

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

RECEIVED

AUG 18 2011

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA FEDEX NEXT DAY

August 18, 2011

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:

In accordance with 52 Pa.Code § 5.421(c), enclosed for filing is the original and three copies of the Application of J3 Energy Group, Inc., for Issuance of a Subpoena to Boston Pacific Company Inc., to Produce Documents and Request to Amend the July 19, 2011 Protective Order.

On August 17, 2011, I filed and served the Application with the incorrect docket number C-2011-2119920 in the cover letter and certificate of service. This submission corrects the error. Therefore, I withdraw the August 17th submission and respectfully request that it be removed from the Commission's docketing system. I apologize for any confusion that was caused by the error.

Sincerely,



Thomas J. Russial
Attorney for J3 Energy Group

Enclosure

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AUG 18 2011

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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

**APPLICATION OF J3 ENERGY GROUP, INC., FOR ISSUANCE OF A SUBPOENA
TO BOSTON PACIFIC COMPANY INC., TO PRODUCE DOCUMENTS
AND
REQUEST TO AMEND THE JULY 19, 2011 PROTECTIVE ORDER**

J3 Energy Group, Inc., (J3), through Counsel, submits this Application respectfully requesting issuance of a subpoena to Boston Pacific Company, Inc., (Boston Pacific) to produce a report prepared by Boston Pacific and submitted to the Pennsylvania Public Utility Commission (Commission) reporting the results of a Request for Proposals (RFP) conducted by West Penn Power Company, dba Allegheny Power (West Penn) for Solar Photovoltaic Alternative Energy Credits (SPAECs). J3 also requests production by Boston Pacific of all presentation materials, slides, and handouts (if any) used by Boston Pacific during an oral presentation on the results of the RFP made by Boston Pacific to the Commission. A Draft Subpoena is provided for consideration at Attachment 1 of this Application.

In that information contained in the requested documents may be considered confidential, J3 requests that the Protective Order issued by the Presiding Officer on July 19, 2011, be amended to provide for production of the documents subject to the limitations and conditions of the amended order. Attachment 2 contains a marked-up version of a Draft Amended and Restated Protective Order for consideration. Attachment 3 contains a clean version of the Draft Amended and Restated 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 RFP for 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 March 7, 2011, West Penn served its answers to interrogatories and document requests that were not subject to earlier objections.

In its First Request for Documents, J3 sought production of a report prepared by the Independent Procurement Manager (IPM), Boston Pacific. The report was described in Article 9.19 of the RPF as follows:

The IPM will prepare a report two (2) business days after the Part 2 Date. The IPM report will present the results of the RFP and will also summarize the most recent processing and evaluation of Proposals. The PaPUC will have three (3) business days after report submission to decide whether to approve the results.

In response to J3's request, West Penn replied that it did not participate in production of the confidential report nor did it receive a copy of the report. Mr. Frank Mossburg, Managing Director, Boston Pacific, has been identified as the individual who performed IPM functions for the RFP. In addition to the IPM report that was submitted to the Commission, J3 understands that Mr. Mossburg made an oral presentation of the RFP results to the Commission.

II. DISCUSSION

The Commission Regulations at 52 Pa.Code § 5.421(b) requires an application for a subpoena to (1) specify as nearly as possible the general relevance and materiality of

documentary evidence sought, (2) provide a specification, as nearly as possible, of the document desired, and, (3) list the facts to be proved by the documents in sufficient detail to indicate the necessity of the documents.

(1) Relevance and materiality of documents sought.

The issues before the Commission in this proceeding are whether the evaluation of bids submitted in response to the RFP was conducted properly and, if improper, would a proper evaluation have resulted in the selection of J3 bids. The IPM report prepared by Boston Pacific and any materials used by Boston Pacific to brief the Commission should contain the evaluation results and a contemporaneous written record summarizing the processing and evaluation of proposals. The documents may also identify significant issues that arose during evaluation and discuss resolution of those issues. This information is central to the matter before the Commission. Furthermore, in its Answer to the Complaint, West Penn has raised the Commission's approval of the RFP results as a basis for denying the Complaint. Hence, to the extent that approval is deemed relevant to the disposition of this proceeding even if an error occurred during evaluation, it is necessary to understand what information was before the Commission when it granted its approval. Based on the foregoing, the requested documents are both relevant and material to this proceeding.

(2) Specification of the documents desired.

The following documents are requested:

- a) The Independent Procurement Manager Report that was prepared by Boston Pacific Company, Inc and submitted to the Pennsylvania Public Utility Commission reporting the results of the Request for Proposals for Solar Photovoltaic Alternative Energy Credits issued in 2010 by West Penn Power Company dba Allegheny Power. The Report is referenced in Article 9.19 of the Request for Proposals.

- b) All presentation materials, slides, and handouts (if any) used by Frank Mossburg, during Mr. Mossburg's oral presentation to the Pennsylvania Public Utility Commission staff on the Request for Proposal results

(3) Facts to be proved by the documents in sufficient detail to indicate the necessity of the documents.

The requested documents will contain information going to the issue of whether the evaluation was conducted properly in accordance with the RFP that was approved by the Commission.

Furthermore, the documents are the written record of the RFP results and evaluation that was before the Commission at the time the Commission approved of the results. As such, the documents are necessary to determine if the Commission was fully informed at the time of the approval decision.

III. PROTECTIVE ORDER

Whereas information contained in the requested documents may be considered confidential, and the character of the requested information is the same or similar to information ordered to be produced subject to the Protective Order issued by the Presiding Officer on July 19, J3 requests that the Protective Order be amended to include documents produced by Boston Pacific within its coverage.

IV. NOTICE

In accordance with 52 Pa.Code. §5.421(b)(3), a response or objection to this application shall be filed with the Commission and Presiding Officer within 10 days of service of the application. Attachment 4 to this Application contains the names and addresses of persons to whom a response or objection shall be sent.

V. CONCLUSION

The documents sought to be produced contain the IPM's presentation of the RFP results to the Commission along with the IPM's summary of the processing and evaluation of proposals. In view of: (1) the issues in this proceeding - the proper evaluation of proposals and the impact of improper evaluation on the outcome; (2) the IPM's role in the evaluation process and the fact that Mr. Mossburg has been identified as an anticipated witness by West Penn in its Pre-hearing Memorandum of August 3, 2011; and, (3) the fact that the documents were presented to the Commission as a basis for approving the RFP results, the contemporaneous written record of the IPM is clearly relevant to disposition of this proceeding. Accordingly, J3 respectfully requests that the Presiding Officer issue the subpoena requiring production of the requested documents subject to the Amended and Restated Protective Order.

Date: August 18, 2011

Respectfully Submitted



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

Attachments

1. Draft Subpoena
2. Draft Amended and Restated Protective Order – Markup
3. Draft Amended and Restated Protective Order - Clean
4. Filing/Mailing List for Response or Objection to Subpoena



**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In the Matter of:

Docket No. C-2011-2219920

J3 Energy Group, Inc. (Complainant)

v.

West Penn Power Company (Respondent)

RECEIVED

AUG 18 2011

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

SUBPOENA

To: Frank Mossburg, Managing Director, Boston Pacific Company, Inc., 1100 New York Avenue, NW, Suite 490 East, Washington, DC 20005.

Pursuant to the authority of this Commission under §§309, 331(d)(2) and 333(j) of the Public Utility Code:

1. YOU ARE ORDERED by the Commission to produce the following documents:

- a) The Independent Procurement Manager Report that was prepared by Boston Pacific Company, Inc and submitted to the Pennsylvania Public Utility Commission reporting the results of the Request for Proposals for Solar Photovoltaic Alternative Energy Credits issued in 2010 by West Penn Power Company dba Allegheny Power. The Report is referenced in Article 9.19 of the Request for Proposals.
- b) All presentation materials, slides, and handouts (if any) used by Frank Mossburg, during Mr. Mossburg's oral presentation to the Pennsylvania Public Utility Commission staff on the Request for Proposal results.

2. The documents shall be mailed by first class mail or overnight delivery service to Thomas J. Russial, Attorney for J3 Energy Group, Inc., and John L. Munsch, Attorney for West Penn Power Company at the addresses provided below, not later than 10 days after the date of this Subpoena.

Thomas J. Russial
198 Stonewood Drive
Bethel Park, PA 15102

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

3. In accordance with the Amended and Restated Protective Order issued on _____, you may designate documents produced as Protected Information by marking the cover page of each document with the legend "PROTECTED INFORMATION."

This subpoena is issued subject to the provisions of 52 Pa. Code §5.421 (with regard to issuance, notice, service and witness fees).

BY THE COMMISSION

Date _____

Elizabeth H. Barnes
Administrative Law Judge

RECEIVED

AUG 18 2011

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

J3 ENERGY GROUP, INC.)
Complainant,)
v.)
WEST PENN POWER COMPANY)
Respondent.)

PA PUBLIC UTILITY COMMISSION SECRETARY'S BUREAU

Complaint Docket No. C-2011-2219920

AMENDED AND RESTATED 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; and, the Application of J3 for Issuance of a Subpoena to Boston Pacific Company, Inc, to Produce Documents and my approval of the Application;

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:

(a) 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.

(b) Documents produced by Boston Pacific Company, pursuant to my Subpoena dated _____.

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.

Boston Pacific Company may designate documents produced pursuant to my Subpoena as Protected Information.

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.

(d) No other persons may have access to the Protected Information, including officers, directors, stockholders, partners, owners or employees of J3.

Protected information produced by Boston Pacific Company pursuant to Subpoena shall also be made available to West Penn for West Penn use only for this Proceeding.

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.

Boston Pacific shall designate documents produced pursuant to my Subpoena as "protected information" by affixing a "Protected Information" stamp or typewritten designation on such documents.

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. 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 *that was produced by West Penn* 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.

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, and West Penn that was produced by Boston Pacific Company shall be immediately returned to Boston Pacific Company or in the alternative destroyed, at the election of Boston Pacific Company. In the event, Boston Pacific Company directs J3 Counsel and West Penn to destroy the Protected Information, J3 Counsel and West Penn Counsel will each provide an affidavit to Boston Pacific Company affirming that the Protected Information has been destroyed.

Dated: _____, 2011

Elizabeth H. Barnes
Administrative Law Judge

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

J3 ENERGY GROUP, INC.)
Complainant,)
)
v.)
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Respondent.)

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Complaint Docket No. C-2011-2219920

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2. The material or information subject to this Protective Order are:

(a) 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.

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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.

Boston Pacific Company may designate documents produced pursuant to my Subpoena as Protected Information.

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.

(d) No other persons may have access to the Protected Information, including officers, directors, stockholders, partners, owners or employees of J3.

Protected information produced by Boston Pacific Company pursuant to Subpoena shall also be made available to West Penn for West Penn use only for this Proceeding.

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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.

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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, and West Penn that was produced by Boston Pacific Company shall be immediately returned to Boston Pacific Company or in the alternative destroyed, at the election of Boston Pacific Company. In the event, Boston Pacific Company directs J3 Counsel and West Penn to destroy the Protected Information, J3 Counsel and West Penn Counsel will each provide an affidavit to Boston Pacific Company affirming that the Protected Information has been destroyed.

Dated: _____, 2011

Elizabeth H. Barnes
Administrative Law Judge

ATTACHMENT 4

FILING/MAILING LIST FOR RESPONSE OR OBJECTION TO SUBPOENA

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

Elizabeth H. Barnes (Presiding Officer)*
Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

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

***The address for overnight or private delivery service mail for Secretary Chiavetta and Judge Barnes is:**

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

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PA PUBLIC UTILITY COMMISSION
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RECEIVED

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

AUG 18 2011

J3 ENERGY GROUP, INC.)
Complainant,)
)
v.)
WEST PENN POWER COMPANY)
Respondent.)

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Complaint Docket No. C-2011-2219920

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the Application of J3 Energy Group, Inc., for Issuance of a Subpoena to Boston Pacific Company Inc., to Produce Documents and Request to Amend the July 19, 2011 Protective Order on the individuals identified below by the method indicated:

By electronic mail and first class mail:

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

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

By FedEx Next Day:

Mr. Frank Mossburg
Managing Director
Boston Pacific Company, Inc.
1100 New York Avenue, NW
Suite 490 East
Washington, DC 20005

Date: August 18, 2011

Attorney for Complainant



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

Sender's Name THOMAS J. RUSSIAL Phone 412389-2482

Company

Address 198 STONEWOOD DRIVE

City BETHEL PARK **State** PA **ZIP** 15102

2 To

Recipient's Name ROSEMARY CHIAVETTA Phone ()

Company SECRETARY PA PUBLIC UTILITY COMMISSION

Address COMMONWEALTH KEYSTONE BUILDING 2ND FLOOR

Address 400 NORTH STREET HOLD at Location
FedEx Office address REQUIRED

City HARRISBURG **State** PA **ZIP** 17120

Country USA **Postal Code** 17120

ROSEMARY
400 N ASTREET
HARRISBURG, PA 17120

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TO: CHIAVETTA, R. PUC (CHIAVETTA)

Agency: PUC


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External Carrier: FEDEX-GND

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SECRETARY PA PUBLIC UTILITY CO
400 NORTH ASTREET
HARRISBURG, PA 17120

(412) 389-2482
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