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November 15, 2013

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: J3 Energy Group, Inc. v. West Penn Power Company and UGI Development
Company
Docket No. C-2011-2219920**

Dear Secretary Chiavetta:

Enclosed please find the Petition of UGI Development Company for Reconsideration and Clarification of a Pennsylvania Public Utility Commission Order in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

David B. MacGregor

DBM/skr
Attachment

cc: Honorable Elizabeth Barnes
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).


VIA E-MAIL AND/OR FIRST CLASS MAIL

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Date: November 15, 2013



Christopher F. Wright

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

J3 Energy Group, Inc.	:	
	:	Docket No. C-2011-2219920
v.	:	
	:	
West Penn Power Company	:	
	:	
And	:	
	:	
UGI Development Company,	:	
Indispensable Party	:	

**PETITION OF UGI DEVELOPMENT COMPANY
FOR RECONSIDERATION AND CLARIFICATION**

UGI Development Company (“UGI Development”), pursuant to Section 703(g) of the Public Utility Code, 66 Pa.C.S. § 703(g), and the provisions of Section 5.572 of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, 52 Pa. Code § 5.572, hereby files this Petition requesting reconsideration and clarification of the Commission’s Order entered October 31, 2013, at Docket No. C-2011-2219920 (“October 31 Order”). For the reasons explained herein, UGI Development respectfully requests that the Commission reconsider, clarify, and rescind portions of its October 31 Order and to dismiss the underlying Complaint. In support thereof, UGI Development states as follows:

I. INTRODUCTION

1. UGI Development is a Pennsylvania corporation with a principal business address of 460 North Gulph Road, Valley Forge, Pennsylvania 19482. UGI Development is a wholly owned subsidiary of UGI Energy Services, LLC. UGI Energy Services, LLC is the marketing, midstream and power generation subsidiary of UGI Corporation, which is a holding company

with businesses focused on providing energy distribution, transportation, marketing and storage services.

2. UGI Development owns unregulated electric generation assets including: a 6% interest in the Conemaugh Power Station, which is a 1,711 MW coal-fired plant; the Hunlock Power Station, which is a previously coal-fired facility that was converted to a 130 MW natural gas-fired facility; the Broad Mountain Power Station, which is an 11 MW plant that generates electricity using landfill gas; the Crayola Solar Park, which is part of a 2 MW joint project that provides 10% of Crayola's Easton facilities' total annual electric consumption; and approximately 7 MWs of additional solar-powered generation capacity in Pennsylvania, New Jersey and Maryland, with several other solar generation projects in development.

3. On October 15, 2008, Governor Rendell signed House Bill No. 2200, subsequently identified as Act No. 129, which established, *inter alia*, certain new requirements for the acquisition of default service supply by electric distribution companies ("EDCs"). Among other provisions, the law amended the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801 *et seq.* (the "Competition Act") to require EDCs, in their role as default suppliers, to procure alternative energy credits ("AECs") through competitive processes utilizing a "prudent mix" of contracts. *See* 66 Pa.C.S. § 2807(e)(3.5). Pursuant to the Alternative Energy Portfolio Standards Act ("AEPS Act"), Act of November 30, 2004, P.L. 1672, *as amended*, 73 P.S. §§ 1648.1-1648.8, EDCs are required, *inter alia*, to acquire AECs in quantities equal to a percentage of their total retail sales of electricity to all retail electric customers in a reporting period. 73 P.S. § 1648.3.

4. An AEC is a tradable instrument that is used to establish, verify, and monitor that one megawatt hour of electricity was generated from an alternative energy source. 73 P.S. §

1648.2. AECs are sold separately from the electricity and represent the aspect of the electricity that was produced from an alternative energy source. The value of an AEC is determined by the market subject to supply and demand constraints. AECs can be sold to and acquired by electricity suppliers or EDCs needing to meet their AEC requirements under the Competition Act and AEPS Act. Solar photovoltaic alternative energy credits (“SPAECs”) are a type of AECs that are generated by solar photovoltaic or other solar sources.

5. Under the AEPS Act, a facility must apply to and obtain approval from the Commonwealth to be qualified for alternative energy system status. UGI Development currently has nine solar facilities that have received approval from the Commonwealth as qualified alternative energy systems.¹ UGI Development offers to sell the SPAECs produced by these qualified solar facilities to electricity suppliers or EDCs needing to meet their AEC requirements.

6. West Penn Power Company (“West Penn”) filed its initial plan to fulfill its default service obligations on October 25, 2007. After a fully litigated proceeding, West Penn’s initial default service plan (DSP1) was approved by the Commission by Opinion and Order entered July 25, 2008, at Docket No. P-00072342. West Penn’s DSP1 encompassed a period of twenty-nine months beginning January 1, 2011, and ending May 31, 2013.

7. West Penn’s DSP1 provided that, commencing January 1, 2011, SPAECs and other Tier 1 AECs would be purchased on a current or spot market basis. On July 29, 2010, however, West Penn filed a petition at Docket No. P-00072342 requesting Commission approval to acquire SPAECs and AECs through long-term contracts rather than on the spot market. The petition included a proposed Request for Proposal (“RFP”), a SPAEC Purchase and Sale

¹ The Commission operates and maintains a website entitled, “Pennsylvania AEPS Alternative Energy Credit Program,” located at <http://paaeps.com/credit/index.do>. This website, among other things, lists those alternative energy systems that have been deemed “qualified facilities” under the AEPS Act, including the UGID solar facilities.

Agreement, and a Bid Form Spreadsheet. By Opinion and Order entered September 8, 2010, at Docket No. P-00072342, the Commission approved West Penn Power's petition.

8. West Penn issued the Commission-approved RFP for SPAECS dated September 24, 2010, and revised on November 3, 2010. The RFP established a tranche target of one tranche for a ten-year, five-month period between January 1, 2011 through May 31, 2021, and four tranches for a ten-year period beginning June 1, 2011, and ending on May 31, 2021.

9. In accordance with the rules established by the Commission-approved RFP, on December 3, 2010, UGI Development submitted bids for the four tranches for the ten-year period beginning June 1, 2011, and ending on May 31, 2021.

10. The RFP process was overseen by an Independent Procurement Manager, Boston Pacific Company, Inc., and was monitored in person by a member of the Commission's Staff.

11. On December 7, 2010, West Penn filed the results of the RFP process and requested that the Commission review and approve the bid results. On December 10, 2010, the Commission issued a Secretarial Letter to West Penn at Docket No. P-00072342, concluding that:

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.

12. In reliance on the Commission's approval of the RFP process and bid results, UGI Development and West Penn executed a Solar Photovoltaic Alternative Energy Credit Purchase and Sale Agreement ("SPAEC Agreement") dated December 15, 2010. Under the SPAEC Agreement, UGI Development agreed to sell, and West Penn agreed to purchase, four tranches of SPAECs from certain solar photovoltaic alternative energy sources for the ten-year period

beginning June 1, 2011, and ending on May 31, 2021, to satisfy West Penn's AEC requirements under the Competition Act and AEPS Act.

13. In reliance on the Commission's approval of the RFP process and bid results, UGI Development made significant capital investments in anticipation that it would fully perform its obligations for the full 10-year term of the SPAEC Agreement.

14. At all times material hereto, UGI Development has fully and continuously performed under the SPEAC Agreement.

15. On January 10, 2011, J3 Energy Group, Inc. ("J3 Energy") filed a Formal Complaint ("Complaint") with the Commission contending, *inter alia*, that West Penn's evaluation of the bids for SPAECs: (1) was not consistent with the RFP approved by the Commission; and (2) was in violation of the competitive procurement standards for AECs established by 52 Pa. Code §§ 75.67(b) and (c) (relating to competitive procurement of alternative energy and AECs) and 52 Pa. Code § 54.186 (relating to default service procurement and implementation plans).²

16. J3 Energy's Complaint was not served on UGI Development, nor was UGI Development named a party to the Complaint.

17. J3 Energy and West Penn fully litigated the issues raised in the Complaint. On August 16, 2012, two and one-half years after the Complaint was filed, the Honorable Administrative Law Judge Elizabeth H. Barnes ("ALJ") issued an Initial Decision dismissing the J3 Energy Complaint. The Initial Decision concluded that West Penn properly relied upon the Commission's December 10, 2010 Secretarial Letter approving the bid results, and that West Penn's evaluation of the bids under the RFP was consistent with the Commission-approved RFP

² The J3 Energy Complaint has not been served on UGID, nor is the Complaint publicly available from the Commission's website. The summary of the contentions raised in the Complaint was taken from the Commission's Opinion and Order issued October 31, 2013.

process and was in compliance with the competitive procurement standards for AECs established by the Commission's regulations.

18. J3 Energy filed Exceptions and a Request for Oral Argument on September 4, 2012. West Penn filed Replies to Exceptions and Opposition to Request for Oral Argument on September 17, 2012.

19. On October 31, 2013, over one year after the Initial Decision was issued, the Commission issued an Opinion and Order ("Order") that declined to address the merits of the Complaint and, *sua sponte*, concluded that:

As the current contractor for West Penn, with a significant interest in the continued performance under the contract, [UGI Development] must be joined as an indispensable party, even at this stage of the proceeding. Otherwise, without [UGI Development] as a party, the Commission does not have subject matter jurisdiction to proceed.

(Order p. 10) The Commission therefore ordered that the Initial Decision be vacated, UGI Development be joined as an indispensable party, a copy of the Order be served on UGI Development, the caption be changed to add UGI Development as a party, UGI Development be added to the service list; and that the proceeding be remanded to the Office of Administrative Law Judge ("OALJ") for such further proceedings as may be warranted. (Order pp. 11-12)

20. UGI Development herein respectfully requests that the Commission reconsider, clarify, and rescind portions of its Order.

II. STANDARD FOR GRANT OF RECONSIDERATION HAS BEEN MET.

21. The Commission's standards for granting reconsideration following final orders are set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1982):

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. In

this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was said that “[p]arties ..., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them....” 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.

22. As explained below, under the circumstances in this case, joining UGI Development as an indispensable party after almost three years of litigation is unlawful, unreasonable, and an abuse of administrative discretion. Despite having knowledge that there was a successful bidder whose contract could be materially and adversely affected by the Complaint, J3 Energy failed to meet *its* burden to timely join all necessary and indispensable parties. UGI Development has been severely prejudiced by J3 Energy’s failure to timely join UGI Development. UGI Development has reasonably relied upon the Commission’s approval of the RFP process and bid results, and has fully performed under the SPEAC contract. Further, the Order likely will have a serious chilling effect on the willingness of suppliers of power and AECs to engage in the competitive procurement process and to make the investments necessary to enter contracts with Pennsylvania utilities. These issues have not previously been heard or otherwise considered by the Commission.

23. Although the Order correctly determined that UGI Development is an indispensable party to the relief requested by J3 Energy if the SPAEC Agreement were at issue, the Order elected the wrong remedy for J3 Energy’s failure to join UGI Development, *i.e.*, remanding the matter for further proceedings. Under the special factual circumstances in this case, joining UGI Development as an indispensable party and remanding the matter for further proceedings after almost three years of litigation is fatally prejudicial and would violate UGI Development’s due process rights. The prejudice and infringement upon UGI Development’s

due process rights caused by the substantial delay in adding UGI Development as an indispensable party has not previously been heard or otherwise by the Commission.

24. Although the Order remands the matter for further proceedings, it appears to have overlooked that this matter has been litigated for almost three years without UGI Development's participation as party. It is unclear from the Order what rights that UGI Development will be provided if this matter is remanded, and whether UGI Development will be provided with all the rights it would have received if it had been timely joined as a party. The issue of what rights UGI Development will have as an indispensable party if this matter is remanded has not previously been addressed or otherwise considered by the Commission.

25. These new and novel issues have not been addressed in this proceeding and, more importantly, will likely evade any meaningful review if the matter is simply remanded prior to and without addressing these important issues. These issues clearly satisfy the Commission's standards for reconsideration under *Duick, supra*.

III. ARGUMENT FOR RECONSIDERATION

A. Joining UGI Development As An Indispensable Party After Almost Three Years Of Litigation Is Unlawful, Inequitable, And An Abuse Of Administrative Discretion

26. The Order concluded that UGI Development was an indispensable party to J3 Energy's Complaint and remanded the matter for the parties. The Order has permitted J3 Energy to proceed with a claim despite the fact that J3 Energy failed to properly and timely join UGI Development until almost three years after it filed its initial Complaint. Under the circumstances in this case, it was unlawful, inequitable and an abuse of administrative discretion to not dismiss the case for J3 Energy's failure to meet its burden to timely join all necessary and indispensable parties.

27. As further explained below, UGI Development submits that, under these circumstances, the appropriate remedy for J3 Energy's failure to timely join UGI Development as an indispensable party is to dismiss the Complaint.

1. J3 Energy Failed To Meet Its Burden To Properly And Timely Join UGI Development

28. The Order has permitted J3 Energy to proceed with a claim despite the fact that J3 Energy failed to meet its burden to properly and timely join all necessary and indispensable parties. UGI Development should not, after almost three years of litigation, now be penalized for J3 Energy's failure to timely join a party.

29. J3 Energy initiated a Complaint on January 10, 2011, asserting that West Penn failed to follow the RFP process and the Commission's procurement regulations. As the complainant, J3 Energy bears the burden to prepare, serve, and file a pleading that is legally sufficient to withstand summary dismissal, including the burden to join all necessary and indispensable parties. *See Bucks County Servs. v. Phila. Parking Auth.*, 71 A.3d 379 (Pa. Cmwlth. 2013) (the failure to join an indispensable party deprives a court of subject matter jurisdiction and is fatal to a cause of action); *see also* 52 Pa. Code § 5.101(a)(5) (permitting preliminary objections and dismissal for failure to join a necessary party).

30. Despite having knowledge that there was a successful bidder whose contract could be materially and adversely affected by the relief requested in its Complaint, J3 Energy made no attempt to notify or join the successful bidder to the cause of action. Indeed, it was not until almost three years after the Complaint was filed, that the Commission, *sua sponte*, joined UGI Development, as an indispensable party.

31. It would be inequitable and prejudicial at this stage of the proceeding to allow J3 Energy to now seek remedies that could impact UGI Development's rights and interests. It was

J3 Energy's failure that resulted in UGI Development not being joined until after almost three years of full performance under the SPAEC Agreement. Clearly, granting relief that would adversely affect UGI Development after many years of performance under the SPEAC Agreement would be inequitable and an abuse of discretion. J3 Energy should not be permitted to correct its error three years after the fact and to the detriment of UGI Development.

32. For these reasons, UGI Development respectfully requests that the Commission reconsider its Order and dismiss the Complaint.

2. UGI Development Has Reasonably Relied Upon The Commission's Approval Of The RFP Process And Bid Results

33. At all times material hereto, UGI Development reasonably and substantially relied upon the Commission's approval of the RFP process and bid results, including but not limited the making significant capital investments in anticipation that it would fully perform its obligations for the full 10-year term of the SPAEC Agreement. UGI Development should not after almost three years of substantially relying and fully performing its obligations under the SPAEC Agreement now be penalized for relying on the Commission's approval. UGI Development submits that, under these circumstances, the appropriate and equitable remedy for J3 Energy's failure to timely join UGI Development as an indispensable party is to dismiss the Complaint.

34. West Penn's RFP process was reviewed and approved by the Commission. Further, the bid results of West Penn's RFP were approved by the Commission in a Secretarial Letter dated December 10, 2010, which concluded that the procurement was conducted in accordance with the RFP process and rules, filed pursuant to the Commission's Opinion and Orders.

35. Relying on the Commission's approval of the RFP process and bid results, UGI Development entered the 10-year SPAEC Agreement with West Penn on December 15, 2010. There is nothing to suggest that UGI Development has at any time done anything wrong with respect to the award of the SPAEC Agreement. Further, UGI Development made significant capital investments in anticipation that it would fully perform its obligations for the full 10-year term of the SPAEC Agreement.

36. Without proper notice of the Complaint filed by J3 Energy or the potential impact to the SPAEC Agreement, UGI Development has continuously performed its obligations under the Agreement. There is nothing to suggest that UGI Development has failed to fully and timely meet its obligations under the SPAEC Agreement. It would be unlawful and inequitable to now permit J3 Energy to proceed with a cause of action that could directly affect UGI Development where UGI Development reasonably relied on the Commission's approval of the RFP process and bid results for almost three years of full performance under the SPAEC Agreement.

37. For these reasons, UGI Development respectfully requests that the Commission reconsider its Order and dismiss the Complaint.

3. The Commission's Order Exceeds the Commission's Statutory Authority And Will Have A Chilling Effect On The Competitive Procurement Process In Pennsylvania

38. In reaching the conclusion that UGI Development is an indispensable party to J3 Energy's challenge to the West Penn RFP process, the Order relied upon the authority under Section 508 of the Public Utility Code, 66 Pa.C.S. § 508, to vary a contract between a public utility and an unregulated entity. (Order p. 10, n.10) The possible use of Section 508 as suggested by the Order exceeds the Commission's statutory authority and would have a chilling effect on the competitive generation procurement process in Pennsylvania and on any contracts between public utilities and private parties.

39. Under the theory advanced by the Order, any agreement awarded as the result of a Commission-approved RFP process could be subject to modification or termination at any time under Section 508. In essence, the Order has created an indefinite protest period for unsuccessful bidders to challenge or oppose competitive procurements.

40. The energy supply and AEC contracts that are procured through the competitive procurement process are private, non-public contracts between the public utility and the contractor/supplier. Absent fraud or bad faith, there are no common law rights or remedies available to unsuccessful bidders seeking to challenge the results of a non-public, private competitive bidding process.³ Further, there is nothing in the Competition Act, AEPS Act, Public Utility Code, or Commission's procurement regulations that provides any protest period or even the explicit right for an unsuccessful bidder to protest a Commission-approved RFP process or Commission-approved bid results.

41. Pursuant to Sections 54.186 and 75.67 of the Commission's regulations, a competitive bid solicitation or RFP for default service procurement must be reviewed and approved by the Commission. 52 Pa. Code §§ 54.186, 75.67. To ensure that the Commission-approved RFP process is followed, the Commission monitors the competitive bidding process, evaluates the bid results, and, in this case, approves the bid results if they are consistent with the Commission-approved RFP process and the Commission's competitive procurement regulations.

³ In concluding that UGI Development, as the successful bidder, is an indispensable party to J3 Energy's cause of action challenging the results of West Penn's RFP process, the Order cites to and relies upon three Commonwealth Court decisions: *Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495 (Pa. Cmwlth. 1999); *Zurenda v. Commonwealth*, 405 A.2d 1124 (Pa. Cmwlth. 1979); and *E-Z Parks, Inc. v. Philadelphia Parking Authority*, 521 A.2d 71 (Pa. Cmwlth. 1987). UGI Development submits that the Order erred in relying on the Commonwealth Court's holdings in these three cases. In each of these cases, the unsuccessful bidder was seeking to challenge competitive procurements for contracts with public or state agencies, not the results of private competitive procurements as is the case here. Competitive procurements for contracts with public or state agencies are governed by the Commonwealth Procurement Code, 62 Pa.C.S. §§ 101 *et. seq.* While the Commonwealth Procurement Code explicitly grants an unsuccessful bidder both the right and a specific limited time to protest the results of a public competitive procurement, *see* 62 Pa.C.S. § 1711.1, the Commonwealth Procurement Code does not, on its face, govern non-public, private competitive procurements such as the one at issue in J3 Energy's Complaint.

To allow an unsuccessful bidder to challenge the Commission-approved RFP process and/or Commission-approved bid results would suggest that the Commission's prior approval cannot be relied upon by the successful bidder or the affected EDC.

42. The whole purpose of the Commission's post-bid review and approval of the RFP process is to ensure that the Commission-approved process is followed. Allowing an unsuccessful bidder to protest the results of a Commission-approved RFP is beyond the Commission's statutory authority and would be repetitive and a waste of the Commission's and parties' resources.

43. The Commission's review and approval should provide utilities, suppliers of energy, suppliers of AECs, and ratepayers with regulatory certainty. This certainty is particularly important to suppliers of energy and AECs, which must assess the risks and benefits of submitting bids in response to an RFP. Suppliers of energy and AECs should be able to reasonably rely on the Commission's approval of the RFP process when entering into procurement contracts with public utilities.

44. If a Commission-approved procurement contract is subject to modification or termination at any time under Section 508, as suggested by the Order, this could significantly increase the risk for energy and AEC suppliers. This increased risk and uncertainty likely will reduce, or possibly eliminate, the number of suppliers that are willing to submit bids in response to an energy or AEC competitive procurement process. Further, those few suppliers that remain willing to submit bids would likely submit much higher and more costly bids to offset the escalated risk and uncertainty. Clearly, such a result would be detrimental to the public utilities and their ratepayers.

45. The Order, in essence, appears to create a private cause of action where one does not exist under the applicable statutory, regulatory, or common law. In the absence of formal regulations, first, granting the right to protest and, second, establishing the appropriate protest procedure, any challenge by an unsuccessful bidder likely will result in significant and substantial delay and prejudice, as is the case here, because, unlike public contracts subject to the Commonwealth Procurement Code, the winning bidder to a public utility competitive procurement is confidential and not publicly disclosed. To the extent that the Commission believes that unsuccessful bidders should have the right to protest the results of a private public utility competitive procurement, the Commission should initiate a separate formal rulemaking proceeding and solicit comments from interested parties. The full participation of all interested and potentially affected parties will allow the Commission to develop reasonable and appropriate safeguards and procedures that will, if necessary and appropriate, permit an unsuccessful bidder to timely challenge the bid results of a competitive procurement without causing undue delay and prejudice to the winning bidder, the public utility, and ratepayers.

46. Based on the foregoing, UGI Development respectfully requests that the Commission reconsider its Order and dismiss the Complaint.

B. The Order Elected The Wrong Remedy For J3 Energy's Failure To Join UGI Development

47. As explained below, remanding this matter on the existing record would be prejudicial and violate UGI Development's due process rights as a party. Under these circumstances, UGI Development submits that the appropriate remedy is for the Commission to dismiss the Complaint.

48. It is well settled that that the failure to join indispensable parties to a complaint is fatal to the cause of action. *See Bucks County Servs. v. Phila. Parking Auth.*, 71 A.3d 379 (Pa.

Cmwlth. 2013) (the failure to join an indispensable party deprives a court of subject matter jurisdiction and is fatal to a cause of action). Here, the Commission determined that J3 Energy's Complaint failed to join UGI Development as an indispensable party. Consequently, the Complaint on its face is "fatal" and the Commission lacks jurisdiction over the Complaint. Therefore, the Complaint should be dismissed.

49. Rather than dismissing the Complaint, the Order, *sua sponte*, joined UGI Development as an indispensable party, and ordered that the proceeding be remanded for further proceedings. However, what the Order overlooks the significance of the fact that this case has been litigated for almost three years, and that an extensive record has been developed without any notice to or opportunity for UGI Development to participate.

50. This proceeding was initiated on January 10, 2010. However, UGI Development had no notice or other knowledge of this proceeding until it was served with a copy of the Commission's October 31, 2013 Order. In fact, UGI Development still has not been formally served with the J3 Energy Complaint.

51. The *sine qua non* of due process is "notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause." *Salters v. Pa. State Police Municipal Police Officers' Education & Training Commission*, 912 A.2d 347, 351 (Pa. Cmwlth. 2006) (quoting *Fiore v. Board of Finance and Revenue*, 534 Pa. 511, 517, 633 A.2d 1111, 1114 (1993)). Here, the existing record was developed over almost three years without UGI Development being afforded notice and a meaningful opportunity to be heard. *Cf. Pennsylvania Administrative Agency Law*, 2 Pa. C.S. §§ 501-508 (requiring reasonable notice and the opportunity to be heard); *Popowsky v. Pa. Pub. Util. Comm'n*, 805 A.2d 637 (Pa. Cmwlth. 2002) (explaining that the Commission, as an

administrative agency, is bound by the due process provisions of constitutional law and by fundamental principles of fairness).

52. If the remand to the ALJ is allowed to go forward, UGI Development's interests could be substantially and adversely affected by the outcome of this proceeding. Yet, by remanding the matter, the Order apparently seeks to require UGI Development to accept a record that has been litigated for almost three years in the absence of UGI Development.

53. UGI Development has had no opportunity to file responsive pleadings or dispositive motions, participate in discovery, raise and preserve issues and objections, or develop the existing evidentiary record. Forcing UGI Development to accept a record that has been developed for almost three years of litigation clearly deprives UGI Development of the due process rights it is entitled to as an indispensable party.

54. Moreover, the Order penalizes UGI Development for J3 Energy's failure to timely join UGI Development as a party. J3 Energy was clearly aware that there was a successful bidder whose rights and interests could be materially and adversely affected by J3 Energy's claim. Clearly, J3 Energy was on notice that there was an indispensable party. The failure to join UGI Development was J3 Energy's error, not UGI Development's. Nonetheless, the Order remanding the matter would penalize UGI Development, not J3 Energy, by forcing UGI Development to accept a record that was developed for almost three years without any opportunity for UGI Development to participate.

55. UGI Development recognizes that J3 Energy has invested time and resources in developing the existing record. However, J3 Energy cannot reasonably argue in good faith that it had no knowledge that the relief requested by J3 Energy could have a material and adverse effect on the winner bidder of the RFP process. Clearly, J3 Energy was on notice and had the

opportunity to join UGI Development in a timely manner that would not prejudice UGI Development or its due process rights to fully participate as a party.

56. Under these circumstances, UGI Development submits that the proper and equitable remedy for J3 Energy's failure to timely join an indispensable party is to dismiss the Complaint. Dismissing the Complaint ensures that a decision is not reached on a record developed without the meaningful participation of all necessary and indispensable parties.

57. For these reasons, UGI Development respectfully requests that the Commission reconsider its Order and dismiss the Complaint.

C. In The Alternative, This Matter Should Be Decided On The Existing Record And J3 Energy's Complaint Should Be Denied On The Merits

58. To the extent that the Complaint is not dismissed for the reasons explained above, UGI Development submits, in the alternative and without waiver of its rights, including but not limited to its right to seek judicial review of the Commission's Order, that this matter should be decided on the existing record and J3 Energy's Complaint should be denied.

59. The Order concluded that UGI Development was an indispensable party to J3 Energy's Complaint and remanded the matter for the parties, including UGI Development, to address the potential remedies that the Commission has jurisdiction to provide J3 Energy if it were to sustain the Complaint.

60. It took almost three years of litigation for the parties and the Commission to determine the necessary and indispensable parties. If this matter is not dismissed and remanded for further proceedings, it is entirely unknown how long it will take to re-litigate the matter before the ALJ, obtain an order from the Commission, and to fully resolve any potential appeals. It potentially could be several additional years before this matter may be fully resolved. In fact, by the time this litigation is finally concluded, the SPAEC Agreement between UGI

Development and West Penn could, and in all likelihood would, be close to the end of its 10-year term.

61. Before requiring the Commission, ALJ, and parties invest significant time and resources on remand addressing what, if any, remedy may exist for J3 Energy, the Commission should, as an initial matter, determine if J3 Energy's Complaint has any merit. While UGI Development obviously has not had any opportunity to review this matter in any detail, the Initial Decision, on its face, appears to be well-researched, well-reasoned, and entirely accurate. J3 Energy, in essence, asks the Commission to conclude that West Penn, West Penn's independent evaluator, the Commission's evaluator, and the ALJ are all completely wrong, and that J3 Energy's bid was improperly evaluated. This claim is simply not credible. At best, J3 Energy has only shown that its bid was ambiguous and confusing. Surely, West Penn, West Penn's independent evaluator, the Commission's evaluator, and the ALJ are entitled to resolve that ambiguity against the party that created it, *i.e.*, J3 Energy.

62. If the Commission determines that the ALJ was correct, then it simply should deny J3 Energy's Complaint. At that point, the case would be over except for any appeal filed by J3 Energy, and the Commission and the parties would avoid the need to deal with the novel and difficult legal and policy issues presented by joining UGID as an indispensable party at this late stage of the proceeding.

D. The Order Failed To Address What Due Process Rights UGI Development Would Be Entitled To On Remand

63. To the extent that the Commission does not dismiss the Complaint and remands this matter for further proceedings, the Commission should clarify its Order to explain what, if any, procedural due process rights UGI Development will be entitled to on remand.

64. The Order directed that “this proceeding be remanded to the Office of Administrative Law Judge for such further proceedings as may be warranted, consistent with this Opinion and Order.” (Order p. 12) However, it is unclear from the Order whether on remand UGI Development, will be provided with all the same rights and remedies that would have been available if J3 Energy had properly and timely joined UGI Development as a party.

65. The failure to join UGI Development as an indispensable party until almost three years after the Complaint was filed has denied UGI Development any meaningful opportunity to participate in this proceeding. Indeed, UGI Development has had no opportunity to file responsive pleadings or dispositive motions, participate in discovery, raise and preserve issues and objections, or develop the existing evidentiary record. As a party to the proceeding, UGI Development should, as a matter of due process, be entitled to fully participate in this proceeding to the full extent permitted by law.

66. To the extent that the Commission does not dismiss the Complaint and remands this matter for further hearings, UGI Development respectfully requests, in the alternative and without waiver of its rights to seek judicial review, that the Commission clarify its Order to expressly provide that UGI Development will be entitled as a party to this proceeding to fully exercise any and all rights and remedies available, including, but not limited to: formal service of the complaint, the opportunity to answer the complaint, the opportunity to file responsive pleadings or dispositive motions, the opportunity to receive and fully review the existing record, participate in discovery, raise and preserve issues and objections, or develop the evidentiary record.

IV. CONCLUSION

67. Under the circumstances in this case, joining UGI Development as an indispensable party after almost three years of litigation is unlawful, inequitable, and an abuse of

administrative discretion. Despite having knowledge that there was a successful bidder whose contract could be materially and adversely affected by the Complaint, J3 Energy failed to meet *its* burden to timely to join all necessary and indispensable parties. UGI Development has been prejudiced by J3 Energy's failure to timely join UGI Development. UGI Development has reasonably relied upon the Commission's approval of the RFP process and bid results. Further, the Order could have a serious chilling effect on the willingness of suppliers of power and AECs to engage in the competitive procurement process and to make the investments necessary to enter contracts with Pennsylvania utilities.

68. The appropriate and equitable remedy for J3 Energy's failure to timely join UGI Development as an indispensable party is to dismiss the Complaint, not to penalize UGI Development which had no notice of the Complaint and has not at any time done anything wrong with respect to the award of the SPAEC Agreement.

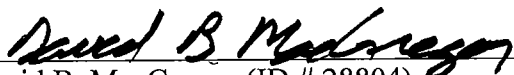
69. Alternatively, before remanding the case, the Commission should first make a determination on the existing record as to whether J3 Energy's Complaint has any merit.

70. To the extent that the Complaint is not dismissed and the matter is remanded for further proceedings, the Commission should clarify its Order to expressly provide that UGI Development will be entitled as a party to this proceeding to fully exercise any and all rights and remedies available, including, but not limited to: formal service of the complaint, the opportunity to answer the complaint, the opportunity to file responsive pleadings or dispositive motions, the opportunity to receive and fully review the existing record, participate in discovery, raise and preserve issues and objections, or develop the evidentiary record.

WHEREFORE, UGI Development Company respectfully requests that the Commission reconsider, clarify, and rescind portions of its October 31, 2013 Order as described above.

Respectfully submitted,

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Date: November 15, 2013

Counsel for UGI Development Company

VERIFICATION

I, Louis P. James being the Director of Business Development for UGI Development Company, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect UGI Development Company to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Date: 11/15/2013

Louis P. James