

THOMAS J. RUSSIAL
198 Stonewood Drive
Bethel Park, PA 15102
412-389-2482

November 25, 2013

VIA E-FILE

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

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

Dear Secretary Chiavetta:

Enclosed is *J3 Energy Group, Inc.'s Answer to Petitions of West Penn Power Company for Reconsideration and UGI Development Company for Reconsideration and Clarification*. The Answer has been filed electronically today and has been served as indicated on the enclosed Certificate of Service.

Sincerely,



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

Enclosures

cc: Honorable Elizabeth H. Barnes

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2013, I served a true copy of the foregoing document, "*J3 Energy Group, Inc. 's Answer to Petitions of West Penn Power Company for Reconsideration, and UGI Development Company for Reconsideration and Clarification*" to the individuals listed below by e-mail and First Class Mail in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a Party):

John L. Munsch, Esq. West Penn Power Company 800 Cabin Hill Drive Greensburg, PA 15601 jmunsch@firstenergycorp.com	Kent D. Murphy, Group Counsel Melanie J. El Atieh, Associate Counsel UGI Corporation 460 North Gulph Road King of Prussia, PA 19406 E-mail: murphyke@ugicorp.com E-mail: elatiehm@ugicorp.com
David B. MacGregor Post & Schell, P.C. Four Penn Center 1600 John F. Kennedy Boulevard Philadelphia, PA 19103-2808 dmacgregor@postschell.com	Kriss E. Brown, Esq. Pennsylvania Public Utility Commission Law Bureau PO Box 3265 Harrisburg, PA 17105-3265 kribrown@pa.gov
Christopher T. Wright Post & Schell, P.C. 17 North Second Street, 12th Floor Harrisburg, PA 17101-1601 cwright@postschell.com	

Date: November 25, 2013

Attorney for Complainant



Thomas J. Russial
198 Stonewood Drive
Bethel Park, PA 15102
Phone: 412-389-2482
Pa. I.D. No. 39730
Phone: 412-389-2482

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**J3 ENERGY GROUP, INC.’S ANSWER TO PETITIONS OF
WEST PENN POWER COMPANY FOR RECONSIDERATION, AND
UGI DEVELOPMENT COMPANY FOR RECONSIDERATION AND CLARIFICATION**

Pursuant to 52 Pa. Code § 5.572, J3 Energy Group, Inc. (J3) hereby files its Answer to the Petitions of West Penn Power Company (West Penn) and UGI Development Company (UGI) for Reconsideration and Clarification of the Commission’s Order of October 31, 2013 in which the Commission, *sua sponte*, joined UGI as an indispensable party to this proceeding, vacated the Initial Decision (ID) of the Administrative Law Judge (ALJ), and, remanded the matter to the ALJ for further proceedings

In its Order, the Commission explained that the Complaint in this proceeding may implicate the Commission’s power to vary, reform or revise a contract pursuant to 66 Pa. C.S. § 508 and that because the Commission has the authority to vary a contract between a public utility and an unregulated entity, the Commission also has the authority to join as an indispensable party any signatory to that contract, whether regulated or not. On remand, the

Commission directed the Parties and the ALJ to address the potential remedies that the Commission has jurisdiction to provide to J3 if the Commission were to sustain the Complaint.¹

I. UGI IS NOT INDISPENSABLE AND THE QUESTION OF INDISPENSABILITY SHOULD HAVE NO BEARING ON DISPOSITION OF THE COMPLAINT

Before turning to the specific matters raised by Petitioners, J3 must respectively disagree with, and object to, the Commission's finding that UGI is indispensable. Furthermore, as explained herein, J3 does not believe the indispensability of UGI will be or should be dispositive of the Complaint. However, if the issue of indispensability subsequently becomes dispositive in a final order, J3 reserves the right to appeal the determination in accordance with the Pennsylvania Rules of Appellate Procedure. Since indispensability has been raised by West Penn and UGI in their Petitions as grounds to have the Complaint dismissed, J3 will respond and explain why UGI is not indispensable.

Pennsylvania's standard for indispensability has been addressed in a number of cases going back many years. Supreme Court decisions provide that a party is indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights, and, a corollary of this principle is that a party against whom no redress is sought need not be joined. *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988); citing *Tigue v. Basalyga*, 451 Pa. 436, 304 A.2d 119 (1973); *Powell v. Shepard*, 381 Pa. 405, 113 A.2d 261 (1955); *Kern v. Duquesne Brewing Co.*, 396 Pa. 279, 152 A.2d 682 (1959); *In re Culbertson's Estate*, 301 Pa. 438, 152 A. 540 (1930); *Erie County v. Lamberton*, 297 Pa. 406, 147 A. 86 (1929). If the merits of a case can be determined without prejudice to the rights of an absent party, the court may proceed. *Mechanicsburg Area School District v. Kline*, 494 Pa. 476,

¹ October 31, 2013 Order, p.10.

431 A.2d 953 (1981). These principles must be viewed in the context of the specific facts and Pennsylvania case law.

As a threshold matter, J3 has not sought redress against the selected bidder. In the Complaint, J3 asked the Commission to order the re-evaluation of J3's four bids as the individual offers that were proposed and if based on the re-evaluation J3 should have been selected for one or more tranches, J3 asked the Commission to revoke its approval of the Request for Proposals (RFP) results until such time as West Penn commits to award J3 the appropriate tranche(s).² Subsequently, it became clear that re-evaluation would be academic since the evidence clearly demonstrated that J3 submitted the two lowest priced bids and should have been awarded two tranches had the procurement been conducted properly. J3 has not asked the Commission to direct termination of the UGI Contract and joinder based on perceived J3 claims against UGI is not warranted.

In the several cases cited by the Petitioners and the Commission that upheld the indispensability of a party, the facts established that the party either had a direct monetary, contractual, or property interest in the outcome of the matter or the party's rights otherwise would be prejudiced by a decree such that due process required joinder. For example, in *Bucks County Services, Inc. v. Philadelphia Parking Authority*, 71 A.3d 379 (Pa. Cmwlth. 2013), where the Petitioners sought a declaration that a jurisdictional agreement executed by the Pennsylvania Public Utility Commission and the Philadelphia Parking Authority was invalid, the Commission was indispensable because the action was seeking to invalidate the Commission's agreement. In *E-Z Parks, Inc., v. Philadelphia Parking Authority*, 103 Pa. Commw. 627; 521 A.2d 71 (Pa. Cmwlth. 1987), Appellant sought to invalidate a joint use agreement between the Department of Transportation and the Parking Authority under which the Authority would lease Department

² See J3 Formal Complaint Form Paragraph 5.

property for 99 years to construct a parking garage. The Department was found to be indispensable because its contractual rights were directly related to the claim seeking to invalidate the use agreement, and, the Department's right to the use and enjoyment of the property would be adversely affected by the litigation. In *HYK Construction Company, Inc. v. Smithfield Township*, 8 A.3d 1009 (Pa. Cmwlth. 2010), neighbors who were granted party status in a conditional use proceeding before a Township Board were indispensable in a declaratory judgment action before the Court of Common Pleas that would affect the rights of the neighbors. And in the public procurement challenge cases (*Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495 (Pa. Cmwlth. 2002); and, *Zurenda v. Commonwealth*, 405 A.2d 1124 (Pa. Cmwlth. 1979)), the remedy sought was either an injunction against award of the contract to the successful bidder or the termination of an award to the successful bidder. In both cases the successful bidder was found to be indispensable.

None of the factual situations in these cases are analogous to the matter before the Commission. However, the facts in *Grimme Combustion Inc., v. Mergentime Corporation and Insurance Company of America*, 406 Pa. Super. 620, 629; 595 A.2d 77, 81 (Pa. Super. 1991), appeal denied, 530 Pa. 644, 607A.2d 254 (Pa. 1992), where the Court declined to find a party indispensable, are directly analogous to the J3 facts. In *Grimme* the plaintiff was a subcontractor to a general contractor who held a prime contract with the Pennsylvania Department of Transportation. Plaintiff sued the general contractor and its surety for damages arising out of Plaintiff's work on a highway construction project. Defendants asserted that a third party, the Department of Transportation, was indispensable and had an interest in the outcome of these claims, as it would ultimately bear the loss by Plaintiff. The Superior Court disagreed:

The defendants assert that PennDOT has an interest in the outcome of these claims, as it will ultimately be held liable for any recovery by Grimme. We are not prepared to make the logical leap that such a conclusion would require. It is entirely conceivable that any right of recovery by the subcontractor against the general contractor and/or its surety regarding such matters would not result in any corresponding right of the general contractor to maintain a successful claim against PennDOT for all or some of the amounts Grimme might recover under Count II of its complaint. Thus, we cannot hold that any right or interest of PennDOT is essential to the merits of the issues raised, nor is there any ground for finding that justice cannot be afforded without violating due process rights of PennDOT. It is evident that the trial court erred in dismissing the claims raised by Grimme in the third part of Count II of its complaint

The parallels to *Grimme* are compelling. As a private company, West Penn has the discretion not to terminate or partially terminate its contract with UGI. West Penn's discretion is supported by its own testimony. When asked to theorize about the potential ramifications that might ensue if the Commission granted J3's requested relief, Mr. Reeping testified:

If the Commission were to agree with J3's arguments in this case and grant the requested relief sought, the Company **theorizes, subject to future legal and management review,** that it would need to enact Section 9.2 of the SOLAR PHOTOVOLTAIC ALTERNATIVE ENERGY CREDIT PURCHASE AND SALE AGREEMENT with the one affected supplier which states:

"The Company's obligations under this Agreement are contingent on, and limited by the Company's ability to recover all costs incurred by it under this Agreement from its retail customers in full and on a current basis. If any statutes, rules, regulations, permits or authorizations are enacted, amended, granted or revoked which have the effect of changing the recovery of costs, **the Company may terminate this Agreement upon thirty (30) days written notice.**"³ (Emphasis Added by J3)

Accordingly, the Article itself does not mandate termination and West Penn's management and legal team may or may not decide that termination of the UGI contract is warranted. West Penn could absorb the cost of their error and/or seek to use the UGI credits to meet a portion of their renewable portfolio requirement subject to whatever cost recovery the Commission may allow. This is contrasted with the government procurement cases where a

³ West Penn Power Company Statement No 1-R, pp. 22-23

Commonwealth agency or political subdivision does not have sufficient funds, authority or discretion to purchase the product from both the correct bidder and the wrongfully selected bidder. In those cases, as illustrated by *Polydyne (supra)* and *Zurenda (supra)* the remedy must involve injunction against an award of a contract to the successful bidder or termination of a contract with such bidder. The *Grimme* Court stated that it was not prepared to make the logical leap that as a necessary result of the requested relief, PennDOT would bear the cost of the defendant's action. Thus, the Court found that it could not hold that any right or interest of PennDOT is essential to the merits of the issues raised, nor that there was any ground for finding that justice cannot be afforded without violating due process rights of PennDOT. Here too it cannot and should not be assumed that UGI would bear the cost of West Penn's error. Hence, as in *Grimme*, a subsequent discretionary attempt by West Penn to shift the cost of its bad procurement to UGI is not a necessary outgrowth of J3's complaint or a Commission decision to grant J3's relief. As such, UGI is not indispensable.

Nor can it be assumed that West Penn actually has the contractual right to terminate UGI's contract if J3's relief is granted. The full Article 9 of the Purchase and Sales Agreement between West Penn and UGI is reproduced below:

ARTICLE 9 **CHANGE IN LAW**

9.1 Change in Law. If any statutes, rules, regulations, permits or authorizations are enacted, amended, granted or revoked which have the effect of changing the transfer and sale procedure set forth in this Agreement so that the implementation of this Agreement becomes impossible or impracticable, or otherwise revokes or eliminates the Alternative Energy Portfolio Standards, the Parties hereto agree to negotiate in good faith to amend this Agreement to conform with such new statutes, regulations, or rules in order to maintain the original intent of the Parties under this Agreement. In the event of federal legislation creating a federal renewable energy credit, Company shall own and have all rights to any federal renewable energy credit derived from the energy associated with each SPAEC transferred to Company under this Agreement.

9.2 Recovery of SPAEC Costs. The Company's obligations under this Agreement are contingent on, and limited by the Company's ability to recover all costs incurred by it under this Agreement from its retail customers in full and on a current basis. If any statutes, rules, regulations, permits or authorizations are enacted, amended, granted or revoked which have the effect of changing the recovery of costs, the Company may terminate this Agreement upon thirty (30) days written notice.⁴

This Article is titled "Changes in Law" and on its face is designed to protect the utility against subsequent federal and state sovereign actions that would alter Pennsylvania's Alternate Energy Portfolio Program and in-turn impact the utility's ability to recover cost. The Article is not titled "Changes in Law and Procurement Errors by the Utility" and it is not at all obvious that the Article contemplated termination in the case where the Commission uses its Complaint authority to remedy an error by the utility. Assuming for the sake of argument that West Penn would seek to invoke Article 9, the Article calls for good faith negotiations to amend the Agreement to conform with such new statutes, regulations, or rules in order to maintain the original intent of the Parties under this Agreement. The outcome of those negotiations also is not obvious. Furthermore, UGI may have defenses to termination.

Earlier in this Answer, we state that J3 does not believe the question of UGI indispensability will be or should be dispositive of the Complaint. The Petitioners seem to believe that the Commission is heading down a possible path that could result in Commission direction to terminate or partially terminate the UGI contract. That is not what the Order says nor does the Order declare that J3 was culpable for not joining UGI. The Commission on its own motion is directing the parties to explore remedies that the Commission has jurisdiction to provide to J3 if the Commission were to sustain the Complaint noting that it is joining UGI because the proceeding may implicate the Commission's power to reform or revise a contract

⁴The complete Purchase and Sale Agreement was included in West Penn's Petition to the Commission to modify its default service plan docketed at P-00072342. The Petition was appended in full as Attachment No. 3 to West Penn's Answer to the Formal Complaint and entered into evidence at hearing as West Penn Power Exhibit RBR-1.

pursuant to 66 Pa. C.S. § 508 and that the authority to vary the contract under Section 508 also gives the Commission authority to join UGI. It is not clear what if any remedy the Commission has in mind with its direction. As discussed above, J3 does not believe that the Commission needs to reach the issue of contract modification because J3 has not sought redress against UGI and UGI is not indispensable. Nevertheless, and assuming J3's argument on the merits is sustained, then the Commission will have found that West Penn violated regulation or Commission order in the conduct of the procurement to the detriment of J3. To direct termination or partial termination of the UGI contract would not seem to make sense because it shifts the risk of West Penn's error to UGI and effectively affords the utility impunity in conducting the procurement. This would be contrary to the public interest in maintaining the integrity of the procurement process and in the ability of the default service procurement process to achieve the lowest cost for rate payers. West Penn should be responsible for their own error – not J3, UGI or the rate payers. In our Main Brief below and our Exceptions to the Commission we expressed the belief supported by the written testimony of J3's Expert Procurement Witness that the competitive process is best served when the procurement is conducted pursuant to its terms and there is a mechanism for bidders to redress errors.⁵ Holding the utility accountable for its errors would also instill confidence in bidders since they would know that they will not become the innocent victims of bad procurement practice by the utility.

II. J3's ANSWER TO MATTERS RAISED IN WEST PENN'S PETITION

1. West Penn Factual and Procedural History

West Penn's factual and procedural histories contain an abbreviated account of this proceeding and contain several of the same factual errors that J3 has identified in its exceptions and post hearing brief including: (1) "*West Penn's competitive bid solicitation was further*

⁵ See e.g.: J3 Exceptions pp. 27-28; J3 Main Brief pp. 52-53;

*conducted in accordance with Commission regulations at 52 Pa. Code § 54.186.”*⁶ This is clearly opinion as the central issue in this Complaint is whether West Penn did in fact comply with Commission regulations and order; (2) *“In the RFP suppliers competed for two distinct contracts.”*⁷ The RFP did not define the competition in terms of two distinct contracts. Instead, the RFP describes the product to *“consist of a term of 10-year and 5-month, and 10-year supply;”*⁸ and, (3) *The Part 2 documents were then provided to the Commission representative for their review and evaluation...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.”*⁹ Mr. Diskin, the Commission representative, testified that he was not an evaluator, was not an active participant, did not see the bids on bid-day; and, he did not know who the successful bidders were until an e-mail was sent by Mr. Reeping around 4:00-5:00 PM with the preliminary results of the auction.¹⁰

A complete history of the material elements of this proceeding is contained in J3’s Post Hearing Briefs and Exceptions.

2. J3 Response to West Penn’s Specific Arguments

A. West Penn Argument – The Order incorrectly determines that there is a need to join a party as indispensable.¹¹

In paragraph 33 of West Penn’s petition, they argue that the Commission incorrectly determined that there is a need to join a party as indispensable. Notably, West Penn agrees with and confirms J3’s assertion that J3’s Complaint did not seek to impair the rights of UGI.¹² For

⁶ West Penn Petition, p.5

⁷ West Penn Petition, p.7

⁸ See J3 Exception No. 5, pp. 14-15

⁹ West Penn Petition p.9

¹⁰ See J3 Exception No. 7, p.16; Transcript pp. 65-70

¹¹ Order means the Commission’s October 31, 2013 Order.

¹² West Penn Petition, pp. 13-14

the reasons we addressed in Part I of this Answer, we too believe that the Commission's indispensability determination was incorrect and this matter can proceed on the current record. However, J3 cannot support West Penn's proposed outcome.

West Penn argues that because the Commission could sustain the ID without impairing UGI rights, the Commission could and should sustain the ID. Using the same argument, if the Commission agrees with West Penn and J3 that UGI is not indispensable and J3 did not seek to impair UGI rights, the Commission could grant J3's Exceptions and direct West Penn to award two tranches to J3.

J3's Exceptions identify multiple errors in fact and conclusions of law that led to an erroneous ID. Furthermore, J3 has set forth a detailed fact-based analysis of the RFP supported by the testimony and documentary evidence that demonstrates West Penn committed error during evaluation and J3 should have been selected for two tranches. Therefore, if a decision on the merits can be made at this time, it should be in favor of J3.

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

The Commission's regulations for Formal Proceedings at 52 Pa. Code Chapter 5 are clear and prescriptive on the responsibilities of the Parties and J3 followed them scrupulously.

First, pursuant to 52 Pa. Code. § 5.21 (a), a person complaining of an act done or omitted to be done by a person subject to the jurisdiction of the Commission, in violation, or claimed violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission, may file a formal complaint with the Commission. J3 did that when it filed the Complaint identifying West Penn as a utility that violated Commission regulation and order. West Penn agrees with J3 that UGI is not indispensable and J3 did not seek to impair

UGI's rights through J3's Complaint. As such West Penn must also agree that J3 was not required to join UGI as a party.

Next, 52 Pa. Code. § 5.101 (a) and (d) requires the Respondent to file preliminary objections within 20 days of the Complaint including preliminary objections for non-joinder of a necessary party. West Penn did not do that. If West Penn truly believed that termination or partial termination of the UGI contract was within its contractual rights and a necessary outgrowth of J3's Complaint, West Penn could have and should have filed a preliminary objection to non-joinder of UGI within the 20 day period. On January 10, 2011, the date of the Formal Complaint, J3 knew that West Penn had committed error because West Penn acknowledged in a post bid question and answer that individual bids such as J3's were averaged for evaluation purposes.¹³ Such averaging was not disclosed in the RFP and inconsistent with the express terms of the RFP as approved by the Commission. At the time J3 did not know if proper evaluation would result in J3's selection due to the small amount of information made public about the RFP results. Nor did J3 know who was selected. J3 advised the ALJ that it would withdraw the Complaint if the proper evaluation would not have resulted in J3 selection.¹⁴ After issuance of the ALJ Order dated June 13, 2011, granting J3's Motion to Dismiss West Penn's Objections and Compel Discovery, West Penn delivered the requested information on August 8, 2011. Based on this information it was apparent that J3 was the low bidder on two tranches and should have been awarded a contract for those tranches. But from the August 8th response it could not be clearly determined who West Penn actually selected. That information was

¹³ The RFP questions and answers were included in the Complaint as Appendix 5 and in the Hearing Record as J3 Exhibit P-3.

¹⁴ August 8, 2011 Prehearing Transcript, pp 5-6.

provided by West Penn on October 20, 2011, in Response to J3's second set of Interrogatories.¹⁵ If UGI is indispensable here, long before J3 knew it should have been selected and J3's Counsel had information identifying the selectee, West Penn should have filed a preliminary objection for non-joinder of UGI. Unlike Pennsylvania Rules of Civil Procedure 1032 (231 Pa. Code § 1032), the Commission's Regulations do not contain a late joinder and non-waiver provision for the defense of failure to join an indispensable party. Therefore, it appears that West Penn does not have the right to raise this defense at this point.

Furthermore, as addressed in Part I of this Answer, the Commission's Order did not state that J3 was at fault for non-joinder of UGI. Instead, the Commission asks the parties to explore the remedies available to it noting that the Commission has joined UGI because the remedies **may** implicate the Commission's power to reform or revise a contract pursuant to 66 Pa. C.S. § 508. To summarize the situation: (1) the Commission is uncertain if the remedies will implicate its Section 508 power; (2) the two original Parties agree that J3 did not seek to impair the rights of UGI, independently do not believe UGI was indispensable, and neither has asked the Commission to utilize its Section 508 authority; and, (3), UGI believes the Commission would exceed its statutory authority by invoking Section 508 to modify the contract.¹⁶ The Party's agree that exercise of the Commission's Section 508 authority is not required to resolve this matter or in the case of UGI, is a violation of statute. Therefore, the fundamental basis for the Commission's decision to join UGI is not supported and not valid. It would be unreasonable and inequitable if J3 should be held responsible for non-joinder on these facts.

Finally, and assuming the Commission still believes UGI is indispensable, a determination to dismiss the Complaint is discretionary rather than mandatory. UGI argues that

¹⁵Certain information in West Penn's discovery responses were subject to a Counsel Only Protective Order issued by the ALJ on July 19, 2011.

¹⁶UGI Petition, pp.11-12.

it will be prejudiced by earlier non-joinder based on factual assertions in its Petition. At the moment these are simply assertions and conclusions that should and must be developed and examined through documentary evidence and testimony. This should occur on remand. The only facts that are clear is that UGI did not suffer from the ID since the ALJ accepted West Penn's arguments and UGI has received thousands of dollars for the two tranches that should have been awarded to J3.

C. West Penn Argument – The Order overlooks that prolonging the proceeding would be contrary to public policy.

West Penn makes a series of arguments that were addressed below and were the subject of J3's Exceptions to the ID starting with the argument that prolonging the proceeding is contrary to public policy. These arguments clearly could not have been overlooked by the Commission in the period since the Exceptions were filed and the October 31 Order.¹⁷ Accordingly, they are not novel or new and therefore appear not to be warranted for review on a Petition for Rehearing pursuant to the standard set forth in *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 *et al.*, 56 Pa. P.U.C. 553, 559, (1982). Nevertheless, if the Commission elects to reconsider these arguments at this time, J3 has fully addressed the arguments in its Exceptions and explained why the arguments are defective and why J3's position should be sustained.

That said, no one would like to see the matter end quickly more than J3 and if the Commission goes to a decision on the merits based on the record, the proper resolution is to resolve it quickly in favor of J3 based on facts and law that were fully briefed in J3's Exceptions.

In response to West Penn's arguments below, J3 stated that there are more reasonable steps the Commission could take to assuage concerns over protracted bid disputes and at the

¹⁷ J3 Exception 15, pp. 27-28

same time protect the public interest than simply ignoring procurement errors by the utility. These may include requiring more transparency in the public reporting of bid results so that bidders can quickly ascertain if there was error and establishing an expedited process for resolving bidder complaints.¹⁸ J3 encourages the Commission to explore those possibilities in the future.

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

Here again, West Penn makes the same detrimental reliance argument that was made below and were the subject of J3 Exceptions. It is not novel or new and clearly could not have been overlooked by the Commission in the period since the Exceptions were filed and the October 31 Order and therefore should not be appropriate for review on West Penn's Petition. Nevertheless, if the Commission entertains the arguments, J3 has fully explained why the argument is defective and why J3's position should be sustained at Exception No. 13.¹⁹

E. West Penn Argument: The 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.

These arguments were made below and were the subject of J3 Exceptions. They are not novel or new and clearly could not have been overlooked by the Commission in the period since the Exceptions were filed and the October 31 Order and therefore should not be appropriate for review on West Penn's Petition. Nevertheless, if the Commission entertains the arguments, J3 has fully explained why the arguments are defective and why J3's position should be sustained at Exceptions Nos. 1 – 12.²⁰

¹⁸ J3 Exception 15, pp. 27-28.

¹⁹ J3 Exception 13, pp. 22-25.

²⁰ J3 Exceptions 1- 12, pp 1-22.

F. West Penn Argument: The Order overlooks the ALJ's correct determination that all bidders were treated in a uniform fashion.

This argument was made below and was the subject of J3 Exceptions. It is not novel or new and clearly could not have been overlooked by the Commission in the period since the Exceptions and Reply were filed and the October 31 Order and therefore should not be appropriate for review on West Penn's Petition. Nevertheless, if the Commission entertains the argument, J3 has fully explained why the argument is defective and why J3's position should be sustained at Exception Nos. 8 and 9.²¹

G West Penn Argument: The Order overlooks that the ALJ correctly found that J3 did not ask for pre-bid clarification of the bid procedures.

The argument was made below and was the subject of J3 Exceptions. It is not novel or new and clearly could not have been overlooked by the Commission in the period since the Exceptions and Reply were filed and the October 31 Order and therefore should not be appropriate for review on West Penn's Petition. Nevertheless, if the Commission entertains the argument, J3 has fully explained why the argument is defective and why J3's position should be sustained at Exception No. 11.²²

Answering further, West Penn persists in propagating the factually inaccurate argument that "*had J3 found something "non-sensical" about the RFP documents or terminology, it should have asked for an interpretation.*"²³ In J3's Reply Brief, J3 explained why this statement is defective:

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

²¹ J3 Exceptions 8-9, pp. 17-19.

²² J3 Exception 11, pp. 20-21

²³ West Penn Petition, p.21

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

A. No.

Q. Why not?

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

As seen by Mr. Russial’s responses, J3 did not consider selecting Up-To as the offer type because under the RFP Rules a single tranche bid would be an All-or-Nothing bid. He **never** testified that when he was preparing J3’s Bids he found the RFP to be nonsensical as West Penn would have the Commission believe. He testified that in reading the RFP, All-or-Nothing was the obvious choice and Up-To would have been inconsistent with the notion that only full tranches would be awarded. Mr. Russial’s written testimony aligns with his oral testimony. (Tr. 54-55).²⁴

If the Commission elects to revisit the merits based on these Petitions, the Commission should be cautious and not take the arguments and statements contained therein at face value.

H. West Penn Argument: The Order overlooks that the ALJ correctly determined that J3’s four bid-form spreadsheets were marked “all-or-nothing” and therefore were aggregated.

This argument was made below and was the subject of J3 Exceptions. It is not novel or new and clearly could not have been overlooked by the Commission in the period since the Exceptions were filed and the October 31 Order and therefore should not be appropriate for review on West Penn’s Petition. Nevertheless, if the Commission entertains the arguments, J3 has fully explained why the arguments are defective and why J3’s position should be sustained at Exceptions Nos. 1 – 12.²⁵

²⁴ J3 Reply Brief, p.7.

²⁵ J3 Exceptions 1-12, pp. 1-22.

3. J3 Conclusion – West Penn Petition

It is clear that the Commission made a thoughtful decision to order the remand and not decide the complaint on the merits at this time. However, based on facts and the Parties own statements as expressed in the Petitions and this Answer, the Commission's stated reason and authority for joining UGI - because the remedy may implicate the Commission's power to modify a contract pursuant to Section 508 - is not supported and not valid. If the Commission now believes that UGI was in fact not indispensable and the case may proceed on the current record, then the outcome should be to sustain J3's Exceptions and grant J3's requested relief.

Alternatively, for the reasons set forth above, West Penn's Petition for Reconsideration should be denied.

III. J3's ANSWER TO MATTERS RAISED IN UGI's PETITION

1. UGI Factual and Procedural History

In the Introduction of its Petition, UGI sets forth a generally accurate but incomplete factual and procedural history which is understandable since UGI has not previously participated in this proceeding. J3 notes a minor error in paragraph 17 of the Petition where UGI states that the ID was issued two and one-half years after the Complaint was filed. In fact, the ID was issued 19 months after the Complaint was filed. A complete history of the material elements of this proceeding is contained in J3's Post Hearing Briefs and Exceptions.

2. J3 Response to UGI's Specific Arguments

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

UGI argues that J3 failed to meet a perceived burden to properly and timely join UGI Development.

In Part I of this Answer, J3 has fully explained why, in accordance with Pennsylvania law and jurisprudence, UGI is not an Indispensable Party and was not required to be joined by J3. J3 incorporates Part I into its response here. J3's Complaint does not seek redress against UGI. Furthermore, a completely discretionary and notably questionable suggestion by West Penn that they may seek to terminate the UGI contract if J3's relief is granted, does not make UGI indispensable under Pennsylvania law. Hence, the fundamental premise of any argument that J3 was culpable for not joining UGI is fatally defective.

Furthermore, the Commission's Order did not state that J3 was at fault for non-joinder of UGI nor find that J3 failed to meet its burden to properly join all necessary and indispensable parties. Rather, the Commission asks the parties to explore the remedies available to it noting that the Commission has joined UGI because the remedies may implicate the Commission's power to reform or revise a contract pursuant to 66 Pa. C.S. § 508.²⁶ As addressed in Part II of this Answer, which J3 incorporates into its response here: (1) the Commission is uncertain if the remedies will implicate its Section 508 power; (2) the two original Parties agree that J3 did not seek to impair the rights of UGI, independently do not believe UGI was indispensable, and neither has asked the Commission to utilize its Section 508 authority; and, (3), UGI believes the Commission would exceed its statutory authority by invoking Section 508 to modify the contract. Hence, the Parties either agree that exercise of the Commission's Section 508 authority is not required to resolve this matter or in the case of UGI, is a violation of statute. Therefore, the fundamental basis and authority for the Commission's decision to join UGI - because the remedy may implicate the Commission's power to modify a contract pursuant to Section 508 - is

²⁶ October 31, 2013 Order, p.10, footnote 10.

not supported and not valid. It would be unreasonable and inequitable if J3 should be held responsible for non-joinder on these facts and bootstrap a dismissal on this basis.

Second, UGI argues that it reasonably relied upon the Commission's approval of the RFP process and bid results, made substantial investments based on this reliance, and should not be penalized. UGI states that it would be unlawful and inequitable to now permit J3 to proceed with a cause of action that could directly affect UGI. J3's Complaint and requested relief does not directly affect UGI, a concept reinforced by West Penn's own statement that the Complaint did not seek to impair UGI rights. Only if West Penn takes a completely discretionary and subsequent act might UGI be affected. Even then, as held in *Grimme (supra)*, it would be improper to make the "logical leap" that West Penn would be successful in passing along the cost of its error to UGI with the Superior Court concluding that the lower court erred in finding the third party indispensable and dismissing a count in the Complaint. Therefore it seems that UGI's reliance argument is misdirected at J3 and the Commission, and is more properly directed at the counterparty to their contract (West Penn) who did not seek joinder of UGI within the time period prescribed by Commission regulation nor apparently even inform UGI of the fact that they were considering terminating the contract if J3 was successful. Furthermore, and assuming for the sake of argument that the Commission entertains UGI's request to dismiss the Complaint – which J3 believes would be improper - UGI's argument is based on factual averments in the Petition that have yet to be proven. The nature of the alleged investments, as well as whether the loss of a portion of the West Penn revenue would have caused UGI not to pursue the investments, are all important to the reliance argument. The timing of the investments are also important as: (1) the UGI contract was signed before J3 ever knew about the error, and (2) the term of the contract began before J3 knew if J3 should have been selected and J3 Counsel knew

who was selected. These issues are properly developed on remand and should not be accepted as factual based on UGI's statements in the Petition.

Third, UGI argues that the Commission would exceed its statutory authority by invoking 66 Pa.C.S. § 508 to vary a contract between a public utility and an unregulated entity and that use of the authority would have a chilling effect on the competitive generation procurement process. UGI goes on to argue that the Commission's order "in essence" has created an indefinite protest period for unsuccessful bidders to challenge or oppose competitive procurements and appears to create a private cause of action where one does not exist under the applicable statutory, regulatory or common law. Focusing first on UGI's assertions regarding Section 508, the Commission is in the best position to determine its statutory authority and on the face of Section 508, the law clearly provides the Commission authority to vary contracts between regulated and non-regulated entities. However, based on the discussion contained herein and in the West Penn and UGI Petitions, the Commission need not reach the issue because none of the Parties are asking the Commission to exercise Section 508.

Turning to UGI's assertion that the Commission is in essence creating an indefinite protest period and private cause of action where none exists in law or regulation, the argument is fatally flawed. J3's Complaint was duly and properly filed in accordance with 66 Pa.C.S. § 701 and 52 Pa. Code § 5.21 and there is nothing in either the statute or regulation that suggests the Complaint should be dismissed over concerns about subsequent complaints being untimely. Furthermore, J3's Complaint was filed on January 10, 2011 promptly after J3 first became aware of West Penn's error on December 27, 2010.²⁷ Hence, the issue of an indefinite protest period in this matter is academic. Earlier we suggested that the Commission may wish to amend its Regulations in the future to provide an expedited process for resolving bidder complaints. Such

²⁷ See Formal Complaint, Attachment 1, p.7.

an amendment could include strict timelines for filing, discovery, and other procedural elements. This would be a far more reasonable solution to UGI's concern rather than dismissal of J3's proper and timely Complaint based on fear of future untimely Complaints on other procurement actions.

UGI's argument that this matter does not fall within the Commission's existing statutory or regulatory jurisdiction is also defective. The Commission's authority (and obligation) to redress Complaints pursuant to 66 Pa.C.S. §701 is necessarily broad:

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.

This same authority is reflected in Commission Regulations at 52 Pa.Code § 5.21. J3 is a Pennsylvania small business engaged in energy related activities including the development of solar photovoltaic power systems. J3 submitted a proposal to supply SPAECS in response to a competitive RFP issued by West Penn pursuant to Allegheny Power's Default Service Plan as approved by the Commission. J3's bids were not selected because the West Penn evaluators used an improper and undisclosed evaluation approach that was patently inconsistent with the RFP Rules and supplemental guidance published by West Penn. West Penn was the owner and architect of the RFP and their senior manager was a bid-day evaluator and part and parcel to the selection decision. Had West Penn followed the Rules as written and approved by the Commission, J3 would have received a contract to supply two Tranches for 10 years. J3 asserted that the error in the evaluation process violates the intent of the Commission's Order entered on September 8, 2010, approving a modification to Allegheny Power's Default Service Plan and that the error violates the competitive procurement standards for alternate energy credits established by 52 Pa. Code § 75.67(b) and (c) and 52 Pa. Code. § 54.186. Those

standards require the Default Service Provider or third party evaluator to review and select winning bids procured through a competitive bid solicitation process in a nondiscriminatory manner based on price determinative bid evaluation criteria rather than undisclosed criteria.²⁸

As a Pennsylvania Corporation that was harmed by West Penn's procurement error, J3 has stated a Complaint that is clearly cognizable under the Commission's Formal Complaint proceedings. This was recognized in the ALJ's Order of October 17, 2011:

The value ultimately obtained from J3's [SRAECs] is also relevant to the Complainant's loss or grievance in this proceeding and while the Commission does not have jurisdiction to award compensatory damages, it does have jurisdiction over the relief sought in Complainant's Complaint of requiring West Penn to re-evaluate the bids, and if error is found, possibly directing the award of a contract to J3. (Emphasis Added)²⁹

The fact that this may be a matter of first impression before the Commission does not make the Complaint any less valid and UGI's argument must be rejected.

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

Like West Penn, UGI assumes that the Commission's order found J3 culpable for not joining UGI as indispensable and requests dismissal of the Complaint. As addressed in Part I of this Answer, UGI is not indispensable under Pennsylvania standard and precedent and as such joinder by J3 was not required. Furthermore, the Commission's Order did not find J3 at fault for non-joinder of UGI. Rather, the Commission asks the parties to explore the remedies available to it noting that the Commission has joined UGI because the remedies may implicate the Commission's power to reform or revise a contract pursuant to 66 Pa. C.S. § 508. With apologies for repetition: (1) the Commission is uncertain if the remedies will implicate its Section 508 power; (2) the two original Parties agree that J3 did not seek to impair the rights of

²⁸ See 52 Pa. Code. § 54.186(c)(4).

²⁹ Second Amended Scheduling Order And Order Granting The Motion To Compel Filed By the West Penn Power Company Against J3 Energy Group, Inc. October 17, 2011.

UGI, independently do not believe UGI was indispensable, and neither has asked the Commission to utilize its Section 508 authority; and, (3), UGI believes the Commission would exceed its statutory authority by invoking Section 508 to modify the contract. Hence, the exercise of the Commission's Section 508 authority is not implicated in this matter and the fundamental basis and authority for the Commission's decision to join UGI is not supported and not valid. It would be unreasonable and inequitable if J3 should be held responsible for non-joinder on these facts.

UGI also argues prejudice in that the "*Order apparently seeks to require UGI to accept a record that has been litigated for almost three years in the absence of UGI Development.*" The Order says no such thing. Instead, it remands the matter to the Office of the Administrative Law Judge for such further proceedings as may be warranted, consistent with this Opinion and Order. If UGI is not satisfied with the current record after its review, the Order certainly provides them the opportunity to propose a path forward to the ALJ to amend, supplement, or change the record if UGI believes it is necessary to protect their interests.

As a final note, UGI makes much of the point that the existing record has been developed over almost three years. In reality, the existing record was complete on September 17, 2012 when West Penn filed its reply to J3's Exceptions. Nevertheless, a review of the complete procedural history of this proceeding reveals that much of the period between now and when J3's Complaint was filed involved time for the Commission's normal procedural and decision making process. We point this out only so that it is understood the time that it has taken was not due to J3's lack of diligence in filing and pursuing the Complaint.

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

As an alternative to remand, UGI recommends that the Commission first decide the matter on the existing record and deny J3's Complaint preserving UGI's rights to seek judicial review of the Commission's Order and other unspecified rights.

As much as J3 would prefer a decision on the existing record, J3 must oppose UGI's open ended recommendation as it provides the opportunity for this proceeding to drag out indefinitely if UGI or West Penn does not agree with the Commission's Order on the merits.

Furthermore, J3 does not agree with UGI's proposed outcome that J3's Complaint be denied on the merits. If the Commission accepts UGI's recommendation, J3 reasserts that the Exceptions identify multiple errors in fact and conclusions of law that led to an erroneous ID. Furthermore, J3 has set forth a detailed fact-based analysis of the RFP supported by the testimony and documentary evidence that demonstrates West Penn committed error during evaluation and J3 should have been selected for two tranches. Therefore, if a decision on the merits can be made at this time, it should be in favor of J3.

UGI also notes that re-litigation of this matter could potentially take several years or longer. J3 shares UGI's concern and if the matter is remanded, J3 encourages the Commission to establish a reasonable time-frame for completion.

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

UGI requests that the Commission clarify its Order. Certainly that is within the discretion of the Commission. However, if after considering the UGI and West Penn Petitions and J3's Answer, the Commission still believes that remand is necessary, then the most efficient and sensible approach on remand would be for the Parties and Commission staff to cooperate to

get UGI the documents they desire and then let the ALJ determine how the matter should proceed based on her good judgment and the recommendations of the Parties.

IV. CONCLUSION

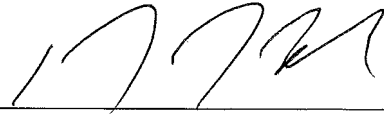
None of the parties have requested the Commission to use its authority under 66 Pa.C.S. § 508 to vary the terms of the West Penn/UGI contract nor believe that it is appropriate or necessary for the Commission to exercise such authority. Therefore, the fundamental rationale and authority for the Commission's joinder of UGI - because the remedy may implicate the Commission's power to modify a contract pursuant to Section 508 – is not valid. On these facts, if the Commission no longer believes remand is necessary the case could proceed to a decision on the merits. In such case, J3's exceptions should be sustained and J3's requested relief granted.

If the Commission continues to believe UGI is indispensable, it would be unreasonable and inequitable to hold J3 responsible for non-joinder on the facts of this proceeding and grant a dismissal on this basis.

Finally, dismissal based on non-joinder is not compulsory in Pennsylvania. The Petitioners arguments for dismissal due to prejudice and reliance are based on assumed facts that are not of record and have yet to be proven. Petitioners should be required to prove these factual assertions on remand before dismissal for non-joinder can be entertained.

WHEREFORE, J3 respectfully requests that the Commission use its sound judgment to determine whether the matter can proceed on the record. If not, J3 requests that the Commission deny the Petitions and relief requested therein and remand the case for additional proceedings as warranted consistent with the October 31 Order.

RESPECTFULLY SUBMITTED



Thomas J. Russial
Attorney for Complainant
198 Stonewood Drive
Bethel Park, PA 15102
Pa. I.D. Number 39730
Phone: 412-389-2482

Date: November 25, 2013

VERIFICATION

I, Stephen C. Russial, President of J3 Energy Group, Inc., hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect 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).

Stephen C. Russial
(Signature)

11-24-13
(Date)