



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

February 15, 2012

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
Docket No. C-2011-2219920**

Dear Secretary Chiavetta:

Enclosed for filing is an original and three copies of Objections by the Bureau of Technical Utility Services to the Application for Subpoena submitted by J3 Energy Group, Inc. seeking to compel the testimony of Paul Diskin, Director, Bureau of Technical Utility Services, in the above-referenced matter. Copies have been served according to the attached certification of service.

Sincerely,

Kriss E. Brown
Law Bureau
(Counsel for the Bureau of Technical Utility
Services)

Enclosures

cc: Per Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Complaint Docket No. C-2011-2219920

Objections to the Application for Subpoena Submitted by J3 Energy Group, Inc. Seeking the Testimony of Paul Diskin, Director, Bureau of Technical Utility Services, Filed by the Law Bureau on Behalf of the Bureau of Technical Utility Services

The Bureau of Technical Utility Services (TUS), through its counsel, Kriss E. Brown, file this objection to the application by J3 Energy Group, Inc. (J3) to subpoena Paul Diskin, the Director or the Pennsylvania Public Utility Commission's (Commission) Bureau of TUS, to testify to, among other things, the information, recommendations and supporting analysis provided to the Commission regarding the results of a Request for Proposal (RFP) for solar photovoltaic alternative energy credits (SAECs) conducted by West Penn Power Company (West Penn). Specifically, TUS objects to the request for a subpoena compelling Paul Diskin to testify to the opinions, recommendations and advice he and TUS staff provided to the Commission during the Commission's deliberative process in determining whether to approve the RFP as such communications is protected by the deliberative process privilege.

In addition, TUS objects to the general release of information, data and analysis contained in documents covered by the October 17, 2011 Protective Order, issued by Administrative Law Judge Elizabeth H. Barnes, under the above-captioned Docket, through the testimony of Paul Diskin. TUS, however, does not object to making Paul Diskin available for testimony regarding facts and information not covered by the deliberative process privilege,

provided that any protected information that may be solicited and presented in testimony be protected in accordance with any Protective Order issued in the above-captioned Docket.

BACKGROUND

1. On or about February 9, 2012, J3 submitted an application for issuance of a subpoena requiring Paul Diskin, Director, Bureau of TUS to testify at a hearing. In support of its request for the subpoena, J3 asserts that the testimony that Paul Diskin will provide will have the following relevance, materiality and scope:

- a. The factual information relevant and material to the issue of justifiable reliance by West Penn on the Commission's approval of the RFP includes: (1) an understanding of the roles, duties and responsibilities of West Penn, Boston Pacific and the Commission during the RFP solicitation and evaluation process; (2) the information, recommendations and supporting analysis conveyed to the Commission; (3) whether the Commission was fully and accurately informed by West Penn and Boston Pacific; (4) 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 RFP.
- b. Paul Diskin, as the Commission's monitor, understands the Commission's role in the procurement, as well as his personal knowledge of the procurement, bid day events and discussions, and December 8, 2010 oral presentation by Boston Pacific Company, Inc. go directly to the questions identified above.
- c. The absence of a written record memorializing the decision to average J3's spreadsheets further supports the need for testimony by individuals involved in order to understand the facts and analysis before the Commission prior to the approval of the RFP.

DISCUSSION

3. As indicated in J3's application, Paul Diskin, acting within his Commission duties, monitored the RFP at issue and its results. In addition, Paul Diskin, acting within his

Commission duties, reviewed the RFP bid results and the confidential report produced by Boston Pacific Company, Inc. (Boston Pacific), was present during the December 8, 2010, Boston Pacific oral presentation to the Commission and provided oral and written analysis, opinions, recommendations and advice to the Commission regarding the RFP at issue.

4. The Commonwealth Court in *Commonwealth of Pa. v. Pa. Pub. Util. Comm'n*, 331 A.2d 598, upheld the Commission's refusal to allow interested parties access to technical staff reports that analyze and recommend positions that were used by the Commission to determine whether to approve tariff changes. The Commonwealth Court held that it "must recognize and respect the pronouncement that the decisional process of an administrative agency must be free from public or private inquisition either by the investigative or appellate device." *Commonwealth*, 331 A.2d at 601.

5. More recently, the Pennsylvania Supreme Court, in *Tribune-Review Publ'g Co. v. Dep't of Cmty. and Econ. Dev.*, 580 Pa. 80, 92, 859 A.2d 1261, 1269, explained when the deliberative process privilege applies.¹ Specifically, the Supreme Court stated that

The deliberative process privilege permits the government to withhold documents containing confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice The privilege recognizes that if the government agencies were forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.

* * *

For the deliberative process privilege to apply, certain requirements must be met. First, the communication must have been made before the deliberative process was completed. Second, the communication must be deliberative in character. It must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Information that is purely factual, even if decision-makers used it in their deliberations is usually not protected.

¹ While not adopting the deliberative process privilege, as the case was decided on other grounds, the Pennsylvania Supreme Court noted it agreed with the principles the Court expressed in support of the privilege in the *Unified Judicial System v. John O. Vartan*, 557 Pa. 390, 399-402, 733 A.2d 1258, 1263-1265. See *Tribune*, 580 Pa. at 93, 859 A.2d at 1269.

Tribune, 580 Pa. at 92-93, 859 A.2d at 1269 (quoting *Unified Judicial System v. John O. Vartan*, 557 Pa. 390, 399-401, 733 A.2d 1258, 1263-1264).

6. As the opinions, recommendations and advice provided to the Commission by Paul Diskin regarding the RFP at issue were provided to the Commission prior to the Commission approving the RFP and express legal or policy recommendations or opinions such opinions, recommendations and advice are protected from discovery in this and any appellate proceeding as privileged communications. Therefore, TUS objects to a subpoena compelling Paul Diskin to testify to the oral and written opinions, recommendations and advice he and other Commission staff may have provided to the Commission regarding the approval of the RFP at issue. TUS, however, does not object to a subpoena compelling Paul Diskin to testify to facts related to the RFP solicitation, selection process or results or the Commission's RFP approval process.

7. Furthermore, TUS objects to the general release of all correspondence, documents, data, information, and other materials that were produced by Boston Pacific that are covered by the October 17, 2011 Protective Order, through the testimony of Paul Diskin. TUS requests that any testimony providing the protected correspondence, documents, data, information and other materials produced by Boston Pacific be made available only in accordance the October 17, 2011 Protective Order and all other Protective Orders issued in this proceeding.

CONCLUSION

TUS objects to the issuance of a subpoena compelling Paul Diskin to testify to the oral and written opinions, recommendations and advice he and other Commission staff may have provided to the Commission regarding the approval of the RFP at issue. TUS, however, does not object to a subpoena compelling Paul Diskin to testify to facts related to the RFP solicitation, selection process or results or the Commission's RFP approval process. Furthermore, TUS objects to the release, through the testimony of Paul Diskin, of protected correspondence, documents, data, information, and other materials that were produced by Boston Pacific to the public, to include, but not limited to, the officers, directors, stockholders, partners, owners or employees of J3. TUS, however, does not object to the release, through the testimony of Paul Diskin, of the protected correspondence, documents, data, information, and other materials that were produced by Boston Pacific to counsel for J3 and eligible outside experts, as well as West Penn and its counsel in accordance with the October 17, 2011 Protective Order.

Respectfully submitted,



Kriss E. Brown
Assistant Counsel
Law Bureau of the
Pennsylvania Public Utility Commission
Counsel for the Bureau of Technical Utility
Services

P.O. Box 3265
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(717) 787-5000


Dated: February 15, 2012

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VERIFICATION

I, Paul T. Diskin, Director, Bureau of Technical Utility Services, hereby state that the facts set forth in the attached Objection to the Application for Subpoena Submitted by J3 Energy Group, Inc. Seeking the testimony of Paul T. Diskin are true and correct to the best of my knowledge, information, and belief, and that I expect to be able to prove the same at any hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to the unsworn falsification to authorities.

Date: 2-15-12



Paul T. Diskin

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Bureau of Technical Services Objections to the Application for Subpoena submitted by J3 Energy Group, Inc. seeking documents prepared by Frank Mossburg, Managing Director of Boston Pacific Company, Inc., in accordance with the requirements of § 1.54 (relating to service by a party):

Service by First Class Mail:

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

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

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

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



Kriss E. Brown
Law Bureau
Attorney ID #89036
Pennsylvania Public Utility Commission
Counsel for the Bureau of Technical Utility
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Dated: February 15, 2012

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