**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, :

Law Bureau Prosecutory Staff :

:

v. : 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 :

**INITIAL DECISION APPROVING**

**JOINT PETITION FOR SETTLEMENT**

Before

Katrina L. Dunderdale

Administrative Law Judge

HISTORY OF THE PROCEEDINGS

On June 15, 2011, the Law Bureau Prosecutory Staff (“Complainant” or “Law Bureau” or “Prosecutory Staff”) filed a complaint against Kelly Fink, Joe Fink, Jr.[[1]](#footnote-1), Claude J. Fink, and Lois A. Fink, (“Respondents”) individually and jointly, t/d/b/a Fink Gas Company, alleging the individuals operate an unincorporated gas utility business and engage in providing public utility service as a retail natural gas supplier to the public for compensation. On July 22, 2011, Respondents responded separately to the complaint.

The presiding officer conducted a prehearing conference on April 12, 2012 and on April 13, 2012, the presiding officer issued the Second Prehearing Order which, *inter alia*, established various procedural provisions, outlined some discovery rules and scheduled the evidentiary hearings for June 26, 2012 and June 27, 2012.

Thereafter, on June 26, 2012 and June 27, 2012, the presiding officer conducted the initial hearings in this proceeding in Pittsburgh, Pennsylvania. Present during the hearings were attorneys representing the Law Bureau, Claude J. Fink, Lois A. Fink, and Kelly Fink. Claude Joseph Fink, Jr. was not present and was not represented by counsel. The two issues to be resolved were: (1) is Fink Gas Company a public utility in which Respondents have provided public utility service as a retail natural gas supplier to the public for compensation, pursuant to 66 Pa. C.S.A. Sections 102, 1101 and 1102(a); and (2) if yes, then what actions need to be taken by Fink Gas Company to comply with the Commission’s statutes and regulations.

Upon the conclusion of taking testimony on the second day concerning the first issue, the presiding officer advised the parties the Law Bureau had presented sufficient convincing evidence to meet its burden concerning the first issue. The parties were presented with an opportunity to engage in settlement negotiations to resolve the outstanding issue, concerning appropriate future actions, in a mutually-agreeable and amicable manner. The parties present accepted the opportunity.

On July 3, 2012, the presiding officer issued the Fourth Interim Order which ordered a status conference to be scheduled after August 6, 2012 and directed the parties to continue with settlement discussions. On July 27, 2012, the Office of Administrative Law Judge scheduled a status conference for Friday, August 17, 2012 at 10:00 a.m. with the parties to appear telephonically.

On Wednesday, August 15, 2012, the Law Bureau forwarded to the presiding officer a list of settlement terms to which three of the four named individual Respondents had agreed. The individuals who agreed to the terms were Claude J. Fink and Lois A. Fink, and Claude Joseph Fink, Jr.

On Friday, August 17, 2012, the presiding officer conducted a status conference to gauge the effectiveness of the parties’ negotiations, or if a subsequent hearing should be scheduled. At the status conference, all parties either were present and/or represented by counsel. The parties indicated on the record that negotiations resulted in a settlement of the issues between the Law Bureau and three of the four named individuals: Claude J. Fink, Lois A. Fink, and Claude Joseph Fink, Jr.

In addition, Claude Joseph Fink, Jr. indicated he faxed an Application for a Certificate of Public Convenience to the Law Bureau on August 14, 2012. The Application was sent to the Law Bureau in various transmissions and included maps and various documentation.

The counsel for Kelly Fink requested to have access to the Application filed by Claude Joseph Fink, Jr. before agreeing to the proposed settlement terms. The Law Bureau indicated it had a complete Application and would forward the same to counsel.

Because it appeared all parties were in agreement with the proposed settlement terms, the presiding officer issued the Fifth Interim Order that required the parties to file a fully-executed settlement agreement on or before Friday, September 14, 2012. On September 25, 2012, the Law Bureau provided an update on the status of the Settlement Agreement.

On October 10, 2012, the presiding officer advised the parties the hearing record would close on October 12, 2012 unless a settlement agreement was received. Again, the Law Bureau provided an update on the status of the agreement and indicated all signatures had not been received yet. On October 15, 2012, the Law Bureau advised the presiding officer that the last signature was being “overnighted.”

On October 17, 2012, the Law Bureau filed the original Settlement Agreement with the Secretary’s Bureau. Paragraph No. 8 of the Settlement Agreement provided the bulk of the substantive agreement. The Agreement, *inter alia*, indicated Respondents Claude J. Fink and Lois A. Fink would be dismissed as respondents while Respondents Kelly Fink and

Claude Joseph Fink, Jr. would file an application for a certificate of public convenience within thirty days and make a series of upgrades and improvements listed specifically in the Settlement Agreement. No party elected to file or requested to file a Statement in Support, instead all parties relied upon an agreed-upon joint statement within the body of the Settlement Agreement which indicates why the Joint Petitioners believe the Settlement is in the public interest.

On November 20, 2012, the Law Bureau sent an e-mail to the presiding officer and all parties indicating that actions specified in Paragraph No. 8(a) and 8(c) of the Agreement were not completed by Respondents Kelly Fink and Claude Joseph Fink, Jr. within thirty days of the date of the Settlement Agreement. The Law Bureau indicated it expected a resolution soon thereafter but if not resolved, the Law Bureau intended to file a Request to Withdraw the Settlement Agreement.

On November 30, 2012, the presiding officer issued the Sixth Interim Order in which, *inter alia*, the presiding officer required the Office of Administrative Law Judge’s Scheduler to schedule a Further Hearing for Wednesday, January 9, 2013 to be conducted for the sole purpose of taking in evidence concerning the appropriate remedy and actions to take because Respondents operated as a public utility without a certificate of public convenience, as discussed at the Initial Hearing on June 26, 2012 at Transcript pages 9 and 10.

On December 10, 2012, the Office of Administrative Law Judge scheduled a Further Hearing for Wednesday, January 9, 2013 at 10:00 a.m. with the parties to appear in person. The purpose for the third day of hearings was to provide the parties with a final opportunity to present evidence concerning the second issue, i.e., what actions did Fink Gas Company need to take in order to comply with the Commission’s statutes and regulations.

On December 27, 2012, counsel for the Law Bureau provided the presiding officer with a status update concerning the parties’ discussions and the status of compliance with the proposed agreement between the parties.

On December 28, 2012, counsel for Kelly Fink sent an electronic Motion for Continuance, requesting a continuance on the grounds counsel had a non-jury criminal trial scheduled for the same day and time in Allegheny County, Pennsylvania. The Motion was not filed with the Secretary’s Bureau and no response to the Motion was received within ten days. Therefore, on January 7, 2013, the presiding officer notified the parties via electronic mail that the hearing would not be continued but would be moved to 1:00 p.m. on the same day. The parties were given the option to appear telephonically or in person.

On January 9, 2013, the presiding officer conducted the third day of hearings in this proceeding in Pittsburgh, Pennsylvania. Present telephonically during the hearings were attorneys representing the Law Bureau, Claude J. Fink and Lois A. Fink, and Kelly Fink. Claude Joseph Fink, Jr. was present and represented himself. The parties indicated on the record there was no evidence to be presented on the third day of hearings. All parties agreed a settlement of all issues had been reached and was in effect. The hearing record closed upon the conclusion of the hearing.

This matter is now ready for an Initial Decision on whether the Settlement should be approved.

DESCRIPTION OF THE SETTLEMENT

The Joint Petition consists of a ten (10) page document, with no attachments, however, Section IV is a joint Statement in Support. The essential terms of the Settlement, found in Section III on pages 3 through 6 and in numbered paragraph 8, are as follows:

8. Prosecutory Staff and Respondents, intending to be legally bound and for consideration given, desire to conclude this Complaint proceeding and agree to stipulate as to the following terms:

a) The Parties agree that Fink Gas Company is a public utility providing jurisdictional natural gas service to the public for compensation consistent with the definition of public utility in Section 102 of the Public Utility Code, 66 Pa. C.S. § 102, that Kelly Fink and Claude Joseph Fink, Jr. [will] file an application for a certificate of public convenience within thirty (30) days of filing the Agreement, and that the name Fink Gas not be used as the name of the applicant.

b) The Parties agree that Kelly Fink and Claude Joseph Fink, Jr. would continue to provide the natural gas service identified in the Complaint and Respondents are prohibited from abandoning any customer without prior Commission approval.

c) The Parties agree that Kelly Fink and Claude Joseph Fink, Jr. continue to furnish and maintain adequate, efficient, safe, and reasonable natural gas service and facilities, and that Kelly Fink and Claude Joseph Fink, Jr. correct violations and complete a list of improvements and upgrades set forth as follows:

1. Fix the leaks located at 392 Fosters Mill Road and the driveway of

Alvin Fiscus at 397 Fosters Mill Road. **(49 CFR Part 192.703(b))**.

1. Replace all the above ground plastic with approved gas pipe and bury it to the proper depth listed in (**49 CFR Part 192.321 (a), (e), (g))**.
2. Replace all the hose clamps in the system with approved mechanical fittings. **(49 CFR Part 192.273)**.
3. Identify the types of plastic pipe in the system and if they are not the approved pipe replace them. **(49 CFR Part 192.59(a))**.
4. Install a tracer wire or other means of locating all plastic pipe.

**(49 CFR Part 192.321(e))**.

1. Join Pennsylvania One Call and start marking pipelines when a One Call is received. **(49 CFR Part 192.614)**.
2. Install line Markers with the required information at all road crossings. **(49 CFR Part 192.707)**.
3. Identify the valves that need to be used in case of an emergency in the system and start inspecting them. **(49 CFR Part 192.747)**.
4. Perform a leak survey of the system. **(49 CFR Part 192.723)**.
5. Perform odor level testing with an instrument on the system.

**(49 CFR Part 192.625(a), (c), and (f))**.

1. Purchase the equipment to perform leak surveys, odor level testing, and pipeline locating.
2. Complete an atmospheric corrosion inspection. **(49 CFR Part 192.481)**.
3. Remediate any atmospheric corrosion that could affect the safe operation of the pipeline before the next scheduled inspection or is more severe than a light surface oxide. **(49 CFR Part 192.479)**.
4. Create a map of the system. (**52 Pa. Code 59.37)**.
5. Create an Operations and Maintenance Manual. **(49 CFR Part 192.605)**.
6. Create an Emergency Plan. **(49 CFR Part 192.615)**.
7. Create a Damage Prevention Plan. **(49 CFR Part 192.614)**.
8. Create an Operator Qualification Plan and qualify all employees.

**(49 CFR Part 192 Subpart N)**.

1. Create a Drug and Alcohol plan and a testing program. **(49 CFR Part 199 and Part 40)**
2. Create a Distribution Integrity Management Plan. **(49 CFR Part T 192 Subpart P)**.

The Parties further agree that Nos. 1, 2, and 3 will be completed within thirty (30) days of filing the Agreement and Nos. 4-20 will be completed within six (6) months of filing the Agreement.

d) The Parties agree that Kelly Fink and Claude Joseph Fink, Jr. will not sell or transfer any assets used to provide public utility gas service without prior Commission approval.

e) Respondents agree to pay a civil penalty in the amount of $500.00 to the Commonwealth pursuant to Section 3301 of the Public Utility Code, to resolve, through this Agreement, the allegations raised by Prosecutory Staff’s Complaint proceeding. Respondents shall remit the entire amount within 30 days from the date that the Commission approves this Agreement. The check shall be made payable to the “Commonwealth of Pennsylvania” and addressed to “Rosemary Chiavetta, Secretary, Pennsylvania Public Utility Commission, P.O. Box 3265, Harrisburg, PA 17105-3265.”

f) The Parties agree that Claude Fink, Sr. and Lois A. Fink would be dismissed from the Complaint proceeding.

Joint Statement in Support of the Settlement Agreement

In the Settlement Agreement, the parties specified and endorsed a joint statement which supports the settlement agreement and asks the Commission to approve the settlement. That statement, found in Section IV of the Settlement Agreement at pages 7 through 10, states, as follows:

**IV. Statement in Support of Settlement**

11. Pursuant to the Commission’s Regulations at 52 Pa. Code § 5.231, it is the Commission’s policy to promote settlements that are in the public interest. *Pennsylvania Public Utility Commission v. Philadelphia Gas Works*, M-00031768 (Order entered January 7, 2004).

12. The Commission has determined that all alleged violations of the Public Utility Code and Commission regulations shall be subject to review under the standards enunciated in *Joseph A. Rosi v. Bell-Atlantic-Pennsylvania, Inc*., C‑00992409 (March 16, 2000); *Pa. P.U.C. v. NCIC Operator Services*, M‑00001440 (December 21, 2000). Prosecutory Staff and Respondents submit that this Settlement Agreement complies with the requirements set forth in *Rosi* and that the terms of this Agreement are in the public interest.

13. The Parties further assert that approval of this Settlement is consistent with the Commission’s Policy Statementregarding factors and standards for evaluating litigated and settled proceedings at 52 Pa. Code § 69.1201. [[2]](#footnote-2) Under this Policy Statement, while many of the same factors and standards may still be considered in both litigated and settled cases, the Commission specifically recognized that in settled cases the parties “will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest.” 52 Pa. Code § 69.1201(b). The ten factors of the Policy Statement, as applied to this case are addressed herein.

14. The first factor to be considered under the Policy Statement is whether the alleged actions were of a serious nature, such as willful fraud or misrepresentation, or were merely administrative or technical errors. 52 Pa. Code § 69.1201(c)(1). The violations alleged here were of a serious nature as the Respondents willfully failed to obtain certificates of public convenience. However, although the request was not timely, Respondent did request on June 3, 2011 an opinion of counsel letter regarding their jurisdictional status.

15. The second factor to be considered under the Policy Statement is whether the resulting consequences of the actions were of a serious nature. 52 Pa. Code § 69.1201(c)(2). This alleged violation should not be deemed serious as the actions discussed in this proceeding do not involve personal injury or property damage.

16. The third factor to be considered under the Policy Statement is whether the alleged conduct was intentional or negligent. 52 Pa. Code § 69.1201(c)(3). “This factor may only be considered in evaluating litigated cases.” *Id*. Since this matter is being resolved by settlement of the parties, this standard is not relevant here.

17. The fourth factor to be considered under the Policy Statement is

whether the Respondents have made efforts to change its practices and procedures to prevent similar conduct in the future. 52 Pa. Code § 69.1201(c)(4). Kelly Fink and Claude Joseph Fink, Jr. have agreed to file an application for a certificate of public convenience to lawfully provide public utility natural gas service.

18. The fifth factor to be considered under the Policy Statement relates to the number of customers affected by the Company’s actions and the duration of its violations. 52 Pa. Code § 69.1201(c)(5). Although the public is adversely affected by a failure to comply with the Public Utility Code and Commission regulations, gas service to individual customers was not affected.

19. The sixth factor to be considered under the Policy Statement relates to the Respondents’ compliance history. 52 Pa. Code § 69.1201(c)(6). Respondents do not have a compliance history with the Public Utility Code and the Commission’s regulations but have agreed to comply with the Public Utility Code by filing an application for a certificate of public convenience.

20. The seventh and eighth factors to be considered under the Policy Statement relate to whether the Respondents cooperated with the Commission’s investigation or proceeding and the appropriate settlement amount. 52 Pa. Code § 69.1201(c)(7), (8). Respondents fully cooperated with the Commission’s Staff in this Complaint proceeding and during settlement discussions. Furthermore, consistent settlement amounts are a reliable method for assuring that public utilities are compliant with the Public Utility Code and Commission regulations. Prosecutory Staff submits that Respondent’s payment of the agreed $500.00 constitutes a reasonable and appropriate resolution of the dispute in this proceeding given the merits of the positions of the Parties in this proceeding.

21. The ninth factor to be considered under the Policy Statement relates to past Commission decisions in similar matters. This Agreement is consistent with prior decisions based upon the circumstances of this case with respect to violations of Commission regulations.

22. This Agreement represents the entire agreement between the Prosecutory Staff and Respondents with respect to the matters addressed herein. The Agreement addresses and attempts to remedy all allegations raised in this matter. The Law Bureau Prosecutory Staff and Respondents request that the Administrative Law Judge and Commission adopt an order approving the terms of this Agreement as being in the public interest.

DISCUSSION

The Settlement provides a long list of requirements and/or tasks which Respondents agree to accomplish in order to comply with 66 Pa. C.S.A. §1101, §1102 and §1103, concerning public utilities, acts requiring a certificate, and the procedure by which to obtain a certificate of public convenience. On three action items, Respondents agreed to perform the task within thirty days from the date the agreement was filed, and for other action items the response time was six months.

Joint Petitioners asserted the Settlement is in the public interest. The parties point out the Commission has a policy of encouraging settlements and indicated that settlement results are often preferable to those results achieved at the conclusion of a fully litigated proceeding.[[3]](#footnote-3) The Commission’s policy is to promote settlements that are in the public interest.[[4]](#footnote-4) The benchmark for determining the acceptability of a settlement is whether the proposed terms and conditions are in the public interest. Alleged violations of the Public Utility Code and Commission regulations are subject to review under the standards enunciated in Joseph A. Rosi v. Bell-Atlantic-Pennsylvania, Inc.,[[5]](#footnote-5) and Pa. Public Utility Commission v. NCIC Operator

Services[[6]](#footnote-6). Prosecutory Staff and Respondents submit this Settlement Agreement complies with the requirements set forth in Rosiand that the terms of this Agreement are in the public interest for detailed reasons set out in Section IV of the Settlement Agreement.

In support of the $500.00 civil penalty, the Joint Petitioners contend Respondents willfully failed to obtain a certificate of public convenience but did request an opinion of counsel letter from the Commission prior to the filing of this complaint. The consequences of these violations are not serious and did not involve injury to persons or property. Kelly Fink and Claude Joseph Fink, Jr. agreed to file an application to obtain a certificate of public convenience, which action has occurred since the filing of the Settlement Agreement. No customer of the de facto natural gas company was adversely affected by these violations. Respondents fully cooperated with the Commission during the pendency of this proceeding and the $500.00 civil penalty is a reasonable and appropriate resolution to the dispute. In addition, the parties submit the specific actions required in the Settlement Agreement are consistent with prior Commission action in similar circumstances.

Furthermore, as stated in the Joint Petition, approval of the Settlement with respect to the Formal Complaint issues will permit the Commission and Joint Petitioners to avoid incurring the time, expense and uncertainty of further litigation.

Accordingly, based on the reasons set forth in the Settlement Agreement and the provisions of the Settlement Agreement itself, I conclude the proposed resolution of the Formal Complaint at Docket No. C-2011-2246921, as provided in the Settlement, is just, reasonable and in the public interest. In addition, based on the evidence provided and the reasons set forth by the parties in the Settlement, I adopt the parties’ evaluation of the fine under 52 Pa. Code Section 69.1201. Respondents have provided natural gas service to its customers without injury, damage or unreasonable service prior to the initiation of this proceeding, and have taken affirmative steps to correct the omissions and/or violations noted by the Law Bureau. Accordingly, the Settlement Agreement will be approved in the paragraphs below.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa. C.S.A. §§102, 501, 701, 1102(a)(2), 1103(a), and 1501.

2. The benchmark for determining the acceptability of a settlement is whether the proposed terms and conditions are in the public interest. Warner v. GTE North, Inc., Docket No. C-00902815, Opinion and Order entered April 1, 1996; Pa. Public Utility Commission v. CS Water and Sewer Associates, 74 PA PUC 767 (1991).

3. The Joint Petition for Settlement filed by the Law Bureau Prosecutory Staff, Claude J. Fink, Lois A. Fink, Claude Joseph Fink, Jr., and Kelly Fink at Docket No. C‑2011-2246921 is just, reasonable and in the public interest.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Joint Petition for Settlement submitted by the Pennsylvania Public Utility Commission, Law Bureau Prosecutory Staff, Claude J. Fink, Lois A. Fink, Claude Joseph Fink, Jr., and Kelly Fink at Docket No. C-2011-2246921, and which is not opposed by any party, is hereby approved.

2. That the Formal Complaint of the Pennsylvania Public Utility Commission, Law Bureau Prosecutory Staff against Claude Joseph Fink, Jr. and Kelly Fink, at Docket No. C-2011-2246921 is withdrawn, and shall be marked as closed.

3. That the Formal Complaint of the Pennsylvania Public Utility Commission, Law Bureau Prosecutory Staff against Claude J. Fink and Lois A. Fink, at Docket No. C-2011-2246921 is dismissed.

4. That the proceeding of the Pennsylvania Public Utility Commission, Law Bureau Prosecutory Staff v. Claude J. Fink, Lois A. Fink, Claude Joseph Fink, Jr., and Kelly Fink, t/d/b/a Fink Gas Company shall be terminated and marked closed.

Date: January 18, 2013 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Katrina L. Dunderdale

Administrative Law Judge

1. At the initial prehearing conference, the caption was altered to refer to Joe Fink, Jr. by his correct, legal name – Claude Joseph Fink, Jr. His name appears in the filings and transcript as “Joe, Jr.”, “Mr. Fink, Jr.” and “Claude Joseph Fink, Jr.” [↑](#footnote-ref-1)
2. This policy statement became effective upon publication in the *Pennsylvania Bulletin* on December 22, 2007, at 37 *Pa. Bull.* 6755. [↑](#footnote-ref-2)
3. 52 Pa. Code §5.231. [↑](#footnote-ref-3)
4. Pennsylvania Public Utility Commission v. Philadelphia Gas Works, M-00031768 (Order entered January 7, 2004). Also Warner v. GTE North, Inc., Docket No. C-00902815, Opinion and Order entered April 1, 1996; Pa. Public Utility Commission v. CS Water and Sewer Associates, 74 PA PUC 767 (1991). [↑](#footnote-ref-4)
5. Docket No. C-00992409 (March 16, 2000). [↑](#footnote-ref-5)
6. Docket No. M-00001440 (December 21, 2000). [↑](#footnote-ref-6)