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May 22, 2012

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

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: J3 Energy Group, Inc. v. West Penn Power Company
PA PUC Complaint Docket No. C-2011-2219920
Main Brief of J3 Energy Group

Dear Secretary Chiavetta:

Enclosed for filing please find the original and nine copies of the Main Brief of J3 Energy Group, Inc., in the referenced matter. Please note that the Brief is filed in confidential and public (redacted) versions.

Sincerely,



Thomas J. Russial
Attorney for J3 Energy Group, Inc.

Enclosures

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED

MAY 22 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

J3 ENERGY GROUP, INC.)
Complainant,)

v.)

WEST PENN POWER COMPANY)
Respondent.)

Complaint Docket No. C-2011-2219920

MAIN BRIEF OF
J3 ENERGY GROUP, INC.

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Dated: May 22, 2012

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TABLE OF ABBREVIATIONS

AEC	Alternative Energy Credit
Art.	RFP Article
DATP	Discounted Average Term Price
DSP	Default Service Provider
Int.	Interrogatory
IPM	Independent Procurement Manager
J3	J3 Energy Group, Inc.
J3 Ex P-	J3 Public Exhibit
J3 Ex C-	J3 Confidential Exhibit
J3 Ex R-	J3 Rebuttal Exhibit
J3 St. 1	Direct Written Testimony of Stephen C. Russial
J3 St. 1-R	Rebuttal Testimony of Stephen C. Russial
J3 St. 2	Direct Written Testimony of Curtis W. McBride
J3 St. 2-R	Rebuttal Testimony of Curtis W. McBride
MetEd	Metropolitan Edison Company
Penelec	Pennsylvania Electric Company
Q&A	Question and Answer
REC	Renewable Energy Credit
RFP	Request for Proposals
SPAEC	Solar Photovoltaic Alternate Energy Credit
SREC	Solar Renewable Energy Credits
St.	Statement
Tr.	Evidentiary Hearing Transcript
WP	West Penn
WP Ex RBR-	West Penn Exhibit Robert R. Reeping
WP Ex FM-	West Penn Exhibit Frank Mossburg
WP St. 1	Direct Written Testimony of Robert B. Reeping
WP St. 1-R	Rebuttal Testimony of Robert B. Reeping
WP St. 2	Direct Written Testimony of Frank Mossburg
WP St. 2-R	Rebuttal Testimony of Frank Mossburg

I. INTRODUCTION

J3 Energy Group, Inc (J3), a small Pennsylvania company who has successfully developed solar photovoltaic projects, submitted the two lowest priced bids for the 10-year contract term specified in a 2010 competitive Request for Proposals (RFP) issued by West Penn Power Company d/b/a Allegheny Power (West Penn) for the procurement of solar photovoltaic alternate energy credits (SPAECs). The RFP sought four 200 SPAEC blocks (also called Tranches) for the 10-year term. J3's bids were not selected because the West Penn evaluators used an improper and undisclosed evaluation approach that was patently inconsistent with the RFP Rules and supplemental guidance published by West Penn. Had West Penn followed the Rules as written and approved by the Pennsylvania Public Utility Commission (Commission), J3 would have received a contract to supply two Tranches for 10 years. Instead, the four 10-year Tranches were awarded to [REDACTED]

The defective evaluation approach violated the Commission's Order adopted on September 2, 2010 approving a modification to Allegheny Power's Default Service Plan (J3 Ex P-8)² and violated the competitive procurement standards for alternate energy credits established by 52 Pa. Code § 75.67(b) and (c) and 52 Pa. Code. § 54.186. Hence, J3 has requested that the Commission revoke approval of the evaluation results until such time as West Penn awards J3 the two Tranches that J3 deserves.³

Throughout this proceeding West Penn has sought to recast J3's Complaint as a quarrel with the RFP Rules and as an attempt by J3 to amend its Bids and obtain an advantage over the

¹ Information that appears as redacted in this Brief was taken from confidential versions of written testimony, confidential exhibits, or proprietary portions of the Hearing Transcript. Much of the testimony in the proprietary portions of the Transcript is not confidential information; however, in an abundance of caution it is shown as redacted in this brief and does not appear in the public version.

² The Commission's Order approving the modification to the Default Service Plan is also found at WP Ex RBR-2.

³ The Commission's December 10, 2010 letter to West Penn approving the RFP results is found at WP Ex RBR-3.

other bidders. Neither is the case. J3's Complaint has always been that West Penn did not follow its own Rules. As is demonstrated through the testimony of J3's President (Mr. Stephen Russial) and procurement expert (Mr. Curtis McBride), and the express terms of the RFP, the Rules were clear and had they been followed, J3 would have won two Tranches. Not only were the Rules clear, the flexible bidding structure inherent in the West Penn RFP made it more conducive to competition than other Pennsylvania SPAEC RFPs because West Penn allowed bidders to better match their bids to actual business needs. This flexibility furthered the Commission's interest in addressing barriers that could prevent new solar projects from coming to fruition in Pennsylvania. (J3 Ex P-8, p.4). Bidders have only the published RFP and supplemental guidance to go by and cannot read the undisclosed thoughts of the drafters and evaluators. If West Penn wanted to change the Rules, fairness dictated that West Penn amend the RFP and provide all bidders an opportunity to restructure their bids to conform to the new Rules.

After the Complaint was filed, J3 looked into how West Penn could have so wrongly interpreted its own RFP. J3 hypothesized that the root cause laid in the fact that West Penn copied the RFP Rules from an earlier RFP jointly conducted by Metropolitan Edison (MetEd) and Pennsylvania Electric Company (Penelec) and then combined those Rules with a West Penn developed bidding structure. Testimony at hearing supports this hypothesis. The MetEd/Penelec RFP Rules were designed for an individual bid scenario. West Penn kept the boilerplate MetEd/Penelec Rules, including the definitions and descriptions of the important terms *Bid*, *All-or-Nothing Bid*, and *Up-To Bid*, but altered the bidding structure to allow individual bidders to submit multiple Bids with their Part 2 Proposal. Once the MetEd/Penelec Rules were combined with West Penn's multiple bid structure, the Rules took on new context. All-or-Nothing and

Up-To still applied to the individual Bid but bidders were now permitted to submit between 1 and 5 individual Bids. The meaning was clear to J3 and the [REDACTED] other bidders who structured their Bids accordingly but apparently not understood by the West Penn team. When Part 2 proposals containing multiple All-or-Nothing Bids arrived on bid-day, the evaluators made an arbitrary and peculiarly undocumented decision to aggregate and average J3's four All-or-Nothing Bids rather than evaluate them as the individual Bids that were proposed and were expressly authorized by the RFP. Had the evaluators properly discharged their responsibility and conducted a thorough analysis, they would have understood what the RFP Rules were telling bidders and further understood that the RFP provided no authority for the undisclosed averaging approach used during evaluation.

West Penn has also attempted to distance itself from any error by testimony to the effect that neither the Independent Procurement Manager (IPM) nor the Commission informed West Penn that the evaluation was improper. This is disingenuous in that it ignores the role West Penn played in this matter. The Commission's approval was only as good as the faulty information provided by the evaluators. The record establishes that West Penn's senior manager, with years of utility procurement experience, was the architect of the RFP, the person who answered the key question from prospective bidders, a bid-day evaluator, and, part and parcel to the selection decision. He was responsible for understanding his RFP and should never have let the flawed evaluation occur.

II. STATEMENT OF THE CASE⁴

A. BACKGROUND

On July 29, 2010, West Penn petitioned the Commission for approval to modify its Retail Electric Default Service Program and Competitive Procurement Plan for Service in order to acquire SPAECs and other Tier I Alternate Energy Credits (AECs) through long-term contracts rather than on the spot-market. The Petition was docketed at Docket No. P-00072342. West Penn included the procurement documents it planned to use for acquisition of SPAECs and Tier I AECs in the Petition. (WP Ex RBR -1). West Penn's RFP was modeled on an earlier RFP conducted jointly by MetEd and Penelec with the major change being that the MetEd/Penelec RFP allowed submission of only one Bidform spreadsheet while the West Penn RFP allowed submission of multiple spreadsheets. (WP Ex RBR-1, p.7; Tr. 174). The Commission granted the petition by Order adopted September 2, 2010. (J3 Ex P-8).

The RFP was drafted by Mr. Robert Reeping. (Tr. 171). In his written testimony, Mr. Reeping indicates that he has been Manager of Regulated Commodity Sourcing for Allegheny Energy Service Company since 2000. In his position, Mr. Reeping is primarily responsible for the procurement and management of the regulated energy supply portfolio, including renewable portfolio standard compliance that FirstEnergy's electric utilities are required to maintain in West Virginia, Ohio, Maryland and Pennsylvania. (WP St. 1, pp. 1-2). His duties include responsibility for procurement of AECs for West Penn. (Tr. 169). Mr. Reeping was also identified as the West Penn bid evaluator in response to J3's interrogatories. (J3 Ex P-5, Int. 1).

⁴ This appears to be a case of first impression for the Commission. This may be due to the fact that competitive procurement of AEC supply is a relatively new concept for Pennsylvania utilities. The lack of public transparency associated with evaluation results coupled with the lengthy process involved in challenging evaluation errors also discourages disappointed bidders or other interested parties from questioning the results. J3 has not raised these issues in its Complaint because those are the rules currently established in the Commission regulations and guidance. However, regardless of the outcome of this proceeding, the Commission may wish to revisit its rules in order to protect ratepayer interests.

The Solar RFP and Tier I RFP Rules were effectively identical with adjustments made for the nature of the product and quantity. Both RFPs as submitted to the Commission are contained in West Penn's Petition and are available for comparison in West Penn Exhibit RBR-1 admitted into evidence. (WP Ex RBR-1). West Penn also used a common Pre-bid Webinar (J3 Ex P-4) and common Q&A sets (J3 Ex P-2; J3 Ex P-3) for the Solar and Tier I RFPs.⁵

Mr. Frank Mossburg, Boston Pacific Company, Inc. (Boston Pacific) has been identified as the IPM for the RFP (WP St. 2, p.2). West Penn also identified Mr. Mossburg as the independent bid evaluator in response to J3 interrogatories (J3 Ex P-5, Int. 1). The Post Bid Report to the Commission identifies Boston Pacific as the Technical Consultant. (J3 Ex C-1). In his written testimony, Mr. Mossburg indicated that he has extensive experience as an IPM (WP St. 2, p. 2). In his oral testimony he testified to a good educational background in finance and business administration, but that all of his IPM experience has been since he rejoined Boston Pacific in 2007 and that he has not had procurement training outside of his Boston Pacific work. (Tr. 103).

West Penn released the RFP on September 24, 2010 and revised the RFP on November 3, 2010. (J3 Ex P-1). The revision was issued to correct West Penn's misinterpretation of the RFP's credit exposure amount calculation after J3 alerted West Penn and Commission staff of the error. (J3 St. 1, pp. 4-5).

The RFP was conducted in two parts. Bidders who passed a Part 1 qualification stage were authorized to submit a Part 2 proposal with bid pricing. Part 1 qualification requirements included providing contact information, financial information for a creditworthiness assessment,

⁵J3 did not propose against and is not challenging selection under the Tier I RFP

Tier I is discussed in this Brief because the Rules applicable to Tier I and Solar were identical

and representations to ensure that the bidder can perform under the terms of the SPAEC Purchase and Sale Agreement. (J3 Ex P-1, Articles 5.1 and 6). West Penn determined that J3 was a qualified bidder and issued a notice to J3 dated October 22, 2010, stating that J3 “*is Eligible to submit a Part 2 Form and Proposals for Solar Photovoltaic Alternate Energy Credits.*” (J3 St. 1, p.3; J3 Ex P-7).

The RFP was not unit specific, meaning that bidders could obtain credits for sale from any source qualified under Pennsylvania rules. (J3 Ex P-3, Q&As 2 and 4; J3 Ex P-1, Art. 3.4).

Part 2 proposals from qualified bidders were to undergo another screening for compliance with financial security, certification, and form requirements. (J3 Ex P-1, Articles 7 and 9). Bids that passed the screening were then to be evaluated for selection on a price-only basis. (J3 Ex P-1, Articles 1.4, and 2.3). Disclosure of and selection based upon price-determinative bid evaluation criteria is required by the procurement standards established by Commission Regulations. See 52. Pa. Code §75.67(b) and (c); 52 Pa. Code §54.186(c). J3 was among the eight qualified Part 1 bidders on the Solar RFP whose Part 2 proposals passed screening and were considered during the price evaluation stage of the competition.

RFP Article 2.4 defined the basis for source selection:

Upon receipt of Bids, the Company and IPM will rank all Bids from lowest to highest price. The Company and IPM will determine a portfolio of those Winning Bidders whose Bids minimize the overall cost of satisfying the Target Quantity. All Winning Bidders receive the price they Bid, expressed in \$/SPAEC rounded off to the nearest cent. (J3 Ex P-1, Art 2.4).

In the Solar RFP, West Penn sought to purchase five Tranches of SPAECs each at 200 SPAECs per reporting year. The RFP states that the product will consist of a term of 10-year and 5-month, and 10-year supply. (J3 Ex P-1, Art. 1.1). The “Target Quantity” as defined in the RFP is comprised of a single Tranche for January 1, 2011 through May 31, 2021, and a

maximum of 4 Tranches for the period June 1, 2011 through May 31, 2021. (J3 Ex P-1, Art. 1.2). The RFP also uses the defined term “Tranche Target” to mean the number of Tranches needed for the Target Quantity. (J3 Ex P-1, Art. 1.2).

The term “Bid” is defined in RFP Article 1.2 as a:

“Binding offer to supply a portion of the Tranche Target at a specified price per SPAEC. (J3 Ex P-1, Article 1.2).

The term “Bid” is further defined in RFP Article 7.6:

A Bid consists of three elements: (i) a price in dollars per SPAEC in the format \$xx.xx or \$xxx.xx (rounded to the nearest cent) for each Delivery Year; (ii) a specification of the maximum number of Tranches offered with each Bid; and, (iii) an indication of whether the Bid is “All or Nothing” or an “Up-To” bid (as defined in Section 7.10 of the RFP Rules). (J3 Ex P-1, Article 7.6)

The RFP instructed bidders that they may submit one Part 2 proposal and between one (1) and five (5) Bidform Spreadsheets for the available Tranches. The RFP further instructed bidders that they must use the Appendix 7, Part 2 Proposal and Appendix 8, Bidform Spreadsheet. One spreadsheet was designed for the 10 year, 5-month term; a second sheet was for the 10-year term. (J3 Ex P-1, Articles 5.3, 7.5 and Appendix 8). Shaded areas on the spreadsheets were for completion by bidders. Bidders were also required to complete the Tranches Bid cell of the spreadsheet which RFP Article 7.12 (iii) defines as the number of Tranches [the bidder] is willing to supply at the prices offered in the Price/SPAEC section.⁶ The Discounted Average Term Price or DATP cell is computed automatically for each spreadsheet and per the RFP is the single parameter that will be used to compare offers for the contract term. Both the 10 year, 5-month spreadsheet and the 10-year spreadsheets required the bidder to select

⁶ At the hearing [REDACTED] (Tr. 211-212). J3 Counsel has since checked the source file downloaded from Allegheny Power’s RFP website in 2010 and believes that the “1” actually appeared in the Appendix 8 document on the website and therefore the cell was not shaded. J3 does not dispute that Tranches Bid cell was a Bidder input cell.

either an “All-or-Nothing Bid” or “Up-To Bid” Offer Type for each spreadsheet submitted. (J3 Ex P-1, Art. 7.12 and Appendix 7). The All-or-Nothing Bid and Up-To Bid concepts were explained in RFP Article 7.10:

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”).
(J3 Ex P-1, Art. 7.10.)

Hence, the RFP allowed a bidder to condition a Bid, by selecting the All-or-Nothing Bid Offer Type option on each Bidform Spreadsheet. West Penn and the IPM were to make the selection decision based on the combination of All-or-Nothing Bids and Up-To Bids that minimize the overall cost of satisfying the Target Quantity. (J3 Ex P-1, Art. 2.4).

Prior to submission of Bids, West Penn received questions from prospective suppliers seeking guidance on how to submit proposals with different pricing for individual Tranches. The questions and answers (Q&As) were published on Allegheny Power’s RFP website in two files admitted into evidence as J3 Ex P-2 (Pre-Bid Q&As) and J3 Ex P-3 (Chronological Q&As).⁷

Q46. If a Bidder bids on more than one Tranche, can the bidder submit a separate price for each Tranche?

A46. Yes. (J3 Ex P-2, Q&A 46).

Q47. For a given auction (Tier-I non solar 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 auction? Would this require 5 different Part II forms, or could a single part 2 form be submitted with the 5 different bid sheets? Would the same hold true for the Tier-I non solar auction (1 Part 2 form with a maximum of 15 bid sheets)?

⁷ The hearing transcript shortens the identification of J3 Ex P-2 from “West Penn RFP October 6, 2010 Pre-Bid Questions and Answers” to “West Penn RFP.” (Tr. 24).

A47. Per your example, one Part 2 Form for each RFP with up to 5 different Bid Form Spreadsheets for each is acceptable. (J3 Ex P-3, Q&A 47).

Q61. When bidding on a Tranche, is the price locked in? For example, if we were bidding on 8 Tranches, could we bid 7 at \$3.00 and 1 at \$6.00 for a particular year?

A61. Yes, but the differing offer strategies would need to be done on separate bid form spreadsheets. (J3 Ex P-3, Q&A 61).

Following the RFP instructions and reinforcing Q&Ss, J3's Part 2 proposal contained four Bidform Spreadsheets each with a different price specified for the single Tranche offered. On each spreadsheet, J3 elected the All-or-Nothing Bid Offer Type. (J3 Ex C-2).⁸ J3's President Stephen Russial testified that each spreadsheet was submitted as a separate All-or-Nothing Bid. (J3 St. 1, pp.6, 8-9; Tr. 39-42, 50). At hearing, both West Penn witnesses Mr. Mossburg and Mr. Reeping acknowledged after questioning that J3 submitted four Bids. (Tr. 108-110, 188). Mr. Russial also testified (J3 St. 1-R, pp. 2-3) and Mr. Mossburg confirmed (WP St. 2-R, p. 4-5; Tr. 115-116) that J3 submitted four offers.

Bid-day was December 3, 2010 and the bid room was in West Penn's offices in Greensburg, Pennsylvania. (WP St. 1, pp. 10 and 12). At the hearing, Mr. Reeping clarified for J3 Counsel that the Solar and Tier I RFPs were conducted concurrently with the bidding window for receipt of faxed Part 2 proposals between 9:00 AM – 12:00 PM.⁹ (Tr. 170). In his written testimony, Mr. Reeping testified that in the bid room were himself, West Penn Specialist Helen Taylor, Mr. Mossburg, and Commission representative Mr. Paul Diskin (WP St. 1, p. 12). At the hearing, Mr. Diskin testified that he arrived at West Penn's Greensburg office around 10:15-10:30 having left Harrisburg at approximately 7:30-8:00. By the time he arrived the auction had

⁸ J3 Ex C-2 is the electronic version of J3's four Bidform Spreadsheets. J3 submitted hard copies by fax to West Penn on bid-day. Testimony of Stephen Russial. (Tr. 53).

⁹ Time of receipt stamps are shown on the Solar Bidform Spreadsheets that were faxed to West Penn and produced through discovery. See J3 Ex C-3. J3's faxed spreadsheets were not produced by West Penn and are therefore not included in J3 Ex C-3.

already started and he remained through completion of the auction at 12:00 and left at 1:00. (Tr. 65-66).

West Penn received a total of 14 Part 2 proposals from eligible Solar and Tier I suppliers prior the 12:00 PM closing window. (J3 Ex P-9). [REDACTED] of the 14 contained multiple spreadsheets. [REDACTED] of the [REDACTED] were structured like J3's Part 2 Proposal with All-or-Nothing Bid elected as the Offer Type on each spreadsheet. [REDACTED] of the multiple spreadsheet proposals for the 10-year term on the Tier I RFP, [REDACTED], were submitted with the All-or-Nothing Bid election on each spreadsheet. (J3 St. 2-R, pp. 3-4).

On bid-day, confirmation calls were placed to each supplier to confirm the discounted Price For Evaluation Purposes and the Offer Type for each Bid-Form spreadsheet submitted. (WP St. 1, p. 13). J3 was not available when the call came in and Mr. Russial returned the call in the afternoon. His testimony aligns with Mr. Reeping's in that during the call, the caller stated they had received four Bidform Spreadsheets, stated the different price that J3 bid on each Bidform Spreadsheet, and asked Mr. Russial to confirm that this was what J3 submitted to which he replied "yes." Mr. Russial further testified that during the confirmation call he was not informed that the West Penn evaluators considered J3's offer to be the aggregate of J3's four spreadsheets on an All-Or-Nothing basis and that the Discounted Price for Evaluation Purposes that would be used for selection purposes would be the average of J3's four spreadsheets? (J3 St. 1-R, p. 2).

In early December 2010, J3 was notified by a West Penn representative that it was not selected for award. (J3 St. 1, p.12). On December 23, 2010, a news release was posted to the Allegheny Power RFP website stating that 10,200 Tier I Solar AECs at a weighted average cost of \$240.27 per credit were approved by the Commission. (J3 Ex P-9). That day Mr. Russial

sent an email to the RFP Coordinator with copy to Mr. Reeping asking whether the reported auction result was the weighted average discounted price or the weighted straight average of the winning bids. (J3 St. 1-R, p.6). In the same e-mail Mr. Russial asked for a detailed explanation of how J3's bids were not included among the winning bids. (J3 Ex R-1). The RFP Coordinator responded on December 27th indicating that the value reported in the news release was the weighted straight average of the winning bids. Mr. Russial further testified that it was in the Dec 27th response that West Penn first disclosed that they had averaged J3's four independent bids together for evaluation purposes.¹⁰ Mr. Russial then immediately responded to the RFP Coordinator citing the definition of Bid in RFP Article 7.6 and asking where in the RFP rules did it state that multiple bids would be aggregated into a single bid and what gave West Penn authority under the RFP to translate J3's four individual All-or-Nothing bids each for one full tranche into a single bid for 800 SPAECs per year. (J3 St.1-R, pp 6-7; J3 Ex R-1). On December 28, 2010, Mr. Russial contacted Mr. Diskin by phone and then by email follow-up asking him to investigate the issue. (J3 St. 1-R, p. 7; J3 Ex R-2). Once it became clear that Mr. Diskin was not going to revisit the evaluation process, J3 filed its Formal Complaint with the Commission. (J3 St. 1-R, p. 7).

B. PROCEDURAL HISTORY

J3's Formal Complaint was filed on January 10, 2011. West Penn answered on February 2, 2011. J3 served its First Set of Interrogatories and First Request for Documents on February 12, 2011. West Penn served an Objection to certain discovery requests on February 24, 2011 and served a partial set of answers on March 7, 2011. On March 4, 2010, J3 filed a Motion to Dismiss West Penn's Objections and Compel Discovery. West Penn filed its Answer on March

¹⁰ In his testimony at the hearing, Mr. Russial corrected two dates contained on page 7 of his written rebuttal testimony that identified the RFP Coordinator response date as December 28, 2010 when it should have been December 27, 2010. (Tr. 31).

14, 2011. By Order dated June 13, 2011, the Presiding Officer granted J3's Motion to Compel with disclosure subject to a Protective Order. West Penn filed a Petition for Interlocutory Review on June 22, 2011. J3 filed its Response opposing the Petition on June 29, 2011. On July 15, 2011, the Parties submitted a draft Protective Order to the Presiding Officer covering release of the requested information. The Protective Order was signed on July 19, 2011 and West Penn hand delivered a partial response to J3 at the August 8, 2011 prehearing conference. At J3's request, West Penn supplemented the response by letter dated August 23, 2011. West Penn served its First Set of Interrogatories and Requests for Production of Documents on August 5, 2011. J3 served an Objection on August 15, 2011 to certain discovery requests and served a partial response on August 24, 2011. The Presiding Officer granted West Penn's Motion to Compel on October 17, 2011 with disclosure of J3 information subject to a Protective Order. The Protective Order was signed on October 28, 2011 and J3 served its supplemental response on West Penn on November 5, 2011.

As a result of discussion at the August 8th prehearing conference, on August 18, 2011, J3 submitted an Application for a Subpoena to Boston Pacific to produce Boston Pacific's Post Bid Report to the Commission and briefing materials used by Boston Pacific during its presentation to the Commission. Through Counsel, the Commission's Bureau of Technical Services objected to the Subpoena but in the alternative agreed to release the documents to West Penn, J3 Counsel and eligible experts under a Protective Order. The Order was signed on October 17, 2011, the date of the second prehearing conference, and the documents were hand-delivered to West Penn and J3 Counsel.

The Procedural Schedule was suspended by Order dated September 23, 2011 through October 14, 2011 to allow the Parties time to *finalize* a tentative oral settlement agreement and

reduce their agreement to a written joint petition for settlement. See Presiding Officer Order Dated September 23, 2011. At the October 17th prehearing conference, West Penn advised that West Penn had withdrawn from settlement discussions. Prehearing Transcript at 11. During the conference J3 requested and received permission to file a Summary Judgment Motion by November 15, 2011, and the hearing schedule was reset for January 5, 2012.

J3 filed its Summary Judgment Motion on November 14, 2011. On December 5, 2011, West Penn filed its Answer to J3's Motion and a Cross-Motion for Summary Judgment. The Parties requested that the Procedural Schedule be adjusted to allow J3 time to respond to the Cross-Motion. J3 filed its Response on December 22, 2011. On January 17, 2012, at the Parties request, the Procedural Schedule was again stayed pending the outcome of the Summary Judgment Motions. The Presiding Officer denied the Motions by Order dated February 1, 2012 and by Order dated March 1, 2012 the evidentiary hearing was set for May 1-2, 2012. Also on March 1, the Presiding Officer granted J3's Application for a Subpoena seeking the testimony of Mr. Diskin at the hearing. J3 served the Subpoena on March 13, 2012.

Prior to the hearing, J3 submitted the written direct testimony and rebuttal testimony of J3's President, Stephen C. Russial and J3's expert procurement witness, Curtis W. McBride. Mr. McBride is a retired federal attorney and retired Air Force Reserve Officer who spent the majority of his 30+ year professional career structuring, reviewing and implementing thousands of competitive public procurement and federal financial assistance actions. Review of solicitations for use of the proper selection criteria, thoroughness of selection documents and compliance with the appropriate legal and regulatory requirements were his daily functions. As an active duty and reserve member of the Air Force Staff Judge Advocate Corp he specialized in contracting and became an Adjunct Professor of Law with the Air Force Institute of Technology

teaching Contract Law seminars at installations throughout the United States. (J3 St. 2, pp. 2-4; J3 Ex P-6).

West Penn submitted the written direct testimony and rebuttal testimony of Robert B. Reeping and Frank Mossburg. Both parties submitted testimony in Public and Confidential versions where necessary. At the hearing, the Parties stipulated to admission of all written testimony and exhibits. (Tr. 27-28). Nine J3 Public Exhibits, four Confidential Exhibits, and two Rebuttal Exhibits were admitted into evidence. Three West Penn Public Exhibits and two Confidential Exhibits were also admitted.

At the hearing, Mr. Russial, Mr. Mossburg and Mr. Reeping testified on direct, cross, and re-direct. Mr. Diskin was called as a J3 witness and testified on direct and cross-examination. West Penn waived cross-examination of Mr. McBride. Mr. McBride was later called by J3 as a rebuttal witness.

III. STATEMENT OF THE ISSUES

A. Did error occur during Part 2 proposal evaluation and if so, did that error deprive J3 of selection?

The central issue in this proceeding is whether the West Penn evaluators used an improper and undisclosed evaluation approach when they aggregated and averaged J3's four All-or-Nothing Bids into a single offer for evaluation purposes. A secondary issue is whether the error deprived J3 of selection.

Evidence presented during this proceeding clearly demonstrates that the evaluation was improper and that J3 would have been selected for two Tranches but for the error.

B. Is the Commission estopped from granting J3 relief?

West Penn has never pleaded the facts necessary to support the affirmative defense of detrimental reliance as required by Commission Regulation. See 52 Pa. Code 5.62 (b). However, West Penn has suggested in testimony that it detrimentally relied on the Commission's December 10, 2010 approval letter when it entered into contracts for the supply of SPAECS with the implication being that the Commission cannot grant J3's requested relief even if error occurred.

Timeliness aside, the factual and legal elements necessary to assert the estoppel-based affirmative defense of detrimental reliance are not present in this proceeding.

IV. BURDEN OF PROOF AND STANDARD OF REVIEW

A. Error

As the Complainant in this matter, J3 has the burden to prove that error occurred and that J3 was deprived of selection due to the error. See 66 Pa. C.S. 332(a). J3's burden must be established by a preponderance of the evidence which is substantial and legally credible. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 134 Pa.Cmwlt. 218; 221-222, 578 A.2d 600; 602 (1990), app. denied, 529 Pa. 654, 602 A.2d 863 (1992). The term "preponderance of the evidence" means that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party. *Seling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). See also *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates*, Docket No. C-2009-2093336, (Entered March 16, 2010), 2010 WL 1259661 (Pa.P.U.C.).

B. Estoppel

If accepted as timely, West Penn has the burden to prove the essential elements of the estoppel-based defense of detrimental reliance by clear, precise and unequivocal evidence. *Commonwealth of Pennsylvania v. Venesky*, 516 A.2d 445, 101 Pa. Commw. 456 (1986).

V. SUMMARY OF ARGUMENT

West Penn copied the MetEd/Pennelec RFP, combined it with their own bidding structure, and came up with perhaps one of the most flexible, competition enhancing solicitations for AECs issued in Pennsylvania. Then they did not follow through. The evidence establishes that West Penn did not understand its RFP going into bid-day. However, one of the most perplexing aspects of this matter is that when the right answer was staring the evaluators in the face by [REDACTED] offerors who structured their bids just like J3, they still did not go back and thoroughly review the RFP and supplemental guidance to determine what it actually was saying to bidders. Instead, they made an on-the-spot decision to utilize an evaluation approach that is reflected nowhere in the RFP or supplemental guidance. Then they did not document the decision. And now they are trying to rationalize it.

The RFP is clear. A Bid is a binding offer to supply a portion of the Tranche Target at a specified price per SPAEC. (J3 Ex P-1, Article 1.2). The RFP allowed the submission of 1-5 Bidform spreadsheets with a Part 2 Proposal. (J3 Ex P-1, Art 5.3). The information contained on each Bidform spreadsheet matches identically the elements that define a Bid. (J3-Ex P-1, Article 7.6 and Appendix 8). West Penn's witnesses have acknowledged that each spreadsheet is a Bid. (Tr. 108-110, 188). The Q&As instructed offerors to use different spreadsheets to

submit Bids with different pricing strategies (J3 Ex P-3, Q&A 47) and different offer strategies (J3 Ex P-3, Q&A 61). Source selection was to be based on the combination of Bids that minimized the overall cost of satisfying the Target Quantity. (J3 Ex P-1, Art. 2.4). The “All-Or-Nothing Bid” and “Up-To Bid” Offer Type concept in the RFP was a function of the defined term “Bid” not the Part 2 proposal as a whole. (J3 Ex P-1, Art 7.10). The sum of these facts is that each Bidform spreadsheet was a separate Bid that stood alone for evaluation purposes.

The West Penn witnesses testified as to the intent of the RFP’s All-or-Nothing concept. When asked to identify where the words actually appear in the RFP, they had no choice but to acknowledge that it was interpretation. (Tr. 115-116, 130-131, 135, 187). If the various words and phrases used by the witnesses to attribute meaning to the RFP actually appeared in the RFP, this case would not have been filed because J3 and the other bidders would have adjusted their Bids to account for the different Rules.

West Penn failed to execute the RFP properly and is now trying to hide behind process and the Commission’s approval as an excuse. As discussed below, clean hands are an essential element of the estoppel-based defense of detrimental reliance. West Penn wrote the RFP, answered the questions, and was part and parcel to the bid-day selection decision. West Penn does not have clean hands. Furthermore, for a detrimental reliance defense to succeed, the Commission would have had to knowingly misled West Penn when it issued its approval. Mr. Diskin’s testimony demonstrates that this was not the case. (Tr. 70 and 84)

West Penn would also like the Commission to believe that a decision in favor of J3 will chill future competitive bidding in Pennsylvania. First, this argument has no basis in law or the Commission regulations. Second, had West Penn done its job properly, we would not be here. Third, the procedural history shows that the reason this proceeding is one year and five months

removed from the filing of the Formal Complaint is primarily because of the difficulty J3 had to obtain the basic information needed for the case to proceed and other delays not attributable to J3. And finally and perhaps most importantly, as stated by Mr. McBride, a procurement expert:

The best way to instill confidence in the competitive bidding process is to follow the bidding rules published in the RFP and thereby obtain the correct results. Procurement officials should confront issues and resolve those problems in a fair and straight forward manner. Openness is critical to the process and the bidders and the public must be satisfied that the competition was conducted in a professional manner. The Commission should take action to remedy the wrong that has been evidenced in this procurement process.

(J3 St. 2-R, p. 16).

Pennsylvania Law and Commission Regulations authorize J3, a corporation having an interest in this matter, to file a Formal Complaint setting forth any act or thing done or omitted to be done by a public utility in violation, or claimed violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission. See 66 Pa.C.S. § 701 and 52 Pa. Code § 5.21. By using an evaluation approach not disclosed in, and patently inconsistent with, the procurement documents submitted with West Penn's Petition to Amend its Default Service Plan, West Penn violated the Commission Order of September 2, 2010. (JP Ex P-8). By not disclosing the evaluation approach to the bidders and not selecting the lowest priced Bids in accordance with the RFP Rules, West Penn violated the competitive procurement standards for alternate energy credits established by 52 Pa. Code § 75.67(b) and (c) and 52 Pa. Code. § 54.186. By participating in the flawed evaluation and not reporting the proper results to the Commission, West Penn misled the Commission. As the Commission's approval is only as good as the faulty information provided by the West Penn evaluators, it should be revoked until such time as West Penn awards J3 two 10-year Tranches.

VI. ARGUMENT

A. EVALUATION ERROR

1. **West Penn's RFP was unambiguous - each Bidform Spreadsheet was a Bid and each Bid would be evaluated separately for selection purposes.**

Bidders had only the RFP and West Penn's supplemental guidance to rely upon when fashioning their Part 2 proposals. The Parties do not agree upon the interpretation of the RFP. However, drawing on the law of contract interpretation, a contract [or in this case an RFP] is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction. *See Metzger v. Clifford Realty Corp.* 476 A.2d 1, 327 Pa. Super. 377 (1984). Here, the RFP was unambiguous and reinforced by West Penn's supplemental guidance. Each Bidform Spreadsheet was a Bid and each Bid would be evaluated separately for ranking and selection purposes.

The RFP uses the formal term "Bid" which is defined in both Article 1.2 and the Part 2 proposal instructions contained in Article 7:

Bid - Binding offer to supply a portion of the Tranche Target at a specified price per SPAEC. (J3 Ex P-1, Art. 1.2)

A Bid consists of three elements: (i) a price in dollars per SPAEC in the format \$xx.xx or \$xxx.xx (rounded to the nearest cent) for each Delivery Year; (ii) a specification of the maximum number of Tranches offered with each Bid; and, (iii) an indication of whether the Bid is "All or Nothing" or an "Up-To" bid (as defined in Section 7.10 of the RFP Rules). (J3 Ex P-1, Art. 7.6)

These definitions informed the prospective bidders as to what constituted a Bid per the terms of the RFP. They are read together with the Bidform Spreadsheet structure that was mandated by RFP Articles 5 and 7. (J3 Ex P-1, Articles 5.3 and 7). The contents of the Bidform Spreadsheet match the definitions of the term Bid. Mr. McBride testified that: (1) Each Bidform Spreadsheet

constituted a separate bid that was to be ranked as required by Section 2.4 of the RFP; (2) The mandatory Bidform established the bid for separate tranches at the prices entered by the bidder on the form; (3) Each form constituted a separate offer consisting of a quantity, the discounted average term price offer, a date and the signature of the authorized representative; and, (4) There was no indication in the materials submitted for his review that individual bids were to be aggregated or averaged in the selection process.¹¹ (J3 St. 2, p. 9).

Written and oral testimony also confirmed that J3 submitted four Bids that were four offers. See Testimony of Mr. Russial, (J3 St. 1, p. 6; J3 St. 1-R, pp. 2-3; Tr. 50-51); Mr. Mossburg (WP St. 2-R. pp 4-5; Tr. 108-110, 115-116); and, Mr. Reeping (Tr. 188). Mr. Mossburg further testified that spreadsheets [REDACTED] (Tr. 111).

In addition to the RFP Rules, West Penn issued supplemental guidance in the form of Q&As which reinforced the concept embodied in the RFP that bidders could submit multiple Bids containing different prices and offer strategies by using separate Bidform Spreadsheets. (J3 Ex P-2, Q&A 46; J3 Ex P-3, Q&As 47 and 61; J3 St. 1, p. 6; J3 St. 2, pp. 7-8).

The other key terms used in the RFP and cited by all witnesses in their written and oral testimony were “All-or-Nothing Bid” and “Up-to Bid.” These terms describe the Offer Type election that bidders had to make on each of the 10-year, 5- month and 10-year Bidform Spreadsheets submitted with a Part 2 proposal. (J3 Ex P-1, Art. 7.12 and Appendix 7). Failure to make the election would result in an “incomplete” flag on the Bid. Conversely, making the election triggers a flag that shows the Bid to be complete. (J3 Ex P-1, Art. 7.12; Tr. 189). The relevant explanatory language is found in RFP Article 7.10:

¹¹ The documents and materials reviewed by Mr. McBride are identified in his written direct testimony (J3 St. 2, pp. 5-6), and include the RFP and supplemental guidance issued by West Penn.

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”). (Emphasis Added) (J3 Ex P-1, Art. 7.10.).

It is clear that the All-or-Nothing Bid and Up-To Bid concepts are established as a function of the defined capitalized term “Bid.” Contrary to the West Penn testimony and interpretation, it is equally clear that no language in Article 7.10 states or suggests that All-or-Nothing applies to all Bids or offers submitted with a Part 2 proposal, or that All-or-Nothing Bids will be averaged, grouped, or combined for evaluation purposes.

Article 7.10 contained an example of how the All-or-Nothing function would work during evaluation. (J3 Ex P-1, Art. 7.10). In his written direct testimony, Mr. Mossburg stated that the example shows several “All or Nothing” blocks being offered at the same price rather than at different prices so the example is not completely analogous to the bid J3 presented.¹²

(WP St. 2, pp. 8-9). At the hearing, [REDACTED]

[REDACTED]. (Tr. 165-166). J3 agrees with the principle that an All-or-Nothing Bid means you take all that is offered in the Bid or you take nothing that is offered in the Bid, but the operative word is **Bid** not a grouping or combination of individual Bids. In his written rebuttal testimony, Mr. McBride populated the table from the example to illustrate the proper evaluation of the mix of Up To and All or Nothing Bids based on the actual single Tranche Bids that were submitted on bid-day and compared it to the improper approach used by West Penn. Using the proper approach, the two lowest priced Bids from J3 and the two lowest priced Bids from [REDACTED] resulted in the lowest combined price for the 10-year term. Using West Penn’s improper

¹² Mr. Mossburg also testified that a similar example appeared in the Pre-Bid Webinar Presentation.

approach, the [REDACTED] resulted in a higher combined price and should not have been selected. (J3 St. 2-R, pp 12-13).

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Hence, it appears that on bid-day the West Penn evaluators had the tools to follow the correct evaluation template but lost course once bids arrived.

Per the express language of the RFP, the Discounted Price for Evaluation Purposes (the DATP cell on the Bidform Spreadsheet) is the single parameter that was supposed to be used by the West Penn evaluators to compare offers. (J3 Ex P-1, Art. 7.12 and Appendix 7). The DATP is calculated based on the Tranches Bid at the prices offered on the individual spreadsheet even if the All-or-Nothing Bid Offer Type is elected on multiple spreadsheets. It is undisputed that the West Penn evaluators aggregated and averaged the DATPs contained in J3's four Bids for the purpose of comparison and source selection. Recalling that the testimony establishes that J3 submitted four Bids (four offers), that Article 2.4 provides that ranking is based on Bid pricing, and that selection is based on the combination of Bids which minimize the overall cost of satisfying the Target Quantity - the evaluators introduced the undisclosed and unauthorized process of consolidating All-or-Nothing Bids when each Bid was supposed to stand-alone for evaluation purposes. See Rebuttal Testimony of Mr. McBride. (J3 St. 2-R, pp. 1-2). When

¹³ [REDACTED]

asked at hearing if he considered structuring the Bidform Spreadsheet so that when All-or-Nothing was selected, the calculation of discounted price for evaluation purposes would be the combined average discounted price of all multiple spreadsheets marked All-or-Nothing, Mr. Reeping testified “no”. (Tr. 181-182). This testimony along with other evidence discussed below supports J3’s hypothesis that West Penn truly did not understand its RFP going into bid-day.

West Penn has suggested that J3 was at fault for not submitting a pre-bid question about J3’s offer strategy. (WP St. 1, pp. 19-20). At the hearing, the Presiding Officer asked Mr. Russial if he ever considered clarifying the All-or-Nothing Bid designation with the company. (Tr. 55-55). Mr. Russial testified that he did not because the RFP was clear - there was no information anywhere in the RFP or anywhere in the Q and A that would have raised any kind of question that multiple bids would ever be aggregated together and averaged together that would have even triggered the question. (Tr. 56). Mr. McBride, who has considerable experience structuring and reviewing competitive solicitations to avoid the errors encountered here, agrees. He analyzed the RFP Rules and supplemental guidance and concluded: (1) The RFP Rules were clear and in compliance with the authorizing Pennsylvania Code (J3 St. 2, p. 17); (2) The evaluation approach used was inconsistent with the stated procedure in the RFP and was a material defect in the procurement process (J3 St. 2, p. 18); (3) That based on a plain reading of the RFP it was not disclosed to any of the bidders that they were going to have their bids added into one bid and averaged out (Tr. 219); (4) No reservations were made in the RFP or public response to questions by bidders that would indicate any of the individual spreadsheets would be averaged for the purpose of determining the winning bids (J3 St. 2, p.7); (5) He could find no language in the RFP that would lead any bidder to believe that their individual bid sheets would

be aggregated and averaged for evaluation purposes (J3 St. 2-R, p. 15), and, (6) A reading of the RFP instruction would lead a prospective bidder to believe that the submission of individual bids on the, "All or Nothing," basis for each bid would be an acceptable strategy (J3 St. 2, p. 11).

West Penn had the opportunity to question Mr. McBride on these points but Mr. McBride was not cross-examined at the hearing. (Tr. 56). Turning to Pennsylvania public contracting law for guidance, if a solicitation contains a patent, obvious or glaring ambiguity, a bidder may be obliged to inquire. *See James D. Morrissey, Inc. for and on behalf of W. P. Dickerson vs. Commonwealth of Pennsylvania, Department of Transportation, Board of Claims, Docket No. 1295, 1995 WL 457818 (Pa.Bd.Claims)*. But as in the case here, where the RFP is clear, there is no ambiguity and the bidders have no reason or duty to inquire.

J3 points out that [REDACTED] of the 14 bidders on the Solar and Tier I RFPs submitted multiple Bidform Spreadsheets, [REDACTED] of whom marked their spreadsheets as All-or-Nothing Bids. (J3 Ex C-1). There is no logical reason to submit multiple All-or-Nothing spreadsheets unless they are intended as stand-alone Bids. If not stand-alone all Bids must be combined and averaged for evaluation purposes and, if selected for award, the payout would equal the average price. Therefore, the bidder would simply bid the average price for the total volume desired on a single spreadsheet, rather than staged pricing. (J3 St. 1, p.8). [REDACTED]

[REDACTED] The [REDACTED] and [REDACTED] of Bids formulated like J3's coupled with the absence of any questions, is strong anecdotal evidence that the Bidders understood what the RFP was saying even if West Penn did not. See McBride Rebuttal Testimony (J3 St. 2-R, pp. 4-5).

In his written testimony, Mr. Russial explained that the flexibility inherent in the West Penn RFP allowed bidders the opportunity to structure their Bids to respond to real world

scenarios. (J3 St. 1, pp. 6-7). This is a point where perhaps J3 and West Penn agree. Mr. Reeping testified that when he designed or changed that part of the RFP language [to allow multiple spreadsheets], he was trying to create opportunities for bidders to be creative in their offers to create value for our ratepayers. (Tr. 194). In his testimony, Mr. Russial used an example of a developer who has two potential client-systems each with different financial goals or revenue needs. By allowing multiple Bids, the West Penn RFP permitted the developer to accommodate both clients through a Bid for each system. Mr. Russial also noted that the flexibility in multiple staged bids increased the chances for a lower overall cost of satisfying the tranche target which was the goal of the RFP. (J3 St. 1, pp. 6-7). Mr. Russial described why J3 structured its Part 2 proposal to contain four independent Bids to respond to the real world Pennsylvania project that J3 seeks to develop.¹⁴ (J3 St. 1, pp. 9-10). He testified had he been informed on bid-day that the West Penn evaluators considered J3's offer to be the aggregate of J3's four spreadsheets on an All-Or-Nothing basis and the Discounted Price for Evaluation Purposes would be the average of J3's four spreadsheets, he would not have been able to confirm that as J3's offer and that it violated the RFP Rules for West Penn to treat the combination of J3's four bids as the offer. (J3 St. 2-R, p. 2). As to why he chose All-or-Nothing rather than Up-To on the four bids, he testified that the RFP rules indicated that a Bidder could not be awarded less than a single tranche citing RFP Article 2.1 and Q&A 29 from the Pre-Bid Q&A set. That being the case, Mr. Russial concluded that any bid submitted for just a single tranche was obviously by RFP rules, an All-or-Nothing bid and selection of Up To would have been inconsistent with the RFP rules and not make sense. (J3 St. 1, p. 8)

¹⁴As addressed earlier in this Brief, the West Penn was not unit specific and a successful bidder could obtain SPAECs from any source authorized by Pennsylvania. (J3 Ex P-3, Q&As 2 and 4; J3 Ex P-1, Art. 3.4).

West Penn's interpretation takes away RFP flexibility because in West Penn's mind, an All-or-Nothing Bid election on each Bid makes selection of the Bids mutually dependent – the developer either wins both Bids or wins neither. West Penn may argue that the developer in J3's example could have accommodated its business model by selecting Up-To on each spreadsheet so that the Bids would be evaluated independently. This outcome is only a happenstance and rationalization of a single Tranche Bid scenario where All-or-Nothing and Up-To produce the same result. And although Mr. Mossburg testified that as evaluators, it is not their job to deduce the intent of the bidders, (WP St. 2-R, p. 6) the evidence strongly suggests that is precisely what they did by improperly rationalizing the intent of J3's single Tranche Bids to exclude J3 from selection. This rationalization will be discussed in more detail later in this Brief, however, as explained in Mr. McBride's rebuttal testimony, Mr. Mossburg's logic fails as an RFP Rule which can be applied against J3 because it does not consider the application of the thought process on different bid formulations. (J3 St. 2-R, 7-8). For multiple Tranche bids the selection of "All or Nothing" does become a factor in the selection process. (id.). Multiple Tranche bidders cannot achieve the same result by selecting Up-To rather than All-or-Nothing on their individual spreadsheets. For example, if the bidder needs 400 SPAECS to support financing for each of two separate projects, but selects Up-To on both spreadsheets, the bidder may be selected for only one 200 SPAEC Tranche and not be able to fulfill its business needs. For Mr. Mossburg's logic to be an RFP Rule it would have to apply consistently across all Bid formulations.

Mr. Russial's [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Solar and Tier I RFPs were using the same Rules (WP Ex RBR-1) and at the hearing Mr. Reeping clarified that the Solar and Tier I RFPs were run concurrently. (Tr. 170). Therefore all Solar and Tier I Part 2 proposals were in the evaluator hands the morning of December 3, 2010.

[REDACTED]

[REDACTED] This should have been a glaring signal to the evaluators to go back, look at all the Part 2 proposals, and conduct a thorough analysis of the RFP Rules and Q&As to determine what they were actually saying to bidders. But that did not happen. Instead they

made an unsupported, on-the-spot decision to average J3's spreadsheets leading to J3's non-selection.

J3's interpretation of the RFP Rules is supported by substantial and legally credible evidence including the unambiguous express terms of the RFP, the reinforcing supplemental guidance, the testimony of Mr. Russial and Procurement Expert Mr. McBride, and the lack of testimony from West Penn witness that points to any language in the RFP that actually matches their interpretation. Furthermore, there is strong anecdotal evidence that the suppliers were interpreting the RFP in the same manner as J3 based on the [REDACTED] of similarly structured Solar and Tier I Part 2 proposals. Failure to follow the RFP Rules and use of an undisclosed and unauthorized evaluation process was error and violated the Commission's order authorizing the RFP and the Commission's competitive procurement standards for alternate energy credits established by 52 Pa. Code § 75.67(b) and (c) and 52 Pa. Code. § 54.186.

2. West Penn defenses to J3's Formal Complaint have no basis in fact or law.

West Penn's defenses to J3's Formal Complaint fall into several general themes:

- (1) Conclusory statements that the RFP language dictates that the All-or-Nothing Bid function transcends multiple All-or-Nothing spreadsheets, (2) Testimony that bidders were treated consistently that is not supported by documentation and not relevant to the issue of error, (3) Inaccurate analysis of the perceived need to give meaning to All-or-Nothing beyond the individual spreadsheet; and, (4) Factual unsupported and untimely detrimental reliance (which will be discussed in Section VI.B.).

(a) The RFP does not state or imply that All-or-Nothing transcends spreadsheets.

Throughout their written and oral testimony, the West Penn witnesses use language to ascribe meaning to the RFP that simply does not appear in the RFP. Had the actual language been included in the RFP, we would not be here today because J3 and the other bidders would have understood the new Rules and adjusted their bidding strategy accordingly. When pressed on cross-examination to find the language in the RFP, the witnesses had no choice but to admit it was their interpretation. Examples are set forth below.

In his direct testimony, Mr. Mossburg states: *“Per the RFP, which states that an ‘All-or-Nothing’ offer is an offer to supply only the total quantity bid, we grouped J3’s four blocks together as a single bid for 800 SPAECs.”* (WP St. 2, p. 9). J3 witnesses could find the referenced language nowhere in the RFP. (J3 St. 1-R, p.1; J3 St. 2-R, pp. 10-11). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Tr. 130-131). [REDACTED]

[REDACTED]

[REDACTED] (Tr. 131).

Earlier in his testimony, when asked if there was any language in the RFP that stated bids will be grouped, Mr. Mossburg again pointed to Article 7.10 which does not contain the terms group or grouping but Mr. Mossburg cited it as the authority for grouping J3’s four offers into a single offer. (Tr. 115-116). [REDACTED]

[REDACTED]

In his direct testimony, Mr. Mossburg states: *“According to the RFP, “All or Nothing” offers are exactly what the name denotes; the company must take the entire supply offered or*

take nothing.” (WP St. 2, p. 6). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Tr. 131).

In Mr. Reeping’s direct testimony he too references Article 7.10 for the proposition that All-or-Nothing transcends spreadsheets: *“In accordance with Section 7.10 of the RFP rules All-Or-Nothing offers were evaluated as specified by the bidder on the Bid-Form spreadsheet whether one Bid-Form spreadsheet was submitted or multiple Bid-Form spreadsheets were submitted with the Part 2 proposal: West Penn must take the entire supply offered or take nothing.”* When asked where the *“take the entire supply offered or take nothing”* language appear in the RFP, Mr. Reeping testified that it does not appear verbatim. (Tr. 191-192). Mr. Reeping also quoted additional language in Article 7.10 to support his position: *“Unless indicated as 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.”* (Tr. 188). He appeared to believe that this language made Up-To the default and that somehow translated into All-or-Nothing transcending spreadsheets. (Tr. 188-189). In subsequent responses he confirmed that offerors did not have a choice; they had to specify either All-or-Nothing or Up-To or the spreadsheet would show incomplete. (Tr. 189). Hence, this language appears to be an artifact from the MetEd/Penelec RFP which did not contain the All-or-Nothing/Up To forcing function contained in the West Penn active Bidform Spreadsheets and where the possibility existed that a Bid could be submitted without designating it as All-or-Nothing or Up-To. (Tr. 188-189). Moreover, artifact or not, when it was pointed out that the language used the capitalized, defined term “Bid” in the phrase *“number of tranches specified in the Bid”* Mr. Reeping said he used the phrase

“bid” not the “defined term bid.” (Tr. 193) When asked how a bidder could make the leap from the defined term “Bid” [which means individual spreadsheets] to offers will be grouped, or West Penn must take the total supply offered, or must take the entire supply offered, Mr. Reeping declined to take the leap but merely said he believed the language was clear and any bidder who did not understand the offer type had the opportunity to submit a question. (Tr. 193).

Mr. Reeping’s last response illustrates the main point of this discussion and the defect in West Penn’s argument. West Penn was not reading the express rules of the RFP. Instead the evaluators were contriving their own interpretations not expressed anywhere in the RFP or otherwise disclosed to bidders, and then blaming J3 and the other bidders for not understanding West Penn’s unexpressed interpretations. West Penn has yet to provide a detailed analysis based on the express terms of the RFP that aligns with West Penn’s interpretation. The reason for that is because West Penn’s interpretation does not align with the RFP. West Penn’s testimony must be read with caution because while it appears confident on its face, it has no basis in fact. J3, on the other hand through its testimony and in Section VI. A.1, above, has provided a detailed RFP-based analysis that aligns with the proper interpretation of the RFP

(b) Treating everyone wrong does not make it right.

Both West Penn witnesses testified that Part 2 proposals and multiple Bid-Form spreadsheets with the Offer Type marked as All-Or-Nothing were aggregated for evaluation. (WP St. 1, p.19; WP St. 2, p. 10). Initially, J3 notes that there is no written documentation in the record prepared prior to the Commission’s approval of the RFP results supporting the assertion that all Part 2 proposals with multiple spreadsheets marked All-or-Nothing were aggregated and averaged for evaluation purposes. During discovery, J3 asked for all evaluation materials prepared by Respondent and Boston Pacific during the course of evaluation that discussed or

memorialized the decision to average the pricing contained in J3's four spreadsheets. None were produced. (J3 Ex P-5, Doc. Req. 6). [REDACTED]

[REDACTED]

This is another perplexing aspect of the procurement since the decision to aggregate and average Bids drove source selection on the Solar RFP. In fact, the only written evidence that any Bids were averaged is [REDACTED]

[REDACTED]

Assuming for discussion purposes that Bids similar to J3's were averaged, both West Penn witnesses and Mr. Diskin believed equal treatment was important. J3 agrees – bidders should be treated equally. But equally wrong treatment it is neither relevant to nor dispositive of the question of whether evaluation error occurred -- which is the central issue before the Commission [REDACTED]

An equally important principle of competitive bidding is that you have to follow the Rules that were conveyed to the bidders. This is reflected in the Commission's regulations which specify required disclosures to prospective bidders including disclosure of bid price formats, bid submission instructions and format, and price-determinative bid evaluation criteria. See 52. Pa. Code. § 54.186 (c)(1). It is also reflected the public procurement law of Pennsylvania which although not directly applicable here, provides guidance on proper procurement practice:

To alter the specifications during the submission of bids, as found by the court below, would not produce competitive bidding, unless public notice of the change was given. Bidders should be informed by the specifications on file what is expected of them; material changes thereof should be followed by a public notice and a letting made accordingly. Personal notice to those having already secured plans, in addition to the public notice, is highly desirable, and should be given if possible; but, without public notice, discrimination may be easily practiced by sending only personal notices to a few individuals. A contract cannot be lawfully awarded when changes are made in the specifications after advertisement, unless the change is advertised: (Emphasis Added)

Page v. King, 285 Pa. 153, 131 A. 707, 1926 Pa. LEXIS 420 (1926).

The witnesses agree. In response to a statement in Mr. Mossburg's direct testimony regarding fairness, Mr. McBride testified.

In terms of fairness, the possible solution offered in response to Question 20 misapplies the procurement concept that unilateral contact with one bidder in a competition concerning such a material issue is unfair to all of the other bidders. Fundamental fairness would dictate that all bidders be treated equally under these circumstances. All bidders should have been contacted and provided the same opportunity to respond to the question. Actually none of the bidders needed to be contacted if the evaluators followed the written rules of the RFP. (Emphasis Added). (J3 St. 2-R, pp. 2-3).

Like the Supreme Court in *Page v. King* (supra), Mr. McBride is saying follow the written rules and if the owners of the RFP want to change the rules, provide all bidders the opportunity to respond. [REDACTED]

[REDACTED] (Tr. 95). [REDACTED]

[REDACTED] (Tr. 202).

J3 hopes that the West Penn evaluators went through the steps of averaging Bids in similarly structured Part 2 proposal. However, if they did it has no bearing on interpretation of the RFP Rules or whether the evaluation approach was improper. Nor does it have bearing on whether J3 should be granted the requested relief. The evaluators still were required to follow the Rules that were published and approved by the Commission.

(c) For single-tranche Bids, All-or-Nothing and Up-To provide the same result -- one stand-alone Bid for 200 SPAECS.

Mr. Mossburg maintains that All-or-Nothing must transcend bids or it completely ignores the All-or-Nothing designation. (WP St. 2, p. 12; Tr.112). The express language of the RFP and other evidence demonstrates that he is wrong.

First and foremost, as addressed at length earlier in this Brief the terms All-or-Nothing Bid and Up-To Bid are a function of the term "Bid" which is expressly defined in the RFP. Evidence and testimony establishes that each spreadsheet is a Bid. Nothing in the definition of Bid or description of All-or-Nothing and Up-To states or implies that the terms apply to Bids in the plural or grouped or combined Bids. That should be the end of the discussion. Nevertheless, there are other defects in Mr. Mossburg's position.

It is undisputed that the RFP prohibited a Bid for a partial Tranche. (J3 St. 1, p. 8). Mr. Russial testified that he did not chose Up-To on his Bids because any bid submitted for just a single tranche was obviously by RFP rules, an All-or-Nothing bid and selection of Up-To would have been inconsistent with the RFP rules. (id.) [REDACTED]
[REDACTED]
[REDACTED] (Tr. 145-146). In plain English, bidding Up-To on a single Tranche that could not be split may have been a risky proposition for a bidder.

In his written testimony, Mr. McBride explained how the All-or-Nothing and Up-To designation becomes meaningful:

For a single tranche bid, checking of the "Up To" box on the Bidform would have no significance because the RFP and Q&As make it clear that only full tranches would be awarded. For a (1) tranche bid, there would be no quantity number offered greater than (1) one on the Bidform. Consequently, the "Up To" language would have nothing to act on for a one tranche bid. It would have a meaningful

impact on multiple tranche bids, two or more, in that the selecting official could award tranches “Up To” the quantity of tranches entered on the Bidform.

An “All or Nothing” bid, indicated by checking the box on the Bidform, has no meaning for a (1) one tranche offer because, like the previous discussion concerning the “Up To” bid, the quantity offered is (1) one tranche. The RFP specifically stated full tranches would be awarded. If the “All or Nothing” bidder had offered more than one tranche, the result would be different. In the case of tranche offers greater than (1) one, the selection official would have to take all of the tranches offered or none. (J3 St. 2, p. 14).

This concept is perhaps best illustrated by

[REDACTED]

[REDACTED] (Tr. 113).

[REDACTED]

[REDACTED] (J3 Ex P-1, Art. 1.1).¹⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Tr. 113).

J3 has held the position that there was no logical business reason for bidders to submit multiple Bids marked All-or-Nothing if the bidder knew the Bids were going to be averaged for evaluation purposes. If not stand-alone and if selected for award, payout would equal the average price. Therefore, the bidder would simply bid the average price for the total volume on a single spreadsheet rather than bid staged pricing. West Penn responded to this assertion not with a logical business reason but rather with an assessment that 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 that made it clear only full blocks would be awarded. (J3 Ex P-5, Int. 8.). Similar discussion appears in Mr. Mossburg's written testimony. (WP St. 2, pp. 11-12). [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

¹⁶ [REDACTED]

[REDACTED] (Tr. 140-141).

This is the faulty single-Tranche rationalization logic. It also demonstrates that Mr. Mossburg's reluctance to deduce bidder intent (WP St. 2-R, p. 2) did not apply to J3 since that is precisely what they did by using inverse logic to erroneously conclude that J3 must have meant for its Bids to be combined and that West Penn's interpretation was correct. Mr. McBride addressed the faulty logic in his rebuttal testimony:

Beyond the plain reading of the RFP rules, Mr. Mossburg's logic also fails because it focuses on the single tranche scenario where "All-or-Nothing" and "Up-To" have no meaning because they provide the same result. He attributed J3's intent in selecting "All or Nothing" without considering the application of his thought process on different bid formulations by other bidders. An analysis of [REDACTED] illustrates this failure in Mr. Mossburg's logic. (J3 St. 2-R, p.8).

Mr. McBride went on to explain how the logic does not work for multiple Tranche Bids [REDACTED] where All-or-Nothing becomes a factor in selection the selection process. (J3 St. 2-R, pp. 8-9). In those cases, there is no safe harbor in selecting Up-To because Up-To can produce a different result from All-or-Nothing. If a logic does not apply consistently across all Bid formulations, it is not a rule but a rationalization and has no bearing on the intent of Bids or the interpretation of the RFP.

Once Mr. McBride identified the multiple-Tranche bid conundrum in his direct testimony (J3 St. 2, p. 10), Mr. Mossburg felt compelled to suggest three other reasons why a bidder might submit multiple All-or-Nothing Bids when the bidder knew the Bids would be aggregated and averaged for evaluation purposes. (WP St. 2-R; pp. 5-8).

Mr. Mossburg's first new reason (identified as the second reason in his list) actually aligns with J3's analysis. He states that a bidder may wish to support multiple projects with different price requirements and rather than take the time and effort, the bidder could simply

offer separate bid form spreadsheets for each project. (WP St. 2-R, p. 6). If a bidder has multiple projects, but they submit linked Bids, the bidder must either win all Bids or win none.

[REDACTED]

[REDACTED] (Tr. 147-151). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Tr. 149). In reality, these were smart bidders who knew how to read the RFP and combine tranches on a single spreadsheet when they wanted them combined and how to bid them on separate spreadsheets when they wanted them treated as stand-alone Bids.

Mr. Mossburg's next new reason is difficult to comprehend. It is premised on a bidder with a single project which has different price [revenue] requirements based on external market factors. Mr. Mossburg states: "*The bidder may then offer a different price stream for each "estimated" state of the market rather than "risk-weighting" all possible states into a single offer.*" (WP St. 2-R, p. 7). Keeping in mind that Mr. Mossburg's new reasons were to illustrate possible scenarios where a bidder might want to use separate spreadsheets marked All-or-Nothing but want its Bids considered as single offer, Mr. Mossburg's reasoning is contrary on its face to the intended purpose because his bidder does not want to "risk-weight" all possible states into a single offer. [REDACTED]

[REDACTED] (Tr. 151-155).

Mr. Mossburg's last new reason is simply out of touch with the realities of competitive bidding. He believes a theoretical bidder might have entered the competition with the intent to

game the outcome of the RFP when structuring its Bids. (WP St. 2-R, pp. 7-8). To be able to game this competition, a bidder would have to be astonishingly prophetic and a bit mad. When preparing its Bids, the bidder would have to: (1) Anticipate that the evaluators may use the aggregation and averaging evaluation approach that is contrary to the evaluation approach stated in the RFP; (2) Guess how the other bidders would bid; (3) Structure its Bids to finesse the evaluation; and, (4) Be willing to spend hundreds of hours of their time and legal time to ferret-out the other Bids and file a complaint with the Commission. A bidder's efforts are better spent trying to put together the best bids possible based on the published RFP Rules and supplemental guidance. [REDACTED]

[REDACTED] (Tr. 155).

[REDACTED] (Tr. 140-141). However, the record established that the defective single-Tranche rationalization was conveyed to Commission staff to explain why multiple All-or-Nothing Bids would be submitted with the intent and understanding that they would be grouped for evaluation purposes. (J3 Ex P-5, Int. 8). [REDACTED]

[REDACTED]

The RFP Rules are clear. Each spreadsheet is a Bid that must stand-alone for evaluation purposes whether the spreadsheet offers one Tranche or multiple Tranches. There is no basis in the RFP Rules to expand the operation of All-or-Nothing beyond the individual Bid. In the case of single Tranche Bids, the RFP was structured such that All-or-Nothing and Up-To produced the same result – a stand-alone Bid for one 200 SPAEC Tranche.

3. The root cause of West Penn's error.

J3 has hypothesized that West Penn's error grew out of the fact that it copied the RFP rules from the MetEd/Penelec RFP which was designed for a single Bid, combined the Rules with their own bidding structure which allowed multiple Bids, and in the process did not understand the meaning and context that resulted from the combination. The evidence supports this hypothesis.

Mr. Reeping testified that he drafted the RFP and developed the bidform spreadsheet that was included as Appendix 8 to the RFP. (Tr. 171, 178). He started by reviewing several RFPs that were in the market. Some RFPs were unit specific but West Penn was not concerned about receiving Tier I renewable energy credits (RECS) and Tier I solar renewable energy credits (RECS) from any specific facility. The MetEd/Penelec RFP fit West Penn's needs. (Tr. 171-172). In transposing the MetEd/Penelec RFP into the West Penn RFP, Mr. Reeping testified that from a document perspective, he kept a majority of everything and may have reordered sections a little bit for clarity. He indicated that the only major change was in allowing for more than one bid form spreadsheet to be part of an offer. (Tr. 174). He acknowledged that the definition of Bid contained in the RFP and the All-or-Nothing and Up-To language in Article 7.10 was the same language as in the MetEd/Penelec RFP. (Tr. 174). He testified that he was aware the MetEd/Penelec RFP permitted only one Bid and did not allow bidders to vary prices by tranches. (Tr. 175). He further testified that he did not review the bid presentation by the Brattle Group (IPM for the MetEd/Penelec RFP) when he developed the RFP (Tr. 172 and 175). At the hearing, slide 11 from the presentation was projected on the wall and the slide's two Q&As were read. The first Q&A instructed that a bid can only include one price regardless of the source of SPAECS. The second Q&A was answering the question could a bidder submit multiple all-or-

nothing bids. The response was “*no – a bidder may only submit one bid.*” (Tr. 177). When asked if he made any changes to the boilerplate terms in the RFP to account for the fact that West Penn was allowing multiple spreadsheets, Mr. Reeping testified that he “*made changes to the RFP rules to designate that we had different terms, different tranche sizes, different bid blocks, and different amounts of bid form spreadsheets were allowed.*” He further testified that he did not change the definition of a bid and the all-or-nothing language from the MetEd/Penelec RFP. (Tr. 179). When asked when he was transposing the RFP from MetEd to West Penn, did he consider the possibility that the all-or-nothing language took on new meaning in the context of [West Penn’s] multi-spreadsheet RFP, Mr. Reeping answered “*no.*” (Tr. 180). When asked when he was putting together the RFP, did he run through different bid scenarios that possibly could have been submitted, Mr. Reeping answered “*I didn’t presuppose what might come in.*” (Tr. 181). When asked when he was putting the bid form spreadsheets together for the RFP, did he consider structuring the spreadsheet so that when all-or-nothing was selected, the calculation of discounted price for evaluation purposes would be the combined average discounted price for evaluation purposes of all multiple spreadsheets marked all-or-nothing, Mr. Reeping testified “*no.*” (Tr. 181-182).

When asked how he familiarized himself with the RFP, Mr. Mossburg testified that “*he simply read the RFP documents.*” (Tr. 105). He did not run through any scenarios with West Penn as to the possible bid formulations that might come in under the RFP. (Tr. 105). Mr. Mossburg testified that did he not review the MetEd/Penelec RFP or the Brattle Group pre-bid information sessions and that he did not know that the MetEd/Penelec RFP permitted the submission of only one bid sheet and bid. (Tr. 106). When asked when did it first dawn on him that he might receive a Part 2 proposal that contained multiple spreadsheets, Mr. Mossburg

responded “*Our consideration of multiple spreadsheets marked all-or-nothing was probably after the bids were received. Certainly in the design of the RFP, it was allowed.*” (Tr. 105). See also (Tr. 113). Mr. Mossburg also testified [REDACTED] [REDACTED] (Tr. 126). Mr. Reeping testified that he averaged J3’s four spreadsheets on an Excel spreadsheet he prepared in the bid room. (Tr. 183). And in a question about the 10-year, 5 month Tranche, [REDACTED] [REDACTED] [REDACTED] (Tr. 113).

The collective testimony of Mr. Reeping and Mr. Mossburg demonstrates that when the MetEd/Penelec Rules were transposed into the West Penn RFP, the proper due diligence was not conducted that would have led to an understanding of the actual meaning and intent of the terms *Bid*, *All-or-Nothing Bid* and *Up-To Bid* as presented in the final RFP document. The collective testimony also demonstrates that the West Penn evaluators did not understand nor take the steps to understand the RFP going into bid-day which J3 believes led to the arbitrary and unsupported interpretations that were made on bid-day.

4. The events of bid-day and thereafter are perplexing.

There are certain facts about bid-day and the period leading up to the Commission’s December 10th approval letter that have been clearly established. There are also a number of factual issues where the testimony and evidence is perplexing and sometimes inconsistent. These matters must be kept in mind when considering the factual representations in West Penn’s arguments.

(a) Established Facts

The bidding window for both the Solar RFP and the Tier I RFP was between the hours of 9:00 AM and 12:00 PM on December 3, 2010. (Tr. 170). In the bid room were Mr. Reeping, Helen Taylor, and Mr. Mossburg (WP St. 1, p. 12) who were joined later in the morning after the auction had started by Mr. Diskin – around 10:15 or 10:30 according to Mr. Diskin’s testimony. (Tr. 65-66). Mr. Diskin stayed through completion of the auction and left at 1:00. (Tr. 66). Mr. Reeping and Mr. Mossburg were the Bid evaluators. (J3 Ex P-5, Int. 1). West Penn and the IPM were responsible for ranking Bids and determining a portfolio of winning Bids that minimize the overall cost of satisfying the Target Quantity. (J3 Ex P-1, Art. 2.4). Mr. Diskin was the Commission’s monitor for the RFP. (J3 Ex P-5, Int. 1).

West Penn received a total of 14 Part 2 proposals from eligible Solar and Tier I suppliers prior the 12:00 PM closing window. (J3 Ex P-9). [REDACTED] of the 14 contained multiple spreadsheets. [REDACTED] of the [REDACTED] were structured like J3’s Part 2 Proposal with All-or-Nothing Bid elected as the Offer Type on each spreadsheet. (J3 St. 2-R, pp. 3-4). On bid-day, confirmation calls were placed to each supplier to confirm the discounted Price For Evaluation Purposes and the Offer Type for each Bid-Form spreadsheet submitted. (WP St. 1, p. 13). J3 was not informed that the evaluators considered J3’s offer to be the aggregate of J3’s four spreadsheets on an All-Or-Nothing basis and that the Discounted Price for Evaluation Purposes that would be used for selection purposes would be the average of J3’s four spreadsheets? (J3 St. 1-R, p. 2).

J3’s two lowest priced Bids were the lowest overall for the Solar 10-year term. (WP St. 2, p. 9). None of J3’s Bids were selected because the average evaluated price of J3’s four single Tranche Bids was higher than the average evaluated price of [REDACTED].

Boston Pacific prepared a post-bid report and presentation for Commission staff concluding that

[REDACTED]

[REDACTED]

[REDACTED] (J3 Ex C-1). Boston Pacific's presentation was made on December 8, 2010 (J3 Ex C-1) and two days later the Commission issued a letter to West Penn approving the RFP results (WP Ex RBR-3).

(b) Perplexing matters.

In his written testimony, Mr. Reeping stated: "*Mr. Diskin was an active on-site participant in the bid room including the evaluation of the Part 2 proposals received and the determination of the winning bidders.*" (WP St. 1, pp. 10-11). In Mr. Mossburg's written rebuttal testimony, he states: "*A Commission representative, Mr. Paul Diskin, was in the bid room with us and was fully aware of how we ranked and selected the winning offers. Evaluators walked Mr. Diskin through all the offers received and displayed exactly how we chose the winning bids. This process made it very clear that "All or Nothing" bids were to be treated as offers to supply only in the quantities offered and that all bids were evaluated in the same fashion.*" (WP St. 2-R, p. 9).

Mr. Reeping's and Mr. Mossburg's testimony are not consistent with the testimony of Mr. Diskin. Mr. Diskin twice testified that he did not see the bids (Tr. 67), that he was not an evaluator, and that he was there to monitor and not as an active participant (Tr. 68). Mr. Diskin further testified with a high degree of specificity: "*There was no communication to me on bid day of who the successful bidders were, because the third-party monitor and the company still had work to do on that, and usually that information comes to us either later in the day.*" (Tr. 68-69). He further testified with specificity that "we" received an e-mail from Mr. Reeping

sometime around 4:00 or 5:00 with the preliminary results of the auction and who the successful bidders were (Tr. 69). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (Tr. 75). West Penn did not ask Mr. Diskin about his bid-day activities.

In Mr. Reeping's direct testimony he states: "*There was no discussion amongst the Independent Procurement Manager Boston Pacific, the Commission Staff and the Company as to the handling of Part 2 proposals that had multiple Bid-Form spreadsheets with the Offer Type marked as All-Or-Nothing on bid day.*" (WP St. 1, p. 16). This appears consistent with Mr. Diskin's testimony that he was not an active participant on bid-day and did not know the identity of apparently successful bidders until after he left on bid-day. But it appears very inconsistent with Mr. Mossburg's statement that the evaluators walked Mr. Diskin through all the offers received and displayed how the winning bids were chosen. It is not clear what point Mr. Reeping was trying to make. However, considering that [REDACTED] [REDACTED] (Tr. 126) and Mr. Reeping created his spreadsheet on bid-day morning which averaged Bidform Spreadsheets (Tr. 183) it is difficult to understand how there could not have been a discussion.

No evaluation materials, documents or other recorded material have been produced that discuss or memorialize the decision to average multiple All-or-Nothing spreadsheets contained in Part 2 proposals. In response to J3's discovery request, West Penn reported that none exists. (J3 Ex P-5, Doc. Req. 6). Considering that the decision to average was the determining factor in

source selection on the Solar RFP, and that [REDACTED] Mr. Reeping (Tr. 183) [REDACTED] [REDACTED] averaged on bid-day, this seems extraordinary.

Even more extraordinary is the fact the [REDACTED] [REDACTED] [REDACTED] (J3 Ex C-1).

[REDACTED] This is the case even though Mr. Mossburg's testimony establishes that Boston Pacific had concerns about the averaging approach prior to submission of the Report. (WP St. 2, p. 11-12). Mr. McBride observed that the [REDACTED]

[REDACTED] He considered this a material omission in the written documentation. (J3 St. 2-R, p. 9).

At the hearing, the Presiding Officer asked Mr. Diskin [REDACTED] [REDACTED] [REDACTED] [REDACTED]¹⁷ (Tr. 92-93). In Section VI.A.2.(b) of this Brief, we addressed that uniformity is but one principle of proper competitive procurement. Evaluators must still follow the RFP Rules that were provided to the bidders. Earlier in his testimony, Mr. Diskin was [REDACTED]

[REDACTED] His response [REDACTED]

¹⁷ Mr. Diskin testified that he had not read any of the written testimony submitted in the proceeding or discussed the matter with either Party or Boston Pacific since the time J3 filed its Formal Complaint. (Tr. 61-62). Hence, Mr. Diskin's knowledge base for answer the Presiding Officer's question was the information supplied to the Commission by West Penn and Boston Pacific in December 2010.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Tr. 74). When asked if there was any additional analysis provided by Mr. Reeping or Mr. Mossburg, he testified that there was none that he could recall. (id.). Mr. Diskin's testimony illustrates two points: (1) the importance of creating and preserving a complete and accurate written record that can form a basis for review; and, (2) his understanding of the reason for averaging multiple spreadsheets is based on the faulty information provided to him by the West Penn evaluators.

The last perplexing aspect of this procurement that will be noted here is that when [REDACTED] [REDACTED] Part 2 proposals structured with multiple spreadsheets marked All-or-Nothing was staring the evaluators in the face on bid-day, why was this not a red flag to the evaluators that their interpretation of the RFP was out of line with the instructions broadcast to the bidders.

When asked [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]” (Tr. 124). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Tr. 166). Mr. McBride testified that the evaluators should have been on notice that their interpretation of the RFP evaluation approach may not have been clearly conveyed to prospective bidders in the RFP and guidance. (J3 St. 1, p. 16). When asked what good procurement practice dictates, he stated:

Someone in charge of the evaluation should have determined if the problem was the result of a material defect in the RFP and then taken appropriate action to cure the defect depending upon their assessment of the situation. One straight forward action, requiring no change in the process, would be to follow the RFP as written and abandon the undisclosed evaluation approach. If the RFPs instructions were written contrary to the desires of the drafters, then an acceptable and well recognized management action would be to stop the evaluation, amend the RFP with the undisclosed evaluation criteria and allow the qualified bidders to resubmit their bids. (Emphasis Added) (id).

Clearly, the good procurement practice outlined in Mr. McBride's testimony did not occur here.

B. WEST PENN'S ESTOPPEL DEFENSE OF DETRIMENTAL RELIANCE HAS NOT BEEN PROPERLY PLEADED NOR DOES IT MEET THE TESTS REQUIRED BY PENNSYLVANIA LAW

West Penn testimony suggests that detrimental reliance is a defense to J3's Complaint.

Per the Commission's Regulations at 52 Pa.Code § 5.62(b), an affirmative defense shall be pleaded in an answer or other responsive pleading under the heading of "New Matter."

Detrimental reliance is an estoppel-based affirmative defense which comes under the Commission's Regulations. Facts which would support this defense (if any) would have been known to West Penn at the time West Penn filed the Answer to J3's Formal Complaint on February 2, 2011. Such facts were not pleaded in the Answer or in a subsequent responsive pleading. Accordingly, West Penn's assertion of the defense should now be deemed untimely and dismissed. Timeliness notwithstanding, West Penn's detrimental reliance defense is unwarranted.

Although never actually articulated in a pleading or other document, it appears West Penn would like to assert that even if error was proven to have occurred during Bid evaluation that deprived J3 of selection, the Commission is estopped from granting the relief requested by J3 because West Penn relied on the December 10, 2010 Secretarial Letter (WP Ex RBR-3) approving the RFP results. This logic suffers from multiple defects as discussed below.

The doctrine of estoppel may be applied to a Commonwealth agency in cases in which: (1) it has intentionally or negligently misrepresented some material fact, (2) knowing, or having reason to know, that another person will justifiably rely on that misrepresentation, and (3) where that other person has been induced to act to his detriment because he did justifiably rely on that misrepresentation. *See Cicchiello v. Bloomsburg Zoning Hearing Board and Town of Bloomsburg*, 617 A.2d 835, 151 Pa. Commw. 506 (1992); *Hauptmann v. Department of Transportation*, 429 A.2d 1207, 59 Pa. Commonwealth Ct. 277, (1981). The one who asserts estoppel must establish the essential elements by clear, precise and unequivocal evidence. *See Commonwealth of Pennsylvania v. Venesky*, 516 A.2d 445, 101 Pa. Commw. 456 (1986).

West Penn has not and cannot demonstrate that the Commission intentionally or negligently misrepresented material facts in its approval of the RFP results. Mr. Diskin testified that on bid-day he provided no information to West Penn that was misleading or factually incorrect. (Tr. 70). [REDACTED]

[REDACTED] (Tr. 84). When issuing the letter, the Commission relied on information and bid evaluation results provided by the West Penn evaluators. Hence, there could not be the requisite intentional or negligent misrepresentation of material facts by the Commission. West Penn's reliance defense fails on this point alone.¹⁸

Mr. Diskin testified that he believed Mr. Reeping and Mr. Mossburg were responsible for understanding the RFP and Q&As, and responsible for conducting the evaluation properly. (Tr. 66). This is consistent with West Penn's and Boston Pacific's joint responsibilities under RFP Article 2.4 which specify that they both will rank all Bids from lowest to highest price and determine a portfolio of those Winning Bidders whose Bids minimize the overall cost of

¹⁸ J3 notes that the Commission letter couched approval on the presumption that the procurement was conducted in accordance with the RFP rules. (WP Ex RBR-3).

satisfying the Target Quantity. (J3 Ex P-1, Art 2.4). [REDACTED] (Tr. 203-204).

“Clean hands” is also required for assertion of an estoppel defense. *See In re Land use Appeal of Cooke*, 2009 Pa. Commw. Unpub LEXIS 140 (“*The Township has gleaned these additional requirements from vested rights and variance by estoppel cases, rather than equitable estoppel cases. Nevertheless, it is clear that theories grounded in equity require a moving party to have clean hands.*”); *Strunk v. Zoning Hearing Board*, 684 A.2d 682, 1996 Pa. Commw. LEXIS 457 (“*To invoke the doctrine of equitable estoppel, Owners must also show "clean hands," which they have not done.*”). West Penn, as owner of the RFP and evaluator, was in the best position to know that an error occurred during bid evaluation and was obliged to make sure the correct results were reported to the Commission. Therefore, West Penn cannot claim detrimental reliance on the Commission’s approval of results that were not in accordance with the RFP because West Penn does not have clean hands. Reliance was not justifiable on West Penn’s part.

On the issue of detriment, West Penn had multiple opportunities within its own power to avoid harm to itself and everyone involved. First, West Penn should have been more diligent up-front and taken steps to understand the meaning of the RFP they developed through the combination of the MetEd/Penelec single Bid rules and the West Penn multiple Bid format. If they had, they would have understood what the RFP was telling bidders and may have realized that they created a highly flexible instrument to advance solar and Tier I non-solar development in Pennsylvania.

Once bid-day arrived and West Penn received [REDACTED] Part 2 proposals containing multiple spreadsheets marked All-or-Nothing, West Penn had a second opportunity to

avoid error. As the architect of the RFP Mr. Reeping was the most knowledgeable person in the room about the RFP content and should have known that the evaluators' interpretation of All-or-Nothing did not match the bid formulations he was seeing. At that point he should have stopped the evaluation, studied the RFP and supplemental guidance, and decided if West Penn wanted to proceed with the Rules as written or request permission from the Commission to amend the RFP and give all bidders a chance to adjust their bids accordingly. Instead, the evaluators made a rash, on-the-spot decision based on an unsupported interpretation.

After the selection decision was announced and J3 notified West Penn on December 27, 2010 of the error (J3 St. 1-R, pp. 6-7; J3 Ex R-1), West Penn could have taken quick action to minimize impact to all parties by notifying the Commission of a mistake and then terminating the agreement for the two Tranches that J3 should have been awarded pursuant to Article 9.2 of the SPAEC Purchase and Sale Agreement . At that point any damage to an erroneously selected bidder could have been eliminated or mitigated because first delivery of SPAECs under the 10-year term contract was not scheduled until after the third quarter of 2011. (J3 St. 1-R, pp. 7-8). Accordingly, to the extent that West Penn has suffered any detriment as a result of reliance on the Commission's approval, it was self imposed and is not a basis for an estoppel defense.

Without supporting facts or law, West Penn seeks to elicit a visceral reaction from the Commission - grant J3's relief and you will chill future competitive bidding in the Pennsylvania utility sector. Mr. Reeping testified that it would "*undermine the confidence of bidders.*" (WP St. 1, p.23). At hearing, West Penn's counsel elicited a similar comment from Mr. Diskin.

Asking Mr. Diskin, "[REDACTED]
[REDACTED]
[REDACTED]" Mr.

Diskin responded. “

.” (Tr. 90).

West Penn completely loses sight of the fact that if the Commission believes J3’s requested relief is warranted, it means West Penn had not done its job properly in the first place. If West Penn had, we would not be here today. As for the time gap, the Procedural History in Section II. B of this Brief clearly demonstrates that we are one year and five months removed from the Formal Complaint primarily because of the difficulty J3 had in obtaining basic information needed for the case to proceed and other delays not attributable to J3. West Penn played no small part in the delay. And most importantly, as stated by Mr. McBride, a procurement expert:

The best way to instill confidence in the competitive bidding process is to follow the bidding rules published in the RFP and thereby obtain the correct results. Procurement officials should confront issues and resolve those problems in a fair and straight forward manner. Openness is critical to the process and the bidders and the public must be satisfied that the competition was conducted in a professional manner. The Commission should take action to remedy the wrong that has been evidenced in this procurement process. (J3 St. 2-R, p. 15).

Bidders will be more comfortable knowing: (1) that their Bids will be evaluated fairly and in accordance with the disclosed rules; (2) they did not waste time and money preparing proposals that never had a fair chance; and, (3) if there is error that deprived them of selection, they have at least a plausible opportunity to pursue their rights before the Commission.

West Penn also appears to erroneously believe that Commission Rules do not authorize the relief requested by J3. A question was asked of Mr. Diskin concerning the default service regulations at 52 Pa. Code §54.188(d) which read in full:

(d) Upon receiving written notice, the Commission will have 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. When the Commission does not act within 1 business day the results of the process will be deemed approved. The Commission will not certify or otherwise approve or disapprove a DSP's spot market energy purchases made pursuant to a Commission-approved procurement plan. The Commission will monitor the DSP's adherence to the terms of the approved default service program and 66 Pa.C.S. §§ 2801-2812 (relating to the Electricity Generation Customer Choice and Competition Act). The Commission may initiate an investigation regarding implementation of the DSP's default service program and, at the conclusion of the investigation, order remedies as may be lawful and appropriate. The Commission will not deny the DSP the recovery of its reasonable costs for purchases made pursuant to an approved competitive procurement process unless the DSP concealed or misled the Commission regarding its adherence to the program, or otherwise violated the provisions of this subchapter or the code.¹⁹

Mr. Diskin was asked [REDACTED]

[REDACTED]

[REDACTED]. (Tr. 90-91).

The Regulation establishes fact-based tests for disallowing recovery of costs by a DSP. Initially, as mentioned in Footnote 17 earlier in this Brief, Mr. Diskin's frame of reference for answering questions about the propriety of the procurement is based on the information provided by the West Penn evaluators in 2010. That information was faulty and the limited analysis conclusory without basis in the express Rules of the RFP. Therefore, [REDACTED] must be read in this light. The evidence discussed herein indicates that West Penn did mislead and conceal by failing to properly discharge its obligations during Bid evaluation and allowing an erroneous selection recommendation to go forward to the Commission.

Regardless of misleading and concealing, J3's Formal Complaint, filed in accordance with 66 Pa.C.S. § 701 and 52 Pa. Code § 5.21 is based on violations by West Penn of the

¹⁹ It is not clear that 52 Pa. Code §54.188(d) is applicable to procurement of renewable energy credits. The Alternate Energy Cost Recovery Provisions at 52. Pa. Code § 75.67 reference the standards for competitive procurement found at 52 Pa. Code § 54.186 and the default service rate design and cost recovery regulation at 52 Pa. Code § 54.187, but not 52 Pa. Code. §54.188.

procurement standards for alternate energy credits established by 52 Pa. Code § 75.67(b) and (c) and 52 Pa. Code. § 54.186 and the Commission Order authorizing the modification to West Penn's Default Service Plan. J3 has met its burden of proof that these violations have occurred. Violations of the subchapter and Code are additional reasons for denying a DSP recovery of cost pursuant to 52 Pa. Code §54.188(d).

Finally, West Penn has testified that it would have no option but to terminate an existing contract if J3's relief is granted. (WP St. 1, p. 23). J3 has suggested that if J3's relief is granted West Penn should consider requesting that the Commission permit it to use the existing contract to meet West Penn or First Energy's upcoming renewable portfolio requirement rather than take the more drastic measure of terminating the contract. (J3 St. 1-R, p.9). Since the long-term credit market in Pennsylvania is highly volatile and subject to external events and the credits were acquired through competition and [REDACTED], the Commission may consider J3's suggestion a reasonable alternative to West Penn's more radical approach and allow West Penn to recover some or all of the cost.

VII. CONCLUSION

J3 has more than met its burden of proof in this proceeding by establishing that error occurred during the evaluation process conducted for the West Penn Solar RFP and that but for the error J3 would have been selected for two 200-SPAEC Tranches for the 10-year term.

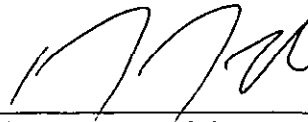
West Penn has yet to plead the affirmative defense of detrimental reliance as was required by Commission Regulation. Therefore, the defense is untimely and should be dismissed. Timeliness notwithstanding, West Penn has not and cannot establish the requisite

facts required by Pennsylvania Law to support detrimental reliance and estop the Commission from granting J3's relief.

In the Formal Complaint, J3 requested that the Commission direct a re-evaluation of the bids and revoke its approval of the evaluation results until such time as West Penn committed to award J3 the Tranches that J3 should have been awarded. At the time of the Complaint, insufficient public information was available for J3 to know how many Tranches it should have been awarded. Now that it is undisputed that J3 would have won two Tranches had the evaluation been conducted properly, re-evaluation is no longer necessary.

WHEREFORE, J3 Respectfully requests that the Commission amend its order to revoke approval of the evaluation results until West Penn awards J3 the two Tranches per year for 10 years that West Penn was required to award pursuant to the Commission-approved RFP.

RESPECTFULLY SUBMITTED



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Date: May 22, 2012.

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MAY 22 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

Complaint Docket No. C-2011-2219920

PROTECTIVE ORDER

Upon consideration of the Application of J3 Energy Group, Inc. (J3), for a Subpoena seeking documents prepared by Frank Mossburg, Managing Director of Boston Pacific Company, Inc. and Request to Amend the July 19, 2011 Protective Order, that was filed on August 17, 2011, and the objection to the subpoena by the Law Bureau, on behalf of the Bureau of Technical Utility Services;

IT IS ORDERED THAT:

1. This Protective Order applies to all materials and information identified in Paragraph 2 below, which will be filed with the Commission, produced in discovery, or otherwise presented during the above-captioned proceeding. All persons hereafter granted access to the materials and information identified in Paragraph 2 of this Protective Order shall use and disclose such information only in accordance with this Protective Order.

2. The material or information subject to this Protective Order are all correspondence, documents, data, information, and other materials that was produced by Boston Pacific Company, Inc. related to West Penn's December 3, 2010, competitive procurement of solar photovoltaic and non-solar photovoltaic Tier I alternative energy credits (AECs).

3. The Bureau of Technical Utility Services may designate as Protected Information the reports, memorandum, presentation and spreadsheet documents that are customarily treated by the Bureau of Technical Utility Services as confidential or proprietary, which are not available to the public and, which if disclosed freely, would subject West Penn and/or the bidders to risk of competitive disadvantage.

4. Protected Information produced in this proceeding shall be made available to the Commission and its Staff solely for use in this proceeding. For purposes of filing, to the extent that Protected Information is placed in the Commissions record, such information shall be separately bound, conspicuously marked, and accompanied by a copy of this Order.

5. Protected Information shall be made available to counsel of record in this proceeding for J3 and West Penn Power Company pursuant to the following procedures:

(a) The Protected Information may be used only for and to the extent that it is necessary for participation in this proceeding.

(b) Any person obtaining Protected Information disclosed through this provision may not use that information to gain any commercial advantage and may not forward it to any person except as set forth herein.

(c) To the extent required for participation in this proceeding, J3 counsel may afford access to Protected Information to an eligible outside expert (or experts) provided any such expert is not an officer, director, stockholder, partner, owner or employee of J3 or a competitor of West Penn or the bidders who responded to West Penn's RFP.

(d) To the extent required for participation in this proceeding, West Penn counsel may afford access to Protected Information to officers, directors, owners, or employees of West Penn and eligible experts selected by West Penn, provided any such

expert is not an officer, director, stockholder, partner, owner or employee of J3 or a competitor of West Penn or the bidders who responded to West Penn's RFP.

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

6. Any public reference to Protected Information shall be to the title or exhibit reference in sufficient detail to permit persons with access to the fully understand the reference and not more. The Protected Information shall remain a part of the record, to the extent admitted, for purposes of administrative or judicial review.

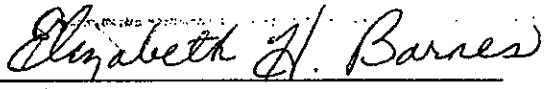
7. Bureau of Technical Utility Services staff shall designate documents as constituting or containing Protected Information by affixing a "Protected Information" stamp or typewritten designation on such documents. Where only a portion of a document constitutes Protected Information, Bureau of Technical Utility Services staff shall designate only the specific pages or information that constitutes Protected Information.

8. Portions of the record of this proceeding that contain Protected Information, including exhibits, writings, testimony, cross examination, argument and discovery responses, shall be sealed for all purposes, including administrative and judicial review, unless such Protected Data is released from the restrictions of this Order through agreement of the parties or pursuant to order of the Administrative Law Judge, the Commission or court.

9. Within 30 days after completion of this proceeding, including any administrative or judicial review, all Protected Information in the possession of J3 Counsel and experts and West Penn counsel, officers, directors, owners, or employees and experts shall be immediately returned to the Bureau of Technical Utility Services or in the alternative destroyed, at the election of the Bureau of Technical Utility Services. In the event, the Bureau of Technical

Utility Services directs J3 and West Penn Counsel to destroy the Protected Information, Counsel will provide an affidavit to the Bureau of Technical Utility Services affirming that the Protected Information has been destroyed.

Dated: October 17, 2011


Elizabeth H. Barnes
Administrative Law Judge

3. West Penn may designate as Protected Information those bid and evaluation materials that customarily are treated by West Penn and/or the bidders as confidential or proprietary, which are not available to the public and, which if disclosed freely, would subject West Penn and/or the bidders to risk of competitive disadvantage.

4. Protected Information produced in this proceeding shall be made available to the Commission and its Staff solely for use in this proceeding. For purposes of filing, to the extent that Protected Information is placed in the Commissions record, such information shall be separately bound, conspicuously marked, and accompanied by a copy of this Order.

5. Protected Information shall be made available to J3's counsel of record in this proceeding pursuant to the following procedures:

(a) The Protected Information may be used only for and to the extent that it is necessary for participation in this proceeding.

(b) Any person obtaining Protected Information disclosed through this provision may not use that information to gain any commercial advantage and may not forward it to any person except as set forth herein.

(c) To the extent required for participation in this proceeding, J3 counsel may afford access to Protected Information to an eligible outside expert (or experts) provided any such expert is not an officer, director, stockholder, partner, owner or employee of J3 or a competitor of West Penn or the bidders who responded to West Penn's RFP.

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

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9. Within 30 days after completion of this proceeding, including any administrative or judicial review, all Protected Information in the possession of J3 Counsel and experts shall be immediately returned to West Penn or in the alternative destroyed, at the election of West Penn. In the event, West Penn directs J3 Counsel to destroy the Protected Information, Counsel will provide an affidavit to West Penn affirming that the Protected Information has been destroyed.

Dated: July 19, 2011

Elizabeth H. Barnes
Administrative Law Judge

C-2011-2219920 - J3 ENERGY GROUP INC v. ALLEGHENY POWER

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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.)	

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2012, I served the Main Brief of J3 Energy Group, Inc., by electronic mail and FEDEX delivery upon Respondent, West Penn Power Company and the Presiding Officer at the addresses below.

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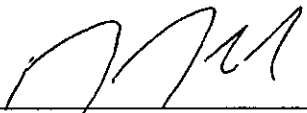
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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Date: May 22, 2012

Attorney for Complainant





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 To: _____
 Recipient's Name: **ROSEMARY CHIAVETTA** Phone: _____
 Company: **PA PUBLIC UTILITY COMMISSION**
 Address: **COMMONWEALTH KEYSTONE BUILDING**
 Address: **400 NORTH STREET 2ND** HOLD at Location
HARRISBURG State: **PA** FedEx Office address REQUIRED.
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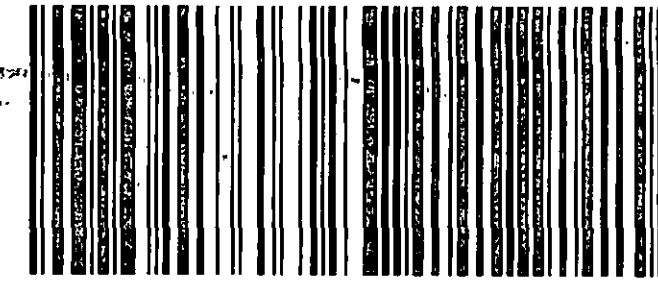
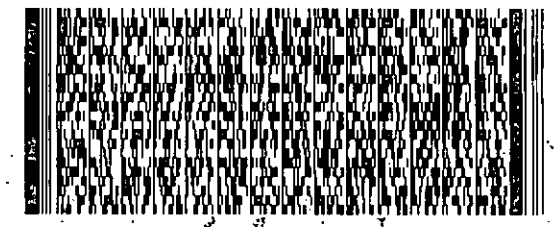
From: **THOMAS RUSSIAL**
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Ship Date: **22MAY12**
 ActWgt: **19.7 LB**
 CAD: **9612/0FFC1302**

TO **rosemary chiavetta**
pa public utility commissior

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Ref: _____
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 PO: _____ Dept: _____



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