id.* This case demonstrates that a factual record must be created to determine whether refunds will be required by the Commission.

Applying the *D's Water Company* precedent to Claude J. and Lois A. Fink, these Respondents should not be dismissed from this case because it is unknown whether the Commission will order refunds. The factual record may exist to make this determination, and Respondents have not addressed this issue in their brief or other pleadings.

Respondents' liability for refunds is not barred by the statute of limitations. The Commission can require rebates to customers for up to four years from the date of a complaint being filed. Respondents still had control of the assets known as Fink Gas Company until February 26, 2008. The Commission filed its complaint on June 15, 2011, holding Respondents liable for refunds from June 15, 2007 to February 26, 2008.

Respondents may be personally liable for these refunds even though they transferred the assets collectively known as "Fink Gas Company." Respondents adamantly declare that there was and is no such company as "Fink Gas Company," and there is no record that a separate entity was formed to hold and control these assets.

Therefore, Respondents are inseparable from their actions with respect to the assets they formerly held in their own names. Accordingly, the sale of the assets should have no bearing on the liability created while Respondents held and controlled these assets, and operated a public utility without a certificate of public convenience. Moreover, the transfer of Fink Gas Company without the required authorization raises an issue as to the current status of Fink Gas Company and Respondents' responsibilities given the unauthorized transfer. The legal consequence of this transfer is still at issue as to the effect it may have on the proceedings against all the Respondents.

As an uncertificated public utility, Respondents operated a de facto gas company, and thus all rates charged may be unlawful under *Popowsky*. Under *Popowsky* and *D's Water Co.*, the Commission can order refunds from de facto utilities to their customers. Thus, Respondents are liable if the Commission determines that a refund is necessary under 66 Pa. C.S. § 1312(a). However, issues may still exist as to what rates were charged during this time period, the effect that a refund may have, and ultimately whether the rates were unjust and unreasonable. Thus, since the evidentiary record required by *D's Water Co.*, is still an issue in this case also, there are genuine issues of material fact still present within this proceeding with respect to Respondents.

Since there are genuine issues of material fact directly weighing on Respondent's potential liability for refunds, and tangential issues as to the effect of Respondents' transfer of assets, genuine issues of material fact exist with respect to Lois and Claude Fink, and these Respondents are thus not entitled to judgment as a matter of law. Accordingly, the Commission should deny Respondents' Motion for Summary Judgment.



WHEREFORE, Law Bureau Prosecutory Staff respectfully requests that the Honorable Commission issue an order denying Respondents' Motion for Summary Judgment.

Respectfully submitted,



Terrence J. Buda  
Assistant Counsel

Heidi Wushinske,  
Assistant Counsel

Pennsylvania Public Utility Commission  
Law Bureau Prosecutory Staff

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Dated: July 12, 2012

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## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing documents in accordance with the requirements of 52 Pa. Code § 1.54 *et seq.* (relating to service by a participant).

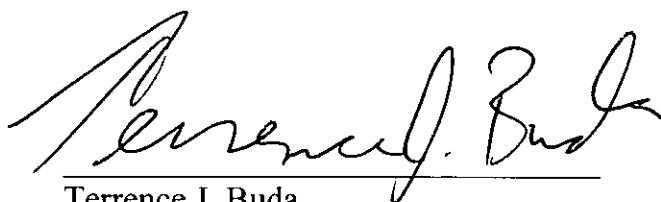
### Notification by first class mail addressed as follows:

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