

May 22, 2012

VIA FEDEX OVERNIGHT

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

**Re: J3 Energy Group, Inc., v. West Penn Power Company
Confidential and Public Versions of West Penn Power
Company's Main Brief; Complaint Docket No. C-2011-2219920**

Dear Secretary Chiavetta:


Enclosed please find an original and nine (9) copies of public and confidential versions of the Main Brief of West Penn Power Company in the above-referenced proceeding.

The Main Brief is being filed electronically in public (redacted) version and via FEDEX overnight in both public and confidential versions. The confidential version contains proprietary information that is protected information under Protective Orders issued in the proceeding.

West Penn is serving electronic copies of its Main Brief via email to the Administrative Law Judge and to J3's counsel.

Paper copies of both versions of the Main Brief are being served as indicated in the attached Certificate of Service.

Very truly yours,


John L. Munsch
Attorney

Enclosure

cc: Elizabeth H. Barnes, Administrative Law Judge
Certificate of Service

Pennsylvania Public Utility Commission;
Re: J3 Energy Group, Inc., v. West Penn Power Company; Docket No. C-2011-2219920

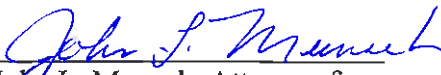
CERTIFICATE OF SERVICE

I hereby certify that I have this day served by FEDEX, overnight mail, **West Penn Power Company's Main Brief** addressed as follows:

Thomas J. Russial, Esq.
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Bethel Park, PA 15102

Elizabeth H. Barnes
Administrative Law Judge
PO Box 3265
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Date: May 22, 2012


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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

MAIN BRIEF OF WEST PENN POWER COMPANY

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Dated: May 22, 2012

TABLE OF CONTENTS

	<u>Page No.</u>
I. Introduction	1
II. Procedural History	2
III. Factual History	5
IV. Summary of Argument	13
V. Argument.....	15
A. “All or Nothing” and “Up To” Designations.....	15
1. J3 misinterpreted the designation of “All or Nothing” in designating its bid-form spreadsheets.....	15
2. The Commission representative agreed with the averaging of J3’s bid-form spreadsheets.....	18
3. J3’s interpretation disregards any distinction between “all or nothing” and “up to” bids and would lead to serious evaluation contradictions.....	20
4. J3’s admitted inexperience in bidding may have led to its incorrect offer type designation.....	21
B. West Penn’s Reliance on Commission’s Approval.....	23
1. West Penn correctly followed the RFP rules as approved by the Commission and it followed Commission regulations in performing its procurement.	23
2. West Penn justifiably relied on Commission’s December 10, 2010 approval of the RFP results.....	26
3. J3 incorrectly argued that West Penn’s reliance on the Commission’s December 10, 2010 Secretarial Letter should have been raised as New Matter by West Penn.....	27

TABLE OF CONTENTS (cont'd.)

	<u>Page No.</u>
C. J3 failed to employ the publicly available process for asking questions about the RFP terminology even though J3 states that if found the RFP “non-sensical”	30
D. J3’s contention that Bid day should have been interrupted or cancelled, or that West Penn or evaluators should have contacted bidders, presents an inappropriate scenario.	31
E. It is uncontroverted that all bidders were treated uniformly and in accordance with RFP Rules.	32
F. J3 inappropriately speculates on other bidders’ rationales or intentions....	33
G. J3 mischaracterizes explanations provided on West Penn’s webpage.	33
H. The effect of the purported RFP error, alleged by J3, upon the ratepaying customers of West Penn would be minimal.	34
VI. Conclusion	35

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

MAIN BRIEF OF WEST PENN POWER COMPANY

I. Introduction

West Penn Power Company (“West Penn”) conducted a Request for Proposals (“RFP”) for the purchase by West Penn of solar photovoltaic alternative energy credits (“SPAECs”) on December 3, 2010. West Penn’s RFP was conducted pursuant to the Opinion and Order of the Pennsylvania Public Utility Commission (“Commission”) entered September 8, 2010, at Docket No. P-00072342. The Commission’s September 8, 2010, Order approved West Penn’s Petition for modification of West Penn’s default service plan to allow for the procurement of SPAECs. West Penn also requested, and the Commission approved, the use of specific procurement documents for the West Penn procurement.

The RFP was personally monitored on-site in Greensburg, Pennsylvania, by a Commission representative, Paul T. Diskin, and was personally overseen on-site by an Independent Procurement Manager (“IPM”) Boston Pacific Company, Inc. (“Boston Pacific”).

On December 10, 2010, the Commission issued a Secretarial Letter to West Penn approving the results of the RFP. West Penn followed the approval with a public announcement

of the RFP winners and entered contracts with the RFP winners. The delivery of the SPAECs commenced and continues to the present.

J3 Energy Group, Inc. (“J3”) participated in West Penn’s procurement but was not successful in the RFP award. J3 filed a formal complaint with the Commission on January 3, 2011, contending that its RFP offer had been incorrectly evaluated and requesting that the Commission overturn the RFP results.

II. Procedural History¹

On January 10, 2011, J3 filed a formal complaint contending that West Penn had incorrectly evaluated the bid that J3 had submitted to supply SPAECs in response to a competitive RFP issued by West Penn. J3’s bid had not been selected in the RFP process.

West Penn answered the complaint on February 2, 2011, and stated that its evaluation of J3’s SPAEC bid proposal was correct. West Penn stated that it followed its default service procurement process for SPAECs, as approved by the Commission Order entered September 8, 2010, at Docket No. P-00072342,² and that West Penn’s competitive bid solicitation was further conducted pursuant to Commission regulations at 52 Pa. Code §54.186.

A Prehearing Conference was held on August 8, 2011, and a Scheduling Order was issued setting the procedural schedule for the case, with a hearing date of October 17, 2011. Thereafter, the ALJ was notified on or about September 16, 2011, that the parties had reached a settlement and they requested the scheduling order be modified such that testimony would not

¹ The procedural history is drawn in part from the Administrative Law Judge Order Denying Cross Motions for Summary Judgment dated February 1, 2012.

² *Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period (Petition of Allegheny Power to Modify its Procurement of Solar Alternative Energy Credits and Alternative Energy Credits Under its Default Service Plan)*, P-00072342, Opinion and Order dated September 8, 2010. This Opinion and Order allowed West Penn to acquire solar and non-solar Tier 1 AECs through an RFP process utilizing long-term procurement contracts in lieu of AEC purchases related to spot market supply being acquired solely on the spot market.

longer be due October 7, 2011. The parties requested until October 17, 2011, to submit a joint petition for settlement. This was ordered in an Amended Scheduling Order dated September 23, 2011. However, as the oral agreement was never reduced to writing, a second Prehearing Conference was held on October 17, 2011. A second Amended Scheduling Order and Order Granting the Motion to Compel filed by West Penn against J3 Energy Group, Inc. was issued on October 17, addressing discovery issues and setting a deadline for an anticipated Motion for Summary Judgment of November 15, 2011. The Order further established other procedural deadlines, including an evidentiary hearing on January 5, 2012.³

J3 filed a Motion for Summary Judgment on November 15, 2011, and on December 5, 2011, West Penn filed an Answer and Cross-Motion for Summary Judgment. The parties requested a further amendment to the procedural schedule. On December 8, 2011, a Third Amended Scheduling Order was issued giving J3 until December 22, 2011 to file an answer to the cross-motion for summary judgment, and establishing a new deadline for direct testimony of January 24, 2012. This procedural order was later suspended on January 20, 2012, until a decision could be rendered regarding the cross-motions for summary judgment.

The ALJ issued an Order Denying Cross Motions for Summary Judgment dated February 1, 2012. The ALJ's Order determined that there were genuine issues of facts to be determined concerning the parties' different views on the procurement process, and that the proceeding could not be concluded based on the parties' pleadings, answers to interrogatories and admissions.

³ Three Protective Orders were issued by the ALJ in response to requests of parties that information sought during discovery should remain confidential. Commission regulation at Section 54.186(c)(5) provides that competitive bid solicitation shall remain confidential, as provided in the RFP's confidentiality agreement approved by the Commission. The first Protective Order, dated July 19, 2011, covered bid solicitation information provided to J3 by West Penn pursuant to discovery requests of J3. The second Protective Order, dated October 17, 2011, covered procurement information provided by the Independent Procurement Manager, Boston Pacific Company, to the Commission Staff as part of the procurement evaluation. The third Protective Order, dated October 28, 2011, covered information about J3's business operations provided to West Penn by J3 in discovery by West Penn.

In an Order dated March 1, 2012, the ALJ issued a procedural schedule for written direct and rebuttal testimony, hearings on May 1 and, if necessary, on May 2, and briefs. J3 submitted an application for issuance of subpoena to requesting that the ALJ approve a Subpoena directing that a Commission Staff member, Paul Diskin, Bureau Director, Bureau of Technical Utility Services, be available to testify at the hearing scheduled for May 1, 2012. The Subpoena request was approved by the ALJ and a Subpoena was issued dated March 1, 2012.

A hearing was held at the Commission's Harrisburg offices on Tuesday, May 1, 2012, resulting in a transcript of 216 pages, some of which were classified as proprietary as including information covered by the Protective Orders.

J3 presented the written direct and written rebuttal testimony of Stephen C. Russial, President and Owner of J3.⁴ Mr. Russial answered questions upon cross examination by West Penn's counsel.

J3 also presented the written direct and written rebuttal testimony of Curtis W. McBride, an independent consultant who consults on procurement matters for TechSource, Inc., of Los Alamos, New Mexico. West Penn allowed the admission of Mr. McBride's written testimony by stipulation without cross examination. Mr. McBride also offered oral surrebuttal testimony at the May 1 hearing.⁵

West Penn presented written direct and written rebuttal testimony of Frank Mossburg, Managing Director of Boston Pacific Company, Inc., which was the IPM for West Penn's procurement for solar RECs held December 3, 2011.⁶ Mr. Mossburg's written direct testimony

⁴ Mr. Russial submitted written direct testimony in confidential version and a public (redacted) version. Mr. Russial's written rebuttal testimony was submitted in public form only.

⁵ The written direct and rebuttal testimony of Mr. McBride was submitted in both a confidential version and a public (redacted) version, pursuant the ALJ's Protective Orders.

⁶ The written direct and rebuttal testimony of Mr. Mossburg was submitted in both a confidential version and a public (redacted) version, pursuant the ALJ's Protective Orders.

was identified and admitted as West Penn Statement No. 2, and Mr. Mossburg's written rebuttal testimony was identified and admitted as West Penn Statement No. 2-R. Mr. Mossburg answered questions upon cross examination by J3's counsel.

West Penn also presented written direct and written rebuttal testimony⁷ of Robert B. Reeping, Manager of Regulated Commodity Sourcing for Allegheny Energy Service Corporation a subsidiary of FirstEnergy Corp.⁸ Mr. Reeping's written direct testimony was identified and admitted as West Penn Statement No. 1, and Mr. Reeping's written rebuttal testimony was identified and admitted as West Penn Statement No. 1-R. Mr. Reeping answered questions upon cross examination by J3's counsel.

Mr. Diskin of the Commission Staff appeared at the May 1, 2012, hearing pursuant to subpoena and answered questions upon examination by J3 and by West Penn. Mr. Diskin was represented by counsel from the Commission's Law Bureau.

III. Factual History

Pursuant to the Electric Generation Competition and Customer Choice Act, 66 Pa. C.S. §§ 2801-2812, West Penn filed its restructuring plan at Docket No. R-00973981 in August 1997. By Final Order entered November 19, 1998, the Commission approved a settlement of the proceeding which extended West Penn's generation rate cap to the end of 2008. West Penn's generation rate caps were later extended until December 31, 2010, pursuant to a Commission Order entered May 11, 2005, at Docket Nos. R-00973981 and R-00039022.

⁷ The written direct testimony of Mr. Reeping was submitted in both a confidential version and a public (redacted) version, pursuant the ALJ's Protective Orders. The written rebuttal testimony of Mr. Reeping was submitted in a public form only.

⁸ West Penn and Allegheny Energy Service Corporation are subsidiaries of Allegheny Energy, Inc. Allegheny Energy, Inc. became a subsidiary of FirstEnergy Corp. through merger proceedings approved by several regulatory bodies including Commission approval in an Opinion and Order entered February 28, 2011, at Commission Docket Nos. A-2010-2176520 and A-2010-2176732.

On October 25, 2007, West Penn filed a Petition for Approval of its Retail Electric Default Service Plan and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Plan. After a fully litigated proceeding, the Commission approved West Penn's Petition, as modified through the litigated proceeding, by Order entered July 25, 2008. West Penn's default service plan encompasses a period of twenty-nine months beginning January 1, 2011, and ending May 31, 2013.

On July 29, 2010, West Penn filed a Petition requesting Commission approval to amend West Penn's default service plan by modifying its procurement process to acquire SPAECs and other Tier I alternative energy credits ("AEC"). West Penn's July 29, 2010 Petition was included in the record as Exhibit RBR-1 to the written Direct Testimony of Robert B. Reeping, West Penn Power Company Statement No 1. The proposed modification applied only to West Penn's default service plan's spot market purchases. West Penn proposed to run two distinct RFPs; one for SPAECs and one for other Tier I AECs. Potential bidders would have the opportunity to participate in either or both solicitations which were to be held concurrently.

At the time of West Penn's Petition in July of 2010, the Commission was promulgating guidelines designed "to provide the longer term revenue stability that is likely needed to support both small scale and large scale solar development, and to address other barriers that could prevent new solar projects from coming to fruition in Pennsylvania."⁹

The Commission's Proposed Guidelines reiterated the requirement in the Default Service Regulations at Section 54.186 that the Commission should review and evaluate the results of utility procurements for large and small-scale solar projects, stating that the Commission will review and evaluate bids for large-scale and small-scale solar RFPs within a reasonable period of

⁹ Proposed Policy Statement, Order entered December 10, 2009, at Docket No. M-2009-2140263; p.1.

time.¹⁰ The Commission entered its Final Policy Statement Order on September 16, 2010,¹¹ shortly after its approval of West Penn's Petition. The final Commission Guidelines for solar RFPs were largely unchanged from its December 2009 proposed policy. Both the proposed and final Policy Statement of the Commission sought to "promote the construction of small-and large-scale solar projects in this Commonwealth ... of any size...."

West Penn's July 29, 2010, Petition for modification of its Default Service Program specifically requested Commission approval of West Penn's proposed RFP documents. In particular, West Penn's Petition requested approval of its "Request for Proposal Rules" and it sought approval of its "Bid Form Spreadsheet."¹² West Penn's concluding "Wherefore" Paragraph stated: "Wherefore, Allegheny Power¹³ requests that the Pennsylvania Public Utility Commission approve Allegheny Power's request to modify its Default Service Plan to allow the purchase of solar Renewable Energy Credits and other Tier I Alternative Energy Credits through 120-month and 125-month term contracts using procurement documents listed herein." (Emphasis added, footnote added.)

West Penn's July 29, 2010 Petition was served on all parties to West Penn's original default service proceeding at Docket No. P-00072342. West Penn's July 29, 2010 Petition was not opposed.

Without qualification or alteration the Commission approved West Penn's July 29, 2010 Petition by Opinion and Order entered September 8, 2010, at Docket P-00072342. The Commission's Opinion and Order specifically recognized that "Allegheny has included as part of its Petition, the procurement documents it proposes to utilize...." Opinion and Order at p. 5. In

¹⁰ The Proposed Commission Guideline was proposed to be listed at Section 69.2903(a) and (b) of the Commission Guidelines.

¹¹ Final Policy Order entered September 16, 2010 at Docket No. M-2009-2140263.

¹² West Penn July 29, 2010 Petition at Paragraph No. 15 (Exhibit RBR-1).

¹³ West Penn formerly conducted business under the trade name "Allegheny Power."

its approval of West Penn's July 29, 2010 Petition, the Commission referred to its proposed Policy statement stating: "[t]he intent of this Policy statement is to provide the longer term revenue stability that is likely needed to support both small scale and large scale solar development, and to address other barriers that could prevent new solar projects from coming to fruition in Pennsylvania."¹⁴

West Penn's competitive bid solicitation was further conducted in accordance with Commission regulations at 52 Pa. Code §54.186. The regulations require that default service procurement be monitored by the Commission and by an independent third party evaluator. The regulations state:

(3) A competitive bid solicitation process used as part of the implementation plan will be subject to monitoring by the Commission or an independent third party evaluator selected by the DSP in consultation with the Commission. A third party evaluator shall operate at the direction of the Commission. Commission staff and a third party evaluator involved in monitoring the procurement process shall have full access to all information pertaining to the competitive procurement process, either remotely or where the process is administered. A third party evaluator retained for purposes of monitoring the competitive procurement process shall be subject to confidentiality agreements identified in § 54.185(d)(6) (relating to default service programs and periods of service).

(4) The DSP or third party evaluator shall review and select winning bids procured through a competitive bid solicitation process in a nondiscriminatory manner based on the price determinative bid evaluation criteria set forth consistent with paragraph (1)(vi).

52 Pa. Code §54.186(c)(3) and (4).

As anticipated by Commission regulations West Penn, in consultation with the Commission,¹⁵ hired Boston Pacific Company, Inc. as the IPM for the RFPs, both Tier I (non

¹⁴ Opinion and Order entered September 8, 2010 at Docket P-00072342, p. 4 (Exhibit RBR-2, p. 4)

¹⁵ See Diskin Testimony, Proprietary Transcript, pp. 91 to 92.

solar) and solar. Boston Pacific was selected in September 2010 after the Commission's approval of West Penn's RFP.¹⁶ In accord with Commission regulations Boston Pacific reported to the Commission and was paid by West Penn. Boston Pacific's scope of work for the RFP included RFP document review, protection from public disclosure of data, pre-bid review with the Commission, onsite bid day monitoring, and evaluation of the RFP and the bid results.¹⁷

In preparation for the RFP Boston Pacific and West Penn conducted a webinar and posted questions and answers on West Penn's public website. Bidders were encouraged to ask questions about the RFP process and the questions and the answers were posted on the website. J3 and all other bidders had ample opportunity to submit questions about the RFP Process. J3 did not avail itself of the opportunity to ask questions or to seek clarification of the RFP terminology of "all or nothing" or "up to."¹⁸ J3 had submitted questions prior to bid day concerning collateral (bidders' security) issues, and it submitted a post-bid question in which it inquired how bids had been evaluated, but J3 did not inquire before bid day about the evaluation of offers or RFP terminology. Only after the RFP awards were public did J3 use the public question process to inquire about the RFP evaluation methodology.

In the RFP suppliers competed for two distinct contracts: (a) a 10-year, 5-month contract for delivery of 200 SPAECs per year beginning January 1, 2011 and continuing through May 31, 2012, and (b) a 10-year contract for 800 SPAECs per year beginning June 1, 2011 and ending May 31, 2021. The ten-year contract was further broken into four "blocks" or "tranches" of 200 SPAECs each.¹⁹

¹⁶ West Penn Statement No. 2. p.4.

¹⁷ WPPCo. Statement No. 1, pp. 8-10.

¹⁸ Transcript pp. 39 to 40, 54 to 56.

¹⁹ WPPCo. Statement No. 2, p. 5.

The major point of contention in the proceeding is the use of the offer type designations of “all or nothing” and “up to.” Bidders were provided the opportunity to designate their bid-form spreadsheets as “all or nothing,” meaning that bidders would not be bound to supply tranches of SPAECs in quantities other than those offered. The theory behind the “all or nothing” designation was to account for the developing nature of renewable generation industry. The “all or nothing” designation was meant to accommodate bidders that may plan to build a solar installation based on winnings in West Penn’s RFP, but who may be unable to construct their installation if they won less than their total offered quantities.²⁰

Section 7.10 of the RFP provided the basis for “all or nothing” offers and it contrasted the “all or nothing” offer with the more typical “up to” offer. Section 7.10 provided:

Recognizing that the magnitude of SPAEC sales to the Company may affect financing or other commercial considerations for Qualified Bidders, All-or-Nothing Bids will be allowed, such that Qualified Bidders will not be bound to supply SPAECs in quantities other than those Bid. Unless indicated as an All-or-Nothing Bid, Bids will be considered an offer to supply any quantity up to and including the number of Tranches specified in the Bid (an “Up-to Bid”).

Bid day was held December 3, 2010. The bid room was a secure conference room at West Penn’s offices in Greensburg, Pennsylvania. Per the RFP schedule Part 2 proposals including bid-form spreadsheets would be accepted between the hours of 9 a.m. and 12 noon Eastern Time. In the bid room were Company representatives Robert B. Reeping, General Manager, Electric Supply; Helen L. Taylor, West Penn Specialist; Boston Pacific representative Frank Mossburg, Managing Director; and Commission representative Paul T. Diskin, Manager, Bureau of Fixed Utility Services, now the Director of the Commission’s Technical Utility Services.

²⁰ WPPCo. Statement No. 1, p. 16-17.

On bid day Part 2 proposals were submitted by those suppliers who had submitted an initial application in which prospective suppliers were qualified to submit Part 2 proposals.²¹ The Part 2 proposals were submitted by suppliers by fax to the bid room.²² Once received each Part 2 submission was reviewed by a West Penn representative to ensure it was in compliance with the RFP rules. Once validated the Part 2 documents were provided to Boston Pacific for concurrence that the Part 2 documents were complete. If required information associated with the Part 2 documents was found to be missing, a call would be placed from the bid room by speaker phone to the bidder to notify them of such deficiency and to make them aware that their bid would not be considered unless such deficiency was addressed prior to the closing of the bid window.

Once the Part 2 documents were validated Boston Pacific reviewed and independently validated each bid-form spreadsheet that was submitted with the Part 2 documents. The independent validation was conducted to ensure that each faxed bid-form spreadsheet was not altered or that an unknown error in the Excel program, in which the bid-form spreadsheet was developed, had not provided an anomalous result. Once Boston Pacific validated each bid-form spreadsheet, the Discounted Price For Evaluation Purposes and the offer type for each bid-form spreadsheet submitted by that supplier were entered by Boston Pacific into an evaluation template. The Part 2 documents were then returned to a Company representative. A call was then placed by speaker phone to each supplier who had submitted the Part 2 documents to confirm that the Company had received their Part 2 documents and to confirm the Discounted Price For Evaluation Purposes and the offer type for each bid-form spreadsheet submitted. Once

²¹ Seven (7) suppliers were eligible to participate in the Tier I AEC RFP and eleven (11) suppliers were eligible to participate in the SAEC RFP.

²² The bid-form spreadsheets were filled out by the suppliers in an Excel program provided by West Penn on its public website and the bid-form spreadsheets were then faxed by the suppliers to the West Penn fax in the West Penn bid room.

the confirmation call was completed a Company representative entered the Discounted Price For Evaluation Purposes and the offer type for each bid-form spreadsheet submitted by that supplier into a separate evaluation template. The Part 2 documents were then provided to the Commission representative for their review and evaluation.

Once the bid window closed at 12 noon supplier offers were independently evaluated by Boston Pacific, Commission staff and West Penn by the Discounted Price for Evaluation Purposes and the offer type submitted by each of the suppliers with their Part 2 proposals. Winning bidders were then identified and confirmed by Boston Pacific, Commission staff and West Penn for each of the RFPs based upon the evaluation criteria established in the RFP rules.²³

As anticipated by Commission regulations and by the RFP Rules, the IPM made a presentation to the Commission concerning the bid evaluation.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁴

²³ WPPCo. Statement No. 1, pp. 12 to 14.

²⁴ Proprietary testimony of Paul T. Diskin; Proprietary Transcript pp. 82 to 84; Proprietary testimony of Frank Mossburg, WPPCo. Statement No. 2, p. 13.

The RFP rules at Section 9.19 provided that the Commission would have three (3) business days after report submission by the IPM to decide whether or not to approve the results.²⁵ Section 9.19 further provides that after the Commission's decision, "[t]he company or IPM will notify all Bidders of the PaPUC's decision."

On December 10, 2010, the Commission issued a Secretarial Letter to West Penn stating that the RFP results from the December 3, 2010 procurement were approved. The Secretarial Letter provided:

*West Penn requested that the Commission approve the bid results from this AEC procurement on or before December 10, 2010. Further investigation does not appear warranted at this time, since procurement appears to have been conducted in accordance with the RFP process and rules, filed pursuant to the Commission's Opinion and Orders. Therefore, we approve the bid results submitted for this AEC procurement.*²⁶

In reliance on the Commission's approval of the procurement results West Penn announced the RFP winners and executed agreements with the winning Tier I and Solar bidders. West Penn and the winning bidders commenced delivery of the Tier I and Solar products, and such delivery continues to the present.²⁷

IV. Summary of Argument

J3 misinterpreted the plain meaning of the RFP terminology of "all or nothing" versus "up to" in RFP Section 7.10 and the subsequent application of Section 7.10 to the evaluation of J3's Part 2 proposal including its bid-form spreadsheets. J3 admits in its testimony that it formed

²⁵ The Default Service Rules at Section 54.188(d) provide that "the Commission will have one (1) business day, to approve or disapprove the results of a competitive bid solicitation process used by a DSP as part of its procurement plan." The Commission Guidelines for Pennsylvania Solar Projects provide for a more flexible deadline for the Commission, stating that "[t]he Commission will review and evaluate bids for [large and small] scale solar RFPs within a reasonable period of time." 52 Pa. Code § 69.2903(a) and (b)(1) (emphasis added).

²⁶ Exhibit RBR-3. Secretarial Letter dated December 10, 2010 at Docket No. P-00072342.

²⁷ WPPCo. Statement No. 1, pp. 21 to 22.

its own opinion of the RFP language and supplemental information provided through the question and answer forum, yet none of the language J3 identifies in support of its position discusses the application of the offer type designation of “all or nothing” versus “up to” and how the RFP evaluation would be completed based on the way J3 submitted its bid-form spreadsheets. Further, J3 states in its testimony that it chose not to seek clarification before or on bid day through the question and answer RFP forum of the offer type designation of “all or nothing” versus “up to” and the application of Section 7.10 to the evaluation process of its own accord even though J3 testified that marking a bid-form spreadsheet with a single tranche would be, in J3’s opinion, “non-sensical”²⁸ yet then goes on to say that the Offer Type to J3 made “no difference”.²⁹

West Penn fully, reasonably and justifiably relied on the Commission’s Secretarial Letter of December 10, 2010, approving the RFP results when West Penn went ahead and announced the RFP winners and entered contracts. Furthermore, West Penn’s RFP process, RFP Rules and specific documents used by West Penn in its RFP -- including the form of the bid-form spreadsheets – were approved by the Commission in its Opinion and Order entered September 8, 2010 at Docket No. P-00072342, in which it approved West Penn’s modified Default Service Plan.

²⁸ Russial direct at p. 8.

²⁹ Transcript p. 54.

V. Argument

A. “All or Nothing” and “Up To” Designations

1. **J3 misinterpreted the designation of “All or Nothing” in designating its bid-form spreadsheet.**

J3 submitted four bid-form spreadsheets for the 10-year terms of June 1, 2011 to May 31, 2021. On each of its four bid-form spreadsheets J3 designated that it was bidding for one tranche as “all or nothing.” The testimony of West Penn’s Mr. Reeping, of Boston Pacific’s Mr. Mossburg and of the Commission’s Mr. Diskin was unanimous and consistent that such an “all or nothing” submission by J3 made little sense and contradicted the RFP rules.

It was recognized by all parties, including J3, that RFP rules clearly stated that a bidder could not bid on less than a full tranche. J3’s Mr. Russial stated on cross examination: “The RFP is clear that each bid was going to be an offer for a certain volume for a full 10-year or 10-year plus 5-month period.”³⁰ Thus, it made little or no sense for a bidder to designate a bid sheet for a single tranche as “all or nothing” because the RFP rules clearly provide that nothing less than a full tranche would be awarded. That is, even though the tranche on the bid-form spreadsheet was segregated by reporting year (6/1/2011 to 5/31/2012, then 6/1/2012 to 5/31/2013, and so on to 6/1/2020 to 5/31/2021) to allow for a different price per SPAEC for each reporting year in the 10-year tranche, nothing less than the full 10-year tranche would be awarded. The RFP rules prohibited awarding single years out of the 10-year tranche.

The simplest and most likely reason that J3 submitted its individual bid sheets designated as “all-or –nothing” is that J3 misread Section 7. 10 of the RFP Rules. Section 7. 10 provides:

³⁰ Transcript p. 41.

Recognizing that the magnitude of SPAEC sales to the Company may affect financing or other commercial considerations for Qualified Bidders, All-or-Nothing Bids will be allowed, such that Qualified Bidders will not be bound to supply SPAECs in quantities other than those Bid. Unless indicated as an All-or-Nothing Bid, Bids will be considered an offer to supply any quantity up to and including the number of Tranches specified in the Bid (an "Up-to Bid").

First, the second sentence starts out with the phrase "(u)nless indicated as an All or nothing Bid" which signifies that there is a special purpose for the "all-or-nothing" designation as part of the evaluation process. The special purpose was to allow bidders to designate their offers so that the bidders' offers would not be disaggregated into separate offers or awarded in amounts less than was designated under the "all-or-nothing" offer type. Since the RFP and subsequent FAQs made it clear that an award could not be made for anything less than a tranche then it is actually "non-sensical" to mark the offer as "all or nothing" unless J3 wanted all its similarly marked offers considered together. In the same vein the only logical offer type to mark for a single offer is the "up to" designation. Continuing on with the sentence, "(b)ids will be considered an offer to supply any quantity up to and including the number of Tranches specified in the Bid (an "Up-to Bid")." Again, since the RFP and subsequent FAQs made it clear that an award could not be made for any less than a tranche, and if J3 did not want its offers to have special consideration using the "all or nothing" designation and evaluated independently, then as stated in Section 7.10, the offer type should have been correctly marked by J3 as an "up to" offer on each of J3's bid-form spreadsheets.³¹

Mr. Russial testified, upon questioning from the ALJ, that he thought the "up to" versus "all or nothing" terminology did not apply to an offer for a single tranche. He stated: "But for a single tranche bid as we submitted – we submitted four single tranche bids – the flag really made

³¹ WPPCo. Statement No. 1R, pp. 3 to 6.

no difference. It had no relevance, because, by definition, in the RFP, a bidder was only going to be awarded a single tranche.”³²

J3’s testimony raises concerns that J3 simply misinterpreted the RFP terminology and made an assumption, without any basis in the RFP, that “all or nothing” had different meanings depending on the number of tranches offered on each bid-form spreadsheet. The RFP Rules make no distinction for the use of the designation “all or nothing” on single tranche offers versus multiple tranche offers. In both single tranche and multiple tranche bid sheets, “all or nothing” meant exactly that--either all the blocks offered would be accepted or none would be accepted. West Penn also emphasizes that when an RFP participant entered the “all or nothing” or “up to” designation in the “Offer Type” box on the bidform spread sheet, a reminder automatically popped up that restated either “You have selected All-or-Nothing Bid” or “You have selected Up-To Bid” depending on which designation the supplier made.³³ The pop-up occurred in J3’s single tranche bid sheet submissions. J3 had many reasons to be alerted that the “all or nothing” designation had major significance, but J3 chose to overlook the significance and not to inquire of its significance.

Boston Pacific’s Mr. Mossburg considered the possible rationale behind J3’s bidding strategy in preparing Boston Pacific’s recommendation to the Commission. He considered: why would a bidder offer a single block as an “all or nothing” offer when no less than a single block could be awarded? Mr. Mossburg testified that the best answer at the time was that a bidder would be concerned with winning less than a single tranche. Mr. Mossburg stated that while winning less than a single tranche might be a reasonable concern, it was not reasonable in West Penn’s RFP because West Penn had made it clear that it would only award full tranches. West

³² Transcript, p. 54.

³³ Transcript, p. 209.

Penn had made this point clear in its RFP and in its publicly posted answers to questions. The point was made in a frequently asked question posted publicly and available for all bidders to see prior to bid day. The response appears in FAQ question number 29.

"Q29: But within an "up-to" block, could you be awarded something less than the full block?"

A29: No, only full blocks will be awarded."

Thus, while it made little sense for a bidder to offer separate prices for tranches that would be grouped together, it made even less sense for a bidder to designate its offer as "all or nothing" in the fear of winning less than a full tranche -- this fear had been specifically addressed and eliminated. Mr. Mossburg considered that the varied prices within an "all or nothing" offer might reflect other factors known only to the bidder, such as the bidder's business structure. In the end, it was determined that West Penn and Boston Pacific and the Commission cannot delve into bidder's possible motives, but that the evaluators should respect the "all or nothing" designation of all the bidders who chose it and to treat them identically under the RFP rules.³⁴

2. The Commission representative agreed with the averaging of J3's bid-form spreadsheets.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁵

³⁴ Direct testimony of Frank Mossburg, pp 10 to 11.

³⁵ Proprietary Transcript pp. 92 to 93.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁶

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁶ Proprietary transcript, p. 61.

3. J3's interpretation disregards any distinction between "all or nothing" and "up to" offers and would lead to serious evaluation contradictions.

J3's interpretation of an "all or nothing" offer type designation for a single tranche is that the evaluator should choose a single "all or nothing" offer as the winner of a single tranche if that bid-form spreadsheet contained the lowest price for the tranche. Or, if the bidder had a number of single "all or nothing" bid-form spreadsheets that each contained the lowest prices, the evaluators could choose those numbers of single bid-form spreadsheets as the winners for their lowest priced tranche. The problem with J3's interpretation is that it completely obviates the "all or nothing" designation and disregards a distinction between the two classifications of offer types. J3's interpretation of "all or nothing" would render the meaning of "up to" as meaningless and as having no distinction compared to "all or nothing." It should also be noted that J3's strained interpretation of "all or nothing" is after the fact – that is, after J3 learned that two of its individual bid-form spreadsheet offers would have been chosen had they been designated as "up to."

J3's interpretation would also lead to serious practical problems. Had the evaluators taken this interpretation the procurement could have been faced with at least two different problems.

³⁷ Proprietary Transcript, pp. 74 to 87

First, [REDACTED] had correctly shaped its bid strategy as separate bidsheets for a single tranche, with each bid-form spreadsheet designated as “up to.”³⁸ Had the evaluators evaluated J3’s separate bid-form spreadsheets as “up to”— that is, as enabling the evaluator to pick and choose among the lowest of the four bid-form spreadsheets -- then the procurement winner could have complained that the evaluators had ignored J3’s “all or nothing” designation and should have grouped J3’s bid-form spreadsheets together.

Second, if the prices of J3’s offers had been a little lower, or had J3’s two least expensive offers been just a little bit cheaper, such that grouping all four of their bid-form spreadsheets was the cheapest solution, then J3 might have complained that its designation was ignored in the evaluation and that J3 should have been awarded all four tranches and not just two.

In the final analysis, the evaluators could not read the mind of the bidders, nor delve into bidders’ possible strategy motives. The evaluators respected the “all-or nothing” designation of J3 and evaluated J3’s bid-form spreadsheets as either winning all or nothing of the tranches bid.³⁹ The testimony of West Penn, Boston Pacific and the Commission representative was consistent that they could not delve behind the strategy of the bidders.

4. J3’s admitted inexperience in bidding may have led to its incorrect bid designation.

It is not clear to West Penn if J3 actively misinterpreted the RFP Rules and the Rules’ distinction between “up to” and “all or nothing” or, on the other hand, if J3 simply missed entirely the distinction between “up to” and “all or nothing” and labeled its bid-form spreadsheets with carefree abandon.

³⁸ WPPCo. Statement No 2, p. 12; J3 Confidential Exhibit 2, J3-C-Ex-2. four pages designated WP-00013, WP-00014, WP-00015 and WP-00016.

³⁹ Direct testimony of Frank Mossburg, pp. 10 to 13.

J3's experience in procurement was very limited when it participated in West Penn's 2010 procurement. J3 was formed as sole proprietorship in 2002 and continued as such through 2009. J3 worked primarily in helping industrial and commercial consumers purchase electricity in the recently deregulated generation marketplace. J3's participation in West Penn's RFP in December 2010 was only J3's second attempt at a utility procurement. J3's first attempt at a procurement bid was only a few months prior to West Penn's RFP when J3 participated in an auction by PECO in early 2010. J3 was also unsuccessful in the PECO auction. Moreover, the PECO auction did not employ the bidding classifications of "all or nothing" and "up to." West Penn's December 2010 auction was the first procurement that J3 faced that used an "all or nothing" designation.⁴⁰

It is also revealing that J3's owner, Mr. Russial, performed the bidding strategy and interpretation of the "all or nothing" versus "up to" RFP rules by himself. Mr. Russial testified that he prepared the Part 2 proposal documents and made the submission primarily on his own. He further stated that he did not consult with anyone about the meaning of "all or nothing" versus "up to" offer type designation.⁴¹ Nor did Mr. Russial avail himself of West Penn's public question and answer process to submit questions about the RFP terminology.⁴² The preparation of J3's Part 2 proposal including the bid-form spreadsheets in isolation, without consultation of a second opinion, and without the use of clarification through the FAQ tools, may have resulted in J3's misinterpretation or lack of understanding of the RFP terms.

⁴⁰ Transcript page 32 to 37.

⁴¹ Transcript page 38.

⁴² Transcript page 39.

B. West Penn's Reliance on Commission's Approval

West Penn would not have purchased the SPAECS as it did had the Commission not approved the RFP results. West Penn fully, reasonably and justifiably relied on the Commission Secretarial Letter approving West Penn's procurement results when West Penn announced the procurement results and when West Penn entered contracts to purchase the SPAECs.

1. West Penn correctly followed the RFP rules as approved by the Commission and it followed Commission regulations in performing its procurement.

As described in the foregoing Factual History, West Penn carefully and methodically obtained Commission pre-approval of its RFP and of the RFP documents that were to be used in the RFP process. The Commission approval of the RFP documentation included the RFP bid-form spreadsheets. Following approval of its RFP process and documents West Penn carefully followed the approved process, as well as Commission regulations, in performing its RFP. A description of West Penn's careful process, including obtaining necessary Commission approval, follows, as was also described in the foregoing Factual History.

On July 29, 2010, West Penn filed a Petition requesting Commission approval to amend West Penn's default service plan by modifying its procurement process to acquire SPRECs and other Tier I AECs.

West Penn's July 29, 2010, Petition for modification of its Default Service Program specifically requested Commission approval of West Penn's proposed RFP documents. In particular, West Penn's Petition requested approval of its "Request for Proposal Rules" and it sought approval of its "Bid Form Spreadsheet."⁴³ West Penn's concluding "Wherefore" Paragraph stated: "Wherefore, Allegheny Power requests that the Pennsylvania Public Utility

⁴³ West Penn July 29, 2010 Petition at Paragraph No. 15 (Exhibit RBR-1).

Commission approve Allegheny Power's request to modify its Default Service Plan to allow the purchase of solar Renewable Energy Credits and other Tier I Alternative Energy Credits through 120-month and 125-month term contracts using procurement documents listed herein." (Emphasis added.)

West Penn's July 29, 2010 Petition was served on all parties to West Penn's original default service Proceeding at Docket No. P-00072342. West Penn's July 29, 2010 Petition was not opposed.

Without qualification or alteration the Commission approved West Penn's July 29, 2010 Petition by Opinion and Order entered September 8, 2010, at Docket P-00072342. The Commission's Opinion and Order specifically recognized that that "Allegheny has included as part of its Petition, the procurement documents it proposes to utilize...."

It is unclear to West Penn how it could have more assiduously obtained Commission approval of West Penn's procurement process and associated documents.

Furthermore, after carefully obtaining Commission pre-approval of its procurement process, West Penn carefully followed the approved process and followed Commission regulations concerning procurement of default service, including Commission regulations at 52 Pa. Code §54.186. That section requires that default service procurement be monitored by the Commission and by an independent third party evaluator. The regulation provides in part:

(3) A competitive bid solicitation process used as part of the implementation plan will be subject to monitoring by the Commission or an independent third party evaluator selected by the DSP in consultation with the Commission. A third party evaluator shall operate at the direction of the Commission. Commission staff and a third party evaluator involved in monitoring the procurement process shall have full access to all information pertaining to the competitive procurement process, either remotely or where the process is administered. A third party evaluator retained for purposes of monitoring the competitive procurement process shall be subject to confidentiality agreements identified in § 54.185(d)(6) (relating to default service programs and periods of service).

(4) The DSP or third party evaluator shall review and select winning bids procured through a competitive bid solicitation process in a nondiscriminatory manner based on the price determinative bid evaluation criteria set forth consistent with paragraph (1)(vi).

52 Pa. Code §54.186(c)(3) and (4).

West Penn's competitive bid process was monitored by the Commission and by an IPM pursuant to Section 54.186(c)(3). The Commission representative was Paul Diskin, who at the time was the Energy Manager of the Commission's Bureau of Fixed Utility Services. The IPM, Boston Pacific, was chosen as the independent third party evaluator in close consultation with the Commission and reported directly to the Commission for this solicitation, in accordance with the regulations. Both the Commission representative, Mr. Diskin, and the independent third party evaluator, Boston Pacific's Frank Mossburg, were on site during the bid submission process that occurred on December 3, 2010, between 9 a.m. and 12 noon at West Penn's headquarters in Greensburg, Pennsylvania, and during the bid evaluation process that followed the bid submissions. The independent third party evaluator and the Commission representative concurred with the bid results and that the procurement process was conducted properly in a fair and competitive manner.

Inasmuch as West Penn's procurement of SPAECs was carefully conducted according to approved Commission procedures, was carefully monitored by West Penn representatives, by the independent third party evaluator and by the Commission, and inasmuch as the RFP results were approved by the Commission, J3's Complaint should be denied.

2. West Penn justifiably relied on Commission's December 10, 2010 approval of the RFP results.

The Commission approved the bid results of West Penn's December 3, 2010 procurement. In its December 10, 2010, Secretarial Letter, the Commission described the RFP process, and specifically approved the RFP results. It stated:

Further investigation does not appear to be warranted at this time, since this procurement appears to have been conducted in accordance with the RFP process and rules, filed pursuant to the Commission's Opinion and Orders. Therefore, we approve the bid results submitted for this AEC procurement.

Following the Commission's approval of the bid procurement, West Penn announced the RFP winners in accordance with the RFP rules. West Penn then commenced its purchase of SPAECs from the announced RFP winners. West Penn fully, reasonably and justifiably relied on the Commission's approval of the RFP results through the Secretarial Letter when West Penn announced the RFP winners and entered contracts to purchase the SPAECs.

Mr. Reeping described West Penn's reliance on the Commission's December 10 Secretarial Letter. He stated that West Penn "absolutely relied" on the Commission's approval in announcing the RFP winners and moving forward with the execution of agreements.⁴⁴

Mr. Reeping related that the Commission-approved RFP Rules provided for Commission approval or disapproval of the RFP results in RFP Sections 2.5, Section 7.21 and Section 9.19. Section 9.19 specifically provided;

The IPM will prepare a report two (2) business days after the Part 2 Date. The IPM's 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. The Company or IPM will notify all Bidders of the PaPUC's decision.

⁴⁴ WPPCo Statement No. 1, p. 21.

Thus, the RFP rules, as approved and followed by the Commission, anticipated that the West Penn would have a Commission Order or Secretarial Letter approving the procurement before West Penn would act upon the results of the RFP through notification to bidders and execution of agreements.

Mr. Reeping testified that Commission approval of the RFP results was an “absolute prerequisite” in order for West Penn to announce the RFP results and to award agreements. He stated that West Penn “definitely relied” on the Commission approval in the Commission’s December 10, 2010 Secretarial Letter in awarding agreements for the purchase of SPAECs and Tier I AECs under the RFP. Absent such Commission approval of the RFP results the Company would not have awarded any agreements under the RFP.⁴⁵ As a result of the Commission approval West Penn executed agreements with each of the identified winning bidders and SPAEC and Tier I AEC deliveries to West Penn began immediately thereafter and are continuing today under all the executed agreements.

3. J3 incorrectly argued that West Penn’s reliance on the Commission’s December 10, 2010 Secretarial Letter should have been raised as New Matter by West Penn.

J3 has contended that West Penn’s reliance on the Commission’s Secretarial Letter should have been raised as New Matter at the time of West Penn’s Answer to the Complaint. West Penn respectfully points out that in standard Pennsylvania practice an affirmative defense that should be pleaded as New Matter is a defense that requires the averment of facts extrinsic to the Complaint of the Plaintiff. In the present case, by contrast, the existence of the Commission’s approval of West Penn’s procurement was stated by J3 in J3’s complaint. J3 specifically cited the Commission’s Secretarial Letter in Paragraph No. 17 of its Complaint,

⁴⁵ WPPCo. Statement No. 1, p. 21 to 23.

stating: “Disclosure of the weighted average price was required by the commission’s Secretarial Letter dated December 10, 2010, which approved the results of the evaluations.”

In response to the Complaint, West Penn’s Answer also referred to, cited, and quoted the Commission’s Secretarial Letter. At Paragraph No. 4.3 of its Answer, dated February 2, 2011, West Penn wrote:

4-3. It is denied that an error occurred in West Penn’s evaluation of J3’s SPAEC bid proposal. To the contrary, West Penn followed its default service procurement process for SPAECs, as approved by the Commission by Order entered September 8, 2010, at Docket No. P-00072342. West Penn’s competitive bid solicitation was further conducted pursuant to Commission regulations at 52 Pa. Code §54.186. The regulations require that default service procurement be monitored by the Commission and by an independent third party evaluator. The regulations state:

(3) A competitive bid solicitation process used as part of the implementation plan will be subject to monitoring by the Commission or an independent third party evaluator selected by the DSP in consultation with the Commission. A third party evaluator shall operate at the direction of the Commission. Commission staff and a third party evaluator involved in monitoring the procurement process shall have full access to all information pertaining to the competitive procurement process, either remotely or where the process is administered. A third party evaluator retained for purposes of monitoring the competitive procurement process shall be subject to confidentiality agreements identified in § 54.185(d)(6) (relating to default service programs and periods of service).

(4) The DSP or third party evaluator shall review and select winning bids procured through a competitive bid solicitation process in a nondiscriminatory manner based on the price determinative bid evaluation criteria set forth consistent with paragraph (1)(vi).

52 Pa. Code §54.186(c)(3) and (4).

West Penn’s competitive bid process was monitored by the Commission and by an independent third party evaluator pursuant to Section 54.186(c)(3). The Commission representative was Paul Diskin, Energy Manager of the Commission’s Bureau of Fixed Utility Services. The independent third party evaluator was Boston Pacific Company, Inc. Boston Pacific was chosen as the independent third party evaluator in close consultation with the Commission. Boston Pacific has extensive experience in the independent evaluation and procurement monitoring in

Pennsylvania and other states. Both the Commission representative and the independent third party evaluator were on site during the bid submission process that occurred on December 3, 2010, between 9 a.m. and 12 noon at West Penn's headquarters in Greensburg, Pennsylvania, and during the bid evaluation process that followed the bid submissions. The independent third party evaluator and the Commission representative concurred that the procurement process was conducted properly.

By Secretarial Letter issued December 10, 2010, at Docket No. P-00072342 the Commission approved the bid results of West Penn's competitive procurement of SPAECs. The Commission stated: "Further investigation does not appear to be warranted at this time, since this procurement appears to have been conducted in accordance with the RFP process and rules, filed pursuant to the Commission's Opinion and Orders. Therefore, we approve the bid results submitted for this AEC procurement." (See Attachment No. 1.)

Inasmuch as West Penn's procurement of SPAECs was carefully conducted according to approved Commission procedures, was carefully monitored by West Penn representatives, by the independent third party evaluator and by the Commission, and inasmuch as the bid results were approved by the Commission, West Penn denies that an error occurred in the evaluation process.

West Penn's February 2, 2011 Answer even went so far as to attach a copy of the Secretarial Letter to its Answer. Thus, it is amply clear that J3 was fully aware that West Penn had relied on the Commission's approval of West Penn's procurement, that J3 was not surprised by West Penn's reliance argument, and that New Matter pleading was unnecessary and inappropriate.

Finally, any further argument that West Penn's justifiable reliance was not properly raised was put to rest in the ALJ's Order Denying Cross Motions for Summary Judgment, dated February 1, 2012, in which the ALJ recognized: "Whether or not West Penn's reliance upon Commission approval of the bid procurement when it purchased the SPAECs was appropriate is in dispute."⁴⁶

⁴⁶Order Denying Cross Motions for Summary Judgment, dated February 1, 2012; p. 9.

C. J3 failed to employ the publicly available process for asking questions about the RFP terminology even though J3 states that it found the RFP “non-sensical.”

J3’s direct testimony begins with a remarkable assertion that it did not mark its bid-form spreadsheets as “up to” because to do so would have been “non-sensical.”⁴⁷ J3 stated that such a designation defies the correct definition of an “up to” bid and that *“any bid submitted for just a single tranche was obviously by RFP rules, an “All-or-Nothing” bid. A single tranche bid flagged as “up to” would have been inconsistent with the RFP rules and therefore non-sensical.”*⁴⁸

The statement is remarkable because had J3 found something “non-sensical” about the RFP documents or terminology, it should have asked for an interpretation. The question and answer process employed by West Penn leading up to bid day was a public process for resolving questions about the RFP process and straightening out or clarifying anything that didn’t make sense to bidders. J3 testified that it was aware of the process but did not take part and did not submit any questions prior to bid day about the RFP terminology.⁴⁹

West Penn’s Mr. Reeping directly stated that if there was “fault” in the RFP process, it rested with J3.⁵⁰ J3’s offer strategy was not specifically addressed in the RFP rules or FAQs submitted by other potential bidders in the pre-bid public information process. Therefore, it was incumbent for J3 to take responsibility for its own strategy and to make sure its Part 2 proposal including the bid-form spreadsheets would be evaluated as it wanted. Instead J3 appears to have relied on its own assumptions about the process without inquiring through the available process. As J3 found the RFP “non-sensical” it should have inquired during the pre-bid information

⁴⁷ Direct Testimony of Stephen Russial, p. 8.

⁴⁸ Direct Testimony of Stephen Russial, p. 8.

⁴⁹ Transcript pp. 37 to 39

⁵⁰ WPPCo. Statement No 1. pp. 19 to 20.

process about the RFP terminology and made certain that its bid-form spreadsheets were correctly designated. J3 was under an obligation of self help to clear up what it considered a non-sensical RFP.

D. J3's contention that Bid day should have been interrupted or cancelled, or that West Penn or evaluators should have contacted bidders, presents an inappropriate scenario.

J3 argues that West Penn should have contacted the bidders to determine what bidders meant by "all or nothing" offers on multiple bid-form spreadsheets. The record shows that the IPM, Boston Pacific, after bid day and in preparing for its review of the RFP with the Commission, considered the issue of whether bidders should have been called to provide clarification of the bidding terminology, but determined that such contact would have given bidders an opportunity to change their bid-form spreadsheets and provide an unfair advantage.

On bid day, in accordance with its normal bid day practices for its various solicitations, West Penn did contact all bidders to confirm that West Penn had received the faxed bid-form spreadsheets from the bidder, the pricing indicated on each bid-form spreadsheet, and in the case of this solicitation confirmation of the "all or nothing" or "up to" designation on the bid-form spreadsheets. If there were any questions as to any concerns any bidder had with its offer, this was another opportunity to ask a question of the West Penn, Boston Pacific and the Commission representative since all calls were made from the bid room on a speaker phone for participation and monitoring by all the evaluating parties.

Mr. Mossburg addressed the idea communicating with bidders to make sure that they understood the meaning of their offers. He testified that had the evaluators called J3 or other bidders and given them the opportunity to change their offers due to their apparent misinterpretation of the "all or nothing" designation, such communication would have tipped off

the bidders that their win or loss of the procurement depended on the designation. This would constitute an ability to re-bid and would have presented a huge advantage over other bidders that could not be permitted. Mr. Mossburg further testified that if the option to re-bid was extended to all bidders it would damage the appeal of standard procurements. Part of the appeal of standard procurements for bidders, the utility, and the Commission is that standard procedures produce a definitive result quickly, that bidders know whether they have won or lost, and that the utility signs standard contracts, which otherwise might take a long time to negotiate and obtain Commission approval. It would damage this major advantage to these procurements if evaluators were to reject the results and re-bid solely because a bidder may or may not have understood an RFP rule.⁵¹

E. It is uncontroverted that all bidders were treated uniformly and in accordance with RFP Rules.

J3 was not singled out for evaluation different from any other bidders. It is uncontroverted that all bidders were treated in a uniform fashion and in accordance with the RFP Rules.

It is important to recognize that other bidders submitted offers in a fashion similar to J3's – that is, other bidders offered multiple tranches at different prices but designated their bid-form spreadsheets as “all or nothing.” Those bid-form spreadsheets were aggregated into a single price offer for each such “all or nothing” bidder in accordance with the RFP Rules. J3 was treated identically to those other bidders.⁵² The Commission's Mr. Diskin agreed, upon questioning by the ALJ, that J3 had been treated uniformly as other bidders that had designated their bid-form spreadsheets as “all or nothing.”⁵³ And perhaps more importantly Mr. Diskin

⁵¹ WPPCo. Statement No. 2R, p. 12.

⁵² WPPCo. Statement No 2. p. 10, 14.

⁵³ Proprietary Transcript, p. 98.

testified that, not only were the RFP participant treated uniformly, but they were treated correctly in the use of the “all or nothing” and “up to” terminology. He stated succinctly: “So, I believe that the averaging was in compliance with the RFP.”⁵⁴

F. J3 inappropriately speculates on other bidders’ rationales or intentions.

J3 attempts to draw a conclusion that because a high percentage of bidders for the combined Solar and Tier I procurement used multiple bid-form spreadsheets marked “all or nothing” that a large number of bidders were confused by the RFP designations. Witnesses Reeping and Mossburg testified consistently that it is not the job of evaluators to delve into the strategy or thinking of bidders as the offers come in. Rather the appropriate role of the evaluators is to ensure that the bidders are treated uniformly and in conformance with RFP rules.

Further, witness Mossburg testified as to several reasons why a bidder might have submitted multiple bid-form spreadsheets designated as “all or nothing.” The reasons included: a) offering multiple project sites with different pricing considerations, b) offering a single site with different pricing strategies depending on market conditions, and c) gaming offers so as to argue that the interpretation of “all or nothing” designation differently depending on the amount of tranches won and the way in which evaluators reviewed their offers.⁵⁵

G. J3 mischaracterizes explanations provided on West Penn’s webpage.

J3 argues that West Penn’s guidance on how to submit proposals was misleading. J3 quotes Question and Answer No. 47 which stated:

Q47. For a given auction (Tier-1 nonsolar AEC or SPAEC), can a bidder submit a different bid sheet for each Tranche if they want to tier their bids, e.g. 5 different bid sheets with a sets of prices for each of the Tranches in the SPAEC

⁵⁴ Proprietary transcript, p. 93, line 1.

⁵⁵ WPPCo. Statement No. 2, pp. 11 to 12.

auction? Would this require 5 different bid sheets? Would the same hold true for the Tier-1 non- solar auction (1 Part 2 form with a maximum of 15 bid sheets)?

A47. Per your example, one Part 2 Form for each RFP with up to 5 different Bid Form Spreadsheets for each is acceptable.

J3 contends that this answer justified J3's use of individual bid-form spreadsheets all labeled as "all or nothing" bids. But neither Question No. 47 nor the answer to Question No. 47 speak to the difference between the Offer Type designation of "all or nothing" and "up to". The same holds true for Question and Answer Nos. 59, 60 and 61. Had J3 or any other bidder requested additional information on the use of the Offer Type "up to" and "all or nothing" designation for offers West Penn would have provided additional information. The lack of any such question by J3 or any other bidder cannot be used to invalidate the RFP and overturn the Commission-approved result.

H. The effect of the purported RFP error, alleged by J3, upon the ratepaying customers of West Penn would be minimal.

West Penn maintains that its RFP was correct and that if there is any fault in the process, or in not understanding the RFP terminology, or in not asking questions about confusion over terminology, the fault rests with J3. Nevertheless, the Commission has an obligation to help ensure that default service rates of electric distribution companies are just and reasonable under Sections 1301 and 2804 of the Public Utility Code. 66 Pa. C. S. §§1301 and 2804.

With that obligation in mind, West Penn points out that the procurement evaluation error alleged by J3, if found to be correct by the Commission, would have only a minor effect on West Penn's default service ratepayers. Mr. Reeping pointed out that had West Penn chosen – though incorrectly – J3's two lowest bid-form spreadsheets as two of the four winning tranches for the ten-year term, the overall effect would have been a difference of \$52,488.00 spread across West

Penn's entire default service ratepayer group and further spread across the entire ten-year procurement term. Mr. Reeping used estimations of the size of the Company's default service customer base to provide approximations of the effect per individual default service customer, recognizing that the default service base continuously changes. Assuming that West Penn's default service rate group is about one-half of its approximate customer base of 600,000 customers – or about 300,000 default service customers -- the amount per default service customer would be a total of 17 cents per customer over the entire ten years, or 1.7 cents (\$0.017) per customer per year.⁵⁶

VI. Conclusion

West Penn Power Company submits that its RFP procurement process and bid evaluation process for the procurement of solar photovoltaic alternative energy credits was (i) conducted in accordance with Commission regulations concerning procurement of default supply, (ii) conducted in accordance with West Penn's RFP rules relating to the procurement of solar photovoltaic alternative energy credits as approved by the Commission in its Order entered September 8, 2010 at Docket No P-00072342, and (iii) conducted in accordance with Commission regulations at 52 Pa. Code §54.186 that require monitoring of the procurement by the Commission and an independent third party evaluator; and further, that (vi) the procurement and bid evaluation process was in fact monitored on a real-time, on-site basis by the Commission and by the independent third party evaluator, and (v) the results of the RFP process and evaluation process were approved by the Commission through its Secretarial Letter issued December 10, 2010, and (vi) the RFP including its evaluation process was fair and correct, and (vii) the Commission correctly approved the results of West Penn's procurement, and (viii) West

⁵⁶ Proprietary transcript, p. 210.


Penn fully, reasonably and justifiably relied on the Commission's approval of West Penn's procurement results in announcing the winning results and in entering contracts with the announced RFP winners.

West Penn Power Company respectfully requests, therefore, that the Administrative Law Judge find that J3 Energy, Inc.'s Complaint is without merit and that the Administrative Law Judge rule that the Complaint be dismissed with prejudice.

Respectfully submitted,

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By:


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