

September 17, 2012

VIA FEDEX OVERNIGHT

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

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


Dear Secretary Chiavetta:

Enclosed please find original copies of public and confidential versions of the *Reply Exceptions of West Penn Power Company and Opposition to Request for Oral Argument* in the above-referenced proceeding.

The Reply is being filed electronically in public (redacted) version only. The confidential version contains proprietary information that is protected information under Protective Orders issued in the proceeding.

Paper copies of both versions of the Reply Exceptions are being served as indicated in the attached Certificate of Service. This submission is filed via FEDEX overnight and is deemed filed today under 52 Pa. Code §1.11.

Very truly yours,



John L. Munsch
Attorney

Enclosure

cc: ALJ Elizabeth H. Barnes
Certificate of Service

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


CERTIFICATE OF SERVICE

I hereby certify that I have this day served via email and by FEDEX, overnight mail, the *Reply Exceptions of West Penn Power Company and Opposition to Request for Oral Argument*, addressed as follows:

Office of Special Assistants
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Date: September 17, 2012



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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY OF WEST PENN POWER COMPANY TO
THE EXCEPTIONS OF COMPLAINANT J3 ENERGY GROUP, INC.
AND OPPOSITION TO REQUEST FOR ORAL ARGUMENT

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Dated: September 17, 2012

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

J3 ENERGY GROUP, INC.	:	
Complainant,	:	
	:	
v.	:	Complaint Docket No. C-2011-2219920
	:	
WEST PENN POWER COMPANY,	:	
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REPLY OF WEST PENN POWER COMPANY TO
THE EXCEPTIONS OF COMPLAINANT J3 ENERGY GROUP, INC.
AND OPPOSITION TO REQUEST FOR ORAL ARGUMENT

West Penn Power Company (“West Penn” or “Company”) files Reply Exceptions to the Exceptions filed by J3 Energy Group Inc. (“J3”) to the Initial Decision of Administrative Law Judge (“ALJ”) Elizabeth H. Barnes which was served to West Penn under Secretarial Letter of the Pennsylvania Public Utility Commission (“Commission”) dated August 17, 2012. West Penn files its Reply Exceptions pursuant to 52 Pa. Code §5.535.

I. Factual History

A full and detailed factual history underlying this controversy is provided at pages 5 through 14 of West Penn’s Main Brief. The Factual History shows that West Penn meticulously followed the Commission’s regulations, and obtained Commission approval from the earliest steps of West Penn’s procurement process.

- West Penn obtained Commission approval to amend its Default Service Plan to include procurement of solar photovoltaic alternative energy credits (“SPAECs”) and other Tier I alternative energy credits (“AEC”). The Commission specifically approved West Penn’s proposed RFP documents including its “Request for Proposal Rules” and its “Bid Form Spreadsheet. Opinion and Order entered September 8, 2010, at Docket P-00072342.
- West Penn’s competitive bid solicitation was further conducted in accordance with Commission regulations at 52 Pa. Code §54.186. The regulations require that default service procurement be monitored by the Commission and by an independent third party evaluator. 52 Pa. Code §54.186(c)(3) and (4).
- On December 10, 2010, the Commission issued a Secretarial Letter to West Penn stating that the RFP results from the December 3, 2010 procurement were approved. The Secretarial Letter provided:

West Penn requested that the Commission approve the bid results from this AEC procurement on or before December 10, 2010. Further investigation does not appear warranted at this time, since procurement appears to have been conducted in accordance with the RFP process and rules, filed pursuant to the Commission’s Opinion and Orders. Therefore, we approve the bid results submitted for this AEC procurement.¹

II. West Penn opposes J3’s request for Oral Argument

West Penn opposes J3’s request for oral argument before the Commission. J3 has taken across-the-board exceptions to the ALJ’s Initial Decision consisting of 15 specific exceptions or, in real terms, the entire Initial Decision. West Penn submits that there is nothing new that can be brought to the Commission’s attention by the oral argument that has not already been presented

¹ Exhibit RBR-3. Secretarial Letter dated December 10, 2010 at Docket No. P-00072342.

by the witnesses and filings. A decision on J3's Exceptions can be fully made through examination of the Exceptions and Reply Exceptions, and most importantly the full and complete record, including the Briefs and testimony. Oral argument would only serve to add an additional, unnecessary and expensive hurdle, wasteful of administrative time and efficiency, and would provide no new information for the Commission decision.

III. West Penn's Replies to Exceptions of J3

Reply to Exception No. 1: The ALJ correctly determined, based on substantial evidence, that J3's four bid-form spreadsheets were marked "all or nothing" and therefore were aggregated.

As an important preliminary matter, West Penn states that its Procurement Plan for the competitive bid process for obtaining SPAECs was approved by the Commission. West Penn followed its approved plan in the procurement process. On December 10, 2010, the Commission issued a Secretarial Letter to West Penn stating that the RFP results from the December 3, 2010 procurement were approved. The Secretarial Letter provided:

West Penn requested that the Commission approve the bid results from this AEC procurement on or before December 10, 2010. Further investigation does not appear warranted at this time, since procurement appears to have been conducted in accordance with the RFP process and rules, filed pursuant to the Commission's Opinion and Orders. Therefore, we approve the bid results submitted for this AEC procurement.²

In reliance on the Commission's approval of the procurement results West Penn announced the RFP winners and executed agreements with the winning AEC and SPAEC

² Exhibit RBR-3. Secretarial Letter dated December 10, 2010 at Docket No. P-00072342.

bidders. West Penn and the winning bidders commenced delivery of the AEC and SPAEC products, and such delivery continues to the present.³

In response to J3's argument that West Penn improperly evaluated J3's bid-form spreadsheets, West Penn states, as the independent procurement monitor, Boston Pacific, reported to the Commission, as the Commission found in the first instance through its approval of the RFP results, and as the ALJ found through her Initial Decision, the evaluation was conducted properly and in accordance with the RFP rules. Further, West Penn concurs with the ALJ's Initial Decision that J3 mistakenly interpreted Section 7.10 of the RFP Rules as to the use of the Offer Type designations "all-or-nothing" versus "up-to."

A review of the ALJ's Initial Decision requires a look at the bid-form spreadsheets. The bid form spread sheets submitted by J3 are found in the record at "J3 Confidential Exhibit 2, J3-C-Ex-2." J3 submitted four bid-form spreadsheets and each was marked with the Offer Type "All-Or-Nothing."

All parties, including J3, recognized that the RFP rules clearly stated that a bidder could not bid on less than a full tranche. J3's Mr. Russial stated on cross examination: "The RFP is clear that each bid was going to be an offer for a certain volume for a full 10-year or 10-year plus 5-month period."⁴

J3's interpretation of an "all or nothing" Offer Type designation for a single tranche is that the evaluator should ignore the "all or nothing" designation and choose a single "all or nothing" bid sheet as the winner of a single tranche if that bid-form spreadsheet contained the lowest price for the tranche. The problem with J3's

³ WPPCo. Statement No. 1, pp. 21 to 22.

⁴ Transcript p. 41.

interpretation is that it completely obviates the “all or nothing” designation and disregards a distinction between the two classifications of Offer Types. J3’s interpretation of “all or nothing” would render the meaning of “up to” as meaningless and as having no distinction compared to “all or nothing.”

The simplest and most likely reason that J3 submitted its individual bid sheets designated as “all-or-nothing” is that J3 misread or misinterpreted Section 7.10 of the RFP Rules. Section 7.10 provides:

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

First, as the ALJ explains, the second sentence starts out with the phrase “(u)nless indicated as an All or nothing Bid” which signifies that there is a special purpose for the “all-or-nothing” designation as part of the evaluation process. The special purpose was to allow bidders to designate their offers so that the bidders’ offers would not be disaggregated into separate offers or awarded in amounts less than was designated under the “all-or-nothing” Offer Type. Since the RFP and subsequent FAQs made it clear that an award could not be made for anything less than a tranche, it was meaningless to mark the offer as “all or nothing” unless J3 wanted all its similarly marked offers considered together. In the same vein the only logical Offer Type to mark for a single offer is the “up to” designation. Continuing on with the sentence, “(b)ids will be considered an offer to supply any quantity up to and including the number of Tranches specified in the Bid

(an “Up-to Bid”).” Again, since the RFP and subsequent FAQs made it clear that an award could not be made for any less than a full tranche, and if J3 did not want its offers to have special consideration using the “all or nothing” designation and evaluated independently, then as stated in Section 7.10, the Offer Type should have been correctly marked by J3 as an “up to” offer on each of J3’s bid-form spreadsheets.⁵

Mr. Russial testified, upon questioning from the ALJ, that he thought the “up to” versus “all or nothing” terminology did not apply to an offer for a single tranche. He stated: “But for a single tranche bid as we submitted – we submitted four single tranche bids – the flag really made no difference. It had no relevance, because, by definition, in the RFP, a bidder was only going to be awarded a single tranche.”⁶

J3’s testimony raises concerns that J3 simply misinterpreted the RFP terminology and made an assumption, without any basis in the RFP, that “all or nothing” had different meanings depending on the number of tranches offered on each bid-form spreadsheet. The RFP Rules make no distinction for the use of the designation “all or nothing” on single tranche offers versus multiple tranche offers. In both single tranche and multiple tranche bid sheets, “all or nothing” meant exactly that--either all the blocks offered would be accepted or none would be accepted. West Penn also emphasizes that when an RFP participant entered the “all or nothing” or “up to” designation in the “Offer Type” box on the bid-form spreadsheet, a reminder automatically popped up that restated either “You have selected All-or-Nothing Bid” or “You have selected Up-To Bid” depending on which designation the supplier made.⁷ The pop-up occurred in J3’s single tranche bid sheet submissions. J3 had many reasons to be alerted that the “all or nothing”

⁵ WPPCo. Statement No. 1R, pp. 3 to 6.

⁶ Transcript, p. 54.

⁷ Transcript, p. 209.

designation had major significance, but J3 chose to overlook the significance and not to inquire of its significance.

The ALJ wrote in the Initial Decision that she found the testimony of Boston Pacific's Mr. Mossburg particularly persuasive in his explanation of J3's misinterpretation of the procurement rules. Mr. Mossburg considered the possible rationale behind J3's bidding strategy in preparing Boston Pacific's recommendation to the Commission. He considered: why would a bidder offer a single block as an "all or nothing" offer when no less than a single block could be awarded? Mr. Mossburg testified that the best answer at the time was that a bidder would be concerned with winning less than a single tranche. Mr. Mossburg stated that while winning less than a single tranche might be a reasonable concern, it was not reasonable in West Penn's RFP because West Penn had made it clear that it would only award full tranches. West Penn had made this point clear in its RFP and in its publicly posted answers to questions. The point was made in a frequently asked question posted publicly and available for all bidders to see prior to bid day. One of multiple responses appears in FAQ question number 29.

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

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

Thus, while it made little sense for a bidder to offer separate prices for tranches that would be grouped together, it made even less sense for a bidder to designate its offer as "all or nothing" in the fear of winning less than a full tranche -- this fear had been specifically addressed and eliminated. Mr. Mossburg considered that the varied prices within an "all or nothing" offer might reflect other factors known only to the bidder, such

as the bidder's business structure. In the end, it was determined that West Penn and Boston Pacific and the Commission cannot delve into bidder's possible motives, but that the evaluators should respect the "all or nothing" designation of all the bidders who chose it and to treat them identically under the RFP rules.⁸

Reply to Exception No. 2. The ALJ correctly did not adopt the reasoning in Mr. McBride's testimony.

The ALJ apparently did not find the testimony of Mr. McBride to be persuasive. West Penn restates the argument it made in its Reply Brief that Mr. McBride's testimony was inconsistent with the relief requested by J3. J3 wants the Commission to declare J3 the winning bidder, whereas J3's witness, Mr. McBride, appears to argue that the Commission should improve its supervision of procurements and improve RFP instructions.

Reply to Exception No. 3: The ALJ correctly described J3's Complaint.

A recurring theme of J3's argument is that it submitted four bids, as opposed to a single bid. West Penn responds that J3 indeed submitted four bid-form spreadsheets. However, because J3 marked each bid-form as "All-or-Nothing" the four bid sheets were correctly aggregated for evaluation purposes in accordance with the RFP rules.

Reply to Exception No. 4: The ALJ correctly describes J3.

J3 contends that while the ALJ is "technically correct" that J3 is a supplier of solar photovoltaic alternative energy credits, the description is incomplete. West Penn

⁸ Direct testimony of Frank Mossburg, pp 10 to 11.

responds that for the purposes of resolving J3's Complaint the ALJ's description is accurate – the basis of J3's complaint was its identity as a SPAEC supplier.

Reply to Exception No. 5: West Penn and the ALJ correctly described the SPAEC products being procured.

The description that J3 finds offensive is a summary of the term “tranche target” which is defined in the RFP instructions at Section 1.2 (J3 Public Exhibit 1, J3-P-Ex 1, page 3) as “Number of Tranches needed for Target Quantity, i.e., One (1) for the initial period of January 1, 2011 through May 31, 2021 and five (5) for each Reporting Year thereafter beginning June 1, 2011 and ending on May 31, 2021.”

Reply to Exception No 6: Finding of Fact No. 17 accurately portrayed the testimony of Mr. Diskin and of Mr. Mossburg that, in Boston Pacific's report to the Commission, the consolidation of J3's four spreadsheets was raised.

At Pages 83 to 84 of the Proprietary Testimony from the hearing of May 1, 2012, |

[REDACTED]

Similarly, Boston Pacific's Mr. Mossburg stated in his Written Direct Testimony (WP Statement No 2) at page 13 that in Boston Pacific's post-bid presentation to the Commission the issue of the “All-or-Nothing” designation was raised.

Reply to Exception No. 7: The ALJ's assertion that Commission Staff was present at the procurement process is based on substantial evidence and is correct.

West Penn's procurement manager, Mr. Reeping, testified that December, 3, 2010 was bid day, and that bids were accepted between 9 a.m. and 12 noon.⁹ The bid room was located at West Penn's headquarters in Greensburg, Pennsylvania. The Commission's monitor, Mr. Diskin, testified that he departed Harrisburg at 7:30 or 8 a.m. and arrived at the Greensburg bid room at 10:15 to 10:30 a.m. The auction had already started when Mr. Diskin arrived. Once the bid window closed at 12 PM, the bids were independently evaluated by Boston Pacific, Commission Staff and the Company.¹⁰ [REDACTED]

[REDACTED]

[REDACTED]¹¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹² [REDACTED]

[REDACTED]

[REDACTED]¹³

[REDACTED]

[REDACTED]

[REDACTED]

⁹ Direct testimony of Robert Reeping, page 12; Testimony of Paul Diskin, Transcript page 76
¹⁰ Direct testimony of Robert Reeping, page 12.
¹¹ Testimony of Paul Diskin, Transcript page 66.
¹² Written Rebuttal Testimony of Frank Mossburg, page 9.
¹³ Written Direct Testimony of Robert B. Reeping, page 11.

[REDACTED]

[REDACTED]¹⁴

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Reply to Exception No. 8: The ALJ’s determination that all bidders were treated in a uniform fashion is based on substantial evidence and is correct.

Other bidders submitted offers in a fashion similar to J3’s – that is, other bidders offered multiple tranches at different prices but designated their bid-form spreadsheets as “all or nothing.” Those bid-form spreadsheets were aggregated into a single price offer for each such “all or nothing” bidder in accordance with the RFP Rules. J3 was treated identically to those other bidders.¹⁵ The Commission’s Mr. Diskin agreed, upon questioning by the ALJ, that J3 had been treated uniformly as other bidders that had

¹⁴ Proprietary transcript p. 75.
¹⁵ WPPCo. Statement No 2. p. 10, 14.

designated their bid-form spreadsheets as “all or nothing” and such treatment was in accordance with the RFP Rules.¹⁶

Reply to Exception No 9: The ALJ’s did not err in placing weight on the fact that all bidders were treated equally.

Exception No. 9 appears to be a version of Exception No. 8. West Penn incorporates herein its response to Exception 8.

Reply to Exception No. 10: The ALJ’s observation that Mr. Russial prepared J3’s proposal primarily on his own is a relevant point and is based on substantial evidence.

J3’s owner, Mr. Russial, testified that he performed the bidding strategy and interpretation of the “all or nothing” versus “up to” RFP rules by himself and that he prepared the Part 2 proposal documents and made the submission primarily on his own. He further stated that he did not consult with anyone about the meaning of “all or nothing” versus “up to” offer type designation.¹⁷ Nor did Mr. Russial avail himself of West Penn’s public question and answer process to submit questions about the RFP terminology.¹⁸ The preparation of J3’s Part 2 proposal including the bid-form spreadsheets in isolation, without consultation of a second opinion, and without the use of clarification through the FAQ tools, may have resulted in J3’s misinterpretation or lack of understanding of the RFP terms.

¹⁶ Proprietary Transcript, p. 98.

¹⁷ Transcript page 38.

¹⁸ Transcript page 39.

Reply to Exception No. 11: The ALJ's finding that J3 did not ask for pre-bid clarification is a relevant finding and is based on substantial evidence.

J3's failure to use West Penn's public question and answer forum is remarkable given J3's direct testimony, which begins with the assertion that it did not mark its bid-form spreadsheets as "up to" because to do so would have been "non-sensical."¹⁹ J3 stated that such a designation defies the correct definition of an "up to" bid and that "*any bid submitted for just a single tranche was obviously by RFP rules, an "All-or-Nothing" bid. A single tranche bid flagged as "up to" would have been inconsistent with the RFP rules and therefore non-sensical.*"²⁰

The statement is remarkable because, had J3 found something "non-sensical" about the RFP documents or terminology, it should have asked for an interpretation. The question and answer process employed by West Penn leading up to bid day was a public process for resolving questions about the RFP process and straightening out or clarifying anything that didn't make sense to bidders. J3 testified that it was aware of the process but did not take part and did not submit any questions prior to bid day about the RFP terminology.²¹

West Penn's Mr. Reeping directly stated that if there was "fault" in the RFP process, it rested with J3.²² J3's offer strategy was not specifically addressed in the RFP rules or FAQs submitted by other potential bidders in the pre-bid public information process. As noted, an example of the evaluation of "all or nothing" bids was provided, but this showed multiple tranches bid at the same price, rather than different prices. Therefore, it was incumbent for J3 to take responsibility for its own strategy and to make

¹⁹ Direct Testimony of Stephen Russial, p. 8.

²⁰ Direct Testimony of Stephen Russial, p. 8.

²¹ Transcript pp. 37 to 39

²² WPPCo. Statement No 1. pp. 19 to 20.

sure its Part 2 proposal including the bid-form spreadsheets would be evaluated as it wanted. Instead J3 appears to have relied on its own assumptions about the process without inquiring through the available process. As J3 found the RFP “non-sensical” it should have inquired during the pre-bid information process about the RFP terminology and made certain that its bid-form spreadsheets were correctly designated. J3 was under an obligation of self help to clear up what it considered a non-sensical RFP.

Finally, in its Exception No. 11 J3 adds that the fact that several other suppliers submitted multiple bid spreadsheets marked “All-or-Nothing” is “anecdotal evidence” that other suppliers were of the same thinking as J3. J3’s discussion of other suppliers’ bid-form spreadsheets, and the underlying intent of other suppliers, is pure speculation. J3 candidly recognized in its Main Brief and in Exception No 11 that other suppliers’ possible motivations are merely “anecdotal.” West Penn witnesses Reeping and Mossburg testified consistently that it is not the job of evaluators to delve into the possible thinking or strategies of suppliers. As Mr. Mossburg stated, there were numerous variations of Offer Types and numbers of tranches that could be offered, and the most important job of the evaluators is to ensure that suppliers are treated uniformly and according to the RFP rules. Again, all bidders were treated and evaluated equally.

Reply to Exception No. 12: The ALJ correctly concluded that J3 did not prove that West Penn violated the Public Utility Code or Commission regulations.

J3 failed to show any violation of law or regulation by West Penn. To the contrary, as described Factual History in West Penn’s Main Brief, West Penn carefully and methodically obtained Commission approval of each step of the procurement process. West Penn obtained pre-approval of its RFP and of the RFP documents that

were to be used in the RFP process. The Commission approval of the RFP documentation included the RFP bid-form spreadsheets. Following approval of its RFP process and documents West Penn carefully followed the approved process, as well as Commission regulations, in performing its RFP. A description of West Penn's careful process, including obtaining necessary Commission approval is set forth in the Factual History of its Main Brief.

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

Reply to Exception No. 13: The ALJ correctly found, based on substantial evidence, that West Penn properly relied on the Secretarial Letter of December 10, 2010, approving the procurement results.

J3 presents several arguments concerning West Penn's reliance on the Commission's December 10, 2010 Secretarial Letter. First, J3 argues that West Penn could not be "pinned down" on what West Penn meant by "reliance." West Penn's position cannot be more forthright. In its December 10, 2010, Secretarial Letter, the Commission described the RFP process, and specifically approved the RFP results. It stated:

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

Following the Commission's approval of the bid procurement, West Penn announced the RFP winners in accordance with the RFP rules. West Penn then commenced its purchase of SPAECs from the announced RFP winners. West Penn fully,

reasonably and justifiably relied on the Commission's approval of the RFP results through the Secretarial Letter when West Penn announced the RFP winners and entered contracts to purchase the SPAECs.

Mr. Reeping described West Penn's reliance on the Commission's December 10 Secretarial Letter. He stated that West Penn "absolutely relied" on the Commission's approval in announcing the RFP winners and moving forward with the execution of agreements.²³

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

The IPM will prepare a report two (2) business days after the Part 2 Date. The IPM's report will present the results of the RFP and will also summarize the most recent processing and evaluation of Proposals. The PaPUC will have three (3) business days after report submission to decide whether to approve the results. The Company or IPM will notify all Bidders of the PaPUC's decision.

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

Mr. Reeping testified that Commission approval of the RFP results was an "absolute prerequisite" in order for West Penn to announce the RFP results and to award agreements. He stated that West Penn "definitely relied" on the Commission approval in the Commission's December 10, 2010 Secretarial Letter in awarding agreements for the purchase of SPAECs and AECs under the RFP. Absent such Commission approval of the

²³ WPPCo Statement No. 1, p. 21.

RFP results the Company would not have awarded any agreements under the RFP.²⁴ As a result of the Commission approval, West Penn executed agreements with each of the identified winning bidders and SPAEC and AEC deliveries to West Penn began immediately thereafter and are continuing today under all the executed agreements.

J3 next contends that West Penn's "reliance" position does not fit the definition of "detrimental reliance." West Penn submits that J3's argument is essentially a straw man. J3 attempts to re-cast West Penn's position as "detrimental reliance" and then J3 attempts to tear down its re-casted argument. In re-casting West Penn's argument J3 cites the elements of a detrimental reliance:

In order to apply equitable estoppel to a governmental agency, the party sought to be estopped (1) must have intentionally or negligently misrepresented some material fact, (2) knowing or having reason to know that the other party would justifiably rely on the misrepresentation and (3) inducing the other party to act to his detriment because of his justifiable reliance on the misrepresentation.

See Cicchello V. Bloomsburg Zoning Hearing Board, 617 A.2d 835, 151 Pa. Commwlth. 506 (1992).

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.

²⁴ WPPCo. Statement No. 1, p. 21 to 23.

West Penn has not detrimentally relied on an incorrect Commission approval.

West Penn has correctly relied on a correct Commission approval.

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. The Commission similarly followed its own regulations for the appointment of an IPM, for consultation with the IPM on an expedited basis, and for review and announcement via Secretarial Letter of the results of its review of the RFP results.²⁵

Finally, J3 contends that West Penn failed to raise its "reliance" position as "New Matter" when West Penn filed its February 3, 2011 Answer to J3's Complaint. An affirmative defense that should be pleaded as New Matter is a defense that requires the averment of facts extrinsic to the Complaint of the Plaintiff. In the present case, by contrast, the existence of the Commission's approval of West Penn's procurement was stated by J3 in J3's complaint. J3 specifically cited the Commission's Secretarial Letter in Paragraph No. 17 of its Complaint, stating: "Disclosure of the weighted average price was required by the commission's Secretarial Letter dated December 10, 2010, which approved the results of the evaluations." In response to the Complaint, West Penn's Answer also referred to, cited, and quoted the Commission's Secretarial Letter.

J3 submitted a Motion for Summary Judgment dated November 14, 2011, in which it presented its argument that West Penn had failed properly to plead its reliance argument.²⁶ In the Order Denying Cross Motions for Summary Judgment, dated

²⁵ West Penn understands J3's explanation of detrimental reliance to be that detrimental reliance could ripen or occur if West Penn's Commission-approved recovery of costs of the SRAEC procurement is later inappropriately denied recovery.

²⁶ Motion for Summary Judgment of J3 Energy Group, Inc., Paragraph Nos. 58-61.

February, 1, 2012, the Presiding Officer recognized that “[w]hether or not West Penn’s reliance upon commission’s approval of the bid procurement when it purchased the SPAECs was appropriate is in dispute.”²⁷ J3 was fully apprised and aware from the start of this proceeding that West Penn relied on the Commission’s Secretarial Letter, and certainly by the time of the Order denying Summary Judgment it was made aware. Any contention by J3 that it was surprised by or not aware of West Penn’s reliance position exceeds credibility.

Reply to Exception No. 14: The ALJ’s observation that the outcome of J3’s Complaint case has a de minimus impact on ratepayers is a valid observation and is based on substantial evidence.

The ALJ’s observation about the de minimus effect of the case was based on the clear, unequivocal testimony by West Penn’s Mr. Reeping at the May 1, 2012 hearing.²⁸

The ALJ clearly pointed out that her reason for including the observation as out of regard for the Commission’s statutory obligation to help ensure that default service rates of electric distribution companies are just and reasonable under Sections 1301 and 2804 of the Public Utility Code. 66 Pa. C. S. §§1301 and 2804.

Reply to Exception No. 15: The ALJ’s discussion and finding that overturning the Commission’s approval of the procurement results could chill competition and spur further litigation is valid and based on substantial evidence.

[REDACTED]

[REDACTED]

²⁷ Order Denying Cross Motions for Summary Judgment dated February 1, 2012, p. 9.

²⁸ Proprietary transcript, p. 210.

[REDACTED]²⁹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

IV. Conclusion

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

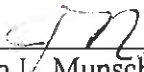
²⁹ Proprietary transcript, p. 90.

Commission through its Secretarial Letter issued December 10, 2010, and (vi) the RFP including its evaluation process was fair and correct, and (vii) the Commission correctly approved the results of West Penn's procurement, and (viii) West Penn fully, reasonably and justifiably relied on the Commission's approval of West Penn's procurement results in announcing the winning results and in entering contracts with the announced RFP winners.

Respectfully submitted,

Date: September 17, 2012

By:



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