

THOMAS J. RUSSIAL
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Bethel Park, PA 15102
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FEB -8 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA FEDEX NEXT DAY

February 8, 2012

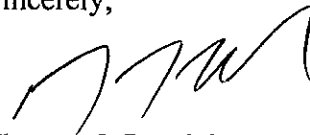
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

**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 for the Testimony of Pennsylvania Public Utility Staff Member Paul Diskin.

Sincerely,



Thomas J. Russial
Attorney for J3 Energy Group

Enclosure

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

FEB - 8 2012

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

**PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU**

Complaint Docket No. C-2011-2219920

**APPLICATION OF J3 ENERGY GROUP, INC., FOR ISSUANCE OF A SUBPOENA
FOR THE TESTIMONY OF PENNSYLVANIA PUBLIC UTILITY COMMISSION
STAFF MEMBER PAUL DISKIN**

1. J3 Energy Group, Inc., (J3), through Counsel, submits this Application respectfully requesting issuance of a subpoena directing Mr. Paul Diskin of the Commission staff to appear for oral testimony at hearing in the captioned matter. A Draft Subpoena is provided for consideration at Attachment 1 of this Application.

I. FACTUAL BACKGROUND

2. By Formal Complaint, dated January 10, 2011, J3 alleged that West Penn Power Company d/b/a Allegheny Power (West Penn) failed to properly evaluate J3's Part 2 proposal submitted in response to West Penn's competitive RFP for Solar Photovoltaic Alternate Energy Credits (SPAECs). Had J3's Part 2 proposal been properly evaluated as the individual bids that were submitted, J3 maintains that its two lowest priced bids should have been selected.

3. Boston Pacific Company, Inc., (Boston Pacific) was selected as the independent third party evaluator for the procurement. Mr. Diskin, then the Energy/Water Manager for the Bureau of Fixed Utility Services, monitored the procurement on behalf of the Commission, was

present at West Penn's facility on bid day when proposals were received, and participated in an oral briefing of bid results presented by Boston Pacific on December 8, 2010.¹

4. J3 identified two issues in its Prehearing Conference Memorandum dated August 2, 2011:

- (a) Was the aggregation and averaging of J3's 4 bids during bid evaluation in accordance with the RFP approved by the Commission and guidance issued by West Penn?
- (b) Would the proper evaluation of bids by West Penn have resulted in the selection of one or more of the J3 bids?

*J3 Prehearing Conference Memorandum § 2.*² J3 noted that if West Penn asserts as a defense the approval by the Commission of the RFP results, then it may be necessary to obtain testimony from Commission staff involved in the review as to their knowledge and understanding of the process used to evaluate J3 bids. *See J3 Prehearing Conference Memorandum § 3.*

5. West Penn's Prehearing Conference Memorandum, dated August 3, 2011, addressed issues as follows:

The primary issue in the proceeding appears to be whether or not West Penn, the third party evaluator, and the Commission representative miscalculated the bid of J3 on December 3, 2010, that J3 made in response to West Penn's RFP for SPAECS.

West Penn Prehearing Conference Memorandum § II.

6. J3 filed a Motion for Summary Judgment on November 14, 2011. West Penn filed its Answer and a Cross-Motion for Summary Judgment on December 5, 2011. J3 filed its Answer to the Cross Motion on December 21, 2011. In its Answer, West Penn claimed that it "fully, reasonably and justifiably relied on the Commission's approval of the bids through the Secretarial letter when West Penn purchased the SPAECS." *See West Penn Answer to Motion for*

¹ Mr. Diskin has since been appointed to the position of Bureau Director, Bureau of Technical Utility Services.

² These issues were recognized by the Presiding Office at the August 8, 2010 Prehearing Conference. *See Transcript, Pg 5, Lines 7-18.*

Summary Judgment § V. In support of its Cross-Motion, West Penn similarly alleged that West Penn justifiably relied on the Commission's approval of the bids. *See West Penn Cross-Motion, § IV.*

7. In J3's Answer to West Penn's Cross-Motion, J3 maintained that an estoppel-based affirmative defense of justifiable reliance was untimely since not pleaded by West Penn as New Matter as required by Commission Regulations. J3 further maintained that the defense was unwarranted since West Penn has not and cannot demonstrate the facts necessary to support the defense, West Penn did not have the clean hands required to assert an estoppel defense since it was in the best position to know that an error occurred during evaluation, and West Penn had multiple opportunities within its own power to avoid detriment. *See J3 Answer to Cross-Motion, ¶¶ 16-21.*

8. In the Order Denying the Cross Motions for Summary Judgment, dated February 1, 2012, the Presiding Officer identified the issues in dispute to include whether or not West Penn's reliance upon the Commission's approval of the bid procurement when it purchased the SPAECS was appropriate." *See Order at Page 9.*

II. DISCUSSION

9. The Commission Regulations at 52 Pa.Code § 5.421(b) require an application for a subpoena to specify as nearly as possible the general relevance, materiality and scope of the testimony sought.

10. In addition to issues related to the clarity of the RFP and evaluation error, West Penn's reliance claim presents the further question - if there was error, was West Penn's reliance on the Commission's approval justified such that it precludes the Commission from granting the requested relief?

11. Factual information relevant and material to the issue of justifiable reliance includes: (1) An understanding of the respective roles, duties and responsibilities of West Penn, Boston Pacific and the Commission during the solicitation and evaluation process; (2) What information, recommendations and supporting analysis were conveyed to the Commission on bid day and during Boston Pacific's oral presentation of RFP results; (3) Was the Commission fully and accurately informed by West Penn and Boston Pacific; (4) What was the Commission's understanding of the information and recommendations provided by West Penn and Boston Pacific; and, (5) Did the Commission rely on the information and recommendations from West Penn and/or Boston Pacific in approving the results of the procurement.

12. As the Commission Monitor, Mr. Diskin's understanding of the Commission's role in the procurement along with his personal knowledge of the procurement, bid day events and discussions, and December 8th oral presentation by Boston Pacific go directly to the questions identified in ¶ 11. Accordingly his testimony is sought on these matters.

13. During discovery West Penn informed J3 that neither West Penn nor Boston Pacific possessed a written record discussing or memorializing the decision to average J3's spreadsheets nor was a written analysis provided to the Commission. *See Attachment 2, West Penn Response to J3's First Set of Interrogatories and Document Requests (Int. 8, Doc Req. 3, 4, 6).*³ The absence a written record on this important issue further supports the need for testimony from the individuals involved in order to understand the facts and analysis before the Commission prior to approval of the bid results.

³ West Penn's response to Interrogatory 8 was inadvertently identified as Response 9.

III. NOTICE

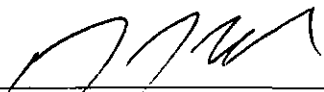
14. In accordance with 52 Pa.Code. §5.421(b)(3), a response or objection to this application shall be filed with the Commission and Presiding Officer within 10 days of service of the application. Attachment 3 to this Application contains the names and addresses of persons to whom a response or objection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

IV. CONCLUSION

15. In that Mr. Diskin was personally involved as the Commission's Monitor for the RFP he has the requisite knowledge to address key factual issues addressed herein related to West Penn's claimed justifiable reliance defense. Accordingly, J3 respectfully requests that the Presiding Officer issue the subpoena requiring the testimony of Mr. Diskin at hearing.

Date: February 8, 2012

Respectfully Submitted



Thomas J. Russial
Counsel for J3 Energy Group Inc.
198 Stonewood Drive
Bethel Park, PA 15102
Pa. I.D. No. 39730
Phone: 412-389-2482

Attachments

1. Draft Subpoena
2. West Penn Response to J3's First Set of Interrogatories and Document Requests (Interrogatory. 8, Document Requests 3, 4, 6)
3. 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)

SUBPOENA

To: Paul Diskin, Bureau Director, Bureau of Technical Utility Services, Pennsylvania Public Utility Commission, Commonwealth Keystone Building, 400 North Street, Harrisburg, PA 17120.

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 testify at the hearing in the captioned matter at a day and time to be established by Procedural Order of the Presiding Officer.

2. 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

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**COMPLAINANT'S DATA REQUEST
J3 ENERGY GROUP, INC. V. WEST PENN POWER COMPANY
COMPLAINT DOCKET NO. C-2011-2219920**

QUESTION NO. 8

Paragraph 4-14 of the ANSWER OF WEST PENN POWER COMPANY states in part:

Additionally, J3 asserts that it would make "no sense" for a bidder to submit linked bids with different prices since those bids would just be grouped together. The independent third party evaluator Boston Pacific also considered this point in the course of the evaluation of the bids and as part of its evaluation considered the inverse question, i.e., why would a bidder offer a single block as an "All-or-Nothing" bid? Put another way, if the bidder did not want its bids grouped together why did the bidder not then designate the bids as "Up-To" offers? The best answer Boston Pacific could envision was that a bidder would be concerned with winning less than a single block. While this is a reasonable concern it was unnecessary in this RFP because the RFP made it clear that only full blocks would be awarded. By multiple references in the RFP (Articles 2.1 & 7.8) and posted questions and answers on the Company's website (Question and Answers 5, 6, 10 and the October 6, 2010 Pre-Bid Questions and Answers 29), bids could not be awarded in anything less than a full tranche. The RFP is attached to J3's complaint as Appendix 1 and is part of West Penn's Petition found in West Penn Attachment No. 3. The October 6, 2010, Pre-Bid Questions and Answers are attached to J3's Complaint as Appendix 4. And the later Questions and Answers are attached to J3's Complaint as Appendix 5. Thus, while it may make little sense for a bidder to offer separate prices for blocks that would be grouped together, it makes even less sense for a bidder to designate a bid as "All or Nothing" in the fear of winning less than a full block since this fear had been specifically addressed and eliminated through the RFP rules. (Emphasis Added).

Please: (1) identify the individual(s) employed by Boston Pacific whose considerations are reflected in the underlined text, (2) identify who, besides Boston Pacific, was privy to Boston Pacific's considerations as reflected in the underline text, (3) explain how those considerations were communicated to other participants in the evaluation process, (4) identify all documents in which those considerations are discussed or memorialized, and, (5) explain in what manner, if any, were those considerations communicated to the Commission prior to the issuance of the Commission's Secretarial Letter to Allegheny Power dated December 10, 2010.

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**COMPLAINANT'S DATA REQUEST
J3 ENERGY GROUP, INC. V. WEST PENN POWER COMPANY
COMPLAINT DOCKET NO. C-2011-2219920**

QUESTION NO. 9 Continued

RESPONSE:

1. Frank Mossburg, Managing Director
2. Pennsylvania Public Utility Commission Staff
3. Mr. Mossburg stated that this consideration was presented as part of his oral presentation to the Pennsylvania Public Utility Commission Staff on the RFP results.
4. Per Mr. Mossburg there are no documents where those considerations are discussed or memorialized. Mr. Mossburg stated that this consideration was presented as part of his oral presentation to the Pennsylvania Public Utility Commission Staff on the RFP results.
5. Please see the answers to Question No. 8, subparts 2, 3 and 4.

Response provided by: R. B. Reeping

**COMPLAINANT'S DATA REQUEST
J3 ENERGY GROUP, INC. V. WEST PENN POWER COMPANY
COMPLAINT DOCKET NO. C-2011-2219920**

DOCUMENT NO. 3

All formal or informal communications between Respondent and the Commission related to the decision to average the pricing contained in the four spreadsheets submitted with J3's Part 2 proposal.

RESPONSE:

As stated, there are no documents for production.

Response provided by: R. B. Reeping

**COMPLAINANT'S DATA REQUEST
J3 ENERGY GROUP, INC. V. WEST PENN POWER COMPANY
COMPLAINT DOCKET NO. C-2011-2219920**

DOCUMENT NO. 4

All formal or informal communications between Boston Pacific and the Commission related to the decision to average the pricing contained in the four spreadsheets submitted with J3's Part 2 proposal.

RESPONSE:

As stated in the previous answers there are no documents including communications for production.

Response provided by: R. B. Reeping

**COMPLAINANT'S DATA REQUEST
J3 ENERGY GROUP, INC. V. WEST PENN POWER COMPANY
COMPLAINT DOCKET NO. C-2011-2219920**

DOCUMENT NO. 6

All evaluation materials, including reports of evaluation, memorandum, notes or other written or recorded material, not produced under Document Requests 1-5, that was prepared by Respondent or Boston Pacific during the course of evaluation and discusses or memorializes the decision to average the pricing contained in the four spreadsheets submitted with J3's Part 2 proposal.

RESPONSE:

As stated in the previous answers there are no documents for production which discuss or memorialize the decision to average the pricing contained in the four spreadsheets submitted with J3's Part 2 proposal.

Response provided by: R. B. Reeping

ATTACHMENT 3

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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J3 ENERGY GROUP, INC.)
Complainant,)
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v.)
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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 for the Testimony of Pennsylvania Public Utility Staff Member Paul Diskin on the individuals identified below by the method indicated:

By FedEx Next Day:

By Email and First Class Mail

Paul Diskin
Director, Bureau of Technical Utility Services
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 3rd Floor
400 North Street
Harrisburg, PA 17120

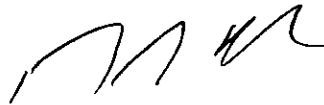
John L. Munsch, Esq.
West Penn Power Company
800 Cabin Hill Drive
Greensburg, PA 15601

Bohdan R. Pankiw, Esq.
Chief Counsel, Law Bureau
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, Ground Floor
400 North Street
Harrisburg, PA 17120

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

Date: February 8, 2012

Attorney for Complainant



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

Ship Date: 08FEB12

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Part # 156297-235

TO

(717) 772-7777

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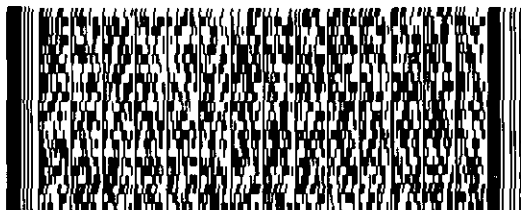
400 N STREET
COMMONWEALTH KEYSTONE BLDG.
HARRISBURG, PA 17120

(US)

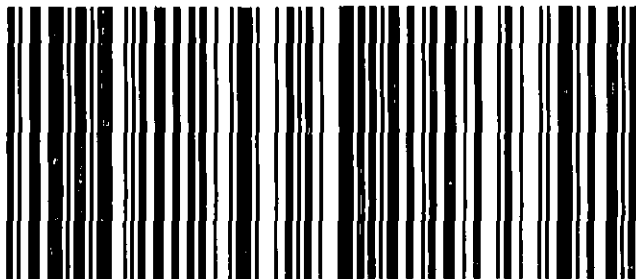


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