

Aaron M. Ponzio
Attorney at Law
Admitted in PA, WV

412-392-5506
Fax: 888-811-7144
aponzo@dmclaw.com

September 10, 2024

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

RE: PUC Bureau of Investigation and Enforcement v. Buffalo & Pittsburgh Railroad,
Inc., et al.
Docket No.: C-2024-3050823
Our File No.: 0002393.0449394

Dear Secretary Chiavetta:

Enclosed for filing please find Buffalo & Pittsburgh Railroad, Inc.'s Preliminary
Objections to Formal Complaint in the above-referenced matter. Copies have been served
on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Very Truly Yours,

Aaron M. Ponzio

Aaron M. Ponzio

AMP/eie

Attachment

cc: All counsel and parties of record (via email w/ encl. per Certificate of Service)

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement	:	
	:	Docket No C-2024-3050823
Complainant,	:	
	:	
vs.	:	
	:	
Buffalo & Pittsburgh Railroad Inc.,	:	
	:	
Respondent.	:	
	:	
<u>Notice to Plead</u>	:	
To: Pennsylvania Public Utility	:	
Commission, Bureau of Investigation and	:	
Enforcement	:	
	:	
You are hereby notified to file a written	:	
answer to the enclosed Preliminary	:	
Objections within ten (10) days from	:	
service hereof or a judgment may be	:	
entered against you.	:	
	:	
By: <u>/s/Aaron M. Ponzo</u>	:	
Aaron M. Ponzo, Esquire	:	
Counsel for Respondent,	:	
Buffalo and Pittsburgh Railroad, Inc.	:	

PRELIMINARY OBJECTIONS TO I&E’S COMPLAINT

NOW COMES Respondent, Buffalo and Pittsburgh Railroad, Inc. (“BPRR”), by and through its undersigned counsel, and files its Preliminary Objections to I&E’s Complaint, averring as follows:

I. INTRODUCTION

1. This matter arises from a railroad track rehabilitation project that involved the removal of a crossing surface and placing of concrete barriers to protect the public from entering the crossing during the remediation of the railroad tracks and track bed.

2. The Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement (“I&E”) filed a Formal Complaint against BPRR on August 21, 2024, seeking cumulative civil penalties in the amount of \$21,700 for this one-time occurrence. A copy of the Complaint is attached hereto as **Exhibit “A.”**

3. I&E also seeks an order directing the remediation of the crossing to be completed and for it to be reopened within six months at BPRR’s sole expense.

4. I&E’s Complaint is legally insufficient and should be dismissed for the reasons set forth below.

II. FACTUAL BACKGROUND

5. The railroad crossing at issue in this matter is located at Etna Street in Butler, Pennsylvania (DOT 149 041 V) (the “Etna Street Crossing”). Compl. at ¶ 10.

6. According to the Complaint, Rail Safety engineer William Sinick visited the crossing in November 2023 and observed that the crossing had been closed and altered. Compl. at 16.

7. On January 17, 2024, in response to I&E Data Requests, Set I, BPRR stated that the Etna Street Crossing was believed to have been closed in or about September 2021 as part of a project to rehabilitate the railroad tracks and track bed. *Id.* at ¶ 11.

8. I&E alleges that BPRR did not have the approval of the Public Utility Commission (the “Commission”) to alter, modify, or close the Etna Street Crossing in violation of 66 Pa. C.S. § 2702(a). *Id.* at ¶¶ 13, 19, 21.

9. The Complaint is devoid of any allegations that BPRR repeatedly altered the crossing, or that it acted in violation of an existing PUC Order.

10. Further, I&E took no action with respect to this alleged violation at the time it was discovered, at the time BPRR responded to I&E's Data Requests – Set I, or in the considerable length of time before I&E filed its Complaint.

11. There are no allegations that BPRR was ordered to remedy its alleged violation, or that BPRR was placed on notice that I&E intended to seek any relief for the closure of the Etna Street Crossing.

III. **ARGUMENT**

A. **Demurrer – Legal Insufficiency Pursuant to 52 Pa. Code §5.101(a)(4): Closure of the Etna Street Crossing is not a Continuing Violation of the Public Utility Code.**

12. Respondent incorporates the preceding paragraphs as if the same were fully set forth herein.

13. Section 2702 of the Public Utility Code prohibits the alteration of a railroad crossing “without a prior order of the commission[.]” 66 Pa. C.S. § 2702(a).

14. A violation of § 2702 subjects a public utility to civil penalties established in § 3301, which states:

(a) General rule. — If any public utility . . . shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; . . . such public utility . . . for such violation, . . . shall forfeit and pay to the Commonwealth a *sum not exceeding \$ 1,000*, to be recovered by an action of assumpsit instituted in the name of the Commonwealth.

(b) Continuing offenses. — Each and every day's continuance in the violation . . . shall be a separate and distinct offense.

66 Pa. C.S. § 3301(a)-(b).

15. Thus, § 3301 authorizes the Commission to impose fines for noncompliance of the provisions of the Public Utility Code which may not exceed \$1,000 per violation.

16. However, under § 3301(b), the Commission may seek up to \$1,000 per day for “continuing offenses.” Pub. Serv. Water Co. v. Pa. PUC, 645 A.2d 423, 430 (Pa. Commw. Ct. 1994) (citing York Telephone & Telegraph Co. v. Pa. PUC, 121 A.2d 605, 609 (Pa. Super. 1956)).

17. In this case, I&E does not seek the imposition of a civil penalty for a one-time violation of § 2702(a), but instead, it attempts to recover a continuous daily penalty of \$100 per day, under the theory that a one-time alteration of a crossing is a continuous violation of the Public Utility Code for every subsequent day after the alteration occurred.

18. This is excessive, illogical, and not contemplated by § 3301(b).

19. Pennsylvania courts have not applied § 3301(b) to a case involving the removal of a railroad crossing without an order from the Commission.

20. However, the cases in which penalties for “continuing offenses” were imposed illustrate that a one-time alteration of a railroad crossing does not justify such a penalty.

21. For example, the Commission has imposed penalties for continuing offenses where the public utility violated the Public Utility Code multiple times. See e.g., HIKO Energy, LLC v. Pa. PUC, 163 A.3d 1079, 1108 (Pa. Commw. Ct. 2017) (electric generation supplier intentionally billed customers excessively on 14,689 invoices over a four-month period); Newcomer Trucking, Inc. v. Pa. PUC, 531 A.2d 85, 86 (Pa. Commw. Ct. 1987) (trucking company intentionally violated a Commission regulation 184 times on 128 separate days by transporting the goods of more than one consignor on one truck at the same time).

22. Cumulative penalties have also been upheld where a public utility failed to comply with a Commission order for a certain number of days. See, e.g., Pub. Serv. Water Co., 645 A.2d at 430 (Commission was authorized to impose a fine of \$66,000 when public

service failed to comply with the Commission's order for over sixty-six days); York Telephone & Telegraph Co, 121 A.2d at 609 (affirming a Commission order fining a public utility \$50 per day for 655 days it failed to comply with an order to improve its service).

23. Pennsylvania courts have recognized that "continuing offenses" are proscribed activities of an ongoing or repeated nature. See Newcomer Trucking, Inc., 531 A.2d at 87 (citing York Telephone & Telegraph Co, 121 A.2d at 617).

24. Conversely, Pennsylvania's intermediate appellate courts have recognized that single acts do not constitute continuous violations. See, e.g., Burkholder v. Dep't of Agric., 265 A.3d 863 (Pa. Commw. Ct. 2021) (vacating the Pennsylvania Department of Agriculture's Order determining that each unauthorized transfer of a single dog was a continuous violation of the Pennsylvania Dog Law, rather than a *single* violation); Commonwealth v. Mikec, 206 A.3d 496 (Pa. Super. Ct. 2019) (overturning trial court's conviction of a summary offense under the Pennsylvania Sewage Facilities Act where it imposed penalties on appellant for a continuing offense resulting from a *single* nuisance).

25. The allegations in I&E's Complaint do not support a "continuing offense" because: (1) BPRR's removal of the crossing surface and placement of concrete barriers at the crossing amounts to a single occurrence not multiple or repeated occurrences; and (2) BPRR was not in continuous violation of an existing Commission Order for a quantifiable number of days.

26. Further, there is no support for the proposition that a one-time occurrence can give rise to cumulative penalties simply because I&E was dilatory in its prosecution, thereby artificially and arbitrarily inflating the penalty amount.

27. BPRR's alleged violation simply does not qualify as a "continuing offense." Accordingly, the Commission cannot impose cumulative civil penalties against BPRR pursuant to § 3301(b) for the one-time alteration of the Etna Street Crossing.

28. Therefore, I&E's Complaint against BPRR must be dismissed.

WHEREFORE, Respondent, Buffalo and Pittsburgh Railroad, Inc. respectfully requests that its Preliminary Objections be sustained, and that I&E's Complaint be dismissed.

Respectfully Submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

By: /s/Aaron M. Ponzio

J. Lawson Johnston, Esquire

PA I.D. 19792

Scott D. Clements, Esquire

PA I.D. 78529

Aaron M. Ponzio, Esquire

PA I.D. 203584

*Attorneys for Respondent,
Buffalo & Pittsburgh Railroad*

Dated: September 10, 2024



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

August 21, 2024

Via Electronic Filing

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

Re: Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement v.
Buffalo & Pittsburgh Railroad Inc.
Docket No. C-2024-
Formal Complaint (Etna Street Crossing)

Dear Secretary Chiavetta:

Enclosed for electronic filing is the **Formal Complaint** of the Bureau of Investigation and Enforcement ("I&E") of the Pennsylvania Public Utility Commission in the above-referenced matter.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads 'mswindler'.

Michael L. Swindler
Deputy Chief Prosecutor
Bureau of Investigation & Enforcement
PA Attorney ID No. 43319
(717) 783-6369
mwindler@pa.gov

MLS/ac
Enclosures

cc: Per Certificate of Service

EXHIBIT A

Notice

A. **You must file an Answer within 20 days of the date of service of this Complaint.**

The date of service is the mailing date as indicated at the top of the Secretarial Letter. *See* 52 Pa. Code § 1.56(a). The Answer must raise all factual and legal arguments that you wish to claim in your defense, include the docket number of this Complaint, and be verified. You may file your Answer by mailing an original to:

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

Or, you may eFile your Answer using the Commission’s website at www.puc.pa.gov. The link to eFiling is located under the Filing & Resources tab on the homepage. If your Answer is 250 pages or less, you are not required to file a paper copy. If your Answer exceeds 250 pages, you must file a paper copy with the Secretary’s Bureau.

Additionally, please serve a copy on:

Michael L. Swindler, Deputy Chief Prosecutor
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
mwindler@pa.gov

B. If you fail to Answer this Complaint within 20 days, the Bureau of Investigation and Enforcement will request that the Commission issue an Order imposing the request relief.

C. You may elect not to contest this Complaint by paying the civil penalty within 20 days. Send only a certified check or money order made payable to the “Commonwealth of Pennsylvania,” with the docket number indicated, and mailed to:

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

D. If you file an Answer which either admits or fails to deny the allegations of the Complaint, the Bureau of Investigation and Enforcement will request that Commission to issue an Order imposing the requested relief set forth in this Complaint.

E. If you file an Answer which contests the Complaint, the matter will be assigned to an Administrative Law Judge for hearing and decision. The Judge is not bound by the penalty set forth in the Complaint and may impose additional and/or alternative penalties as appropriate.

F. If you are a corporation, you must be represented by legal counsel. *See* 52 Pa. Code § 1.21.

G. Alternative formats of this material are available for persons with disabilities by contacting the Commission’s ADA Coordinator at 717-787-8714.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2024-
	:	
Buffalo & Pittsburgh Railroad Inc.,	:	
Respondent	:	

FORMAL COMPLAINT

NOW COMES the Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement (“I&E”), by its prosecuting attorneys, pursuant to Section 701 of the Public Utility Code, 66 Pa.C.S. § 701, and files this Formal Complaint against Buffalo & Pittsburgh Railroad Inc. (“BPRR” or “Railroad” or “Respondent”), alleging violations of the Public Utility Code and/or Pennsylvania Code. In support of its Formal Complaint, I&E respectfully represents the following:

I. Commission Jurisdiction and Authority

1. The Pennsylvania Public Utility Commission (“Commission”), with a mailing address of the Commonwealth Keystone Building, 400 North Street, Harrisburg, PA 17120, is a duly constituted agency of the Commonwealth of Pennsylvania empowered to regulate public utilities within the Commonwealth pursuant to the Public Utility Code, 66 Pa.C.S. §§ 101, *et seq.*

2. The Commission has delegated its authority to initiate proceedings that are prosecutory in nature to I&E and other bureaus with enforcement responsibilities.

Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities,

Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa.C.S. § 308.2(a)(11). Complainant's attorneys are as follows:

Michael L. Swindler
Deputy Chief Prosecutor
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(717) 783-6369
mwindler@pa.gov

Grant Rosul
Prosecutor
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

3. Respondent is Buffalo & Pittsburgh Railroad Inc. which maintains a business address of 200 Meridian Centre, Suite 300, Rochester NY 14618 and a local address of 201 North Penn Street, Punxsutawney PA 15767.

4. BPRR is a common carrier railroad and jurisdictional public utility pursuant to 66 Pa.C.S. § 102.

5. The Commission has exclusive jurisdiction over the construction, reconstruction, alteration, relocation, repair, maintenance, protection, suspension or abolition of railroad crossings, and the authority to determine and order which concerned parties should perform such work, in order to prevent accidents and promote the safety of the public. 66 Pa.C.S. §§ 2702 and 2704.

6. The Commission has the exclusive jurisdiction to order the construction, alteration, relocation, suspension, or abolition of railroad crossings. *Pa. Dep't of Transportation v. Pa. Pub. Util. Comm'n*, 440 A.2d 657 (Pa. Cmwlth. 1982); 66 Pa.C.S. § 2702(b).

7. Pursuant to the provisions of the applicable Commonwealth statutes and regulations, the Commission has jurisdiction over the subject matter and the actions of BPRR related to public crossings.

8. Section 501(a) of the Code, 66 Pa.C.S. § 501(a), authorizes and obligates the Commission to execute and enforce the provisions of the Code.

9. Section 3301 of the Code, 66 Pa.C.S. § 3301, authorizes the Commission to impose civil penalties on any public utility or on any other person or corporation subject to the Commission's authority for violations of the Code or Commission regulations or both. Section 3301 further allows for the imposition of a separate fine of up to \$1,000.00 for each violation and for each day's continuance of such violation(s).

II. Background

10. In or about October 2023, the Commission's Technical Utility Services Rail Safety Division ("Rail Safety") was made aware of a public railroad crossing closure at Etna Street in Butler, Pennsylvania (DOT 149 041 V) ("Etna Street Crossing").

11. In its response dated January 17, 2024 to I&E Data Requests – Set I, BPRR stated that the Etna Street Crossing was believed to have been closed in or about September 2021 as part of a project wherein the Railroad was engaged in rehabilitating the railroad tracks and track bed.

12. Upon investigation, Rail Safety determined that the Commission had never been notified by BPRR of the intended closure or ultimate closure of the Etna Street Crossing.

13. Upon further investigation, Rail Safety further determined that BPRR had not been granted any Commission approval for the closure of the Etna Street Crossing.

III. Alteration of Railroad Crossing without Commission Approval

14. The foregoing paragraphs are incorporated herein.

15. Rail Safety engineer William Sinick visited the site of the Etna Street Crossing in November 2023 and observed that this public at-grade railroad crossing closed and in its altered condition.

16. Photographs taken by the on-site Rail Safety engineer of the Etna Street Crossing during the November 2023 field inspection confirmed as follows:

- a. The public road (Etna Street) at the Etna Street at-grade crossing remained closed;
- b. Concrete barriers prohibiting traffic from accessing the crossing were in place on both the north and south sides of the railroad track;
- c. Timbers on both the north and south sides of the railroad track had been removed;
- d. Asphalt at the railroad track had been removed; and
- e. Overall, this railroad crossing closure is not safe in that it has no or insufficient signage, no or insufficient reflectivity and no proper barricades.

17. As a result of the unauthorized closing of the Etna Street Crossing to vehicular traffic, vehicles traversing on Etna Street toward Center Avenue have been observed utilizing an unobstructed short cut parallel to the railroad tracks from Strawberry Street to the railroad crossing at Center Avenue, rather than the preferred, safer route from Strawberry Street to Walker Avenue to Center Avenue. Vehicles exiting this shortcut on to Center Avenue are entering Center Avenue directly onto the Center Avenue railroad crossing, resulting in a highly dangerous circumstance should a train approach with vehicular traffic backed up on the track.

18. Despite the claims of BPRR that work being conducted in a project to rehabilitate the railroad tracks at the location of the Etna Street Crossing including closing the crossing and removing the wood timbers and asphalt was “only temporary”, the crossing has been closed for nearly three years.

19. The Commission has not issued an order or Secretarial Letter authorizing Buffalo & Pittsburgh to alter, modify or close the Etna Street Crossing.

IV. Violations

20. An entity may not alter, relocate, suspend or abolish an existing crossing without an order from the Commission. 66 Pa.C.S. § 2702(a).

21. BPRR, by altering the public railroad crossing at Etna Street (DOT 149 041 V) by removing the wooden timbers, removing asphalt and placing concrete barriers obstructing passage without Commission approval, violated 66 Pa.C.S. § 2702(a).

22. Each day that a violation of the Public Utility Code continues is a separate and distinct offense. Section 3301(b), 66 Pa.C.S. § 3301(b). Rail Safety became aware of

the unlawful alteration in or about October 2023. BPRR was put on notice of I&E's investigation into the crossing upon being served I&E Data Requests – Set I dated January 17, 2024. Despite said notice, the Etna Street Crossing remains closed and the rehabilitation incomplete as of the date of this Complaint. A total of 217 days has passed between the January 17, 2024 notice and the date of this filing.

23. I&E proposes a continuous daily civil penalty of \$100 per day, resulting in a proposed civil penalty at present of \$21,700, calculated from the date of BPRR's notice of I&E's investigation of the unlawful alteration to the date of this filing.

V. Requested Relief

24. I&E seeks a continuous daily civil penalty of \$100 per day (compared to the maximum civil penalty allowed of \$1,000.00 per day) resulting in a total civil penalty as of the date of this filing of \$21,700.

25. I&E seeks the completion of the remediation of the tracks at the Etna Street Crossing (DOT 149 041 V) crossing, at BPRR's sole cost and expense, such that the Etna Street crossing may be re-opened within six months of the Commission's order or Secretarial Letter concluding this matter.

WHEREFORE, the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement hereby requests that the Commission: (1) find Buffalo & Pittsburgh Railroad Inc., to be in violation of the Public Utility Code for the unlawful alteration of the Etna Street railroad crossing; (2) impose a cumulative civil penalty upon Buffalo & Pittsburgh in the amount of \$21,700; (3) direct that rehabilitation of the Etna Street Crossing be completed and the crossing re-opened for vehicular traffic within six

(6) months of the Commission's order and (4) order other such remedies as the Commission may deem appropriate.

Respectfully,



Michael L. Swindler
Deputy Chief Prosecutor
PA Attorney ID No. 43319

Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(717) 783-6369
mwindler@pa.gov

Dated: August 21, 2024

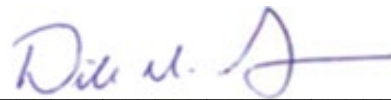
**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2024-
	:	
Buffalo & Pittsburgh Railroad Inc.,	:	
Respondent	:	

VERIFICATION

I, William Sinick, P.E. hereby state that the facts above set forth 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 unsworn falsification to authorities.

Date: August 21, 2024



William Sinick, P.E.
Pennsylvania Public Utility Commission
Bureau of Technical Utility Services –
Rail Safety Section
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2024-
	:	
Buffalo & Pittsburgh Railroad Inc.,	:	
Respondent	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Formal Complaint** dated August 21, 2024, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Served by Electronic Mail

Aaron M Ponzio, Esq.
J. Lawson Johnston, Esq.
Scott D. Clements, Esq.
Dickie, McCamey & Chilcote, P.C.
2 PPG Place, Suite 400
Pittsburgh, PA 15222
aponzo@dmclaw.com
ljohnston@dmclaw.com
sclements@dmclaw.com
Counsel for
Buffalo & Pittsburgh Railroad Inc.

Catherine Pushtak
Buffalo & Pittsburgh Railroad, Inc.
201 North Penn Street
Punxsutawney, PA 15767
Catherine.Pushchak@GWRR.com



Michael L. Swindler
Deputy Chief Prosecutor
Bureau of Investigation & Enforcement
PA Attorney ID No. 43319
(717) 783-6369
mwindler@pa.gov

CERTIFICATE OF SERVICE

I, Aaron M. Ponzio, Esquire, hereby certify that true and correct copies of the foregoing Preliminary Objections to I&E's Complaint have been served this 10th day of September, 2024 upon the parties listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Michael L. Swindler, Esquire
Grant Rosul, Esquire
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265
MSwindler@pa.gov
GRosul@pa.gov

/s/ Aaron M. Ponzio
Aaron M. Ponzio, Esquire