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November 15, 2013

VIA E-FILE


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; Petition for
Reconsideration of West Penn Power Company**

Dear Secretary Chiavetta:

Enclosed please find the *Petition for Reconsideration of West Penn Power Company*, with certificate of service attached. The Petition requests reconsideration of the Commission's Opinion and Order entered October 31, 2013. The Petition has been served by FEDEX and email on the parties as shown on the attached Certificate of Service. This Petition is filed electronically and is deemed filed today.

Very truly yours,


John L. Munsch
Attorney

Enclosure

cc: Honorable Elizabeth H. Barnes
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

J3 ENERGY GROUP, INC.	:	
	:	
v.	:	
	:	
WEST PENN POWER COMPANY	:	Docket No. C-2011-2219920
	:	
and	:	
	:	
UGI DEVELOPMENT COMPANY,	:	
Indispensable Party	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served via email and FEDEX overnight, the *Petition for*

Reconsideration of West Penn Power Company, addressed as follows:

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Date: November 15, 2012



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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v.	:	
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WEST PENN POWER COMPANY	:	Docket No. C-2011-2219920
	:	
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	:	
UGI DEVELOPMENT COMPANY,	:	
Indispensable Party	:	

**PETITION FOR RECONSIDERATION
OF WEST PENN POWER COMPANY**

West Penn Power Company (“West Penn” or “Company”) submits a Petition for Reconsideration of the Opinion and Order of the Pennsylvania Public Utility Commission (“Commission”) entered October 31, 2013 (“October 31 Order”) at the above docket. The October 31 Order determined that UGI Development Company (“UGI Development” or “UGID”) is an indispensable party to the proceeding and, therefore, the October 31 Order vacated the Initial Decision (I.D.) of Administrative Law Judge (“ALJ”) Elizabeth H. Barnes issued on August 17, 2012, directed that UGI Development be named as a party to the proceeding and directed that the proceeding be remanded to the Office of Administrative Law Judge for further proceedings.

I. Standard for Reconsideration

1. West Penn's Petition for Reconsideration is submitted pursuant to Section 703(g) of the Public Utility Code, 66 Pa. C. S. §703(g), and Section 5.572(c) of the Rules and Regulations of the Commission, 52 Pa. Code §5.572(c). The standards for a Petition for Reconsideration following a Commission decision were addressed in *Duick v. PG&W*, 1982 Pa. PUC LEXIS 4, 56 Pa PUC 553 (1982). *Duick* held that a petition for reconsideration under Subsection 703(g) may properly raise any matter designed to convince the Commission that it should exercise its discretion to amend or rescind a prior Order:

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. . . . What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

Duick, 1982 Pa. PUC LEXIS 4, at 11-13.

II. Factual History

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

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

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

5. At the time of West Penn's Petition in July of 2010, the Commission was promulgating guidelines designed "to provide the longer term revenue stability that is likely needed to support both small scale and large scale solar development, and to address other barriers that could prevent new solar projects from coming to fruition in Pennsylvania."¹

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

6. The Commission's Proposed Guidelines reiterated the requirement in the Default Service Regulations at Section 54.186 that the Commission should review and evaluate the results of utility procurements for large and small-scale solar projects, stating that the Commission will review and evaluate bids for large-scale and small-scale solar RFPs within a reasonable period of time.² The Commission entered its Final Policy Statement Order on September 16, 2010,³ shortly after its approval of West Penn's Petition. The final Commission Guidelines for solar RFPs were largely unchanged from its December 2009 proposed policy. Both the proposed and final Policy Statement of the Commission sought to "promote the construction of small-and large-scale solar projects in this Commonwealth ... of any size...."

7. West Penn's July 29, 2010, Petition for modification of its Default Service Program specifically requested Commission approval of West Penn's proposed RFP documents. In particular, West Penn's Petition requested approval of its "Request for Proposal Rules" and it sought approval of its "Bid Form Spreadsheet."⁴ West Penn's concluding "Wherefore" Paragraph stated: "Wherefore, Allegheny Power⁵ requests that the Pennsylvania Public Utility Commission approve Allegheny Power's request to modify its Default Service Plan to allow the purchase of solar Renewable Energy Credits and other Tier I Alternative Energy Credits through 120-month and 125-month term contracts using procurement documents listed herein." (Emphasis added, footnote added.)

8. West Penn's July 29, 2010 Petition was served on all parties to West Penn's original default service proceeding at Docket No. P-00072342. West Penn's July

² The Proposed Commission Guideline was listed at Section 69.2903(a) and (b) of the Commission Guidelines.

³ Final Policy Order entered September 16, 2010 at Docket No. M-2009-2140263.

⁴ West Penn July 29, 2010 Petition at Paragraph No. 15 (Exhibit RBR-1).

⁵ West Penn formerly conducted business under the trade name "Allegheny Power."

29, 2010 Petition was not opposed. Without qualification or alteration the Commission approved West Penn's July 29, 2010 Petition by Opinion and Order entered September 8, 2010, at Docket P-00072342. The Commission's Opinion and Order specifically recognized that "Allegheny has included as part of its Petition, the procurement documents it proposes to utilize...." Opinion and Order at p. 5. In its approval of West Penn's July 29, 2010 Petition, the Commission referred to its proposed Policy statement stating: "[t]he intent of this Policy statement is to provide the longer term revenue stability that is likely needed to support both small scale and large scale solar development, and to address other barriers that could prevent new solar projects from coming to fruition in Pennsylvania."⁶

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

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

(4) The DSP or third party evaluator shall review and select winning bids procured through a competitive bid solicitation

⁶ Opinion and Order entered September 8, 2010 at Docket P-00072342, p. 4 (Exhibit RBR-2, p. 4)

process in a nondiscriminatory manner based on the price determinative bid evaluation criteria set forth consistent with paragraph (1)(vi).

52 Pa. Code §54.186(c)(3) and (4).

10. As anticipated by Commission regulations West Penn, in consultation with the Commission, hired Boston Pacific Company, Inc. as the IPM for the RFPs, both Tier I (non solar) and solar. Boston Pacific was selected in September 2010 after the Commission's approval of West Penn's RFP.⁷ In accord with Commission regulations Boston Pacific reported to the Commission and was paid by West Penn. Boston Pacific's scope of work for the RFP included RFP document review, protection from public disclosure of data, pre-bid review with the Commission, onsite bid day monitoring, and evaluation of the RFP and the bid results.⁸

11. In preparation for the RFP Boston Pacific and West Penn conducted a webinar and posted questions and answers on West Penn's public website. Bidders were encouraged to ask questions about the RFP process and the questions and the answers were posted on the website. J3 and all other bidders had ample opportunity to submit questions about the RFP Process. J3 did not avail itself of the opportunity to ask questions or to seek clarification of the RFP terminology of "all or nothing" or "up to."⁹ J3 had submitted questions prior to bid day concerning collateral (bidders' security) issues, and it submitted a post-bid question in which it inquired how bids had been evaluated, but J3 did not inquire before bid day about the evaluation of offers or RFP terminology. Only after the RFP awards were public did J3 use the public question process to inquire about the RFP evaluation methodology.

⁷ West Penn Statement No. 2, p.4.

⁸ WPPCo. Statement No. 1, pp. 8-10.

⁹ Transcript pp. 39 to 40, 54 to 56.

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

13. The major point of contention in the proceeding is the use of the offer type designations of “all or nothing” and “up to.” Bidders were provided the opportunity to designate their bid-form spreadsheets as “all or nothing,” meaning that bidders would not be bound to supply tranches of SPAECs in quantities other than those offered. The theory behind the “all or nothing” designation was to account for the developing nature of renewable generation industry. The “all or nothing” designation was meant to accommodate bidders that may plan to build a solar installation based on winnings in West Penn’s RFP, but who may be unable to construct their installation if they won less than their total offered quantities.¹¹

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

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

¹⁰ WPPCo. Statement No. 2, p. 5.

¹¹ WPPCo. Statement No. 1, p. 16-17.

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

16. On bid day Part 2 proposals were submitted by those suppliers who had submitted an initial application in which prospective suppliers were qualified to submit Part 2 proposals.¹² The Part 2 proposals were submitted by suppliers by fax to the bid room.¹³ Once received each Part 2 submission was reviewed by a West Penn representative to ensure it was in compliance with the RFP rules. Once validated the Part 2 documents were provided to Boston Pacific for concurrence that the Part 2 documents were complete. If required information associated with the Part 2 documents was found to be missing, a call would be placed from the bid room by speaker phone to the bidder to notify them of such deficiency and to make them aware that their bid would not be considered unless such deficiency was addressed prior to the closing of the bid window.

17. Once the Part 2 documents were validated Boston Pacific reviewed and independently validated each bid-form spreadsheet that was submitted with the Part 2 documents. The independent validation was conducted to ensure that each faxed bid-

¹² Seven (7) suppliers were eligible to participate in the Tier I AEC RFP and eleven (11) suppliers were eligible to participate in the SAEC RFP.

¹³ The bid-form spreadsheets were filled out by the suppliers in an Excel program provided by West Penn on its public website and the bid-form spreadsheets were then faxed by the suppliers to the West Penn fax in the West Penn bid room.

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

18. Once the bid window closed at 12 noon supplier offers were independently evaluated by Boston Pacific, Commission staff and West Penn by the Discounted Price for Evaluation Purposes and the offer type submitted by each of the suppliers with their Part 2 proposals. Winning bidders were then identified and confirmed by Boston Pacific, Commission staff and West Penn for each of the RFPs based upon the evaluation criteria established in the RFP rules.¹⁴

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

20. The RFP rules at Section 9.19 provided that the Commission would have three (3) business days after report submission by the IPM to decide whether or not to

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

approve the results.¹⁵ Section 9.19 further provides that after the Commission’s decision, “[t]he company or IPM will notify all Bidders of the PaPUC’s decision.”

21. 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.*¹⁶

22. In reliance on the Commission’s approval of the procurement results West Penn announced the RFP winners and executed agreements with the winning Tier I and Solar bidders. West Penn and the winning bidders commenced delivery of the Tier I and Solar products, and such delivery continues to the present.¹⁷

III. Procedural History¹⁸

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

¹⁵ The Default Service Rules at Section 54.188(d) provide that “the Commission will have one (1) business day, to approve or disapprove the results of a competitive bid solicitation process used by a DSP as part of its procurement plan.” The Commission Guidelines for Pennsylvania Solar Projects provide for a more flexible deadline for the Commission, stating that “[t]he Commission will review and evaluate bids for [large and small] scale solar RFPs within a reasonable period of time.” 52 Pa. Code § 69.2903(a) and (b)(1) (emphasis added).

¹⁶ Exhibit RBR-3. Secretarial Letter dated December 10, 2010 at Docket No. P-00072342.

¹⁷ WPPCo. Statement No. 1, pp. 21 to 22.

¹⁸ The procedural history is drawn in part from the Administrative Law Judge Order Denying Cross Motions for Summary Judgment dated February 1, 2012.

24. West Penn answered the complaint on February 2, 2011, and stated that its evaluation of J3's SPAEC bid proposal was correct. West Penn stated that it followed its default service procurement process for SPAECs, as approved by the Commission Order entered September 8, 2010, at Docket No. P-00072342,¹⁹ and that West Penn's competitive bid solicitation was further conducted pursuant to Commission regulations at 52 Pa. Code §54.186.

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

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

¹⁹ *Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period (Petition of Allegheny Power to Modify its Procurement of Solar Alternative Energy Credits and Alternative Energy Credits Under its Default Service Plan)*, P-00072342, Opinion and Order dated September 8, 2010. This Opinion and Order allowed West Penn to acquire solar and non-solar Tier 1 AECs through an RFP process utilizing long-term procurement contracts in lieu of AEC purchases related to spot market supply being acquired solely on the spot market.

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

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

29. J3 presented the written direct and written rebuttal testimony of Stephen C. Russial, President and Owner of J3.²⁰ Mr. Russial answered questions upon cross examination by West Penn's counsel. J3 also presented the written direct and written rebuttal testimony of Curtis W. McBride, an independent consultant who consults on procurement matters for TechSource, Inc., of Los Alamos, New Mexico. West Penn allowed the admission of Mr. McBride's written testimony by stipulation without cross examination. Mr. McBride also offered oral surrebuttal testimony at the May 1 hearing.

30. West Penn presented written direct and written rebuttal testimony of Frank Mossburg, Managing Director of Boston Pacific Company, Inc., which was the IPM for West Penn's procurement for solar RECs held December 3, 2011.²¹ Mr. Mossburg's written direct testimony was identified and admitted as West Penn Statement No. 2, and

²⁰ Mr. Russial submitted written direct testimony in confidential version and a public (redacted) version. Mr. Russial's written rebuttal testimony was submitted in public form only.

²¹ The written direct and rebuttal testimony of Mr. Mossburg was submitted in both a confidential version and a public (redacted) version, pursuant the ALJ's Protective Orders.

Mr. Mossburg's written rebuttal testimony was identified and admitted as West Penn Statement No. 2-R. Mr. Mossburg answered questions upon cross examination by J3's counsel. West Penn also presented written direct and written rebuttal testimony of Robert B. Reeping, Manager of Regulated Commodity Sourcing for Allegheny Energy Service Corporation a subsidiary of FirstEnergy Corp. Mr. Reeping's written direct testimony was identified and admitted as West Penn Statement No. 1, and Mr. Reeping's written rebuttal testimony was identified and admitted as West Penn Statement No. 1-R. Mr. Reeping answered questions upon cross examination by J3's counsel.

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

32. On August 17, 2012, the ALJ issued an Initial Decision that denied and dismissed the Complaint of J3. J3 filed Exceptions and on September 17, 2012, West Penn filed Reply Exceptions. On October 31, 2013, the Commission issued its Opinion and Order vacating the I.D. and remanding the proceeding to the Office of Administrative Law Judge to name UGID as an indispensable party.

IV. Argument

A. The Commission's October 31 Order incorrectly determines that there is a need to join a party as indispensable.

33. A party is considered "indispensable" when that party's rights are so connected that no order can be issued that does not impair those rights. *Newcrete Products v. City of Wilkes-Barre*, 37 A.3d 7 (Pa. Comwlth.). *Union Tp. v. Ethan Michael, Inc.* 979 A.2d 431(Pa.Cmwlth. 2009). In the present situation the winning bidder is not indispensable because the ALJ's I.D. does not impair the rights of the party.

Under the ALJ's correct reasoning the existing three-year-old contract between UGID and West Penn will continue unimpaired according to the justifiable expectations of the parties to the contract. J3 did not seek to impair the rights of UGID through J3's complaint about the 2010 SPAEC procurement. Thus, it is easily possible for the Commission to enter an order that does not impair in any way the status of all parties. By affirming the ALJ's I.D. the Commission may enter an order that preserves the status quo. Thus, it is incorrect that no order of the Commission can be entered that does not affect the rights of the parties not joined in this action.

B. Even assuming that UGI Development is an indispensable party the Commission should dismiss the Complaint for J3's failure to join the indispensable party.

34. Even assuming for the purpose of argument that UGID is an indispensable party the appropriate remedy is for the Commission to dismiss J3's complaint. The failure of the complainant, J3, to join an indispensable party deprives the Commission of jurisdiction over the complaint. *HYK Const. Co., Inc. v. Smithfield Tp.*, 8 A.3d 1009 (Pa.Cmwlt. 2010). Given that the Commission appears to believe that UGID is indispensable, the Commission would be deprived of jurisdiction and the proper procedural course would be to dismiss the Complaint.

35. The cases cited by the Commission in its October 31 Order for the proposition that a complainant's failure to name an indispensable party may result in a remand of the proceeding are distinguishable. The cases cited were determined at the very beginning of litigation or after a short proceeding. The J3 v. West Penn proceeding, by contrast, was filed almost three years ago and has an extended, tortuous procedural

history including extensive discovery, depositions, proprietary orders, hearings, briefs, and Exceptions to the I.D.

36. In the case of *Zurenda v. Commonwealth*, 405 A.2d 1124 (Pa. Comwlth. 1979), which is cited by the Commission in its October 31 Order, the Commonwealth Court specifically recognized that “[w]e are at an early stage in these proceedings and no undue hardship will be caused to either party by allowing Zurenda [the Plaintiff] the opportunity to join Interstate [Indispensable Party] in this suit.” *Zurenda* at 1128. Nevertheless, even in *Zurenda*, the Court directed the plaintiff to re-plead within 20 days or face dismissal of the suit. By contrast, the failure of the Complainant here, J3, to name an indispensable party has extended over a nearly three-year period.

C. The Commission’s October 31 Order overlooks that prolonging the proceeding would be contrary to public policy.

37. West Penn submits that the Commission’s October 31 Order is contrary to public policy. Suppliers look for finality in an RFP process where the bidding prices are volatile. Suppliers may find it unsettling should the Commission prolong an already prolonged proceeding and cast doubt on the reliability of Commission approval of procurement results.

38. Paul Diskin, who at the time of the procurement was the Commission’s Energy Manager of the Bureau of Fixed Utility Services, testified under subpoena from J3. The ALJ determined, based on ample testimony, that overturning West Penn’s procurement after the Commission’s approval of the results would inhibit suppliers from entering the Pennsylvania market.²² The ALJ’s conclusion is justified because the volatility of prices for SRAECs is amply evident in this proceeding. J3’s witness testified

²² I.D. at 20.

in May of 2012 that the value of SRAECs had decreased by 80 percent from the time of the December 2010 RFP.²³

39. West Penn points out that disparity between current prices and the procurement prices from 2010 has continued. The disparity between the bid prices in December 2010 and the price of SPAECs is an additional factor that should encourage the Commission to reconsider its October 31 Order.

D. The Commission's October 31 Order overlooks the ALJ's correct determination that West Penn justifiably relied on Commission's December 10, 2010 approval of the RFP results.

40. Not only did West Penn carefully follow the Commission procedures in developing its RFP, West Penn fully and justifiably relied on the Commission's approval of the RFP results. The Commission approved the bid results of West Penn's December 3, 2010 procurement through the Commission's December 10, 2010, Secretarial Letter in which the Commission described the RFP process, and specifically approved the RFP results. The December 3, 2010 Secretarial Letter 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.

41. 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. The ALJ concluded that West Penn fully, reasonably and justifiably relied on the Commission's

²³ Transcript, pp. 43 to 44.

approval of the RFP results through the Secretarial Letter when West Penn announced the RFP winners and entered contracts to purchase the SPAECs.²⁴

42. West Penn witness Robert P. Reeping, West Penn's Manager of Regulated Commodity Sourcing, described West Penn's reliance on the Commission's December 10 Secretarial Letter. Mr. Reeping stated that West Penn "absolutely relied" on the Commission's approval in announcing the RFP winners and moving forward with the execution of agreements.²⁵

43. 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 the Commission would provide West Penn 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.

44. 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 the procurement. Absent such Commission approval of the RFP results the Company would not have

²⁴ I.D. at 20.

²⁵ WPPCo Statement No. 1, p. 21.

awarded any agreements under the RFP.²⁶ As a result of the Commission approval West Penn executed agreements with the identified winning bidder and deliveries to West Penn began shortly thereafter and are continuing today.

E. The Commission's October 31 Order overlooks that the ALJ correctly found that West Penn correctly followed the RFP rules as approved by the Commission and it followed Commission regulations in performing its procurement.

45. The October 31 Order has the effect of prolonging an already long proceeding. The October 31 Order may lend skepticism about the Commission's approval of utilities' procurement results. In this regard, West Penn re-asserts that it methodically followed the Commission's procedures for procurement and relied on the Commission's approval of the procurement results. West Penn carefully obtained Commission pre-approval of its RFP and of the RFP documents to be used in the RFP process. The Commission's approval of the RFP documentation included the RFP bid-form spreadsheets used by West Penn. Following approval of its RFP process and documents West Penn carefully followed the approved process, as well as Commission regulations, in performing its RFP.

46. On July 29, 2010, West Penn filed a Petition requesting Commission approval to amend West Penn's default service plan by modifying its procurement process to acquire SPRECs and other Tier I AECs. West Penn's July 29, 2010, Petition for modification of its Default Service Program specifically requested Commission approval of West Penn's proposed RFP documents. In particular, West Penn's Petition requested approval of its "Request for Proposal Rules" and it sought approval of its "Bid

²⁶ WPPCo. Statement No. 1, p. 21 to 23.

Form Spreadsheet.”²⁷ West Penn’s concluding “Wherefore” Paragraph stated: “Wherefore, Allegheny Power requests that the Pennsylvania Public Utility Commission approve Allegheny Power’s request to modify its Default Service Plan to allow the purchase of solar Renewable Energy Credits and other Tier I Alternative Energy Credits through 120-month and 125-month term contracts using procurement documents listed herein.” (Emphasis added.)

47. Without qualification or alteration the Commission approved West Penn’s July 29, 2010 Petition by Opinion and Order entered September 8, 2010, at Docket P-00072342. The Commission’s Opinion and Order specifically recognized that that “Allegheny has included as part of its Petition, the procurement documents it proposes to utilize....” It is unclear to West Penn how it could have been more careful in obtaining Commission approval of West Penn’s procurement process and associated documents.

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

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

²⁷ West Penn July 29, 2010 Petition at Paragraph No. 15 (Exhibit RBR-1).

shall be subject to confidentiality agreements identified in § 54.185(d)(6) (relating to default service programs and periods of service).

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

52 Pa. Code §54.186(c)(3) and (4).

49. West Penn's competitive bid process was monitored by the Commission and by an independent third party evaluator ("IPM") pursuant to Section 54.186(c)(3). The Commission representative was Paul Diskin. Boston Pacific was chosen as the IPM in close consultation with the Commission and Boston Pacific reported directly to the Commission for the solicitation, in accordance with the regulations. Both the Commission representative, Mr. Diskin, and the IPM, Boston Pacific's Frank Mossburg, were on site during the bid submission process and during the bid evaluation process that followed the bid submissions. The independent third party evaluator and the Commission representative concurred with the bid results and that the procurement process was conducted properly in a fair and competitive manner.²⁸ The ALJ concluded: "It is undisputed that Commission staff was present at the evaluation, and had the benefit of a written recommendation report by Boston Pacific before it approved the bid results in this case."²⁹

50. Inasmuch as West Penn's procurement of SPAECs was carefully conducted according to approved Commission procedures, was carefully monitored by West Penn representatives, by the independent third party evaluator and by the

²⁸ WPPCo Statement No 2, p. 13; I.D. at pp 10-11.

²⁹ I.D. at 11.

Commission, and inasmuch as the RFP results were approved by the Commission, J3's Complaint should be denied.

F. The Commission's October 31 Order overlooks the ALJ's correct determination that all bidders were treated in a uniform fashion.

51. Other bidders submitted offers in a fashion similar to J3's – that is, other bidders offered multiple tranches at different prices and 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.³⁰

G. The Commission's October 31 Order overlooks that the ALJ correctly found that J3 did not ask for pre-bid clarification of the bid procedures.

52. J3's failure to use West Penn's public question and answer forum is remarkable given J3's direct testimony that it did not mark its bid-form spreadsheets as “up to” because to do so would have been “non-sensical.” 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.*”³¹

53. 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 clarifying any confusion for bidders. J3 testified that it was aware of the process but did

³⁰ WPPCo. Statement No 2. p. 10, 14.

³¹ Direct Testimony of Stephen Russial, p. 8.

not take part and did not submit any questions prior to bid day about the RFP terminology.³²

54. West Penn's Mr. Reeping directly stated that, if there was "fault" in the RFP process, it rested with J3.³³ It was incumbent for J3 to take responsibility for its own strategy and to make sure its Part 2 proposal including the bid-form spreadsheets would be evaluated as it wanted. Instead J3 appears to have relied on its own assumptions about the process without inquiring through the available process. As J3 found the RFP "non-sensical" it should have inquired during the pre-bid information 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.

H. The Commission's October 31 Order overlooks that the ALJ correctly determined that J3's four bid-form spreadsheets were marked "all or nothing" and therefore were aggregated.

55. West Penn properly evaluated J3's bid-form spreadsheets. And as the independent procurement monitor, Boston Pacific, reported to the Commission, and 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."

56. 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-

³² Transcript pp. 37 to 39

³³ WPPCo. Statement No 1. pp. 19 to 20.

form spreadsheet contained the lowest price for the tranche. The problem with J3's interpretation is that it completely obviates the "all or nothing" designation and disregards a distinction between the two classifications of Offer Types. J3's interpretation of "all or nothing" would render the meaning of "up to" as meaningless and as having no distinction compared to "all or nothing."

V. Conclusion

West Penn Power Company submits that the Commission should reconsider its October 31 Order because UGI Development Company is not an indispensable party. Moreover, even assuming that the Commission is correct that the Complainant has failed to name an indispensable party, such failure deprives the Commission of jurisdiction and, in such event, the Complaint should be dismissed.

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

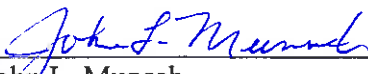
(vi) the RFP including its evaluation process was fair and correct, and (vii) the Commission correctly approved the results of West Penn's procurement, and (viii) West Penn fully, reasonably and justifiably relied on the Commission's approval of West Penn's procurement results in announcing the winning results and in entering a contract with the announced RFP winner.

West Penn Power Company respectfully requests, therefore, that the Commission rescinds its Opinion and Order entered October 31, 2013, affirm the Initial Decision of the Administrative Law Judge issued August 17, 2012 and find that J3 Energy, Inc.'s Complaint is without merit and should be dismissed with prejudice.

Respectfully submitted,

Date: November 15, 2013

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