

THOMAS J. RUSSIAL
198 Stonewood Drive
Bethel Park, PA 15102
412-389-2482

VIA FEDEX NEXT DAY

June 29, 2011

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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

**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 Response of J3 Energy Group, Inc., Opposing the Petition of West Penn Power Company for Interlocutory Review of Discovery Order. The Response was served on Counsel for West Penn Power Company and the Presiding Administrative Law Judge by first class mail on June 29, 2011.

Sincerely,



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

Enclosure

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**RESPONSE OF J3 ENERGY GROUP, INC.,
OPPOSING THE PETITION OF WEST PENN POWER COMPANY
FOR INTERLOCUTORY REVIEW OF DISCOVERY ORDER**

Pursuant to 52 Pa. Code § 5.304(d), J3 Energy Group, Inc., (J3) submits this response opposing the petition of West Penn Power Company (West Penn) for Interlocutory Review of the Discovery Order issued by the Presiding Officer on June 13, 2011.

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.

On February 12, 2011, J3 served West Penn with its First Set of Interrogatories and First Request for Documents. On February 24, 2011, West Penn served its objections to Interrogatories 3 and 4 and Document Request 5. On, March 4, 2011, J3 filed a Motion to Dismiss Objections and Compel Discovery or in the Alternative for a Protective Order that would permit discovery to proceed. Due to the nature of the information sought, J3's Motion

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to Compel requested a protective order limiting access to confidential information to Counsel for J3 and eligible experts 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 requested that the number of bids submitted be excluded from the coverage of the protective order since: (1) West Penn waived its right to object to the confidentiality of the number of bids by disclosing the number in its Answer without identifying the number as confidential; and, (2) public disclosure of the number is consistent with the RFP approved by the Commission, not prejudicial to the bidders, and in the public interest.

On June 13, 2011, the Presiding Officer granted J3's Motion to Compel subject to a protective order. West Penn was directed to submit a draft protective order within 7 business days of the date of entry of the Order.

On June 22, 2011, West Penn petitioned for interlocutory review of the Order. In its petition, West Penn asserts that a protective order limiting disclosure of confidential information to J3 would still afford J3 an unfair competitive advantage in future bids for SPAECS and suggests, without further detail, that "should the matter proceed to a hearing, an explanation of the evaluation of J3 Energy's bid can be presented so as to determine the validity of the process."

II. DISCUSSION

The Commission's standard for certification of interlocutory review of discovery matters is set forth at 52. Pa.Code 5.304(b):

(b) Standard for certification. A presiding officer may certify that a discovery ruling is appropriate for interlocutory review when the ruling involves an important question of law or policy that should be resolved immediately by the Commission.

Protective orders are a tried and true practice accepted by the Commission for dealing with confidential information. Nothing in West Penn's petition raises an important question of law

or policy that would not have been considered by the Commission at the time it promulgated regulations allowing for protective orders.

It appears that West Penn may have overlooked the option of drafting the protective order as “attorney eyes only” for J3 counsel and eligible outside experts.¹ Such an order was requested in J3’s Motion to Compel and nothing in the Presiding Officer’s decision suggests that an attorney eyes only protective order would be inappropriate. By limiting disclosure of confidential information to J3 counsel and experts, and prohibiting disclosure to J3 officers and employees, any concern about J3 obtaining an unfair competitive advantage in future bids is obviated. The Commission’s regulations at 5 Pa.Code § 5.423 define persons who may be admitted to protective orders:

d) *Access to representatives of parties.* Proprietary information provided to a party under this section shall be released to the counsel and eligible outside experts of the receiving party unless the party who is releasing the information demonstrates that the experts or counsel previously violated the terms of a recent protective order issued by the Commission. To be eligible to receive proprietary information, the expert, subject to the following exception, may not be an officer, director, stockholder, partner, owner or employee of a competitor of the producing party. An expert will not be ineligible on account of being a stockholder, partner or owner of a competitor or affiliate unless the ownership interest is valued at more than \$10,000 or constitutes a more than 1% interest, or both. No other persons may have access to the proprietary information except as authorized by order of the Commission or of the presiding officer.

Undersigned counsel for J3 has never been subject to a Commission protective order and therefore satisfies the requirement that counsel not have violated the terms of a recent protective order. Furthermore, J3 Counsel is not an officer, director, stockholder, partner, owner or employee of J3 or a competitor.

If West Penn is now questioning the relevance of the information sought - as appears to be the case based on West Penn’s suggestion that the matter may be resolved without J3 access

¹ J3 does not anticipate using experts at this time, but reserves the right do so.


to the information - then West Penn's request is both presumptuous and untimely and should be denied. In its Limited Objections to Complainant's Discovery Request filed on February 24, 2011, West Penn only raised confidentiality as a basis for denying J3's discovery request. Relevance was not raised by West Penn but was nonetheless briefed by J3 in its Motion to Compel. In the Order Granting the Motion to Compel, the Presiding Officer agreed that the information was relevant to the matter. Commission Regulations at 52 Pa.Code § 5.342(d) and § 5.349(d) require service of objections within 10 days of service of interrogatories and requests for documents. Accordingly, any West Penn objections based on relevance should be deemed untimely at this point because they were not raised within 10 days of service of J3's First Set of Interrogatories and First Request for Documents.

III. CONCLUSION

For the reasons stated herein, J3 requests that West Penn's Petition for Interlocutory Review be denied. Furthermore, to move discovery along in an efficient manner, J3 requests that the Presiding Officer issue the attached Protective Order.

Date: June 29, 2011

Respectfully Submitted



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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| v. |) | Complaint Docket No. C-2011-2219920 |
| |) | |
| WEST PENN POWER COMPANY |) | |
| Respondent. |) | |

PROTECTIVE ORDER

Upon consideration of the Motion of J3 Energy Group, Inc. (J3), to Dismiss Objections and Compel Discovery or in the Alternative for a Protective Order, that was filed on March 4, 2011, and my Order Granting J3's Motion, dated June 13, 2011;

IT IS ORDERED THAT:

1. This Protective Order applies to all materials and information identified in Paragraph 2 below, which will be filed with the Commission, produced in discovery, or otherwise presented during the above-captioned proceeding. All persons hereafter granted access to the materials and information identified in Paragraph 2 of this Protective Order shall use and disclose such information only in accordance with this Protective Order.

2. The material or information subject to this Protective Order are all correspondence, documents, data, information, and other materials which West Penn Power Company (West Penn) is required to produce pursuant to my Order dated June 13, 2011, and which are claimed to be commercially valuable trade secrets or confidential information (hereinafter "Protected Information). The number of bids received by West Penn in response to its Request for Proposals (RFP) for Solar Photovoltaic Alternate Energy Credits (SPAECs) that is the subject of this proceeding shall not be considered Protected Information.

3. West Penn may designate as Protected Information those bid and evaluation materials that customarily are treated by West Penn and/or the bidders as confidential or proprietary, which are not available to the public and, which if disclosed freely, would subject West Penn and/or the bidders to risk of competitive disadvantage.

4. Protected Information produced in this proceeding shall be made available to the Commission and its Staff solely for use in this proceeding. For purposes of filing, to the extent that Protected Information is placed in the Commissions record, such information shall be separately bound, conspicuously marked, and accompanied by a copy of this Order.

5. Protected Information shall be made available to J3's counsel of record in this proceeding pursuant to the following procedures:

(a) The Protected Information may be used only for and to the extent that it is necessary for participation in this proceeding.

(b) Any person obtaining Protected Information disclosed through this provision may not use that information to gain any commercial advantage and may not forward it to any person except as set forth herein.

(c) To the extent required for participation in this proceeding, J3 counsel may afford access to Protected Information to an eligible outside expert (or experts) provided any such expert is not an officer, director, stockholder, partner, owner or employee of J3 or a competitor of West Penn or the bidders who responded to West Penn's RFP, subject to the exception stated herein. An expert will not be ineligible on account of being a stockholder, partner or owner of a competitor or affiliate unless the ownership interest is valued at more than \$10,000 or constitutes a more than 1% interest, or both.

(d) No other persons may have access to the Protected Information, including officers, directors, stockholders, partners, owners or employees of J3, except as authorized by agreement of the Parties, or order of the Commission, or of the Presiding Administrative Law Judge.

6. Any public reference to Protected Information shall be to the title or exhibit reference in sufficient detail to permit persons with access to the fully understand the reference and not more. The Protected Information shall remain a part of the record, to the extent admitted, for purposes of administrative or judicial review.

7. West Penn shall designate documents as constituting or containing Protected Information by affixing a "Protected Information" stamp or typewritten designation on such documents. Where only a portion of a document constitutes Protected Information, West Penn shall designate only the specific pages or information that constitutes Protected Information.

8. Portions of the record of this proceeding that contain Protected Information, including exhibits, writings, testimony, cross examination, argument and discovery responses, shall be sealed for all purposes, including administrative and judicial review, unless such Protected Data is released from the restrictions of this Order through agreement of the parties or pursuant to order of the Administrative Law Judge, the Commission or court.

9. J3 retains the right to question or challenge the trade secret or confidential nature of information designated by West Penn as Protected Information. Challenges not resolved by the Parties shall be resolved by petition in accordance with Commission procedures.

10. Within 30 days after completion of this proceeding, including any administrative or judicial review, all Protected Information in the possession of J3 Counsel and experts shall be immediately returned to West Penn or in the alternative destroyed, at the election of West Penn.

In the event, West Penn directs J3 Counsel to destroy the Protected Information, Counsel will provide an affidavit to West Penn affirming that the Protected Information has been destroyed.

Dated: _____

Elizabeth H. Barnes
Administrative Law Judge

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of The Response of J3 Energy Group, Inc., Opposing the Petition of West Penn Power Company for Interlocutory Review of Discovery Order by first class mail, postage pre-paid, upon Respondent, West Penn Power Company and the Presiding Officer at the addresses below:

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

Elizabeth H. Barnes
Administrative Law Judge
P.O. Box 3265
Harrisburg, PA 17105-3265

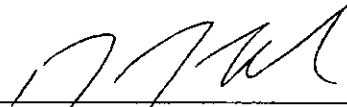
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Date: June 29, 2011

Counsel for J3 Energy Group, Inc.



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

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3 To Recipient's Name RUSSELL CHAVAZZA, SECRETARY Phone _____

Company PENNSYLVANIA PUBLIC UTILITY COMMISSION

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We cannot deliver to P.O. boxes or P.O. ZIP codes. Dept./Floor/Suite/Room

HOLD Weekday
FedEx location address
REQUIRED. NOT available for
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Address 400 NORTH STREET 31
Use this line for the HOLD location address or for continuation of your shipping address.

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REQUIRED. Available ONLY for
FedEx Priority Overnight and
FedEx 2Day to select locations.

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4 Express Package Service to most locations.
NOTE: Service order has changed. Please select carefully. Packages up to 150 lbs.
For packages over 150 lbs., see the new
FedEx Express Freight US Airbill.

- Next Business Day**
- 06 FedEx First Overnight
Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- 01 FedEx Priority Overnight
Next business morning. * Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- 05 FedEx Standard Overnight
Next business afternoon.
Saturday Delivery NOT available.
- 2 or 3 Business Days:**
- 49 NEW FedEx 2Day A.M.
Second business morning. * Saturday Delivery NOT available.
- 03 FedEx 2Day
Second business afternoon. * Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- 20 FedEx Express Saver
Third business day. * Saturday Delivery NOT available.

- 5 Packaging * Declared value limit \$500
- 06 FedEx Envelope* 02 FedEx Pak* 03 FedEx Box 04 FedEx Tube 01 Other

6 Special Handling and Delivery Signature Options

03 SATURDAY DELIVERY

- No Signature Required
Package may be left without obtaining a signature for delivery.
- 10 Direct Signature
Someone at recipient's address may sign for delivery. Fee applies.
- 34 Indirect Signature
If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only. Fee applies.

Does this shipment contain dangerous goods?
One box must be checked.

No 04 Yes
As per attached Shipper's Declaration.

Yes
Shipper's Declaration not required.

06 Dry Ice
Dry Ice, 3 UN 1845 _____ x _____ kg

Cargo Aircraft Only

Dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Drop Box.

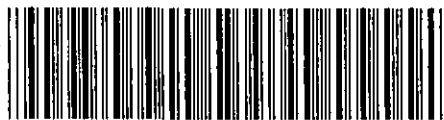
7 Payment Bill to:

Enter FedEx Acct. No. or Credit Card No. below. Obtain recip. Acct. No.

1 Sender Acct. No. in Section 1 will be billed. 2 Recipient 3 Third Party 4 Credit Card 5 Cash/Check

Total Packages _____ Total Weight _____
lbs. _____
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