

THOMAS J. RUSSIAL
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March 4, 2011

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: J3 Energy Group, Inc. v. West Penn Power Company
PA PUC Complaint Docket No. C-2011-2219920**

Dear Secretary Chiavetta:

Enclosed for filing is The Motion of J3 Energy Group, Inc., To Dismiss Objections And Compel Discovery Or In The Alternative For A Protective Order. The Motion was served on Counsel for West Penn Power Company by first class mail on March 4, 2011.

Sincerely,



Thomas J. Russial
Counsel for J3 Energy Group, Inc.

Enclosure

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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J3 ENERGY GROUP, INC.)
Complainant,)
)
v.) Complaint Docket No. C-2011-2219920
)
WEST PENN POWER COMPANY)
Respondent.)

**MOTION OF J3 ENERGY GROUP, INC.,
TO DISMISS OBJECTIONS AND COMPEL DISCOVERY
OR IN THE ALTERNATIVE FOR A PROTECTIVE ORDER**

Pursuant to 52 Pa. Code § 5.342, §5.362, and §5.423, Complainant, J3 Energy Group, Inc., (J3) files this Motion to Dismiss the Objections of Respondent, West Penn Power Company (West Penn) to certain requests contained in J3's First Set of Interrogatories and First Request for Documents and to Compel Discovery responses. Whereas, West Penn's objections are based on the claimed confidentiality of the information sought, to the extent the Pennsylvania Utility Commission (Commission) finds that the information warrants confidential treatment, J3 requests in the alternative that the Commission order discovery to proceed subject to the terms of an appropriate Protective Order.

I. BACKGROUND

By Formal Complaint, dated January 10, 2011, J3 alleged that West Penn failed to properly evaluate J3's Part 2 proposal submitted in response to West Penn's competitive Request for Proposals (RFP) for Solar Photovoltaic Alternate Energy Credits (SPAECs). J3 further alleged that proper evaluation of J3's proposal may have resulted in an overall lower cost for the Target Quantity of SPAECs than the bid(s) selected by West Penn. In such case, one or both of J3's lower priced bids should have been selected. West Penn filed its Answer to the Formal

Complaint on February 2, 2011. On February 12, 2011, J3 served its First Set of Interrogatories and First Request for Documents on West Penn. On February 24, 2011, West Penn served its objections to one of J3's interrogatories and one document request. A copy of West Penn's objections is attached hereto as Appendix 1.

II. MOTION TO COMPEL

West Penn's objections are interrelated and based solely on the claimed confidentiality of the requested information. West Penn objected to Interrogatory 4, which was a follow-up to Interrogatory 3, and Document Request 5. All three requests are provided below:

Interrogatory 3. Please state whether Respondent or Boston Pacific communicated with any bidder after submission of Part 2 proposals for the purpose of clarifying and/or confirming any aspect of a bidder's Part 2 proposal.

Interrogatory 4. If the answer to Interrogatory Number 3 is in the affirmative, please explain the nature of the communication in full including: (1) who initiated the communication, (2) the date of the communication, (3) whether the communication was oral or written, (4) to whom was the communication directed, (5) what was the clarification or confirmation requested, and, (6) what was the response to the requested clarification or confirmation.

Document Request 5. All Part 2 proposals submitted by bidders in response to the RFP.

In its discussion of Interrogatory 4, West Penn states that a response will require West Penn to list the bidders who responded to the RFP and concludes by objecting to the disclosure of the identity and number of bidders. However, West Penn also maintains that the disclosure of any bid information would violate the Commission's regulations relating to confidentiality, the provisions of the Commission Approved- RFP, and the confidentiality agreement required of bidders. Accordingly, for the purpose of this Motion, J3 interprets the objection to be an objection to Interrogatory 4 its entirety. In its discussion of Interrogatory 5, West Penn states that a response would require disclosure of all bid information including bidder identity and

prices. West Penn maintains that “[t]his information is absolutely confidential” and would provide J3 preferential information.

Initially, J3 notes that in Section 10.7 of the RFP (approved by the Commission) West Penn notified prospective bidders that it expected to publicly release the total number of proposals received in response to the RFP:

10.7 However, absolute protection from public disclosure of the Bidders' data and information filed in response to the RFP cannot be provided and is not intended. For example, the Company will provide access to the Bidders' data and information to selected personnel/staff from the PaPUC in order to allow the PaPUC to accept or reject the RFP results. Moreover, the Company expects to publicly release the total number of Proposals received in response to this RFP, the amount of Tranches awarded and the average price per SPAEC for results accepted by the PaPUC. By submitting a Proposal in response to the RFP, a Bidder acknowledges and agrees to the confidentiality provisions set forth herein, as well as any limitations thereto. (Emphasis added)

Furthermore, West Penn already disclosed the number of bidders in Paragraph 4-17 of its Answer to the Formal Complaint without identifying the information as confidential or filing a redacted version of the Answer as required by 52 Pa. Code §1.32(a)(4). Hence, West Penn cannot now reasonably argue that the number of bidders should be protected as confidential and West Penn's right to object should be deemed to have been waived. In addition, the following reasons support disclosure:

1. Bidders cannot claim that disclosure is prejudicial or violates the confidentiality provisions of the RFP because the RFP anticipated public release of the information.
2. The disclosure is occurring after bid closing and source selection and therefore has no impact on the competitive process conducted by West Penn.
3. There is nothing to be learned from the disclosure that would discourage competition on future solicitations and/or lead to higher prices for the ratepayer.

4. There is a legitimate public interest in knowing this information because it would help ratepayers determine if the competitive process is meeting expectations.

In its objections, West Penn references the Commission's confidentiality guidelines for competitive acquisition of electric supply contained at 52 Pa. Code §69.1807(7).¹ Those guidelines consider the impact on competition from disclosure, the public interest in disclosure, and, the harm or prejudice to ratepayer interest by disclosure. Here, there is no discernable harm from disclosure and there is a legitimate public interest in knowing the information.

Accordingly, based on West Penn's own statements contained in the RFP, its unprotected disclosure of the information, and the factors outlined in Commission guidelines, West Penn's objection to disclosure of the number of bidders should be dismissed.

Turning to the release of other bid and evaluation information requested by J3 in Interrogatory 4 and Document Request 5, the balancing tests contained in the Commission guidelines could reasonably weigh in favor of public disclosure of much of the information. For example, the names of the successful bidders are often disclosed in public bidding processes for the purpose of transparency.² Here, where only the weighted average price of the successful bids has been published, rather than the actual bid amounts, it is difficult to see how publication of names would cause competitive harm to the bidders. Nevertheless, J3's interest is not to force the public disclosure of bid information, but rather to obtain information that is relevant to the matter before the Commission. Therefore; except for information which the Commission believes should be publicly disclosed in the public interest, J3 respectfully requests the

¹ The Commission Guidelines at 52 Pa. PUC 69.1807(7), were effective September 15, 2007, prior to the time the Commission approved West Penn's RFP.

² Although not applicable to the procurement of Pennsylvania SPAECS, by way of example, Federal bidding regulations call for the preparation of a publicly available bid abstract after bid opening that contains the names, quantities bid, and bid prices of all bidders. See *48 Code of Federal Regulations, §14.403*.

Commission to direct discovery of the requested information subject to an appropriate Protective Order.

III. PROTECTIVE ORDER

The Commission regulations at 52 Pa. Code §5.362, permit a party to submit a motion for a protective order. Typically, the motion is submitted by the person from whom discovery is sought; however, Counsel for West Penn and J3 Counsel have not yet had an opportunity to discuss the matter. Therefore, J3 has filed this motion in order to preserve its right to challenge West Penn's objections and to move discovery ahead in an efficient manner.

While West Penn has not filed a timely objection based on the relevance of the requested information, J3 points out that the information is highly relevant to the matter before the Commission. The Formal Complaint alleges that West Penn failed to conduct the competition in accordance with the RFP that was reviewed and approved by the Commission in violation of the Commission's September 2, 2010, Opinion and Order and the competitive procurement standards for alternate energy credits established by 52 Pa. Code §75.67(b) and (c), and 52 Pa. Code §54.186. The proper evaluation of bids may have resulted in the selection of a different slate of bids at a lower price than the slate that was selected. Since little has been disclosed about the evaluation, bid prices and other information requested in Interrogatory 4 and Document Request 5 is needed to: (1) recreate the bid evaluation matrix to determine if a different slate of bids, including J3 bids, would have been selected had the error not occurred; (2) determine why and how the error occurred; and, (3) determine if the bid evaluation process was influenced by any communications that occurred between bidders and West Penn and/or the Independent Procurement Manager after the receipt of Part 2 proposals. Furthermore, bidder names are relevant because the RFP selection criteria was based on the combination of bids that resulted in

the lowest overall price for the Target Quantity of SPAECS. Hence, this interdependency may require the testimony of one or more bidder as to the intent of their bids.

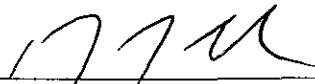
IV. CONCLUSION

J3 respectfully requests that West Penn be directed to answer Interrogatory 4 in full and produce the documents requested by Document Request 5, subject to a Protective Order limiting access to confidential information to Counsel for J3 and qualified experts³ in accordance with the requirements of 52 Pa. Code § 5.423, until such time as the information may be determined not to warrant confidential treatment by the Commission. J3 further requests that the number of bids submitted be excluded from the coverage of the Protective Order since, as addressed in Part II of this Motion, West Penn has waived its right to object to the confidentiality of the number of bids by its own actions, and public disclosure of the number is consistent with the RFP approved by the Commission and the public interest.

Counsel for J3 is not an officer, director, stockholder, partner, owner or employee of J3 and therefore is eligible to receive the information subject to the Protective Order.

Date: March 4, 2011

Respectfully Submitted



Thomas J. Russial
Counsel for J3 Energy Group Inc.
198 Stonewood Drive
Bethel Park, PA 15102
Phone: 412-389-2482

³ J3 does not anticipate engaging experts at this time but reserves the right to do so if the need arises.

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Complainant,)	
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v.)	Complaint Docket No. C-2011-2219920
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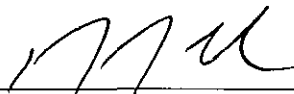
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of The Motion of J3 Energy Group, Inc., To Dismiss Objections And Compel Discovery Or In The Alternative For A Protective Order, by first class mail, postage pre-paid, upon Respondent, West Penn Power Company at the address below in accordance with the requirements of 52 Pa. Code §1.54.

John L. Munsch, Esq.
Jennifer L. Petrisek, Esq.
West Penn Power Company
800 Cabin Hill Drive
Greensburg, PA 15601

Date: March 4, 2011

Counsel for J3 Energy Group, Inc.



Thomas J. Russial
198 Stonewood Drive
Bethel Park, PA 15102
Phone: 412-389-2482

QUESTION NO. 4

If the answer to Interrogatory Number 3 is in the affirmative, please explain the nature of the communication in full including: (1) who initiated the communication, (2) the date of the communication, (3) whether the communication was oral or written, (4) to whom was the communication directed, (5) what was the clarification or confirmation requested, and, (6) what was the response to the requested clarification or confirmation.

Objection:

Inasmuch as West Penn and Boston Pacific Company, Inc., which was the Independent procurement Manager under the RFP, may have communicated with bidders during the RFP process, a response to Question No. 4(4) would require West Penn to list the bidders that made bids in response to West Penn's request for purchase of SRECs. The identity of the bidders and their bid information is confidential. The disclosure of any bid information would violate the confidentiality provisions of the Commission's default service regulations, would violate the Company's Commission-approved Request for Proposal ("RFP"), and would violate the confidentiality agreement entered by West Penn and the Complainant.

The confidential provisions surrounding the default service procurement process, including solar procurement, are numerous and strict. West Penn's Solar Procurement program was approved by the Commission by Order entered September 8, 2010, at Docket No. P-00072342. The Solar Program is a modification of West Penn's previously approved Retail Electric Default Service Program and, as such, is subject to Commission regulations concerning default service procurement at Chapter 54 (52 Pa. Code §54.181 et seq.) and Commission Guidelines at Chapter 69 (52 Pa. Code §69.1801 et seq.). Section 54.186(c)(5) of the Commission's regulations provides that competitive bids for default service shall be confidential. Section 54.186(c)(5) provides:

The bids submitted by a supplier in response to a competitive bid solicitation process shall be treated as confidential pursuant to the confidentiality agreement approved by the Commission under § 54.185(d)(6). The DSP, the Commission and a third party involved

in the administration, review or monitoring of the bid solicitation process shall be subject to this confidentiality provision.

52 Pa. Code §54.186(c)(5).

The Commission's Policy Statement and Guideline concerning default service procurement contains an even more-extensive confidentiality provision and recognizes that the identity of bidders and bid information is confidential. Guideline Section 69.1807(7) provides:

The public interest would be served by the adoption of uniform rules for the confidentiality of competitive solicitation information. Supplier participation, bid prices and retail rates may be impacted by protecting certain information, including, the identity of winning and losing bidders, the number of bids submitted, bid prices, the allocation of load among winning bidders, and the like. At the same time, the Commission recognizes that there is a legitimate public interest in knowing some of this information when there is no possibility of any prejudice to ratepayer interests.

52 Pa. Code §69.1807(7) (emphasis added).

The RFP agreements used by West Penn in its SREC RFP were approved by the Commission and contain numerous provisions to maintain the confidentiality of information. Article 10.6 of the RFP Rules provides that West Penn will "consider all data and information provided by Bidders in response to the RFP to be confidential and will attempt to limit their disclosure...." The RFP Agreement, approved by the Commission and entered by the Complainant as a bidder in the SREC RFP, provides similar extensive confidentiality provisions.

The Commission's policy guidelines and regulations concerning the Company's obligation to keep bidders' identity and information confidential are based on common sense. Bids for SRECs and other items for default service occur frequently through the PJM area, as well as nationwide. Information concerning bidders and their identity would allow a bidder with such information to structure a bid based on the information. It is common understanding in the RFP process that bid information should remain confidential.

Thus, for numerous reasons, based on Commission regulation, on the RFP and the RFP Agreement, West Penn objects to providing the identity and number of bidders, as requested in Complainant's Interrogatory No. 4(4).

Objection to Request for Documents No. 5.

Document Request No. 5

All Part 2 proposals submitted by bidders in response to the RFP.

Objection:


The document request basically asks that West Penn release to Complainant all bid information obtained by West Penn from bidders in their responses to West Penn's RFP. This would include bidders' identities and bid prices. This request for information is even broader than the preceding request in Interrogatory No. 4 and is similarly objectionable. This information is absolutely confidential and would provide Complainant preferential information in violation of Commission regulations at Sections 54.186 and 69.1807 and the RFP rules and agreements.

The objection to Interrogatory No. 4(4) is incorporated herein.

West Penn reserves the right to object to other interrogatories and requests for documents where its responses, to be provided at a later date, may be that no responsive documents exist.

Respectfully submitted,

Date: February 24, 2011

By: 
John L. Munsch
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Pa. I.D. No. 83411

Attorneys for
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Pennsylvania Public Utility Commission;

Re: J3 Energy Group, Inc., v. West Penn Power Company; Docket No. C-2011-2219920

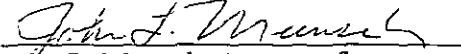
CERTIFICATE OF SERVICE

I hereby certify that I have this day served by first-class mail, postage prepaid, the foregoing **Limited Objections to Complainant's Discovery Requests** (Interrogatory No. 4(4) and Data Request No. 5) addressed as follows:

Thomas J. Russial, Esq.
198 Stonewood Dr.
Bethel Park, PA 15102

A copy of this certificate of service is filed with the Secretary of the Pennsylvania Public Utility Commission.

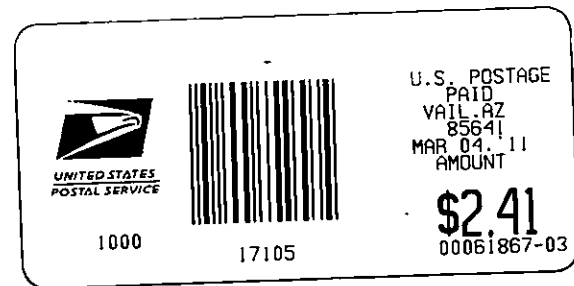
Date: February 24, 2011


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