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January 28, 2016

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

**VIA ELECTRONIC FILING**

**RE: Robert Wasneuski v. Borough of Ephrata; Docket No. C-2015-2522689**

Dear Secretary Chiavetta:

Please find enclosed for filing with the Pennsylvania Public Utility Commission the Borough of Ephrata's Preliminary Objections to the Complaint of Robert Wasneuski in the above-referenced proceeding.

As shown on the attached Certificate of Service, all parties to this proceeding are being duly served. Thank you.

Very truly yours,

McNEES WALLACE & NURICK LLC

By   
Vasiliki Karandrikas

Counsel to the Borough of Ephrata

VK/sar

Enclosure

c: Certificate of Service

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

**VIA FIRST CLASS MAIL**

Robert Wasneuski  
338 Vista Drive  
Ephrata, PA 17522

  
\_\_\_\_\_  
Vasiliki Karandrikas

Counsel to the Borough of Ephrata

Dated this 28<sup>th</sup> day of January, 2016, at Harrisburg, Pennsylvania.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Robert Wasneuski,	:	
Complainant	:	Docket No. C-2015-2522689
	:	
v.	:	
	:	
Borough of Ephrata,	:	
Respondent	:	

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**PRELIMINARY OBJECTIONS OF THE BOROUGH OF EPHRATA  
TO THE FORMAL COMPLAINT OF ROBERT WASNEUSKI**

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**TO THE HONORABLE, THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:**

Pursuant to Section 5.101 of the Pennsylvania Public Utility Commission's regulations, 52 Pa. Code § 5.101, the Borough of Ephrata ("Borough" or "Respondent") hereby files these Preliminary Objections regarding the Formal Complaint filed with the Pennsylvania Public Utility Commission ("PUC" or "Commission") by Robert Wasneuski ("Complainant") in the above-captioned proceeding.<sup>1</sup>

In support thereof, the Borough submits as follows:

1. On December 31, 2015, Complainant filed a Formal Complaint with the Commission challenging the Borough's prohibition of Complainant's alleged right to choose an electric generation supplier ("EGS"). *See* Complaint at ¶ 4.

2. As relief, the Complainant seeks: (1) his "'legislated right to choose electric distribution supplier"; (2) "the same PA PUC protection and regulation overseeing the boro's investment and retail practices afforded to all other Commonwealth citizens"; and (3) in the alternative, "a 'tax credit' from regulation and protection service of state agencies not rendered." *See* Complaint at ¶ 5.

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<sup>1</sup> Concurrent with this filing, the Borough has filed a timely Answer to the above-referenced Formal Complaint.

3. As discussed below, Respondent is not a public utility, nor is Respondent otherwise subject to the Commission's jurisdiction. Moreover, the Complaint is legally insufficient for failure to state a claim upon which relief may be granted. Therefore, Respondent respectfully requests that the Complaint be dismissed.

**I. Preliminary Objection: The Commission Lacks Jurisdiction over the Borough.**

4. Commission regulations establish that Preliminary Objections are appropriate when "lack of Commission jurisdiction" exists. *See* 52 Pa. Code § 5.101(a)(1).

**A. The Borough Is Not a Public Utility.**

5. The General Assembly has conferred the below authority upon the Commission:

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, *setting forth any act or thing done or omitted to be done by any public utility* in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.

66 Pa. C.S. § 701 (emphasis added). As a plainly set forth in 66 Pa. C.S. § 701, the Commission may only hear a Complaint setting forth acts done or omitted to be done by a public utility. *See id.*; *see also Wheatfield Vill. Homeowners Ass'n*, 98 Pa. P.U.C. 259 (May 19, 2003) (authorizing the Commission to exercise jurisdiction over public utilities). Actions by non-public utilities are beyond the jurisdiction of the Commission.

6. The Public Utility Code defines "municipal corporation" as "[A]ll cities, boroughs, towns, townships, or counties of this Commonwealth, and also any public corporation, authority, or body whatsoever created or organized under any law of this Commonwealth for the purpose of rendering any service similar to that of a public utility." 66 Pa. C.S. § 102.

7. Pennsylvania precedent provides that a municipal corporation is not a public utility under the Public Utility Code and, thus, is not subject to regulation by the Commission. *See*

*Commonwealth v. Merritt-Chapman & Scott Corp.*, 432 Pa. 584, 586 (1968); *see also id.* at nn. 3 & 5; *see also Gindhart v. City of Philadelphia-Water Revenue Bureau*, Docket No. C-2010-2207823, 2011 Pa. PUC LEXIS 116 (Sept. 19, 2011) (finding that, as neither a "person" nor "corporation" as defined under the Public Utility Code, a "municipal corporation" does not fall within the definition of "public utility").

8. Respondent is a Pennsylvania borough. As such, Respondent falls within the definition of "municipal corporation." Accordingly, Respondent is not a public utility subject to Commission jurisdiction. Therefore, the Complaint must be dismissed due to the Commission's lack of jurisdiction over the Borough.

**B. The Borough Is Not an Electric Generation Supplier.**

9. Consistent with its general authority to regulate public utilities and other entities subject to its jurisdiction, the Commission has also ruled that Complaints may be filed against certain non-public utilities that are otherwise subject to the Commission's jurisdiction as set forth in the Public Utility Code, such as EGSs. *See, e.g., Re Competitive Safeguards for the Pennsylvania Electric Industry*, Dkt. No. L-00980132 (Apr. 28, 2000).

10. Under the Public Utility Code, the term "EGS" includes, in relevant part, "municipal corporations which choose to provide electric service outside their municipal limits...." 66 Pa. C.S. § 2803.

11. Respondent incorporates by reference Paragraph 6.

12. As a Pennsylvania borough, Respondent falls within the definition of "municipal corporation." Respondent, however, does not provide electric service outside of its municipal limits.

13. As a municipal corporation that does not furnish electric utility service beyond its municipal boundaries, the Borough is not an EGS. Accordingly, the Borough is not otherwise subject to Commission jurisdiction over EGSs. *See* 66 Pa. C.S. § 2083 (stating that municipal corporations are deemed to be EGSs only when providing electric generation service outside of municipal limits); *see Re Competitive Safeguards for the Pennsylvania Electric Industry*, Dkt. No. L-00980132 (clarifying that the PUC may hear Complaints involving non-public utilities otherwise subject to its jurisdiction, such as EGSs). Accordingly, the Borough cannot be subjected to the PUC's jurisdiction.

14. Therefore, the Complaint must be dismissed due to the Commission's lack of jurisdiction over the Borough.

## **II. Preliminary Objection: The Complaint Is Legally Insufficient.**

15. Commission regulations establish that Preliminary Objections are appropriate when a pleading is "legally insufficient." *See* 52 Pa. Code § 5.101(a)(4).

16. The Electricity Generation Customer Choice and Competition Act ("Competition Act") provides certain Pennsylvania retail customers with the opportunity to purchase electricity from their chosen EGS. 66 Pa. C.S. § 2806(a). Retail customers located within a borough, however, generally do not have the right to choose an EGS. The Competition Act expressly states: "*A borough may prohibit [EGSs] from serving end-use customers within its borough limits; however, such a borough shall be prohibited from providing generation service to end-use customers outside of its borough limits which it did not serve prior to the effective date of this chapter.*" *Id.* at § 2805(b)(1)(i) (emphasis added). Thus, a borough may bar an EGS from serving the end-use customers within its limits provided that the borough does not furnish electric generation service to end-use customers outside of its limits.

17. As a borough that furnishes electricity only to the end-use customers within its limits, Respondent may prohibit EGSs from serving the end-use customers within its limits. *Id.* at § 2805(b)(1)(i).


18. Therefore, the Complaint should be dismissed as legally insufficient because the Complaint states no claim upon which relief may be granted. *See Marc Chervenitski, Sr. v. PPL Elec. Util. Corp., C-2014-2423862, 2014 Pa. PUC LEXIS 480 (Aug. 1, 2014)* (upholding dismissal of Formal Complaint as legally insufficient for failure to state a claim within the Commission's jurisdiction to adjudicate).

19. Accordingly, the Commission should dismiss the Complaint pursuant to 52 Pa. Code §§ 5.101(a)(1) and (4) because the Complainant has asked the Commission to enforce public utility regulations against a non-public utility that is not otherwise subject to PUC jurisdiction. As a result, the Complaint falls outside the Commission's jurisdiction and is legally insufficient.

**WHEREFORE**, for all the foregoing reasons, Respondent Borough of Ephrata requests that the Commission sustain its Preliminary Objections and dismiss the Complaint filed by Robert Wasneuski.

Respectfully Submitted,

McNEES WALLACE & NURICK LLC

By   
Vasiliki Karandrikas (Pa. I.D. 89711)  
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Counsel to the Borough of Ephrata

Dated: January 28, 2016



**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Robert Wasneuski,	:	
Complainant	:	Docket No. C-2015-2522689
	:	
v.	:	
	:	
Borough of Ephrata,	:	
Respondent	:	

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**NOTICE TO PLEAD**

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To: Robert Wasneuski

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

Respectfully Submitted,

McNEES WALLACE & NURICK LLC

By *Vasiliki Karandrikas*  
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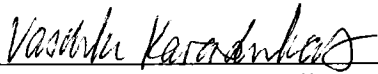
Counsel to the Borough of Ephrata

Dated: January 28, 2016

## VERIFICATION

I, Vasiliki Karandrikas, Counsel to the Borough of Ephrata, hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. §4904 (relating to the unsworn falsification to authorities).

Date: January 28, 2016

  
\_\_\_\_\_  
Vasiliki Karandrikas