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September 4, 2012

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

**RECEIVED**

SEP 4 2012

**Re: J3 Energy Group, Inc. v. West Penn Power Company**  
**PA PUC Complaint Docket No. C-2011-2219920**  
**Exceptions and Request for Oral Argument**

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

Dear Secretary Chiavetta:

Enclosed for filing please find the original and nine copies of the Exceptions of Complainant J3 Energy Group, Inc. and Request for Oral Argument. Please note that the document is filed in confidential and public (redacted) versions. A Certificate of Service is also enclosed.

Sincerely,



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

Enclosures

cc: Honorable Elizabeth H. Barnes

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

SEP 4 2012

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

J3 ENERGY GROUP, INC. )  
Complainant, )

v. )

) Complaint Docket No. C-2011-2219920

WEST PENN POWER COMPANY )  
Respondent. )

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EXCEPTIONS OF COMPLAINANT  
J3 ENERGY GROUP, INC.  
AND REQUEST FOR ORAL ARGUMENT

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Dated: September 4, 2012

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ALJ	Administrative Law Judge
Art.	RFP Article
Arts.	RFP Articles
DATP	Discounted Average Term Price
DSP	Default Service Provider
ID	Initial Decision
J3	J3 Energy Group, Inc.
J3 Ex P-	J3 Public Exhibit
J3 Ex C-	J3 Confidential 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
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**

Pursuant to 52 Pa. Code § 5.533, J3 Energy Group, Inc. (J3), respectfully submits these Exceptions to the Initial Decision (ID) of Administrative Law Judge (ALJ) Elizabeth H. Barnes dated August 16, 2012 and served by Secretarial Letter dated August 17, 2012. Pursuant to 52 Pa. Code § 5.538(b), J3 also requests oral argument before the Commission.

This proceeding involves 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 to purchase five blocks (or Tranches) of SPAECs, each at 200 SPAECs per Tranche. One Tranche was for a 10-year, 5-month term. The other four Tranches were for a 10-year term. (J3 Ex P-1, Art. 1.1)

In the Formal Complaint, J3 alleged serious error on the part of West Penn in the way that J3's four bids for the 10-year term were evaluated. It is undisputed that the West Penn evaluators aggregated J3's four bids for evaluation purposes. J3 alleged that such aggregation violated the express language of the RFP that was approved by the Commission. At the time the Formal Complaint was filed it was not possible for J3 to determine the number of J3 bids that should have been selected had the evaluation been conducted properly because of the limited information made public concerning the RFP results. Through discovery, it became clear that J3 submitted the two lowest priced bids for the 10-year contract term specified in the RFP.<sup>1</sup> Had the evaluators followed the RFP Rules as written and approved by the Commission, J3's two lowest bids would have been selected.

The ALJ found that J3 mistakenly interpreted the RFP and that J3's bids were reasonably evaluated in the aggregate rather than separately. The findings are erroneous. They ignores the

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<sup>1</sup>In his Direct Written Testimony, West Penn witness Mr. Mossburg acknowledged that J3 submitted two blocks of supply at the lowest Discounted Average Term Price. (WP St. 2, p. 9.)

express terms of the RFP and supplemental guidance issued by West Penn as well as other substantial and compelling evidence produced in this proceeding. The ALJ also adopts ancillary statements and arguments to bolster the ID. These statements and arguments: (1) are not supported by the evidentiary record, (2) are rooted in defective logic, and/or (3) do not provide a basis for denying J3 the requested relief under Commission laws and regulations.

## II. EXCEPTIONS

### **Exception No. 1: The ALJ Erred In finding That J3 Misinterpreted The RFP Rules And That Aggregation Of J3's Four Bids Into A Single Bid For Evaluation Purposes Was Authorized By The RFP (Conclusions of Law 4-8, ID at 22-23).**

The central issue in this matter is whether the West Penn evaluators properly applied the RFP Rules to J3's bids. A fact-based analysis of the RFP and other evidence demonstrates that the evaluators clearly did not follow the Rules but instead used an undisclosed and unauthorized process to evaluate J3's four bids. The ID does not contain such an analysis but instead relies on the out-of-context misapplication of one sentence in the RFP along with a defective rationalization advanced by West Penn witnesses to conclude that J3 misinterpreted the RFP and that aggregation of J3's four bids was permitted. Therefore, the ALJ's Conclusions of Law 4 through 8 must be rejected.

#### **A. The Proper Analysis Of The RFP And Bids Dictates Selection Of J3 For Two Tranches**

Analysis of the RFP must include an understanding of the meaning of the formal term "Bid" and how it is employed throughout the RFP Rules.<sup>2</sup> The term is defined in RFP Article 1.2 as follows:

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

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<sup>2</sup> A detailed analysis of the RFP Rules is found at pages 19-31 of J3's Main Brief.

Importantly, Bid is defined in the singular – a point that was disregarded by the West Penn evaluators and overlooked in the ID. The elements of a singular Bid are further defined in

Article 7:

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 bidders as to what constituted an individual Bid per the RFP Rules. They are read together with the Bidform Spreadsheet structure that was mandated by RFP Articles 5 and 7. (J3 Ex P-1, Arts. 5.3 and 7).<sup>3</sup> The information contained on each Bidform Spreadsheet matches identically the elements that define a Bid. See J3-Ex P-1, Art. 7.6 and App. 8; J3 St. 2, p. 9. Hence each Bidform Spreadsheet is a Bid.

The RFP allowed the submission of 1 to 5 Bidform Spreadsheets with a Part 2 Proposal.<sup>4</sup> (J3 Ex P-1, Art. 5.3). J3’s President, Mr. Stephen Russial, testified that J3 submitted four Spreadsheets which were four separate Bids for the 10-year Tranches, each uniquely priced for the single Tranche offered, each a binding offer to supply a definitive portion of the tranche target at a specified price, and each offered on an All-or-Nothing basis. (J3 St. 1, pp.6-9; Tr. 39-42, 50). Both West Penn witnesses acknowledged that J3 submitted four Bids. (Tr. 108-110, 115-116, 188).<sup>5</sup> Hence it is undisputed that J3 four Spreadsheets were four Bids. The question then becomes whether the RFP provided authority to aggregate J3’s four Bids for evaluation purposes. It did not.

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<sup>3</sup> One spreadsheet was designed for the 10 year, 5-month term; a second sheet was for the 10-year term. (J3 Ex P-1, Art. 5.3, 7.5 and App. 8).

<sup>4</sup> Bidders that passed Part 1 qualification were eligible to submit a Part 2 proposal with pricing. (J3 Ex P-1, Arts. 1.7 and 5).

<sup>5</sup> Mr. Mossburg also testified that J3 submitted four offers. (Tr. 115-116).

*Public (Redacted) Version*

Per the RFP, Bidders had to make an “All-or-Nothing Bid” or “Up-To Bid” Offer Type election on each Bidform Spreadsheet submitted with a Part 2 proposal. (J3 Ex P-1, Arts. 7.6, 7.12 (viii) and App. 8). 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 operation of the All-or-Nothing Bid and Up-To Bid elections is 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”). (Emphasis added) (J3 Ex P-1, Art. 7.10.).

The underlined phrases establish the All-or-Nothing Bid and Up-To Bid Offer Type election as a function of the defined term Bid. It is equally clear that Article 7.10 does not state or suggest that multiple All-or-Nothing Bids will be grouped and averaged for evaluation purposes. If that was the RFP intent, it would have been simple to state “all Bids electing an All-or-Nothing Bid Offer Type will be combined and averaged for evaluation purposes.” No such language appears in the RFP nor does the RFP include any other language providing authority for the aggregation and averaging of multiple All-or-Nothing Bids.

The West Penn witnesses testified that Article 7.10 gave them authority to group and average J3’s Bids. When asked to identify where the words actually appear in the RFP that say they can group and average individual bids they acknowledged that it was interpretation. (Tr. 115-116, 130-131, 135, 187-188, 190-193).

J3’s expert procurement witness Mr. McBride testified: (1) 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); (2) 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); (3) 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); (4) 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); and, (5) The RFP provided no authority for the consolidation and averaging that was done with the "All or Nothing" bids for the Solar or the Tier 1 competitions. (J3 St. 2-R, p.2).<sup>6,7</sup>

In addition to the unambiguous RFP Rules which permitted bidders to submit multiple independent Bids each on an All-or-Nothing basis, West Penn issued supplemental guidance in the form of Questions and Answers (Q&As) which reinforced the concept embodied in the RFP that bidders could submit multiple Bids containing different pricing and offer strategies by using separate Bidform Spreadsheets. See 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. 7-9. Furthermore, [REDACTED] bidders on the Solar and Tier I competitions structured their Part 2 proposals with multiple Bids offered on an All-or-Nothing Bid basis providing strong anecdotal evidence that the bidders understood that their Bids would be evaluated separately and not aggregated and averaged. (J3 St. 2-R, pp. 4-5). These facts were not analyzed nor considered in the ID.

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<sup>6</sup> West Penn waived cross-examination of Mr. McBride (Tr. 56) and the ALJ did not address any of Mr. McBride's testimony in the ID.

<sup>7</sup> West Penn conducted an RFP for Tier I non-solar credits concurrently with the Solar RFP using the same Rules. 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 RFPs. Both RFPs as submitted to the Commission are contained in West Penn's Petition and are available at West Penn Exhibit RBR-1 admitted into evidence. (WP Ex RBR-1).

Per Article 7.12 and Appendix 7 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 App. 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. *Id.* The Bid ranking and source selection procedure was set forth in RFP Article 2.4 which reads in full:

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).

It is undisputed that J3 submitted the two Bids for the 10-year term with the lowest DATPs of all Bids received. (WP St. 2, p. 9; [REDACTED]). Accordingly, based on the express Rules set forth in the RFP, J3's two lowest priced Bids should have been selected because they minimized the cost of satisfying the Target Quantity. (J3 St. 2, pp 5-6).

**B. The ALJ Misinterpreted And Misapplied The Last Sentence In The First Paragraph Of Article 7.10.**

The ALJ provided two reasons in support of her opinion that J3 misinterpreted the RFP and that aggregation of J3's four Bids were permitted. The first appears on page 13 of the ID and is based on the last sentence in the first paragraph of RFP Article 7.10:

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)

The ALJ reasoned that the underlined phrase signified that there is a special purpose for the "all or nothing" designation as part of the evaluation process -- specifically to allow bidders

*Public (Redacted) Version*

to designate their offers so that the bidders' offers would not be disaggregated into separate offers or awarded in amounts less than what was designated under the "all-or-nothing" offer type. ID at 13. From this the ALJ concluded that the designation transcended Bids.

J3 addressed the defect in the reasoning at pages 30-31 of J3's Main Brief in response to testimony from West Penn witness Mr. Reeping which relied on this same phrase as authority for aggregating and averaging Bids. *The underlined sentence uses the defined term "Bid" which as discussed earlier means each Bidform Spreadsheet. Therefore, by its own terms the sentence operates on the Tranches offered in each Bid and does not extend to all Bids submitted with a Part 2 proposal marked All-or-Nothing. When it was pointed out that the language used the 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. 192-193). When asked how a bidder could make the leap from the defined term "Bid" which means individual Bids to an understanding that All-or-Nothing Bids would be grouped for evaluation purposes, Mr. Reeping declined to explain 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. Id. Contrary to Mr. Reeping's interpretation and the ALJ's conclusion, the evidence establishes that the language is drafted in the context of the defined term Bid which means individual Bids and not all Bids submitted with the All-or-Nothing designation.*

It should also be noted that referenced sentence was designed as a default provision - if a bidder did not choose All-or-Nothing, the Bid was presumed to be an Up-To Bid. Mr. Reeping confirmed that the West Penn Active Excel Bidform Spreadsheet had a forcing function which required bidders to specify either All-or-Nothing or Up-To on each Spreadsheet or the Spreadsheet would show that the Bid was incomplete. Bidders had to choose one or the other.

(Tr. 189). Hence, the “*Unless indicated*” aspect could not occur and the language appears to be an artifact from the Metropolitan Edison/Penelec (MetEd/Penelec) RFP which Mr. Reeping used when crafting the West Penn RFP. (Tr. 174, 188-189). The MetEd/Penelec RFP did not contain the All-or-Nothing/Up-To forcing function and therefore the possibility existed that a Bid could be submitted without designating it as All-or-Nothing or Up-To. (Tr. 188-189). The language should never have been included in the West Penn RFP from the start and its inclusion further demonstrates the point made by J3 at pages 40-42 of J3’s Main Brief that West Penn did not understand its own RFP. Nevertheless, to subscribe a meaning or intent to this language beyond what it states on its face is clear error.

J3 does not dispute the ALJ’s assessment that there is a special purpose for the “All-or-Nothing Bid” Offer Type designation and that the terms cannot be disregarded. However, the RFP (including the language referenced by the ALJ) is structured such that “All-or-Nothing” operates on the individual Bid, not the aggregation of all “All-or-Nothing Bids” submitted with a Part 2 proposal. There is nothing offensive in this concept because the possibility existed that individual Bids could be submitted offering multiple tranches. In that case the bidder would have to choose whether the multiple Tranches offered on individual Bids would be proposed on an All-or-Nothing or Up-To basis. [REDACTED]

[REDACTED] There is also nothing offensive in the concept that a single Tranche Bid could be offered on an All-or-Nothing basis. [REDACTED]

C. **The ALJ Erroneously Adopted West Penn's Defective Single Tranche Logic To Ascribe Meaning To The RFP And J3's Bids**

The ALJ's second reason in support of her finding that J3 misinterpreted the RFP and that aggregation of J3's four Bids was authorized is premised on the faulty single Tranche Logic that pervades West Penn's argument. ID at 13-14. West Penn theorizes that because only full Tranches would be awarded, J3 would have been safe in identifying each of its Bids as Up-To, and therefore it made little sense for J3 to designate its Bids as "All-or-Nothing" if J3 intended them to be separately evaluated. (WP St. 2, pp. 11-12; [REDACTED]). This peculiar inverse logic was used by the West Penn witnesses and the ALJ to conclude that the RFP was clear and that J3 intended its Bids to be aggregated. The defects in the logic are summarized below and addressed in detail in J3's Main Brief at pages 34-39, J3's Reply Brief at pages 9-10, and Mr. McBride's Written Rebuttal Testimony (J3 St. 2-R, pp. 6-9).

First, as explained above and in J3's Main Brief, the All-or-Nothing Bid and Up-To Bid elections are a function of the defined term Bid. 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 election transcends Spreadsheets. Hence, based on the express language of the RFP, it was error to conclude that the All-or-Nothing election reaches beyond the individual Bid.

Second, the logic is premised on the belief that Bidders knew how the evaluators would interpret the RFP rather than what was actually expressed in the RFP. Mr. Russial testified that since the RFP rules indicated that a bidder could not be awarded less than a single Tranche any bid submitted for just a single tranche was obviously by RFP rules, an "All-or-Nothing" bid and that a single tranche bid flagged as "Up To" would have been inconsistent with the RFP rules. (J3 St. 1, p. 8). [REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]:

[REDACTED]  
[REDACTED]  
[REDACTED] (Tr. 113).

[REDACTED]

[REDACTED]

[REDACTED]

The evidence clearly establishes that the All-or-Nothing and Up-To elections do in fact produce the same result for single Tranche Bids and that the elections became meaningful for multiple Tranche Bids. This is fully consistent with the RFP Rules. Therefore the ALJ's reliance on Mr. Russial's testimony to support the ID is in error.

Fourth, the logic that Up-To is safe and therefore the right choice is focused on the single Tranche Bid scenario without considering its application on different Bid formulations. The logic fails for Part 2 proposals containing multiple Bids for more than one Tranche [REDACTED]

[REDACTED] Mr. McBride explained the logical defect in his Written Rebuttal Testimony. (J3 St. 2-R, pp. 8-9).<sup>8</sup> In the multiple Tranche scenarios the elections become a factor in the selection process because Up-To can produce a different result from All-or-Nothing. Hence, there is no safety in choosing Up-To if the bidder

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<sup>8</sup> [REDACTED]  
[REDACTED]  
[REDACTED]

needs all of the Tranches offered with a Bid. The West Penn evaluators applied the defective logic in isolation to the single Tranche Bid scenario to improperly attribute meaning to J3's Bids and the RFP intent. See J3 MB, pp. 36-37; J3 St. 2-R, pp. 8-9. However, since the logic does not apply consistently across all Bid formulations, it is not a rule but a rationalization and has no bearing on the interpretation of the RFP or the evaluation of Bids. Hence, the ALJ erred in citing the logic in support of the ID.

**Exception No. 2: The ALJ Erred By Failing To Give Weight To The Expert Testimony Of Mr. McBride**

In the History of the Proceedings at IP Page 4, the ALJ states that J3 also presented the written direct testimony of Curtis W. McBride, an independent consultant who consults on procurement matters for TechSource, Inc. of Los Alamos, New Mexico. The statement was copied from West Penn's Main Brief. (WP MB, p.4). In J3's Reply Brief, J3 clarified that 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. (J3 Reply Brief at 3). Mr. McBride's full credentials are described in his Written Testimony (J3 St. 2, pp. 2-5) and his resume (J3 Ex P-6).

More importantly, the ALJ failed to give weight to (or even acknowledge) Mr. McBride's testimony despite Mr. McBride's extensive and relevant experience in competitive procurement practices including the proper evaluation of bids and proposals and despite the fact that West Penn waived cross-examination of Mr. McBride.<sup>9</sup>

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<sup>9</sup> In its Reply Brief, West Penn summarily mentions that Mr. McBride offered little experience in the area of electricity procurement without having questioned Mr. McBride on the relevancy of his credentials in the matter before the Commission. Nor does West Penn explain why a competitive procurement for renewable energy credits is particularly distinguishable from the thousands of competitive procurements Mr. McBride participated in. (WP Reply Brief, p. 12)

The issues in this proceeding involve the proper interpretation of RFP Rules and the application of those Rules to the submitted bids. A review of Mr. McBride's credentials reveals that he is highly qualified to review and evaluate the RFP and related documents and provide expert testimony on the issues. Mr. McBride's testimony includes an in depth analysis of the RFP and West Penn's mistakes including the erroneous interpretations now relied upon by the ALJ in the ID. It was error for the ALJ not to give weight to Mr. McBride's testimony.

**Exception No. 3: The ALJ Mischaracterized J3's Complaint (ID at 1)**

The first paragraph of the ID, states:

On January 10, 2011, J3 Energy Group, Inc. (J3) filed a formal complaint contenting that West Penn Power Company (West Penn) had incorrectly evaluated the bid that J3 had submitted to supply SPAECs in response to a competitive Request for Proposals (RFP) issued by West Penn. J3's bid had not been selected in the RFP Process. (Id at 1). (Emphasis Added).

For the sake of accuracy, and because the meaning of the defined term Bid is highly relevant to this proceeding, J3 notes that this is West Penn's mischaracterization of J3's Formal Complaint taken from West Penn's Main Brief. (WP MB, p.2). It is not an accurate representation of the Complaint. In the Complaint and in all of the documents subsequently filed, J3 has consistently maintained that J3 submitted four Bids which were four individual offers rather than one Bid (one offer) containing four Spreadsheets. Later in the ID, the ALJ recognizes that the Complaint avers that West Penn's evaluation of J3's bids (in the plural) was not consistent with the RFP and violated the Commission's competitive procurement standards. (ID at 8).

**Exception No. 4: The ALJ's Description Of J3 Is Incomplete (Finding of Fact 1, ID at 4).**

Finding of Fact 1 (ID at 4) identifies J3 Energy Group, Inc., as a supplier of solar photovoltaic alternative energy credits. In the context of the RFP the statement is technically

accurate but in general it is incomplete and to the extent it implies that J3 is a SPAEC broker or speculator it is inaccurate. J3 is a small Pennsylvania business that provides energy consulting and energy infrastructure services to clients. J3's energy infrastructure services include the development of solar and combined heat and power renewable energy systems for clients. (J3 St. 1, pp. 1-2). The credits that would have been supplied to West Penn had J3's two Bids been selected would have derived from a planned J3 solar project located in Pennsylvania.<sup>10</sup> The credits would have been used to support financing of the project. If the Commission grants J3 the relief requested, the credits would still be used for the project. (J3 St. 1, pp. 9-10).

**Exception No. 5: The ALJ Erred In Finding That Suppliers Were Competing For Two Distinct Contracts (Finding of Fact 15, ID at 6).**

Finding of Fact 15 states:

Suppliers competed for two distinct contracts: (a) a 10-year, 5-month contract for delivery of 200 SPAECs per year beginning January 1, 2011 and continuing through May 31, 2012, and (b) a 10-year contract for 800 SPAECs per year beginning June 1, 2011 and ending May 31, 2011. The ten-year contract was further broken into four "blocks" or tranches of 200 SPAECs each. (ID at 6)

The Finding is identical to language contained in West Penn's Main Brief where it was presented without citation to a corresponding RFP article. (WP MB, p. 9). As J3 addressed in its Reply Brief, the statement is inaccurate (J3 Reply Brief, p.3) and the ALJ's corresponding finding is in error.

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

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<sup>10</sup> The project name, description and location is identified in the confidential version of Mr. Russial Direct Testimony at pages 9 and 10.

in a single contract if a supplier submitted the lowest evaluated Bids for each term.<sup>11</sup> 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).

**Exception No. 6: The ALJ Erred In finding That The [REDACTED]  
[REDACTED] (Finding of Fact 17, ID at 7).**

Finding of Fact 16 states: "Boston Pacific gave the Commission a final report regarding its evaluation on December 8, 2012." (ID at 7). Finding of Fact 17 states: "[REDACTED]

[REDACTED]

[REDACTED]. *Id.* Contrary to Finding of Fact 17, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. See J3 Ex C-1. [REDACTED]

[REDACTED]. (J3 St. 2, pp. 12-14).

[REDACTED]

[REDACTED]

[REDACTED]. (Tr. 82-84). [REDACTED]

[REDACTED]

[REDACTED] *Id.*

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<sup>11</sup>The 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).

**Exception No. 7: The ALJ's Assertion That It Is Undisputed That Commission Staff Was Present At The Evaluation Is Incomplete And Misleading. (ID at 11 and 21).**

The ALJ states that it is undisputed that Commission Staff was present at the Evaluation (ID at 11). In her Conclusion, the ALJ states: "*The procurement and bid evaluation process was monitored on a real-time, on-site basis by the Commission and by the independent third party evaluator.*" (ID at 21). Although technically accurate since Mr. Diskin was in the bid-room for a portion of bid-day, both statements are incomplete and misleading and any evidentiary value attributable to Mr. Diskin's presence in the bid-room must be based on the complete facts and Mr. Diskin's account of bid-day events.

In its Main Brief, West Penn claimed that Mr. 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).<sup>12</sup> 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. 65-70). 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.

Mr. Diskin's testimony should be read closely for what he actually said, but it is clear that in his opinion he was not party to the bid-day decision making. His knowledge of the

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<sup>12</sup> 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).

procurement results [REDACTED]

was based on erroneous information that was subsequently conveyed to him by the West Penn evaluators. Accordingly, his presence in the bid-room for a portion of the day has limited relevance as to whether the evaluation was conducted properly and the ALJ's statements should be considered in the proper context.

**Exception No. 8: The ALJ Erred In Her Finding That It Is Uncontroverted That All Bidders Were Treated In A Uniform Fashion And In Accordance With The RFP Rules. (ID at 20).**

In the Discussion section of the ID, the ALJ states: "*It is uncontroverted that all bidders were treated in a uniform fashion and in accordance with the RFP Rules.*" (ID at 20). This finding aligns with a statement contained in West Penn's Main Brief (WP MB, p. 32) which as J3 points out in its Reply Brief (J3 Reply Brief, pp. 7-8) is clearly inaccurate and must be disregarded.

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. 31-32, 45-46), and [REDACTED]

[REDACTED]. (Tr. 79)

**Exception No. 9: The ALJ Erred In Placing Weight On The Assertion That All Bidder Were Treated Equally. (ID at 15-17, 20).**

The ALJ erred in placing weight on the consistent treatment of bidders. (ID at 15-17, 20). As noted in Exception 8, there is no contemporaneous written documentation in the procurement record to support the assertion that bidders were treated equally. Nevertheless, assuming for the sake of argument that all similar Part 2 proposals were aggregated and averaged, equally wrong

treatment is neither relevant to nor dispositive of the question of whether evaluation error occurred – which is the central issue before the Commission. See J3 MB, p. 32. If bidders were treated inconsistently there would have been additional error.

Here again it is important to read the testimony closely for what it actually says. ■

[REDACTED]

[REDACTED]; Tr. 92-93).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Tr. 95). Mr. Keeping similarly testified that he believes consistent treatment of offerors has no bearing on the interpretation of the RFP. (Tr. 202).

In addition to consistency, 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).

J3 has alleged and proven by substantial evidence that West Penn did not follow its own RFP Rules that were approved by the Commission and that such error deprived J3 of selection. J3 has not alleged inconsistent treatment. Based on the issues before the Commission, the ALJ's reliance on consistency is misplaced and must be disregarded.

**Exception No. 10: The ALJ Erred In Placing Weight On Mr. Russial's Testimony That He Prepared The Part 2 Proposal Primarily On His Own. (ID at 17).**

The ALJ opined that J3 may have misinterpreted the RFP because Mr. Russial prepared the proposal documents primarily by himself. (ID at 17). As discussed in J3's Reply Brief in response to a similar assertion from West Penn concerning J3's experience, Mr. Russial 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 Reply Brief, pp. 13-14). Moreover, who prepares a proposal 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. *Id.* The Rules set forth in the RFP are determinative of error. Accordingly, the ALJ's statement must be disregarded.

**Exception No. 11: The ALJ Erred In Placing Weight On The Fact That J3 Did Not Ask A Pre-Bid Question Concerning The Meaning Of The All-or-Nothing Designation. (Finding of Fact 12, ID at 6; Discussion, ID at 17; Conclusion of Law 5, ID at 23.)**

The ALJ has erroneously suggested that J3 was at fault for not submitting a pre-bid question seeking clarification of the “All-or-Nothing” and “Up-To” terminology in the RFP. (ID at 6, 17 and 23). J3 addressed this issue in both its Main Brief and Reply Brief. (J3 MB, pp 23-25; Reply Brief, pp 17-18).

The ALJ’s Finding and Conclusion are premised on the assumption that the RFP may be unclear. However, the evidence establishes that the RFP is unambiguous – the All-or-Nothing and Up-To elections operate on the individual Bid and All-or-Nothing does not transcend Bids. Hence there was no reason for a bidder to ask a question.

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 and averaged together that would have even triggered the question. (Tr. 56). Mr. McBride also analyzed the RFP Rules and supplemental guidance and concluded the RFP Rules were clear (J3 St. 2, p. 17); 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); and, 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). West Penn had the opportunity to cross-examine Mr. McBride on these points but declined. [REDACTED]

[REDACTED]

[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 J3 St. 2-R, pp. 4-5.

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. Hence to the extent that the ALJ placed any weight on the fact that J3 did not ask a question, it was error and should be disregarded.

**Exception No. 12: The ALJ Erred In Concluding That Complainant Did Not Prove That Respondent Violated Any provision Of The Public Utility Code Or Any Regulation Promulgated By The Commission. (Conclusion of Law 3, ID at 22).**

The ALJ erroneously concluded that Complainant did not prove that Respondent violated any provision of the Public Utility Code or Commission Regulation. (ID at 22). The Conclusion is premised on the ALJ's Conclusions of Law 4-8 in which she finds that J3's misinterpreted the RFP and that West Penn's interpretation of the RFP was correct. As addressed in Exception 1, those Conclusions were erroneous and a proper analysis of the RFP establishes that the evaluation process used by West Penn was undisclosed to the bidders and unauthorized by the RFP that was approved by the Commission.

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. J3 has more than met its burden of proof that these violations occurred and that but for the violations J3 would have been selected for two 200-SPAEC Tranches for the 10-year term. Accordingly, the ALJ's Conclusion of Law must be rejected.

**Exception No. 13: West Penn Has Failed To Prove The Elements Of A Reliance Defense Under Pennsylvania Law. Hence The ALJ Erred In Concluding That West Penn Properly Relied Upon The Secretarial Letter Dated December 10, 2010 (Conclusion of Law 9, ID at 23).**

The ninth Conclusion of Law states: "*West Penn properly relied upon the Commission's Secretarial Letter dated December 10, 2010.*" (ID at 23). In the Discussion section of the ID, the ALJ states: "*The Commission correctly approved the results of West Penn's procurement and West Penn reasonably relied on the Commission's approval of West Penn's procurement results in announcing the winning results and in entering contracts with the announced RFP winners.*" The ID contains no analysis of the legal and factual elements of a reliance defense under Pennsylvania Law or otherwise addresses the defects in the defense raised by J3 in its Main and Reply Briefs. (J3 MB, pp. 48-54; J3 Reply Brief, pp. 14-17).

Pinning West Penn down on exactly what they were asserting with respect to reliance has been a challenge. It appeared initially that West Penn was claiming that even if error was proven to have occurred during Bid evaluation that deprived J3 of selection, the Commission was

prevented from granting the relief requested by J3 because West Penn relied on the December 10, 2010 Secretarial Letter approving the RFP results – i.e. an affirmative defense of detrimental reliance. However, in West Penn’s Reply Brief they state “*West Penn is not contending that the Commission’s Secretarial letter misrepresented facts or was incorrect. To the contrary, West Penn asserts that the RFP evaluation was correct, that the IPM was correct, that the Commission was correct in approving the RFP results, and that West Penn was correct in relying on the Commission’s Secretarial Letter in announcing the bid winners and awarding the contracts... The purpose of West Penn’s reliance argument is to show that throughout the procurement process, West Penn and the Commission methodically followed Commission regulations, policy guidelines and approvals.*” (WP Reply Brief, p. 16). Accepting this as West Penn’s articulation of reliance, the issues associated with a detrimental reliance defense are academic since West Penn is not asserting reliance as a legal defense to J3’s Complaint but merely making a statement of belief that the procurement was conducted properly (which J3 disputes). Accordingly, Conclusion of Law 9 should be disregarded since it is not sustaining a legal defense that was asserted by West Penn.

However, to the extent the ALJ’s believes she was sustaining the legal defense of detrimental reliance in Conclusion of Law 9, the Conclusion must be rejected because as summarize briefly below and discussed more fully in J3’s Main Brief, the defense was not properly pleaded and the legal and factual elements of the defense under Pennsylvania Law are not present.

A detrimental reliance defense should be dismissed as untimely since it is an estoppel-based affirmative defense that was not appropriately pleaded in an Answer or other responsive pleading under the heading of “New Matter” as required by Commission’s Regulations at 52

Pa.Code § 5.62(b). (J3 MB, p. 48). Timeliness notwithstanding the defense fails because the elements of the defense were not and could not be established. (J3 MB, pp. 48-54).

Under Pennsylvania Law, 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.

“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 based on the Commission's approval because West Penn does not have clean hands.

**Exception No. 14: There Is No Basis In The Commission's Law Or Regulations To Deny A Valid Complaint Based On The *De Minimus* Impact On Rate Payers. Hence The ALJ's Discussion Of this Point Must be Disregarded (Discussion, ID at 21).**

In the Discussion section of the ID, the ALJ notes that the effect of the purported procurement error upon West Penn's rate paying customers is *de minimus* in nature (ID at 21). West Penn raised this argument in its Main Brief (WP MB, pp. 34-35) and J3 responded in its Reply Brief (J3 Reply Brief, pp. 22-24). For legal and public policy reasons, the position is defective.

The Commission's regulations establishing the rules for competitive procurement do not contain a *de minimus* standard for errors. See 52 Pa. Code § 75.67(b) and (c) and 52 Pa. Code. § 54.186. Default service providers are expected to conduct their competitive procurements properly whether they involve \$50,000 or \$500,000,000. That is the very reason for the competitive procurement standards. [REDACTED]

[REDACTED]. (Tr. 214). If the Commission wanted to adopt a *de minimus* standard for procurement errors, it would have to do so by amendment to the Regulations.

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. (J3 St. 1, pp. 9-10). This would be a significant 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. 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 Main Brief and the ALJ in the ID, disqualifies J3 from pursuing its rights and obtaining relief based on the amount of money the ratepayers will 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.

Accordingly, for the reasons set forth above the ALJ's statements must be disregarded.

**Exception No. 15: There Is No Basis In Fact Or Law To Deny J3 Relief Based On Fear That Overturning An Erroneous Decision Will Chill Future Competitive Bidding In Pennsylvania Or Spur Further Litigation Between West Penn And The Winning Bidders. Hence, The ALJ's Discussion On These Points Must Be Disregarded. (Discussion, ID at 22).**

In the Discussion section of the ID the ALJ speculates that overturning the Commission's prior decision may inhibit future suppliers from entering the Pennsylvania market and send an unsettling message to suppliers who look for certainty and finality in an RFP process. (ID at 22). The ALJ also speculates that overturning the decision may spur further litigation between West Penn and the winning bidder(s).<sup>13</sup> *Id.* None of these purely speculative outcomes provide a basis under Commission Law or Regulation to deny J3 the relief requested. Hence the ALJ's speculation must be disregarded.

Legal defects aside, it is not at all clear that prospective bidders would be willing to forego a market over concern that defective bid results might be overturned by the Commission. Procurement actions are routinely subject to challenge in the public sector and there is no shortage of interested bidders as a result. Furthermore, it is not clear that bidders would prefer the risk of defective procurement processes in favor of quick and unchallengeable decisions. 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. There are more reasonable steps the Commission could take to assuage concerns over protracted bid disputes and at the same time protect the public interest. These may include requiring more transparency in the public reporting of bid results so that bidders can quickly ascertain if there was error and

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<sup>13</sup> The references cited by the ALJ appear to be inaccurate since they correspond to Mr. Russial testimony in the transcript.

establishing an expedited process for resolving disputes. As stated by Mr. McBride in his

Rebuttal Testimony:

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. (J3 St. 2-R, p. 15).

Finally, the ALJ appears to have been influenced by West Penn's testimony that it would have no option but to terminate an existing contract if J3's relief is granted. (WP St. 1, p. 23).

Here again, the speculative prospect of additional litigation is not a basis to deny J3 relief.

Furthermore, 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.

**III. REQUEST FOR ORAL ARGUMENT**

The issues in this proceeding appear to be ones of first impression. Accordingly, J3 respectfully requests that the matter be scheduled for oral argument before the Commission. If the request is granted, J3 requests that counsel for the parties be consulted on dates before the matter is scheduled.

**IV. CONCLUSION**

For the reasons set forth herein, J3 respectfully requests that the Commission grant J3's Exceptions to the ID, grant J3's requested relief, and revoke approval of the RFP results until West Penn awards J3 the two 10-year tranches that West Penn was required to award pursuant to the Commission-approved RFP.

RESPECTFULLY SUBMITTED



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Phone: 412-389-2482

Date: September 4, 2012.

**RECEIVED**

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

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>J3 ENERGY GROUP, INC.</b>	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Complaint Docket No. C-2011-2219920</b>
	)	
<b>WEST PENN POWER COMPANY</b>	)	
<b>Respondent.</b>	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on September 4<sup>th</sup>, 2012, I served the Exceptions of Complainant J3 Energy Group, Inc. and Request for Oral Argument on the parties listed below in the manner indicated. A copy of the document on CD-ROM was also provided to the Office of Special Assistants:

**BY FEDERAL EXPRESS OVERNIGHT MAIL AND E-MAIL**

John L. Munsch, Esq.  
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**BY FEDERAL EXPRESS OVERNIGHT MAIL**

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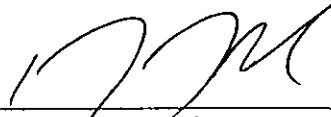
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SEP 4 2012

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Date: September 4, 2012

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