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SECRETARY'S BUREAU

August 26, 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 Answer of J3 Energy Group to West Penn Power Company Response to Objections to Interrogatories.

Sincerely,



Thomas J. Russial
Attorney for J3 Energy Group

Enclosure

cc: Judge Elizabeth H. Barnes, Presiding Officer
John L. Munsch, Esq., West Penn Power Company

**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.)	

**ANSWER OF J3 ENERGY GROUP, INC. TO WEST PENN POWER COMPANY
RESPONSE TO OBJECTIONS TO INTERROGATORIES**

J3 Energy Group, Inc. (J3) files this Answer to the West Penn Power Company (West Penn) Response to Objections to Interrogatories. J3 assumes that the West Penn Response is a Motion to Compel pursuant to 52 Pa.Code § 5.342(g).

I. INTRODUCTION

On August 5, 2011, West Penn served its first set of Interrogatories and Request for Production of Documents. On August 15, 2011, J3 served objections to Interrogatory Nos. 5, 6, 7, 8, 11 and 12. West Penn filed its response to J3's objections on August 22, 2011.

In its response, West Penn did not address all grounds for J3 objections. For Interrogatories Nos. 5, 6, 7, 8 and 11, J3 objected on the basis of relevancy and that production of the information would result in unreasonable burden and annoyance. West Penn's response does not address burden and annoyance for Nos. 5, 6, 8, and 11. In its discussion below, J3 will explain why, in the context of the West Penn Request for Proposals for Solar Photovoltaic Alternate Energy Credits (RFP) and the issues before the Commission in this proceeding, the requested information is irrelevant and would impose unreasonable burden and annoyance as the case may be.

II. DISCUSSION

Before turning to the merits of West Penn's individual responses, several general points will be addressed.

General points

First, J3's Complaint pleads a set of facts alleging that West Penn erred during bid evaluation under its RFP and that the error may have resulted in the non-selection of J3 bids. J3 brought this action in accordance with Commission laws and regulations seeking to correct the error and enforce its rights. West Penn's response to objections Nos. 6 and 12 contain accusations concerning J3's motives for bringing the action. In addition to being purely speculative and untrue, West Penn's accusations are unfair and inconsistent with its own RFP and guidance.

Second, J3 notes that many of the questioned interrogatories (e.g. Who owned the credits? What happened to the credits? What value did J3 derive from the credits?) are oriented toward a breach of contract action where financial loss and mitigation of damages may be at issue. J3 has not filed a breach of contract action against West Penn nor did the Complaint seek money damages for breach. Instead, J3's Complaint is based on an error in the evaluation process used by West Penn. If J3 establishes that the error occurred and that J3 would have been selected but for the error, then J3 has requested that the Commission disapprove of the bid results until West Penn awards J3 the appropriate blocks of credits. As explained in J3's objections and in its recently served answers to West Penn's interrogatories, J3 is a developer of solar photovoltaic projects and intended to use the West Penn purchase agreement to support financing of one or more projects. The credits were not a commodity sitting in J3's inventory. This purpose was absolutely consistent with the goals and intent of the RFP as approved by the

Commission. The Commission has cited long term revenue stability as a barrier to small and large scale solar development in Pennsylvania. This is reflected in the Commission's order in Case Number P00072342 adopted on September 8, 2010, approving West Penn's Petition to modify its Default Service Program to permit the purchase of solar credits through long term contracts:

In support of the instant Petition, Allegheny points to the *Commission's Policy Statement in Support of Solar Projects* at Docket No. M-2009-2140263, Order entered December 10, 2009. (*December 10 Order*) Petition at ¶ 9. The intent of this *Policy Statement* is to provide the longer term revenue stability that is likely needed to support both small and large solar development, and to address other barriers that could prevent new solar projects from coming to fruition in Pennsylvania. *December 10 Order* at 1.¹

Third, at the time it conducted the RFP, West Penn did not care where the credits came from. In response to a question that was posted on 9/29/2010 to West Penn's RFP Question and Answer list, West Penn stated it was indifferent to how a bidder delivers credits:

Q. 4. I am working with a Virginia company to develop an 8-10 MW solar array. As far as I can tell, the REC's from that system can be used in Pennsylvania. If everything lines up perfectly, construction would begin in December with a "go live" date right around June 1, 2011. Do either of these facts preclude my customer from submitting bid information for your RFP? I can't find reference to either point in the docs posted on the internet.

A. 4. No. This solicitation is not unit specific. As long as a bidder can meet the terms and conditions of the RFP and agreements, such as credit and delivery obligations, Allegheny is indifferent how a winning supplier delivers the qualifying AECs.

For West Penn to now suggest that the source and fate of J3's credits is relevant to the outcome of this proceeding, West Penn is being inconsistent with its own statements.

Fourth, J3 fully expects to profit from its projects. But whether J3 would profit or incur loss were not factors during proposal evaluation nor are they issues that are relevant to this proceeding. West Penn's error, if proven to the Commission's satisfaction, took an opportunity

¹ Reference to "Allegheny" mean West Penn Power Company d/b/a Allegheny Power

away from J3 that J3 would have derived as a successful bidder. If J3 had been selected for one or more blocks of credits, J3 would have been obliged to supply those credits to West Penn even if J3 suffered a loss. If J3 did not supply the credits, the RFP and sales agreement contained financial security and breach provisions that would provide a remedy to West Penn.

Finally, in its Response to Objection No. 5 and incorporated by reference into Responses 6 and 7, West Penn states: “It is not clear to West Penn that J3 could or would have been able to deliver SPAECS had its bid on the West Penn RFP been the winning bid.” During Part 1 proposal evaluation West Penn determined that J3 was a “Qualified Bidder” eligible to submit a Part 2 proposal. West Penn admitted this fact in its Answer. See Complaint Attachment 1, Paragraph 8; Answer Paragraph 4-8; Complaint Appendix 2. Hence, the issue was settled during proposal evaluation and in the pleadings. If West Penn wished to use additional evaluation criteria relating to future performance, the criteria should have been disclosed in the RFP and all proposers given an opportunity to respond. If West Penn did in fact use undisclosed criteria during evaluation, additional errors have occurred.

West Penn Interrogatory No.5

Interrogatory No. 5 reads as follows:

Describe the Solar Photovoltaic Alternative Energy Credits that Complainant bid to sell to West Penn in West Penn’s request for purchase of Solar Photovoltaic Alternative Energy Credits; including the identity of the source of the credits; the owner of the generation project or other source of the credits; whether the credits were owned by Complainant or under option or other means; and the cost to Complainant of obtaining the credits.

J3 took partial objection to the interrogatory agreeing to explain that the sale of credits would be used to support financing of one or more planned projects. Hence, J3 has described its plan for securing credits at the time of proposal submission and that is still J3’s plan if successful in this proceeding. Because West Penn was indifferent to the source of credits, in actuality a

bidder could secure credits from any source including the spot market and still comply with its contractual obligations to West Penn. If a bidder did not comply, West Penn has contractual remedies.

J3 objected to disclosure of additional commercial or financial information on the basis of relevancy and that disclosure would cause unreasonable burden and annoyance to J3. Specifically, the interrogatory could have been construed to require J3 to disclose business sensitive elements of its commercial and financial model for solar project development, bidding strategy, costs and customer names. None of this information is relevant to the issues before the Commission: (1) whether West Penn erred during evaluation; (2) whether the error deprived J3 of selection; and (3) whether the Commission's approval of the RFP results should be set aside until West Penn corrects the error and contracts with J3 for credits.

West Penn's response to the objection can be grouped into 3 themes. The information is relevant because: (1) J3 may not have been able to perform; (2) the information is needed to assess J3 loss or grievance in this proceeding or associated proceedings; and (3) J3 may not have suffered any loss from the purported miscalculation rendering the Complaint moot. West Penn correctly points out that information need not be admissible if it is reasonably calculated to lead to discovery of admissible evidence. But West Penn does not explain how the requested information is at all relevant to the actual issues before the Commission. Nor does West Penn explain what is meant by "associated proceedings" or why discovery in this matter should be used to obtain information for another proceeding.² Instead, the response is based on a breach of contract damages concept which as discussed above is not the basis for this proceeding. Therefore, the requested information concerning damages and loss is both irrelevant to the outcome of the proceeding and cannot reasonably lead to discovery of admissible evidence.

² J3 had filed no other actions against West Penn.

Furthermore, J3's commercial and financial model, bidding strategy, costs and customer names and locations of planned projects are highly sensitive information. Since the information is not necessary to determine the outcome of this proceeding, production of the information would result in unreasonable burden and annoyance to J3 and its customers.

Interrogatory No. 6

Interrogatory No. 6 reads as follows:

With respect to all Solar Photovoltaic Alternative Energy Credits that Complainant bid to sell to West Penn in West Penn's request for purchase of Solar Photovoltaic Alternative Energy Credits, describe the final use or placement of said Solar Photovoltaic Alternative Energy Credits.

Interrogatory No. 6 deals with the final use or placement of the credits bid by J3. J3 answered that it intended to use the West Penn purchase agreement to support financing of one or more projects under development. However, J3 objected to the interrogatory to the extent that it requested customer names and other J3 commercial and financial information. West Penn incorporated its Interrogatory 5 response making the same arguments for Interrogatory No. 6. In answering West Penn's response to this objection, J3 incorporates its general points and its discussion under Interrogatory 5 above.

Here again, West Penn's response is based on breach of contract principles – did J3 mitigate damages by selling credits elsewhere. As explained above, this is not a breach of contract claim and J3 did not have credits in inventory waiting to be sold to West Penn. Instead, if J3 was selected, West Penn's purchase agreement would be used to support financing of one or more solar projects which would be the expected source of the credits. But regardless of J3's expected source, J3 would nevertheless have been required to supply credits or be in breach of the purchase agreement. Because the RFP and West Penn were indifferent to credit sourcing, it

makes no difference if J3 was successful or not successful in other solar projects after source selection because West Penn's actions took away one more opportunity J3 otherwise would have had. Hence the information sought by West Penn is irrelevant to the disposition of the matter before the Commission. Furthermore, J3 customer names and locations of potential solar projects is highly sensitive information. In the context of the issues before the Commission in this proceeding, disclosure of such information serves no purpose and therefore would impose unreasonable burden and annoyance upon J3.

Interrogatory No. 7

Interrogatory No. 7 reads as follows:

With respect to all Solar Photovoltaic Alternative Energy Credits that Complainant bid to sell to West Penn in West Penn's request for purchase of Solar Photovoltaic Alternative Energy Credits, identify the value obtained by Complainant from said Solar Photovoltaic Energy Credits.

Interrogatory No. 7 deals with the value obtained from the solar credits. J3 answered that it intended to use the West Penn purchase agreement to support financing of one or more projects under development. However, J3 objected to the interrogatory to the extent that the interrogatory sought J3 anticipated profits or other J3 commercial and financial J3 information. West Penn incorporated its Interrogatory 5 response making the same arguments for Interrogatory No. 7.

Value obtained or anticipated to be obtained may be relevant to a breach of contract action, but as addressed above that is not the nature of this proceeding. In answering West Penn's response to this objection, J3 incorporates its general points and its discussion under Interrogatories 5 and 6 above.

Interrogatory No. 8.

Interrogatory No. 8 reads as follows:

Identify and describe in full the loss or lost value that Complainant believes it has suffered as a result of the alleged actions of West Penn as described in Complainant's complaint. In the event that the loss or lost value is difficult to estimate or fluctuates, provide a good faith estimate of the loss or lost value as of the date of the Complaint.

J3 objected to Interrogatory No. 8 in full based on relevancy. Interrogatory No. 8 is clearly oriented to a breach of contract claim for damages - a point that is reinforced in West Penn's response to J3's objection which states:

West Penn emphasizes that the final use or placement of the SRAECs that J3 bid may be relevant to [in] this proceeding or other proceeding concerning J3's alleged loss or damages.

J3 again notes that discovery in this proceeding should not be used as a means to obtain information for another proceeding. Furthermore, J3's anticipated profit or loss has no bearing on whether West Penn properly evaluated bids received against the RFP and whether J3 should have been selected under the RFP which are the issues before the Commission in this proceeding. In answering West Penn's response to this objection, J3 incorporates its general points and discussion under Interrogatories 5, 6 and 7 above.

Interrogatory Nos. 11 and 12

Interrogatory Nos. 11 and 12 are interrelated and read as follows:

11. Describe Complainant's experience in submitting proposals or bids to supply alternative energy credits to public utilities or electric suppliers, including the date of each and every bid, the identity of the entity to whom the bid was submitted and the nature of the bid, and the result of the bid.

12. Identify any and all litigation or regulatory proceeding that the Complainant has commenced arising from any bid identified in Interrogatory 11.

J3 objected to both interrogatories based on relevancy and unreasonable annoyance and burden. West Penn responded on No. 11 claiming that J3's experience or inexperience may bear directly on how it responded to West Penn's RFP and whether or not the bid was based on J3's experience in other RFPs. On No. 12 West Penn suggested that J3's motive for pursuing this Complaint before the Commission are not sincere.

With respect to No. 11, West Penn has not explained how J3's other bidding experience possibly could be a factor in determining the intent of J3's bids under the West Penn RFP. Nor has West Penn identified other candidate alternate energy credit RFPs that used the same bidding *instructions and guidance as the West Penn RFP. Although we have not conducted a review of all RFPs that have been issued for alternate energy credits, it appears that the West Penn structure and guidance may be unique. Nevertheless, what occurred on other RFPs has no bearing on the errors that occurred on the West Penn RFP or the intent of J3's bids. Hence, the information requested is not relevant to the issues before the Commission in this proceeding. Furthermore, the information requested by Interrogatory 11 concerns J3's commercial strategy which is confidential to J3; and, the terms of RFPs for alternate energy credits in Pennsylvania impose certain disclosure restrictions on bidders concerning their bids. Therefore, in the context of the issues before the Commission, J3 objected to Interrogatory No. 11 on the basis that it will result in unreasonable annoyance and burden on J3.*

Turning to Interrogatory 12, J3 could not have answered the interrogatory without answering Interrogatory 11. Therefore, J3 objected on the same grounds of relevancy. Although still irrelevant to this proceeding and warranting objection, had the interrogatory asked if J3 has filed any other litigation or regulatory proceeding related to submitting proposals or bids to supply alternative energy credits to public utilities or electric suppliers, the answer would have

been no. As for J3's sincerity in bringing this action, the Complaint speaks for itself and pleads a set of facts alleging a defective evaluation and seeking the appropriate remedy from the Commission.

III. CONCLUSION

Based on the foregoing, J3 respectfully requests that the Commission sustain J3's objections to Interrogatories Nos. 5, 6, 7, 8, 11 and 12.

Date: August 26, 2011

Attorney for Complainant



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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2011, I served the Answer of J3 Energy Group, Inc. to West Penn Power Company Response to Objections to Interrogatories on the following by electronic mail and first class mail:

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

Date: August 26, 2011

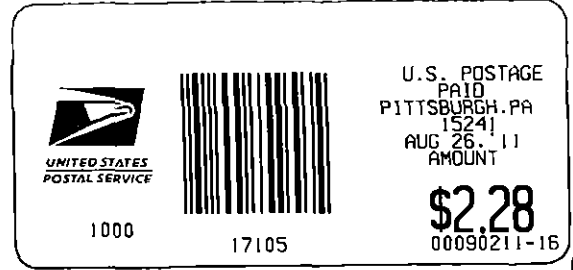
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