

**THOMAS J. RUSSIAL**  
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May 6, 2014

**VIA ELECTRONIC FILING**


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  
Prehearing Conference Memorandum**

Dear Secretary Chiavetta:

Enclosed for filing is the "*Prehearing Conference Memorandum of J3 Energy Group, Inc.*" for the conference scheduled for May 8, 2014. The Reply has been served today as indicated on the enclosed Certificate of Service.

Sincerely,



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

Enclosures

cc: Honorable Elizabeth H. Barnes

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**PREHEARING CONFERENCE MEMORANDUM OF J3 ENERGY GROUP, INC.**

TO THE HONORABLE ELIZABETH H. BARNES, PRESIDING OFFICER

In accordance with 52 Pa. Code § 5.222 and the April 8, 2014 Order of the Presiding Officer, J3 Energy Group Inc., (J3) respectfully files this Prehearing Conference Memorandum.

**1. INTRODUCTION**

By Formal Complaint, dated January 10, 2011, J3 alleged that West Penn Power Company (West Penn) failed to properly evaluate J3's proposal submitted in response to West Penn's competitive Request for Proposals (RFP) for Solar Photovoltaic Alternate Energy Credits (SPAECs). J3's Complaint further alleged that proper evaluation of J3's proposal may have resulted in an overall lower cost than the bid(s) selected by West Penn and in such case, one or both of J3's lower priced bids should have been selected. During the course of the proceeding before the Presiding Officer it became clear that J3 had submitted the two lowest priced bids, and hence, J3 was entitled to a contract award for two tranches. J3 asserts that the error in the evaluation process violates the intent of the Commission's Order entered on September 8, 2010, approving a modification to West Penn's Default Service Plan to allow West Penn to acquire SPAECS through long-term competitively placed contracts. J3 further asserts 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 which 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.

A hearing was held on May 1, 2012. Portions of the testimony, exhibits and transcripts were subject to three Protective Orders and were produced in public and redacted forms. By Initial Decision dated August 17, 2012, the Presiding Officer dismissed the complaint. J3 filed Exceptions with the Commission and requested oral argument. West Penn replied to the Exceptions and opposed J3's request for oral argument.

By Opinion and Order dated, October 31, 2013, the Commission found that UGI Development Company (UGI Development) must be joined as an indispensable party for the Commission to have jurisdiction over the matter. The Commission vacated the Initial Decision, joined UGI Development as an indispensable party, and remanded this proceeding to the Office of Administrative Law Judge for such further proceedings as may be warranted, consistent with the Opinion and Order. The Opinion and Order directed the Parties and the ALJ to address the potential remedies that the Commission has jurisdiction to provide to J3 Energy if the Commission were to sustain the Complaint.

On November 15, 2013, West Penn filed a Petition for Reconsideration of the Commission's Order and UGI Development filed a Petition for Reconsideration and Clarification of the Commission's Order. J3 filed its Answer to the Petitions on November 25, 2013. The Petitions raised a number of issues including:

1. Whether J3's Complaint should be dismissed based on allegations that J3 failed to timely join UGI Development as an indispensable party.<sup>1</sup>
2. Whether prolonging the proceeding would be contrary to public policy.<sup>2</sup>
3. Whether the Order exceeded the Commission's statutory authority and would have a chilling effect on the competitive procurement process in Pennsylvania based on the allegation that no cause of action exists under existing statutory, regulatory or common law.<sup>3</sup>

By Opinion and Order dated February 20, 2014, the Commission denied the Petitions except to clarify UGI Development's rights on remand. The Commission stated that: (1) it was not persuaded by the argument that UGI Development should not be joined based on the procedural status of this case; (2) the process ensures that we have jurisdiction over the proceeding and that UGI Development has the opportunity to participate in this proceeding before we issue a determination addressing the merits, (3) its decision to join UGI Development, *sua sponte*, and remand the proceeding prior to making any decisions on the merits was both legally and equitably sound; (4) that it did not agree the proper remedy would be to dismiss the Complaint or to require J3 Energy to re-plead or face dismissal of the Complaint; and, (5) the proper remedy is to join UGI Development as an indispensable party and remand for further proceedings.<sup>4</sup> The Commission also noted that West Penn restated additional averments that were raised in West Penn's Reply to J3's Exceptions and that the averments were therefore not new or novel or considerations overlooked by the Commission.<sup>5</sup>

The Commission clarified that its intent on remand was that UGI Development be provided an opportunity to participate in the proceeding and be entitled to the full rights of a

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<sup>1</sup> West Penn Petition Section IV. B, pp 14-15; UGI Development Petition, Section III.A.1&2, pp 8-10, 14-17

<sup>2</sup> West Penn Petition Section IV.C. pp 15-16

<sup>3</sup> UGI Development Petition, Section III.A.3., pp 11-14

<sup>4</sup> February 20, 2014 Opinion and Order, pp 19-20

<sup>5</sup> February 20, 2014 Opinion and Order, pp 20-21

party. The Commission acknowledged that it directed the Parties to address potential remedies the Commission has jurisdiction to provide to J3 Energy if the Commission were to sustain the Complaint, but that the Commission did not strictly limit the scope of remand or make any pre-determinations regarding potential remedies. The Commission deferred to the discretion and authority of the Presiding Officer to regulate the matter on remand in order to ensure efficiency in the conduct of the proceeding.

The Commission served UGI Development with J3's Complaint on February 24, 2014. UGI Development filed its Answer and New Matter on March 17, 2014. J3 filed its Reply to UGI Development's New Matter on April 4, 2014.

## **2. PRESENTLY IDENTIFIED ISSUES**

The Commission did not reach the merits and hence those issues remain. J3 submits that issues raised by UGI Development and West Penn in their Petitions and denied by the Commission are not appropriate for consideration on remand. J3 anticipates addressing the following issues and such other issues as may be accepted by the Presiding Officer during the development of this matter on remand:

**(a) Was the aggregation and averaging of J3's 4 bids during bid evaluation in accordance with the RFP approved by the Commission and guidance issued by West Penn during the RFP process?**

J3 will show that: (1) J3 prepared its 4 bids in accordance with the RFP instructions and guidance provided by West Penn; (2) each of J3's bids was intended to stand alone; (3) nothing in the RFP or subsequent guidance issued by West Penn authorized West Penn to aggregate and average the 4 bids; and, (4) West Penn's evaluation approach was inconsistent with the RFP and guidance and was unreasonable.

**(b) Would the proper evaluation of bids by West Penn have resulted in the selection of one or more of the J3 bids?**

J3 will show that had the evaluation been conducted properly in accordance with the terms of the RFP as approved by the Commission, J3's two lowest priced bids would have been selected and J3 awarded a contract by West Penn for two tranches for 10 years.

**(c) What potential remedies does the Commission have jurisdiction to provide to J3 if the Commission were to sustain the Complaint?**

J3 will address the potential remedies that are within the Commission's jurisdiction to provide to J3 if J3's Complaint is sustained including the Commission's authority to revoke its approval of the RFP results and require West Penn to abide by the RFP rules.

### **3. WITNESSES**

J3 will ask that the previously admitted written and oral testimony of Stephen Russial (J3 Statements 1 and 1-R) and Curtis McBride (J3 Statements 2 and 2-R) along with admitted J3 exhibits be accepted on remand. In general: Mr. Russial testified concerning J3 business activities, his understanding of the RFP and guidance, errors in the procurement, and in rebuttal of West Penn testimony; Mr. McBride testified as to the proper interpretation of the RFP and guidance, errors in the procurement, and in rebuttal of West Penn testimony. The addresses of the witnesses are:

Stephen Russial, President  
J3 Energy Group, Inc.  
950 East Main Street – Suite 104  
Schuylkill Haven, Pa 17972

**Expert Procurement Witness**  
Curtis W. McBride  
3016 Kelly Creek Avenue  
Moody, Alabama, 35004

Additional testimony may be required depending upon the issues to be considered on remand. J3 reserves the right to identify additional witnesses and the subject of their testimony as the proceeding develops and issues are identified.

**4. ADDITIONAL MATTERS IDENTIFIED IN THE PREHEARING CONFERENCE ORDER**

**(a) The possibility for settlement of the proceeding, subject to the Commission's approval.**

J3 is willing to pursue settlement discussions with West Penn and UGI Development, subject to the Commission approval if necessary.

**(b) Whether the matter should be decided upon legal briefs, or whether a hearing is necessary.**

J3 believes that the matter of potential remedies may be decided on briefs.

At this time, J3 cannot express an opinion as to whether an additional hearing is necessary. J3 recommends that UGI Development be provided an opportunity to review the existing record and propose what portions of the record UGI Development believes should be reopened and may warrant an additional hearing.

**(c) If a hearing is required, a procedural schedule will be discussed including the amount of hearing time necessary to dispose of the proceeding.**

J3 recommends the following schedule:

1. May 14, 2014: Counsel for UGI Development seeks admission to the Protective Orders issued in this matter.
2. May 23, 2014: Subject to Counsel's admission to the Protective Orders, J3 and West Penn provide UGI Development Counsel with copies of J3 and West Penn written testimony and exhibits; and, UGI Development obtain a copy of the hearing transcript from the court reporter.

3. June 20, 2014: UGI Development files a recommendation: (i) addressing how UGI Development believes the matter should proceed, (ii) identifying what aspects of the existing record UGI Development wishes to reopen; and, (iii) containing a proposed procedural schedule.
4. June 30, 2014: J3 and West Penn file responses to UGI Development's recommendations.
5. Week of July 6th, 2014: Second Prehearing Conference to finalize procedural schedule.

**(d) Arrangements for the submission of direct testimony of witnesses in writing in advance of the hearing to the extent practicable, and for the submission in advance of hearing of written requests for information which a party contemplates asking another party to present at hearing.**

To the extent practicable, J3 agrees to submit direct written testimony in advance of the hearing if a hearing is deemed necessary.

J3 reserves the right to submit written requests for information from West Penn and/or UGI Development depending upon the issues that are identified and accepted on remand.

**(e) Other matters that may aid in expediting the orderly conduct and disposition of the proceeding and the furtherance of justice, including, but not limited to the following:**

**(i) The exchange and acceptance of exhibits proposed to be offered into evidence.**

To the extent it becomes necessary to offer additional exhibits into evidence, J3 supports prior exchange and will cooperate with the parties concerning prior acceptance.

**(ii) The obtaining of admissions as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.**

(ii) Depending upon the issues that are accepted on remand, J3 reserves the right to seek admissions of, or stipulations of, facts not remaining in dispute, or as to the authenticity of documents.

**(iii) The need for public input hearing(s).**

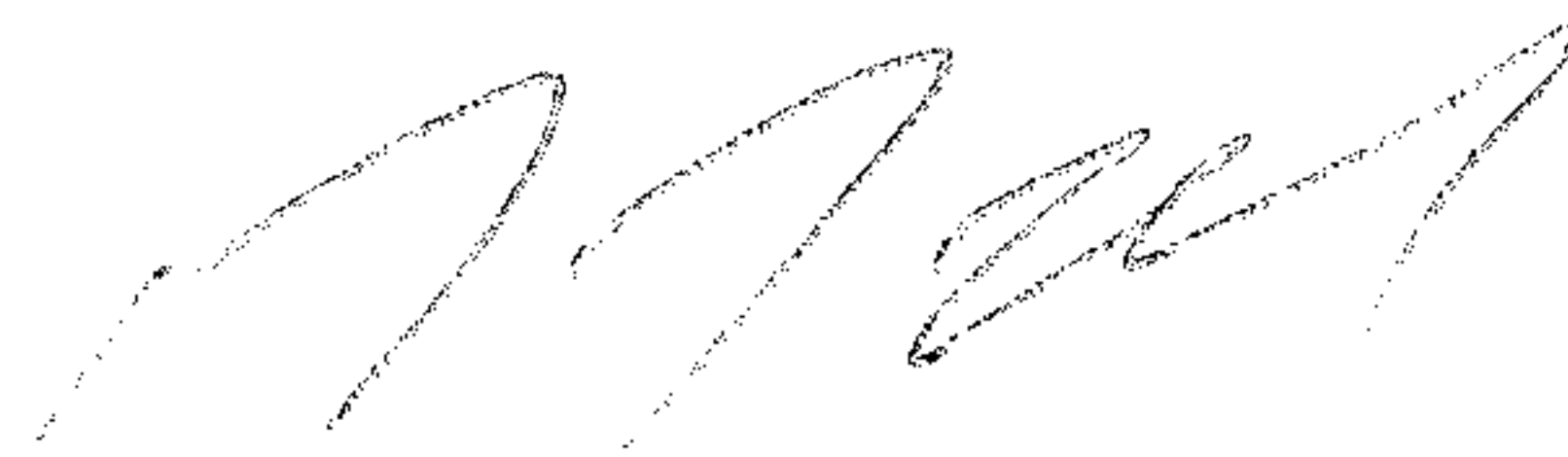
(iii) J3 does not believe a public input hearing is required to resolve this matter.

**(iv) The discovery or production of data or other material.**

(iv) Depending on the issues that are accepted on remand, J3 reserves the right to seek discovery of data or other material.

Date: May 6, 2014

Respectfully Submitted



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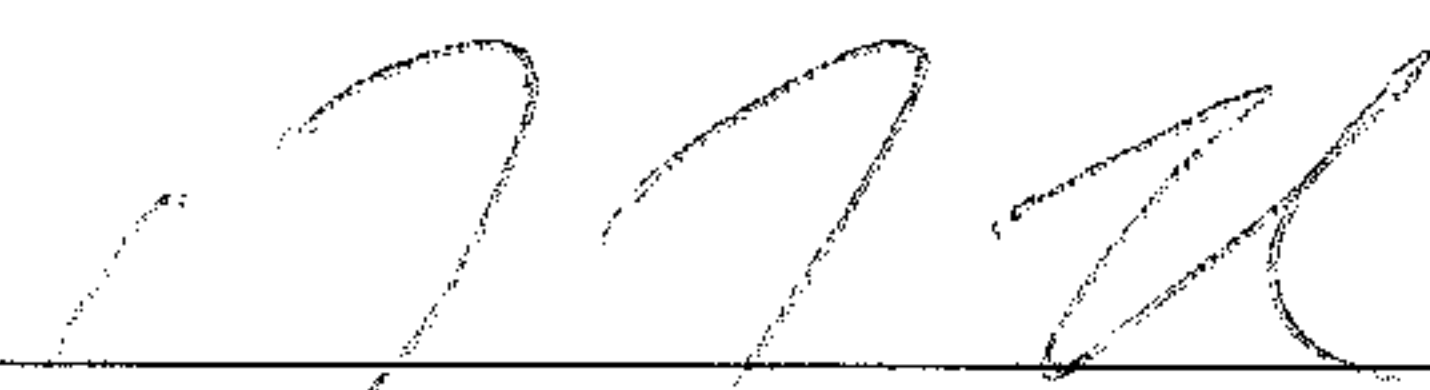
**CERTIFICATE OF SERVICE**

I hereby certify that on May 6, 2014, I served a true copy of the foregoing document, "Prehearing Conference Memorandum of J3 Energy Group, Inc." to the individuals listed below by First Class Mail and/or e-mail in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a Party):

<b>First Class Mail and E-Mail</b>	<b>E-Mail</b>
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
Christopher T. Wright Post & Schell, P.C. 17 North Second Street, 12th Floor Harrisburg, PA 17101-1601 cwright@postschell.com	David B. MacGregor Post & Schell, P.C. Four Penn Center 1600 John F. Kennedy Boulevard Philadelphia, PA 19103-2808 <a href="mailto:dmacgregor@postschell.com">dmacgregor@postschell.com</a>
Elizabeth H. Barnes Administrative Law Judge Pennsylvania Public Utility Commission PO Box 3265 Harrisburg, PA 17105-3265 <a href="mailto:EBARNES@pa.gov">EBARNES@pa.gov</a>	
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Date: May 6, 2014

Attorney for Complainant

  
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