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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

June 8, 2012

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

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

Public and confidential Versions have been served by e-mail and in paper copies to West Penn Counsel and the Presiding Officer as set forth in the Certificate of Service.

Sincerely,



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

Enclosures

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TABLE OF ABBREVIATIONS

Art.	RFP Article
DATP	Discounted Average Term Price
DSP	Default Service Provider
Int.	Interrogatory
J3	J3 Energy Group, Inc.
J3 Ex P-	J3 Public Exhibit
J3 Ex C-	J3 Confidential Exhibit
J3 Ex R-	J3 Rebuttal Exhibit
J3 MB	J3 Main Brief
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
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 MB	West Penn Main Brief
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

On May 22, 2012, J3 Energy Group, Inc. (J3) and West Penn Power Company (West Penn) filed Main Briefs in this proceeding. J3 hereby files its Reply Brief.

As addressed in J3's Main Brief (J3 MB), the testimony and exhibits establish that an undisclosed, unauthorized and improper approach was used to evaluate the four Bids contained in J3's Part 2 proposal submitted in response to West Penn's Request for Proposals (RFP) for the procurement of solar photovoltaic alternate energy credits (SPAECs). J3 submitted the two lowest priced Bids for the 10-year contract term. Had the West Penn evaluators followed the RFP Rules as written and approved by the Pennsylvania Public Utility Commission (Commission), J3 would have received a contract to supply two 200 SPAEC Tranches for 10 years. As owner and architect of the RFP and party to the bid-day evaluations and erroneous selection, West Penn is responsible.

The defective evaluation violated the Commission's Order adopted on September 2, 2010 approving a modification to Allegheny Power's Default Service Plan (J3 Ex P-8) 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.

West Penn has presented no valid fact-based or legal defense to J3's Complaint. West Penn's principal defense is that West Penn interprets the RFP to mean that J3's Four Bids should have been aggregated and averaged for evaluation purposes and that if J3 did not understand this interpretation J3 should have asked a question prior to proposal submission. The flaw with West Penn's argument has always been that the words in the RFP in no way reflect what West Penn claims they mean. Hence, not only is West Penn's interpretation patently inconsistent with the language of the RFP but bidders could not reasonably have anticipated the flawed

interpretation. J3 has provided a detailed analysis based on the actual language of the RFP demonstrating that J3's four Bids (and the similarly structured Bids from other suppliers) were required to be evaluated separately and not aggregated and averaged. J3 has also demonstrated that West Penn failed to properly raise its detrimental reliance defense and the defense fails on the facts.

West Penn sprinkles its argument with innuendo suggesting that by filing the Formal Complaint J3 is trying to be opportunistic. In his written testimony, J3's President, Mr. Stephen Russial, explains why J3 structured its Part 2 proposal the way it did for the purpose of financing the planned ██████████ Project from which the SPAECS would be generated.¹ (J3 St. 1, pp. 9-10). West Penn did not question Mr. Russial on these matters but persists with innuendo that J3's interpretation of the RFP and J3's bidding structure is after-the-fact. It is not clear if this is a human nature reaction (we cannot be wrong, therefore J3 is trying to game the process) or if West Penn actually believes these factually unsupported allegations will resonate with the Commission. Regardless, the innuendo has no place in this proceeding and only serves as further testimony to the weakness of West Penn's arguments on the merits.

II. DISCUSSION

A. West Penn's Brief contains factual assertions that are inaccurate and/or require clarification.

¹Through discovery, West Penn received additional confidential business and financial information about J3's Project. J3 objected to the discovery of project specific information based on the fact that the information was not relevant to the evaluation of proposals and not relevant to the issues before the Commission. West Penn's Motion to Compel was granted by Order dated October 17, 2011. J3 produced the information on November 5, 2011 subject to a Protective Order dated October 28, 2011 which limited access to West Penn Counsel of Record and eligible outside experts.

There are a number of factual assertions in West Penn's Main Brief (WP MB) that are inaccurate, not supported by the record, or require clarification. These will be noted in the order in which they appear.

(1) West Penn states "*J3 also presented the written direct and written rebuttal testimony of Curtis W. McBride, an independent consultant who consults on procurement matters for TechSource, Inc., of Los Alamos, New Mexico.*" (WP MB, p. 4). For clarity purposes, Mr. McBride was engaged by J3 directly (not through TechSource) as an independent expert witness based on his extensive competitive procurement experience gained through a long and distinguished career with the U.S. Department of Energy, the Military and the private sector after his retirement from Federal Service. (See J3 St. 2, pp. 2-5; J3 Ex P-6).

(2) Without reference to a corresponding RFP Article, West Penn states: "*In the RFP suppliers competed for two distinct contracts...*" aligning with the 10 year, 5 month and 10 year terms. (WP MB, p.9). The RFP does not define the competition in terms of two distinct contracts. Instead, the RFP describes the product to "*consist of a term of 10-year and 5-month, and 10-year supply.*" (J3 Ex P-1, Art. 1). The SPAEC Transaction Confirmation appended to the RFP Rules further illustrates that the 10 year, 5 month and 10 year terms were the product and could be included in a single contract if a supplier submitted the lowest evaluated Bids for each term.² J3 does not dispute that Bids for the 10 year, 5 month term should have been evaluated separately. However, as explained in J3's Main Brief, the proper reason therefore was that the 10 year, 5 month spreadsheet was a separate Bid as defined in the RFP, not a separate product or contract. (See J3 MB, pp. 35-36).

²The SPAEC Transaction Confirmation is found in WP Ex. RBR-1 at Solar Photovoltaic Alternative Energy Credits Request for Proposals Rules, Appendix 1, Page 28 (Appendix A to Appendix 1).

(3) West Penn maintains that Commission Representative Paul Diskin was in the bid-room on bid-day, participated in the evaluation of Bids, and participated in the identification and confirmation of winning bidders. (WP MB, pp. 10-12).³ These are recollections of the West Penn witnesses. Mr. Diskin has a different recollection. Part 2 proposals were required to be faxed to West Penn's Greensburg office between 9:00 AM and 12:00 PM on December 5, 2010. Mr. Diskin testified with considerable clarity that: (1) he arrived in West Penn's Greensburg offices around 10:15-10:30 after the auction had begun and left at 1:00 before work was over; (2) he was not an evaluator, was not an active participant, and did not see the bids on bid-day; and, (3) he did not know who the successful bidders were until an e-mail was sent by Mr. Reeping around 4:00-5:00 PM with the preliminary results of the auction. (Tr. 66-69).⁴ At the hearing, West Penn did not question Mr. Diskin about the discrepancies between his recollection of bid-day events and the recollections of the West Penn witnesses.

(4) Without reference to the evidentiary record, West Penn states: "*The testimony of West Penn's Mr. Reeping, of Boston Pacific's Mr. Mossburg and of the Commission's Mr. Diskin was unanimous and consistent that such an "all or nothing" submission by J3 made little sense and contradicted the RFP rules.*" (WP MB, p. 15). It is true that Mr. Mossburg was concerned about the All-or-Nothing designation on single tranche Bids. He determined that Up-To was safe because the RFP prohibited award of partial tranches and then rationalized that into a belief that All-or-Nothing must transcend spreadsheets. (J3 Ex P-5, Int. 8; WP St. 2, pp. 11-12; [REDACTED] ¶ As J3 discusses in the Main Brief, this was faulty logic. (J3 MB, pp. 34-37). It is also true that Mr. Reeping endorsed this same faulty logic in his written rebuttal testimony. (WP

³ West Penn's written testimony further states that Mr. Diskin was an active on-site participant in the bid room including the evaluation of the Part 2 proposals. (WP St. 1, p. 11).

⁴ Mr. Diskin was aware of this dispute prior to the hearing. J3 informed him of the error on December 28, 2010 (J3 St. 2-R, p. 7; J3 Ex R-2), he was involved in production of the Boston Pacific Post-Bid Report in August 2011 (Tr. 62), and he was served with a subpoena to testify at the hearing in March 2012.

St. 1-R, p. 4). However, nowhere in Mr. Diskin's testimony does he endorse this logic. In fact,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Tr. 81-82). [REDACTED]

[REDACTED] (Tr. 74-77, 79, 84). [REDACTED]

[REDACTED] (Tr. 74, 84).

(5) West Penn states: *"It should also be noted that J3's strained interpretation of "all or nothing" is after the fact – that is, after J3 learned that two of its individual bid-form spreadsheet offers would have been chosen had they been designated as "up-to."* (WP MB, p. 20).

Irresponsible innuendo aside, West Penn should at least get the facts correct in the accusing statement. They did not. J3 knew that error occurred during evaluation once West Penn first disclosed the improper averaging approach on December 27, 2010 in response to J3's December 23rd question. (J3 St. 1-R, pp. 6-7).⁵ J3 immediately asked West Penn to explain what gave them authority to translate J3's four all-or-nothing bids each for one full tranche, each with its own unique price, into a single bid for 800 SPAECs per year at some average of J3's individual four bids. (J3 Ex R-1). J3 suspected its two low bids may have been in line for selection. But since very limited information was made public about the winning bids, J3 did not know if J3 would have been successful for any tranches had the evaluation been conducted correctly since there were theoretical bid combinations where J3 would have lost even with proper evaluation. J3's Formal Complaint filed January 10, 2011 describes in detail the error in the evaluation process and the proper interpretation and application of All-or-Nothing to individual Bids as

⁵ In his oral testimony, 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)

defined in the RFP. Still, J3 did not know if it would win any tranches. This is reflected in the requested relief which sought re-evaluation of J3's four bids as individual offers. If based on the re-evaluation J3 should have been selected for one or more tranche, then J3 asked the Commission to revoke its approval until West Penn committed to award J3 the appropriate tranches. (See J3 Formal Complaint Form, Par. 5). In fact, J3 did not know if it would proceed with the case until August 2011, after the Presiding Officer granted J3's Motion to Compel Discovery and West Penn produced the spreadsheets of the other seven solar suppliers at the August 8th Pre-hearing Conference. J3's Pre-hearing memo dated August 2, 2011 states that J3 cannot determine if one or more of its bids would have been selected without access to bid information from the other bidders and J3 will assess whether to proceed after receipt of the documents by J3 Counsel. (See J3 Pre-hearing Memo, p. 2; See also August 8, 2011 Pre-hearing Tr. 5). Hence, contrary to West Penn's innuendo, J3 was challenging the error long before J3 knew it would be entitled to an award of two or any tranches - for the same reasons before the Commission today. Furthermore, West Penn had the information and the opportunity to question Mr. Russial about J3's bidding structure in connection with the [REDACTED] Project where J3 planned (and still plans if successful here) to source the SPAECs. West Penn chose not to do so preferring instead to propound unsupported and inaccurate speculation about J3's sincerity in pursuing rights authorized under Pennsylvania Law and Commission Regulations.

(6) In Section V.C. of West Penn's Main Brief, West Penn argues that J3 should have asked a question about the RFP terminology because J3 found the RFP "non-sensical." (WP MB, p. 30-31). As discussed in J3's Main Brief, J3 has no quarrel with the RFP terminology and never has. J3's quarrel is with the fact that West Penn did not follow the Rules set forth in the

RFP. (J3 MB, pp. 1-2). As for the “non-sensical” statement, West Penn argument is based on a bizarre convolution of Mr. Russial’s direct testimony. Review of the actual testimony contained at the references in West Penn’s brief (J3 St. 1, p. 8) reveals that Mr. Russial answered the following questions:

Q. When J3 prepared its Part 2 proposal, did J3 consider selecting Up-To Bid as the offer type on each spreadsheet?

A. No.

Q. Why not?

A. The RFP rules indicated that a Bidder could not be awarded less than a single tranche. (J3-P-Ex 1, Article 2.1; J3-P-Ex 2, Q&A #29). That being the case, any bid submitted for just a single tranche was obviously by RFP rules, an “All-or-Nothing” bid. A single tranche bid flagged as “Up To” would have been inconsistent with the RFP rules and therefore non-sensical.

As seen by Mr. Russial’s responses, J3 did not consider selecting Up-To as the offer type because under the RFP Rules a single tranche bid would be an All-or-Nothing bid. He **never** testified that when he was preparing J3’s Bids he found the RFP to be nonsensical as West Penn would have the Commission believe. He testified that in reading the RFP, All-or-Nothing was the obvious choice and Up-To would have been inconsistent with the notion that only full tranches would be awarded. Mr. Russial’s written testimony aligns with his oral testimony. (Tr. 54-55).

(7) West Penn maintains that “It is uncontroverted that all bidders were treated uniformly and in accordance with the RFP Rules. (WP MB, p. 32). The crux of J3’s Complaint is that J3 was not treated in accordance with the RFP Rules; therefore, it is clearly disputed that bidders were treated properly. Furthermore, while Mr. Reeping and Mr. Mossburg may have testified that bidders were treated uniformly, there is no contemporaneous written documentation supporting equal treatment (J3 MB, pp. 45-46), and [REDACTED]

[REDACTED] (Tr. 79).

(8) West Penn claims that J3 argues that West Penn's guidance on how to submit proposals was misleading. (WP MB, pp 33-34). To the contrary, from the time J3 filed the Formal Complaint through the time the Main Brief was served, J3 has consistently stated that the RFP is clear but that West Penn failed to follow it. Both Mr. Russial and Mr. McBride testified that the Q&As supplemented and reinforced the express intent of the RFP. (J3 St. 2, pp. 6-9, 11; J3 St. 1-R, pp 2-3; J3 St. 2-R, p. 5).

B. J3's interpretation of the All-or-Nothing and Up-To designations is the only interpretation consistent with, and authorized by, the RFP.

In Section V.A of its Main Brief, West Penn argues that J3 misinterpreted the All-or-Nothing designation. (WP MB, pp. 15-18). West Penn's argument has multiple flaws.

Initially, West Penn's argument is premised on what West Penn believes the RFP to mean – not what the RFP actually says. West Penn ignores the RFP definition of the term Bid in Articles 1.2 and 7.6. West Penn also ignores that the RFP established the All-or-Nothing and Up-To election in Article 7.10 as a function of the defined term Bid. Contrary to what West Penn asks the Commission to believe, the RFP did not establish the All-or-Nothing and Up-To election as a function of the Part 2 proposal as a whole, or the grouping of Bids, or the total quantity of Tranches offered with a Part 2 proposal.⁶ West Penn takes this position despite the fact that their witnesses acknowledged that J3's four Bidform Spreadsheets were four Bids and four offers (Tr. 108-110, 115-116, 188) and that the words West Penn witnesses use to ascribe meaning to the RFP do not actually appear in the RFP (J3 MB, pp. 29-31). When a fact-based analysis of the RFP is performed it becomes clear that West Penn's interpretation is not reflected

⁶ The RFP is found at J3 Ex P-1.

in the RFP document. J3 has set forth the correct analysis in detail in Section VI.A.1 of its Main Brief. (J3 MB, pp. 19-28). West Penn cannot ask the Commission to ignore the unambiguous terms of the RFP because West Penn had an undisclosed intent or different understanding. If West Penn wanted to combine and average All-or-Nothing Bids they were required to amend the RFP and provide the suppliers an opportunity to adjust their proposals accordingly.

The next flaw in West Penn's argument is that it relies on the defective single-tranche rationalization that pervades West Penn's position. West Penn's theory is that since an Up-To election would result in an award for a full tranche, it made little or no sense for a bidder to designate a single tranche Bid as an All-or-Nothing offer type. (WP MB, p.15). West Penn translates this theory into a belief that the All-or-Nothing election aligns with their interpretation and must have been meant to transcend spreadsheets. (J3 Ex P-5, Int. 8; WP St. 2, pp. 11-12; ██████████). In doing so West Penn improperly attributed intent to J3's Bids based on faulty logic.

Inverse logic is a peculiar way to interpret an RFP. Nevertheless, West Penn's logic suffers from two fatal defects. First, it ignores the plain reading of the terms Bid, All-or-Nothing and Up-To as established by the RFP. Second, the logic simply does not work. If West Penn had taken the logic one step further, they would have understood why it does not work.

An All-or-Nothing or Up-To election on a single-tranche Bid produces the same result - an individual Bid for 200 SPAECS. The All-or-Nothing result is obvious and straightforward since the Bid is offering one tranche on an All-or-Nothing basis as Mr. Russial describes in his testimony. (J3 St. 1, p. 8; Tr. 54-55). The Up-To result occurs because the RFP provides that a bidder may not bid on fractions, portions or parts of tranches. (J3 Ex P-1, Art 7.8). Therefore, it is implicit that an Up-To Bid for a single tranche must be for the full tranche. However, once

you go beyond the single-tranche Bid, the elections become operational and make a difference.

A supplier bidding multiple tranche bids could not be assured of receiving the needed tranches by switching between the All-or-Nothing and Up-To elections. [REDACTED]

[REDACTED] (See J3 MB, pp. 25-26, 37).

Hence, the inverse logic applied by West Penn to attribute meaning to the RFP cannot be a Rule because it does not produce the same result across all possible bid formulations. It can no more be used to assess the proper interpretation of J3's Bids than it could be used to assess the interpretation of multiple-tranche Bids.

Later in West Penn's Main Brief, West Penn argues that J3's interpretation disregards the distinction between all-or-nothing and up-to offers and would lead to serious evaluation contradictions. (WP MB, 20-21). J3 has fully addressed the first aspect of West Penn's argument in its Main Brief through a detailed fact-based analysis demonstrating; (1) why the All-or-Nothing and Up-To election provide the same result for single-tranche bids and why the distinction is necessary and becomes meaningful for multiple-tranche bids (J3 MB, pp. 34-39); (2) that there is nothing in the RFP which states or implies that All-or-Nothing transcends spreadsheets (J3 MB, pp. 29-32); and, (3) why it was improper for the West Penn evaluators to aggregate and average J3's four Bids for evaluation purposes (J3 MB, pp. 19-28).⁷ J3 will not repeat the detailed analysis here but will address the second aspect of West Penn's argument concerning evaluation contradiction.

⁷ J3 notes that the MetEd/Penelec RFP, which was the source of the West Penn RFP Rules including the definition of Bid and the All-or-Nothing and Up-To election, allowed bidders to submit a single bid for one or more tranches. (Tr. 175-185). Hence, for the MetEd/Penelec RFP, All-or-Nothing and Up-To operated on the individual Bid and if a supplier offered only one tranche for the Bid it would not have made a difference if the bid-sheet showed All-or-Nothing or Up-To. But if the supplier offered more than one tranche on the Bid, then All-or-Nothing and Up-To became meaningful. The MetEd/Penelec RFP further illustrates that there is nothing offensive in the concept that All-or-Nothing and Up-To only become meaningful for multi-tranche Bids. If West Penn intended otherwise, they needed to adjust the language drawn from the MetEd/Penelec RFP – which they did not do.

West Penn argues that if J3's four Bids had been evaluated separately, the procurement winner could have complained that the evaluators had ignored J3's "all or nothing" designation and should have grouped J3's bid-form spreadsheet together. (WP MB, p. 21). The flaw with this argument is that the potential post-selection action of another bidder was not an evaluation criterion and has no bearing on the interpretation of the RFP. Once a supplier passed the qualification stage (as J3 did), Bids were to be evaluated on a price-only basis (J3 Ex P-1, Articles 1.4 and 2.4). The possibility that a selected bidder might object to J3's selection is no more meaningful to the proper interpretation of the RFP and Bids than the possibility that J3 or any other supplier may have challenged the winner's selection. The West Penn evaluators had to follow the RFP Rules and use those Rules alone to determine the winning bidders. It is not clear if the concern entered into the selection thought process or if it is more rationalization. If it was part of the selection analysis, then West Penn committed additional error.

West Penn also provides a hypothetical where J3's two lowest priced bids are a little cheaper such that the grouping of all four J3 bids would result in the cheapest solution. Under the hypothetical, West Penn states that J3 might have complained that J3 should have been selected for four tranches not just two. (WP MB, p. 21). Inappropriate innuendo aside once again, here West Penn's argument suffers from the same flaws as [REDACTED].⁸ The interpretation of the RFP and Bids must be based on the RFP Rules, not on potential, hypothetical or imagined post-bid actions by the bidders. If this consideration factored into the selection thought process, it was also error.

⁸ As noted earlier in this Reply Brief, Mr. Russial's testimony explains why J3's Bids were structured the way they were and why they were submitted as independent Bids. West Penn declined to question Mr. Russial on these matters.

C. Mr. Diskin's testimony was based on the incomplete analysis and faulty information provided by the West Penn evaluators.

West Penn cites Mr. Diskin's testimony as evidence of a proper evaluation. (WP MB, pp. 18-20). It is important to examine exactly what Mr. Diskin said at the hearing and to understand his frame of reference at the time of his testimony and at the time of the Commission's approval letter.

Mr. Diskin testified that he did not see, nor do an evaluation of, the bids received on bid-day (Tr. 67-68). He received no written documentation discussing, memorializing or analyzing the decision to average multiple All-or-Nothing Bids (J3 Ex P-5, Int. 7 and Doc. Reqs. 3, 4, and

6; [REDACTED]). [REDACTED]
[REDACTED]. (Tr. 79). [REDACTED]
[REDACTED]
[REDACTED] (Tr. 74, 84). [REDACTED]
[REDACTED] (Tr. 81-82). [REDACTED]
[REDACTED]
[REDACTED] (Tr. 92-93). [REDACTED]
[REDACTED]
[REDACTED] (Tr. 95) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Tr. 98).

The point of this factual recitation is to illustrate that Mr. Diskin's frame of reference for his testimony was the limited, superficial and inaccurate analysis provided to Commission staff by the West Penn evaluators. Therefore, his understanding of the propriety of the RFP

evaluation, and the Commission's approval of the RFP results, is only as good as the faulty information provided by the West Penn evaluators.

[REDACTED]

In J3's Main Brief we show that consistency is but one requirement of a proper competitive procurement. Evaluators are also required to follow the published Rules. (J3 MB, pp 31-33). The use of an undisclosed and unauthorized evaluation process violated the competitive procurement standards contained in the Commission's Regulations. See. 52 Pa. Code. § 54.186. Had the evaluators done their job correctly and properly informed the Commission, J3's two lowest Bids would have been selected. Treating everyone wrong did not obviate the error or the harm caused to J3 by the improper selection.

D. A bidder's bidding experience has no bearing on West Penn's error.

West Penn suggests that J3's bidding inexperience may have caused J3 to misinterpret the RFP and led to an incorrect bid designation. They note that J3's participation in the West Penn RFP was only J3's second attempt at a utility procurement.⁹ (WP MB, pp. 21-22).

Several initial observations are in order. First, there is no small amount of irony in West Penn's assertion considering the fact that J3 pointed out West Penn's misinterpretation of the RFP Credit Exposure Calculation to West Penn and Commission staff prior to bid submission which led to an RFP amendment and extension of the due date for Part 2 proposals. (J3 St.1, pp. 4-5). This suggests that J3 understood the RFP quite well and West Penn may not have paid as close attention to the RFP as it should have.¹⁰ J3 notes that prior to release of the West Penn

⁹ West Penn's questions to Mr. Russial at the hearing concerning procurement experience were limited to J3's participation in utility procurements for default service or other default service such as SRECS. (Tr. 35-37). From that West Penn extrapolates that J3 and Mr. Russial have limited overall procurement experience.

¹⁰ In J3's Main Brief, we identify other evidence which supports the hypothesis that West Penn did not understand its own RFP. If West Penn had done a proper due diligence when transposing the MetEd/Penelec RFP into the West

RFP, there appears to have been only two other long-term SREC procurements in Pennsylvania – the PECO auction and the MetEd/Penelec auction. Therefore, there were not many opportunities for Pennsylvania bidders and utilities to gain experience in SREC competitions. West Penn’s RFP itself was unlike the other two. Although West Penn copied the Rules from the MetEd/Penelec RFP, they introduced a unique bidding structure with Bid evaluation based on pricing reduced to current year dollars and the allowance for submission of multiple, independent Bids. Hence, West Penn’s RFP was a first-of-a-kind and experience with the earlier RFPs would not have informed a bidder concerning its intent. J3 also notes that [REDACTED] other suppliers structured their Part 2 proposals just like J3 [REDACTED] [REDACTED]. (J3 MB, p. 10; J3 St. 2-R, pp. 3-4). Finally, the record demonstrates that Mr. Russial, J3’s President, is well educated, has worked in the utility sector for many years, and has formed and grown a successful Pennsylvania small business that includes solar photovoltaic projects. (J3 St. 1, pp. 1-2; Tr. 33-35).

In substance, West Penn’s argument falls into the same category as its other arguments – it has no bearing on the proper interpretation of the RFP or the proper evaluation of Bids and has no relevance to the issues before the Commission.

E. The legal and factual elements of detrimental reliance are not present in this matter.

West Penn dedicates a substantial portion of its argument to its reliance defense. (WP MB, pp. 23-29.). J3 has addressed the legal and factual flaws with West Penn’s claimed defense in its Main Brief and will not repeat them here except as needed to address points raised in West Penn’s argument. (J3 MB, pp. 48-54).

Penn document, West Penn would have understood that the West Penn RFP allowed submission of multiple, independent, All-or-Nothing Bids with a Part 2 proposal. (J3 MB, pp. 40-42).

West Penn argues that it was not required to plead detrimental reliance as New Matter. Without citation, West Penn states that in standard Pennsylvania practice an affirmative defense that should be pleaded as new matter is a defense that requires the averment of facts extrinsic to the Complaint. (WP MB, p. 27). West Penn has never articulated in a pleading, motion, memorandum, or brief the required factual elements of its detrimental reliance defense in the context of Pennsylvania law. There has been ample opportunity for West Penn to do so in its Answer, Pre-hearing Conference Memorandum, Cross-Motion for Summary Judgment or after the Cross-Motion in an Amended Complaint.¹¹

Justifiable or detrimental reliance is an estoppel-based affirmative defense. 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). Under the Commission Rules at 52 Pa. Code § 5.62(b) and Rule 1030 of the Pennsylvania Rules of Civil Procedure, estoppel must be pleaded as a New Matter. If not pleaded, the Pennsylvania Courts have considered it waived. See *March v. Paradise Mutual Insurance Company*, 646 A.2d 1254, 435 Pa. Super. 597 (1994).

Assuming for the sake of argument that the Pennsylvania standard is as permissive as West Penn suggests, West Penn has nevertheless failed to satisfy even the permissive standard. West Penn claims it conducted the process properly (which J3 disputes), that the Commission Representative was involved in the evaluation and selection process (which is contrary to Mr. Diskin's testimony) and that the Commission approved the RFP results before West Penn

¹¹ In West Penn's August 3, 2011, Pre-hearing memorandum, West Penn stated that the primary issue in the proceeding appears to be whether or not West Penn, the third party evaluator, and the Commission Representative miscalculated the bid of J3. At the August 8, 2011, Pre-hearing conference, the Presiding Office identified the current issues as whether the aggregation and averaging of J3's four bids was in accordance with the RFP and if not would the proper evaluation of bids by West Penn have resulted in the selection of one or more of the J3 bids. West Penn did not question the issues identified at the conference. (Pre-hearing Transcript, pp. 5-6).

proceeded with the contracts. But to assert that the Commission cannot grant, or is estopped from granting, J3's requested relief because West Penn relied on the Commission approval requires additional facts beyond those asserted by West Penn. In Pennsylvania, the doctrine of estoppel may be applied against 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 *Commonwealth of Pennsylvania v. Venesky*, 516 A.2d 445, 101 Pa. Commw. 456 (1986) citing *Hauptmann v. Department of Transportation*, 59 Pa. Commonwealth Ct. 277, 283, 429 A.2d 1207, 1210 (1981). Nothing in J3's Complaint suggests that the Commission intentionally or negligently misled West Penn when granting approval. Nor has West Penn alleged any facts suggesting intentional or negligent misrepresentation by the Commission when it approved the RFP results. Therefore, even under West Penn's interpretation of the Pennsylvania standard, the misrepresentation element is an extrinsic fact not in the Complaint or Answer and therefore the defense was not properly raised and is untimely. At hearing, Mr. Diskin testified that he provided no information to West Penn that was misleading or factually incorrect. (Tr. 70). [REDACTED] [REDACTED] (Tr. 84). Accordingly, with no evidence of Commission misrepresentation, West Penn's defense additionally fails on this point on the merits.

In its Main Brief, J3 demonstrates that West Penn's reliance defense also fails because West Penn does not have "clean-hands" which is a requirement under Pennsylvania law. (J3 MB,

pp. 50-51). The clean-hands concept is illustrated in the Commission's Regulations at 52 Pa.

Code §54.188(d) mentioned by West Penn at the hearing. The regulation reads in part:

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.

When the DSP conceals, misleads or violates the provisions of the regulation, the DSP does not have clean-hands and the Commission may take remedial action to deny the recovery of cost.¹²

In this proceeding, J3's Complaint is based on violations by West Penn of the Commission's Order approving a modification to Allegheny Power's Default Service Plan (J3 Ex P-8) and violations of the competitive procurement standards for alternate energy credits established by 52 Pa. Code § 75.67(b) and (c) and 52 Pa. Code. § 54.186. The erroneous decision to not select J3's two lowest priced Bids happened on bid-day. West Penn was party to it and should have prevented it. If the Commission finds that error occurred as J3 alleges, West Penn cannot have clean hands and cannot assert a detrimental reliance defense.¹³

F. Bidders could not have reasonably anticipated the flawed evaluation process utilized by West Penn.

West Penn argues that J3 should have asked a pre-bid question about its bidding structure. J3 has already addressed West Penn's convoluted Mr. Russial's testimony in Section II.A. (6) of this Brief which West Penn uses to anchor its argument. In its Main Brief, J3 addresses in detail that there was no patent ambiguity in the RFP that could have led bidders to question the RFP terminology. (J3 MB, pp. 23-25).

¹² As noted in J3's Main Brief, it is not clear that §54.188(d) is applicable to the procurement of renewable energy credits. (J3 MB, p. 53, Footnote 19).

¹³ J3's Main Brief also demonstrates that West Penn had multiple opportunities within its power to avoid detriment. (J3 MB, pp 50-51).

West Penn assumes that if a question had been asked prior to bid-day, their response would have instructed bidders that All-or-Nothing transcends spreadsheets. We cannot turn back time to learn what the actual response would have been. However, there is substantial evidence in the record establishing that the West Penn evaluators did not fully understand, and take the necessary steps to understand, the RFP going into bid-day and developed on-the-spot interpretations. (See J3 MB, pp. 35, 40-42). Under J3's proper interpretation of the Rules, the RFP is a more flexible and competition enhancing document (See J3 MB, pp. 24-26). It is very possible that had the question been asked, West Penn may have understood and agreed. There would have been no valid reason to disagree because those were the express RFP Rules approved by the Commission and promotion of solar development in Pennsylvania through long term procurement of SPAECS was the reason behind the Commission's approval.

G. If West Penn wanted to change the Rules, it was obliged to stop the procurement, amend the RFP, and give all bidders an opportunity to respond.

West Penn's argument on pages 31 and 32 of its Main Brief is based on another mischaracterization of the facts. West Penn claims J3 was asking for an opportunity to change its Bids. That is not the case as demonstrated by the testimony. Mr. Russial answered two questions in his direct written testimony concerning the bid-day confirmation call:

Q. Did any of the parties on the line ask you to confirm whether J3's four spreadsheets were submitted as individual bids or if they were bid as a group or any similar question?

A. No.

Q. If you had been asked the question, what would your response have been and how quickly could you have sent West Penn a confirmatory message?

- A. I would have told West Penn that we submitted four individual bids and I could have confirmed that in writing by email or fax within a few minutes. (J3 St. 1, pp. 11-12)

In his rebuttal testimony he was asked:

Q. During the bid-day confirmatory call, were you 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?

A. No.

Q. Had you 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, would you have been able to confirm that as J3's offer?

A. No. (J3 St. 1-R, p. 2)

In Mr. McBride's direct written testimony he was asked:

Q. After receipt of Part 2 proposals should the evaluators 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? Please explain the basis for your opinion.

A. Yes, the evaluators should have realized the undisclosed evaluation approach of averaging bids in a manner not obvious to the bidders could be considered unfair and inappropriate. One evaluator did notice there was a problem. (J3-C-Ex 4, Q. 2.5) (J3-P-Ex 5, Q. 8). Bidders were not informed that selection of an "All or Nothing" approach offered in the RFP would diminish their chances of receiving an award when placed in competition with the "Up To", bidders. (See, J3 C-Ex 4)

Q. Under the circumstances, what course of action would good procurement practice dictate?

A. 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.

The procurement process would not be compromised if the evaluation had been halted and the problem clarified, followed by a chance to rebid. The qualified bidders would remain in the competition and would be able make their selections based on the new rules. (Emphasis Added). (J3 St. 2, pp. 16-17).

J3 did not want an opportunity to change its Bids. J3 wanted West Penn to follow the RFP.

The ironic aspect of West Penn's argument is that the evaluators knew they were looking at a slate of Bids that did not match their interpretation but did not take the steps to ascertain the root cause of the anomaly. 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.*" (Tr. 105). [REDACTED]

[REDACTED] (Tr. 126). Mr. Keeping testified [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Tr. 140).

If the evaluators believed in their interpretation of the RFP there should have been no risk or harm in asking J3 and the other [REDACTED] similar bidders on the [REDACTED] to confirm on bid-day or thereafter that their multiple Bids were submitted on a combined basis. J3 would have said no – that is not what your RFP says. It is likely that others would have answered the same. At that point, West Penn could have stuck by its current erroneous interpretation and rejected the proposals as non-conforming in which case J3 (and perhaps the others) would have

raised the matter to the Commission and it would have been resolved before selection. More likely, West Penn would have studied the RFP and realized that its interpretation was defective and would have abandoned the undisclosed evaluation approach and followed the RFP as written. But instead of taking the steps to ascertain the problem, the evaluators did precisely the thing that they have testified repeatedly that they could not do – delve into the thinking of bidders. They elected to rationalize the intent of J3's Bids using defective logic rather than figure out what might be wrong with their own interpretation of the RFP and then deal with it.

If West Penn did not want to follow the Rules as written, then they were obliged to amend the RFP and give all bidders an opportunity to respond. This is the process West Penn followed when J3 identified the error in the Credit Exposure Calculation. And, it has long been the rule for Pennsylvania public procurements as reflected in *Page v. King*, 285 Pa. 153, 131 A. 707, 1926 Pa. LEXIS 420 referenced in J3's Main Brief. Mr. McBride also testified that a rule change would dictate rebidding and that such rebidding would not compromise the procurement process. (J3 St. 2, pp. 16-17).

West Penn argues that re-bidding would damage the appeal of standard procurements. We assume this is based on West Penn's mistaken belief, noted in the last sentence of their argument, that J3's interpretation was wrong and that they could not accommodate one bidder who misunderstood the rules. (WP MB, p. 32). We do not believe West Penn would pursue this argument if they understood that their interpretation of the RFP was wrong and the evaluation process was defective.¹⁴

¹⁴

(Tr. 94-95).

H. The high percentage of bidders who structured their Bids like J3 was a red flag to the West Penn evaluators that could not be ignored.¹⁵

West Penn believes J3 inappropriately speculated on other bidders intentions. (WP MB, p.33). Here again West Penn does not have its facts quite right. J3 does not believe the other bidders were confused. J3 believes the other bidders were reading the terms of the RFP precisely as they were written (and as interpreted by J3) when they structured their Bids with multiple spreadsheets each on an All-or-Nothing basis. J3 believes West Penn was confused.

J3's interpretation is based on the express language of the RFP reinforced by the supplemental guidance issued by West Penn in the form of Q&As. J3 draws attention to the high percentage of bidders who submitted multiple bid-form spreadsheets marked All-or-Nothing because those proposals are additional and compelling anecdotal evidence of what the RFP was broadcasting to the bidders. [REDACTED]

[REDACTED] (J3 MB, pp. 26-28, 34-37, 47). Evaluators cannot be oblivious to the obvious. It is astonishing that West Penn did not take the proper steps to understand their RFP after receiving this slate of Proposals.

J3 addressed the defects in Mr. Mossburg's new reasons for multiple All-or-Nothing Bids in its Main Brief and will not repeat those arguments here. (J3 MB, pp. 37-39).

I. The effects of West Penn's error are not minimal.

In its final argument, West Penn seeks to downplay the consequences of West Penn's error based on the magnitude of cost savings that will result to the ratepayers if J3's requested relief is granted. (WP MB, pp. 34-35). There are legal and public policy defects in this position.

¹⁵ We do not address here the arguments set forth in Section V. E and V.G of West Penn's Main Brief because they have already been addressed in Sections II.A.(7) and (8) of this Reply Brief.

Nowhere in the Commission's regulations establishing the rules for competitive procurement is "close enough" listed as a standard. See 52 Pa. Code § 75.67(b) and (c) and 52 Pa. Code. § 54.186. The Commission expects and requires the default service providers to get their competitive procurements right whether it involves \$50,000 or \$500,000,000. That is the very reason for the competitive procurement standards. [REDACTED]

[REDACTED]. (Tr. 214).

The impact to J3 from the error is extremely significant. J3 lost over \$[REDACTED] in revenue that was (and still is) intended to be applied toward financing of a 400 kW solar project in Pennsylvania.¹⁶ (J3 St. 1, pp. 9-10). This would be a big loss for many large businesses, but for a small business like J3, it is very damaging and the impact cannot be minimized. J3's intended use of the revenue is fully consistent with the Commission's Policy Statement in Support of Pennsylvania Solar Projects at Docket No. M-2009-2140236.¹⁷ The intent of the policy statement is to provide the longer term revenue stability that is likely needed to support both small scale and large solar development and to address other barriers that could prevent solar projects from coming to fruition in Pennsylvania.

Pennsylvania Law and Commission Regulations permit J3 to file a Formal Complaint seeking the correction of West Penn's error. See 66 Pa.C.S. § 701 and 52 Pa. Code § 5.21. If J3's relief is granted, the ratepayers will save money because J3's Bids were lower than the selected Bids. Nothing in the Law and Regulation relating to Formal Complaints, or in the Pennsylvania Public Utility Code Sections referenced by West Penn in its Brief, disqualifies J3 from pursuing its rights and obtaining relief based on the amount of money the ratepayers will

¹⁶ The amount is calculated by multiplying the average annual price of each of J3's two lowest priced Bids by 200 SPAECS/year for 10 years. [REDACTED] (J3 Ex C-1).

¹⁷ The Policy Statement is referenced in the Commission's approval of West Penn's Petition to modify its default service program to allow for long term contracts for alternate energy credits. (J3 Ex P-8).

save. Nor do the Laws and Regulation prohibit the Commission from granting the relief or suggest that the Commission should not grant the relief if it is warranted on the merits.

Finally, the integrity of the procurement process is important to the Commission, important to the ratepayers, and important to the prospective suppliers who need to know that their Bids will be properly evaluated. To repeat the testimony of J3's expert witness who has been in the public procurement business for a long time:

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, pp. 15-16).

Despite their argument, we suspect West Penn would agree that getting it right is important.

III. CONCLUSION

This matter should turn on whether the approach used to evaluate Part 2 proposals was in accordance with the RFP language that was approved by the Commission, and if not, whether the evaluation error resulted in the non-selection of J3's two lowest priced Bids. J3 has more than met its burden of proof on both points. The express terms of the RFP are clear. Each of J3's Bidform Spreadsheets should have been evaluated as the individual Bids that were submitted. If the evaluation was conducted properly, J3's two lowest Bids would have won.

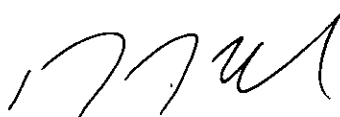
West Penn has not properly pleaded the affirmative defense of detrimental reliance. They could not in good faith plead all the required elements under Pennsylvania law because there is no evidence or reason to believe that the Commission intentionally or negligently misrepresented facts when approving the RFP results. Instead, the Commission's approval was based on the faulty information provided to the Commission by the West Penn evaluators. The defense also

fails on its merits because West Penn's role as owner and architect of the RFP along with its role in the erroneous evaluation and selection means that West Penn did not have clean-hands and could not have justifiably relied on the Commission's approval. Furthermore, West Penn had multiple opportunities within its own power to avoid detriment.

The remaining West Penn arguments are based on mischaracterizations of fact, have no bearing on RFP interpretation or the evaluation of Bids, and/or have no basis in law.

J3 respectfully requests that the Commission grant the requested relief.

RESPECTFULLY SUBMITTED



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Date: June 8, 2012.

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JUN 8 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 Motion of J3 Energy Group, Inc. (J3), to Dismiss Objections and Compel Discovery or in the Alternative for a Protective Order, that was filed on March 4, 2011, and my Order Granting J3's Motion, dated June 13, 2011;

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 which West Penn Power Company (West Penn) is required to produce pursuant to my Order dated June 13, 2011, and which are claimed to be commercially valuable trade secrets or confidential information (hereinafter "Protected Information). The number of bids received by West Penn in response to its Request for Proposals (RFP) for Solar Photovoltaic Alternate Energy Credits (SPAECs) that is the subject of this proceeding shall not be considered Protected Information.

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.

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. West Penn 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, West Penn 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 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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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

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2012, I served the Reply Brief of J3 Energy Group, Inc., by electronic mail and U.S. Postal Service First Class Priority Mail upon Respondent, West Penn Power Company and the Presiding Officer at the addresses below.

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Date: June 8, 2012

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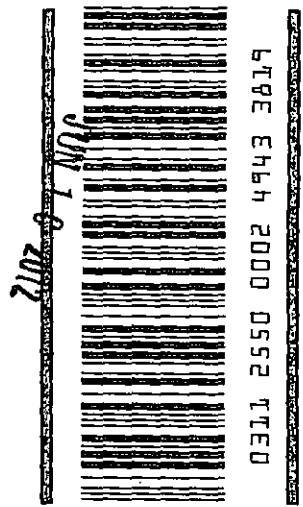
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