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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Comments Of Citizens for Pennsylvania's Future (PennFuture)

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Regarding

Implementation of the Alternative Energy Portfolio Standards Act of 2004
Docket No. L-00060180

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Introduction:

PennFuture is a statewide public interest membership organization, working to enhance Pennsylvania's environment and economy, with offices in Harrisburg, West Chester, Philadelphia and Pittsburgh. We appreciate the opportunity to provide comments on the Commission's Proposed Rulemaking, Docket L-00060180 - Implementation of the Alternative Energy Portfolio Standards Act of 2004 (Act 213) entered in the Pennsylvania Bulletin on October 14, 2006.

PennFuture has also been involved in the implementation of Act 213, assisting the Commission's rulemaking process so that it reflects the legislative intent of the Act. We helped shape the Energy-Efficiency and Demand Side Management rules for Act 213; provided comments to the net metering and interconnection working groups; and submitted comments to the Commission on all past Act 213 rulemakings including: Implementation of the Alternative Energy Portfolio Standards Act of 2004; Interconnection Standards for Customer-generators; Net Metering; and Standards and Processes for Alternative Energy System Qualification and Alternative Energy Credit Certification.

As a result of our work in policy, regulation and markets, PennFuture understands what policy makers intended Act 213 to accomplish and what the clean energy industry needs to help fulfill the goals of the Act.

We commend the Commission for its continued commitment to Act 213 through drafting regulations that will help grow Pennsylvania's clean energy resources.

This rulemaking will set the foundation for how the alternative energy market develops in Pennsylvania over the next 15 years. It is, therefore, critical that the regulatory language be developed in a manner that assures full compliance with the Act.

A successful implementation of Act 213 will avoid 67 million tons of carbon dioxide (CO_2), 59,000 tons of nitrogen oxide (NOx) and 589,000 tons of sulfur dioxide (SO_2) by 2020. Act 213 properly implemented will bring major economic benefits: $10 billion in increased output and $3 billion in additional earnings over 20 years; wind development between 3,000 to 4,000 megawatts and 3,500 more jobs over 20 years compared to business as usual; and approximately 858 megawatts of new solar capacity. This new capacity will increase supply and diversify the fuels and technologies used to produce electricity here, thereby serving as a useful tool to insure that wholesale and retail prices remain affordable.

Some of our comments concern clarity of language. Others address critical areas in which the interpretation of Act 213 into rules needs to be changed, chief of which regard force majeure and alternative compliance payments (ACP).

PennFuture recommends the following items be either clarified or changed to assure that Act 213 is supported by effective rules.

- The threshold for force majeure is too low and the proposed language too vague. Force majeure cannot be an easily available option to negate the requirements of Act 213 but must be reserved to a narrow and unusual set of circumstances. We provide the criteria upon which force majeure determinations should be made.

- Language in § 75.51 (b)(1) – (15) should be clarified to assure that the solar photovoltaic requirement is defined as a percentage of an EDC or EGS's overall retail sales. Without this change the solar share requirement is reduced from 858 megawatts down to 69 megawatts.

- The Commission does not have the authority to lower the solar share requirement in any given reporting period. It could only make that recommendation to the General Assembly. Such a lowering would harm the development of the solar market and make it more difficult to comply with the Act in later years.

- Unless an EDC or EGS cannot comply with the Act due to events beyond their control, they should not receive cost recovery for alternative compliance payments (ACP). Allowing cost recovery for ACPs will take away the penalty driver for EDCs and EGSs to comply with the Act. If force majeure is determined by our proposed criteria, then ACP would be eligible for cost recovery.

- It is vital to the growth of the alternative energy market that EDCs and EGSs obtain cost-recovery for long-term contracts of at least 10 years duration and 15 for solar.

- The Commission needs to clarify language in the rulemaking to protect the voluntary market by assuring that voluntary purchases of alternative energy are not counted towards Act 213 compliance.

- Banking should be extended to all market participants and banking for solar alternative energy credits should be extended from 2 to 5 years.

PennFuture elaborates on the above recommendations below and provides proposed regulatory language to assure that Act 213 is developed properly.

We will begin our comments by addressing the Commission proposed coupling of force majeure and cost recoverable ACP, since it is the area that is most critical to change. .

I FORCE MAJEURE AND COST RECOVERY OF ALTERNATIVE COMPLIANCE PAYMENTS

The proposed force majeure language coupled with alternative compliance payments (ACP) eligible for cost recovery will inadvertently undermine Act 213.

<u>Discussion:</u>

For clarity of argument, we have chosen to present one overall discussion of force majeure and ACP, but we will offer specific language for each of the relevant sections.

How to determine Force Majeure:

A force majeure clause is found in virtually every performance based contract. It is normally understood as a means to provide temporary relief of an obligation when forces beyond ones control are at work, ordinarily acts of god or war. Certainly, if a hurricane destroys a wind farm contracted for compliance supply, or a building fire destroys a roof top solar unit, these disasters may be reasons to grant force majeure. There may be certain other external, limited forces that make compliance with the Act impossible

Our task is to write rules that will enable the intent and the goals of Act 213 to be met, while allowing force majeure in highly unusual situations that make compliance impossible. We can do so and will propose the criteria herein upon which this determination should be made.

An annual force majeure begs a fight and casts doubt on the market:

The Commission should not propose to make force majeure determinations without a specific request by a party. The proposed regulations build in an annual determination, and thus, annual potential litigation over whether force majeure should occur for an entire Tier. This will build in a defeat of the legislation. The Act authorizes the Commission to make a force majeure determination on its own, but it does not *mandate* an annual decision on a Tier-wide basis. This authority should be exercised sparingly.

Force majeure cannot be coupled with supply price spikes; to do so is contrary to Act 213:

Section 1648.2 of Act 213 authorizes the Commission "upon its own initiative or upon a request" to determine whether to invoke force majeure in order to modify the obligations of EDCs and EGSs. The Act does not suggest that the Commission should establish by regulation a cost figure to be used to trigger force majeure. The Act requires that the Commission makes its determination solely based on whether the credits are "reasonably available … in sufficient quantities." Arguably, this standard does not even authorize the Commission to consider cost, but instead requires that force majeure only be invoked when the marketplace has failed to make reasonably available adequate quantities of alternative energy credits.

The statute does not couple force majeure with market prices. The coupling proposed is a tragic flaw that will destroy the free enterprise design of the Act. Free enterprise markets operate according to the laws of supply and demand. Act 213 compliance demand obligations ramp up progressively over a 15 year period. If in any given period, an imbalance exists and price spikes upward to exceed $45.00, which is the expected market signal that will be the incentive for more supply to come on line. That is how markets work.

To thwart that signal by regulatory means, by declaring force majeure and allowing for cost recovery of ACP, will negate the heart of the Act's enterprise design. This in turn will kill the market for development of renewable generation.

If the price signal is not a spike, but a long term secular drift of three or more years, due to fundamental cost structure, reversing all the trends of the past 20 years, that is a separate determination that can be addressed by the criteria we propose.

Force majeure cannot relieve a party of its obligations:

Force majeure should be used to allow EDCs and EGSs additional time to comply with the mandates of Act 213; it should not be used to wholly relieve the parties of their obligation to comply with the Act.

The use of force majeure to relieve a party of its obligations to meet its alternative energy obligations is not authorized by the Act. Section 1648.2 of Act 213 states that, when a force majeure is declared, the commission shall either "modify" the underlying obligation of the EDC or EGS or recommend "to the General Assembly that the underlying obligation be eliminated." By this language, the General Assembly made clear that it reserved to itself the power to relieve parties of their obligations to meet the targets set forth in the Act. It only authorized the Commission to "modify" the obligations of EDCs and EGSs, via an ACP, in the case of a force majeure.

Good and bad players:

Every market has responsible players and those looking for an easy way out. In this area, if an easy way out exists, to stay competitive, all are forced to follow it. We believe that in order to comply with the Act, market participants, not only EDCs and EGSs but also the brokers and other middle players who will emerge, must actively work to develop the market. The kind of actions necessary can be identified and established as the criteria upon which the Commission can make a force majeure determination.

The easy out pathway is easy to predict. It is the passive approach. Those with the compliance obligation simply rely on established, business as usual, procurement methods. They issue an RFP without adequate lead time for a renewable energy project to be built; they do not accommodate the need for long-term contracts that will allow for financing; and they choose the lowest price offer without adequate due diligence of the capacity to deliver.

The market response to a business as usual, easy out approach, will be inadequate supply and a price spike for what little exists. If force majeure and cost recovery of the ACP is granted, the market making mechanism will be destroyed. No sweat, no market, no Act 213 goals.

ACP: Traffic ticket or Lunch Room Pass:

Under 1648.3(f), the ACP is only to be assessed annually at the end of each program year. When a company fails to comply with its obligations, it must make what is in effect a penalty payment. The Act does not authorize recovery of these penalty payments. This is consistent with the intent of the Act, and the cost recovery provisions of 1648.3(a)(3), which authorize recovery for purchase of electricity generated and payments for alternative energy credits that are "voluntarily acquired." Payment of the ACP is not voluntary, and it is not made to purchase electricity generated from alternative energy sources.

Is the ACP a penalty, not recoverable, and intended as the AEPS enforcement teeth, or is it an alternative means to comply with payment recoverable and execution responsibility shifted to the PASEB? It can be the latter only under special circumstances. We need to establish clear principles and rules to identify those limited instances, when events have been beyond the control of those with the obligation, and the ACP may become a temporary lunch pass.

As a starting principle, the ACP should be considered as the Act 213 enforcement driver. The ACP is the penalty awaiting those who do not move to actively develop the market. As such, they are not recoverable.

Recoverable ACP is the exception, not the rule. It is the legitimate regulatory relief in the rare case of a force majeure determination. The criterion upon which a force majeure determination is made is presented herein. That exercise constitutes the test of whether the ACP is a penalty or a temporary means to compliance due to circumstances beyond ones control.

The Solar Obligation:

In § 75.57(d) of the draft rulemaking, the language gives the Commission the ability to reduce the required level of the solar photovoltaic compliance for a particular compliance period. This should not be allowed. Having such language in the rulemaking will not provide the type of incentive needed to drive EDCs and EGSs to actively procure solar renewable energy credits (SREC).

We urge the Commission when rethinking the force majeure provisions for the solar share to move away from a price trigger. We strongly recommend that the Commission take into account both price per kilowatt-hour and the number of kilowatt-hours in making any decision on force majeure. For example, assuming annual demand of 140 million megawatt-hours, Act 213 requires that in the first four years the total percentage sold from solar photovoltaic technologies equal 0.0013 percent, which translates to roughly 0.465 megawatts of installed capacity by 2010. Assuming a cost of $200 per SREC, total utility payments for their obligation for the first four years would only be $149,512 and cannot create a basis for force majeure.

Equally important is how the penalties for non-compliance with the solar share are developed. We are encouraged to find the regulations include past recommendations by the solar industry to require EDC and EGS to pay 200 percent the average market value for solar photovoltaic alternative energy credits (SRECs) sold during the reporting period as their ACP. This is needed, as solar project owners in New Jersey or other PJM states may receive both an up-front capital rebate as well as revenue from the sale of SRECs, while those in Pennsylvania typically do not.

While we feel the penalty is appropriate, it is weakened by the language allowing for the Commission "to reduce the required level of solar photovoltaic compliance for that reporting period" if they find there are not enough SRECs available in the market. The Commission does not have the authority to reduce the solar goal established by the Legislature.

If the Commission needs to place a safety valve on the solar share, relief if any should be a deferral until the following compliance period, NOT a reduction of the requirement.

The Solution:

With an understanding of how the market acts, its problems and challenges, and what Act 213 intends, the solution appears straightforward.

The basic principle of force majeure remains; it is a means to provide relief from an obligation that cannot be satisfied due to reasons beyond one's control. The operative assumption is that the market is working effectively. A general force majeure determination is triggered by a petition from one or more parties to do so; it is not a routine task of the Commission performed annually.

When the Commission does not declare a general force majeure for the period and a particular EDC or EGS makes a special petition, because they cannot procure the necessary credits for compliance, the EDC or EGS cannot simply submit a statement to the Commission that they made a "good faith effort" to comply with Act 213 but could not. They must use the criteria presented herein to establish that events beyond their control were at work.

Force majeure does not remove the obligation but provides temporary relief for events beyond ones control. The test proposed precludes a force majeure determination via an easy out pathway of passive procurement. We offer herein the list of criteria upon which either a general or a petition force majeure determination may be made by the Commission.

If force majeure is declared using these criteria, it is due to events beyond the control of the EDC or EGS. Then the ACP should be paid and the cost should be recoverable. If an EDC or EGS does not meet their compliance obligation, and fails to establish a case for force majeure, then the ACP is a penalty paid that cannot be recovered.

If a force majeure is declared, the Commission may not reduce the compliance goal. It may allow a temporary ACP, but the goals remain intact and still the obligation of the EDC or EGS. Goals may only be changed by the General Assembly.

Criteria to establish an Act 213 force majeure determination:

PennFuture proposes five categories of criteria. The first two relate to the presence or absence of external factors. The remaining three are based on the petitioner's actions to comply with the Act.

1. Acts of God and War: fire, earthquake, hurricane, revolution, etc.
2. Emerging Market Perturbations
    - Equipment availability
    - Financial....on again/off again PTC
    - Equipment Failure....industry wide recall
3. History of Market Trades
    - Are others able to comply
    - Is partial compliance possible and demonstrated

- Is there hoarding or market manipulation
- Analysis of market trading history and price signals

4. Steps taken by EDC or EGS to assure supply
   - Did the EDC or EGS attempt to build solar, Tier I or II generation themselves
   - If a force majeure has been previously declared, what steps were taken to correct
5. Effective Procurement Process
   - Has the process been active, open, and competitive
     - i. RFQs issued three years before compliance requirement
     - ii. RFPs issued twice per year two years before compliance requirement
     - iii. Were additional RFPs issued if necessary
     - iv. RFPs for both individual projects and portfolio bids, to allow for greatest competition, market liquidity, and broker/agent models
   - Capacity to Deliver Due Diligence
     - i. Evidence that bid resources have been qualified or filed for such
     - ii. Evidence of position in PJM interconnection queue
     - iii. Resource proven.....wind documented for such projects
     - iv. Evidence of feedstock contracts or ESCO agreements
     - v. Evidence of construction schedules and delivery dates
     - vi. Financial capacity to deliver
     - vii. Performance record.
     - viii. Were there contingency plans in place
   - Realistic Contracts
     - i. At least 10 year terms, 15 for solar
     - ii. Evidence of security payments, performance bonds, or penalties
     - iii. Evidence of banking reserve capacity of at least 10%

<u>Proposed language:</u>

§ 75.57. General force majeure and § 75.58. Special force majeure:

In order to create force majeure and alternative compliance payments strong enough to assure compliance with Act 213 and growth of the alternative energy market, PennFuture recommends the following language:

<u>§ 75.57. General force majeure.</u>

<u>(a) THE PRESUMPTION SHALL BE THAT THE MARKETS ARE FUNCTIONING EFFECTIVELY AND ONLY AFTER A SPECIFIC PETITION WOULD THE COMMISSION MAKE A GENERAL FORCE MAJEURE DETERMINATION. UPON PETITION BY ONE OR MORE PARTIES, THE COMMISSION, USING THE CRITERIA LISTED IN § 75.57(a)(1) HEREIN, MAY MAKE A GENERAL FORCE MAJEURE DETERMINATION. IN THAT SPECIAL CASE, at least 30 days prior to the beginning of a</u>

reporting period, the Commission will issue an order declaring whether force majeure exists for that reporting period. The order shall include separate force majeure determinations for the Tier I alternative energy source, Tier II alternative energy source, and solar photovoltaic requirements of § 75.51.

(1) Acts of God and War: fire, earthquake, hurricane, revolution, etc.

Emerging Market Perturbations

- Equipment availability
- Financial….on again/off again PTC
- Equipment Failure….industry wide recall

History of Market Trades

- Are others able to comply
- Is partial compliance possible and demonstrated
- Is there hoarding or market manipulation
- Analysis of market trading history and price signals

Steps taken by EDC or EGS to assure supply

- Did the EDC or EGS attempt to build Tier I or II generation themselves.
- If a force majeure has been previously declared, what steps were taken to correct

Effective Procurement Process

- Has the process been active, open, and competitive
  - i. RFQs issued three years before compliance requirement
  - ii. RFPs issued twice per year two years before compliance requirement
  - iii. Were additional RFPs issued if necessary
  - iv. RFPs for both individual projects and portfolio bids, to allow for greatest competition, market liquidity, and broker/agent models
- Capacity to Deliver Due Diligence
  - i. Evidence that bid resources have been qualified or

filed for such

ii. Evidence of position in PJM interconnection queue

iii. Resource proven…..wind documented for such projects

iv. Evidence of feedstock contracts or ESCO agreements

v. Evidence of construction schedules and delivery dates

vi. Financial capacity to deliver

vii. Performance record.

viii. Were there contingency plans in place

- Realistic Contracts

i. At least 10 year terms, 15 for solar

ii. Evidence of security payments, performance bonds, or penalties

iii. Evidence of banking reserve capacity of at least 10%

(b) The Commission may find that force majeure exists if there are insufficient alternative energy credits to satisfy the aggregate Tier I alternative energy source, Tier II alternative energy source, and solar photovoltaic obligation for all EDCs and EGSs pursuant to § 75.51 for that reporting period AND BY USE OF THE CRITERIA IN § 75.51(a)(1).

(d) If the Commission determines that force majeure exists for a reporting period for, EDCs and EGSs shall have the option of making alternative compliance payments in lieu of compliance with § 75.51 for that reporting period.

(1) This payment shall equal $ 45 for each alternative energy credit needed to satisfy the Tier I and Tier II requirements of § 75.51.

(2) For the solar photovoltaic requirement, EDCs and EGSs shall have the option of making an alternative compliance payment equal to the market value of solar photovoltaic credits in the applicable RTO service territory~~, or the Commission may choose to reduce the required level of solar photovoltaic compliance for that reporting period.~~

(3) IF AN EDC OR EGS CHOOSES TO PAY THE ALTERNTATIVE COMPLIANCE PAYMENT, a payment shall be accompanied by a statement filed with the Commission and verified by oath of affirmation, consistent with § 1.36 (relating to verification), DETAILING THE ACTIONS TAKEN BY THE EDC OR EGS TO MEET ~~that the EDC or EGS has made a good faith effort to comply with the requirements of this chapter, that they are unable to acquire a sufficient quantity of alternative energy credits to meet~~ their obligations under § 75.51, and that an alternative compliance payment is the least cost method of compliance.

(e) Alternative compliance payments made by EDCs or EGSs under subsection (d) shall NOT BE RECOVERED ~~be deemed a cost of compliance with this chapter and may NOT be recovered under § 75.59 (relating to alternative energy cost-recovery).~~ UNLESS AN EDC or EGS HAS MET ALL THE CRITERIA LISTED IN § 75.51(a)(1) AND CANNOT MEET THE REQUIREMENTS OF A GIVEN REPORTING PERIOD. ONLY THEN WILL ANY ALTERNATIVE COMPLIANCE PAYMENTS BE DEEMED A COST OF COMPLIANCE WITH THIS CHAPTER AND BE RECOVERED UNDER § 75.59 (RELATING TO ALTERNATIVE ENERGY COST-RECOVERY).

§ 75.58. Special force majeure.

(c) The Commission may find that force majeure exists ~~when there are insufficient alternative energy credits to satisfy the Tier I alternative energy source, Tier II alternative energy source, and solar photovoltaic obligations for all EDCs and EGSs requesting force majeure determinations under this section~~ IF THE EDC OR EGS CAN DEMONSTRATE IN THEIR PETITION BY THE FOLLOWING SET OF CRITERIA THAT EVENTS BEYOND THEIR CONTROL WERE AT WORK:

Acts of God and War: fire, earthquake, hurricane, revolution, etc.

Emerging Market Perturbations

- Equipment availability
- Financial....on again/off again PTC
- Equipment Failure....industry wide recall

History of Market Trades

- Are others able to comply
- Is partial compliance possible and demonstrated
- Is there hoarding or market manipulation
- Analysis of market trading history and price signals

. Steps taken by EDC or EGS to assure supply

- Did the EDC or EGS attempt to build Tier I or II generation themselves.
- If a force majeure has been previously declared, what steps were taken to correct

Effective Procurement Process

- Has the process been active, open, and competitive
  - i. RFQs issued three years before compliance requirement
  - ii. RFPs issued twice per year two years before compliance requirement
  - iii. Were additional RFPs issued if necessary
  - iv. RFPs for both individual projects and portfolio bids, to allow for greatest competition, market liquidity, and broker/agent models
- Capacity to Deliver Due Diligence
  - i. Evidence that bid resources have been qualified or filed for such
  - ii. Evidence of position in PJM interconnection queue
  - iii. Resource proven…..wind documented for such projects
  - iv. Evidence of feedstock contracts or ESCO agreements
  - v. Evidence of construction schedules and delivery dates
  - vi. Financial capacity to deliver
  - vii. Performance record.
  - viii. Were there contingency plans in place
- Realistic Contracts
  - i. At least 10 year terms, 15 for solar
  - ii. Evidence of security payments, performance bonds, or penalties

iii. Evidence of banking reserve capacity of at least 10%

(e) If the Commission determines that AN EDC OR EGS HAS FAILED TO MEET THE CRITERIA IDENTIFIED IN § 75.58(c), ~~force majeure exists for the true-up period,~~ an EDC or EGS requesting a force majeure determination shall have the OBLIGATION of making alternative compliance payments in lieu of compliance with § 75.51 for the just concluded reporting period, consistent with the standard identified in § 75.57. Any payments shall be accompanied by a statement filed with the Commission and verified by oath of affirmation, consistent with § 75.56 (relating to verification), DETAILING THE ACTIONS TAKEN BY THE EDC OR EGS TO MEET THE REQUIREMENTS ~~that the EDC or EGS has made a good faith effort to comply with the requirements~~ of this chapter, that they are unable to acquire a sufficient quantity of alternative energy credits to meet their obligations under § 75.51, and that an alternative compliance payment is the least cost method of compliance.

(f) Alternative compliance payments made by EDCs OR EGSs under subsection (e) shall NOT BE RECOVERED. ~~be deemed a cost of compliance with this chapter and may be recovered pursuant to § 75.59 (relating to alternative energy cost-recovery).~~ UNLESS AN EDC OR EGS HAS MET ALL THE CRITERIA LISTED IN § 75.58(c) AND CANNOT MEET THE REQUIREMENTS OF A GIVEN REPORTING PERIOD. ONLY THEN WILL ANY ALTERNATIVE COMPLIANCE PAYMENT MADE UNDER SUBSECTION (e) BE DEEMED A COST OF COMPLIANCE WITH THIS CHAPTER AND BE RECOVERED PURSUANT TO § 75.59 (RELATING TO ALTERNATIVE ENERGY COST-RECOVERY).

(h) AN EDC OR EGS THAT FAILS TO MEET THE REQUIREMENTS OF § 75.51 DURING A REPORTING PERIOD SHALL SUBMIT A PLAN FOR ACHIEVING COMPLIANCE FOR THE SUBSEQUENT THREE YEARS.

II § 75.57. (d) SOLAR SHARE FORCE MAJEURE

Issue:

As with the force majeure provisions for non-solar share Tier I and Tier II resources, EDCs and EGSs must show they have met a strict set of criteria to demonstrate their procurement efforts, including participation in SREC auctions

In order to assure that the solar share is developed as the legislation intended, PennFuture urges the Commission to remove any reference to reducing the solar share requirement during a given reporting period. Additionally, the Commission needs to clarify the "average market value" of a SREC in order to assure it is comparable with other PJM states. This is critical because solar project owners in New Jersey or other states may receive both an up-front capital rebate, as well as revenue from the sale of SREC's.

Proposed Language:

§ 75.57. General force majeure.

(d) If the Commission determines that a general force majeure exists for a reporting period, EDCs and EGSs shall have the option of making alternative compliance payments in lieu of compliance with § 75.51 for that reporting period.

(1) This payment shall equal $ 45 for each alternative energy credit needed to satisfy the Tier I and Tier II requirements of § 75.51.

(2) For the solar photovoltaic requirement, EDCs and EGSs THAT HAVE PROVEN THEY ARE UNABLE TO SECURE THE REQUIREMENT shall have the option of making an alternative compliance payment equal to THE AVERAGE MARKET VALUE, INCLUDING THE SREC VALUE AND THE LEVELIZED VALUE OF CAPITAL REBATES RECEIVED BY THE SOLAR PROJECT OWNERS, FOR SOLAR PHOTOVOLTAIC ALTERNATIVE ENERGY CREDITS AS RECORDED IN PJM DURING THE REPORTING PERIOD, ~~or the Commission may choose to reduce the required level of solar photovoltaic compliance for that reporting period.~~

(3) A payment shall be accompanied by a statement filed with the Commission and verified by oath of affirmation, consistent with § 1.36 (relating to verification), DETAILING THE ACTIONS TAKEN BY THE EDC OR EGS TO MEET ~~that the EDC or EGS has made a good faith effort to comply with the requirements of this chapter, that they are unable to acquire a sufficient quantity of alternative energy credits to meet~~ the requirements of this chapter, that they are unable to acquire a sufficient quantity of alternative energy credits to meet their obligations under § 75.51, and that an alternative compliance payment is the least cost method of compliance.

III § 75.56. ALTERNATIVE COMPLIANCE PAYMENTS

A) Solar Average Market:

The language in § 75.56(b)(1) describing the determination of the ACP for the solar share needs to be addressed. The language states that an "*...EDC and EGS shall make an alternative compliance payment equal to the number of additional alternative credits necessary for compliance times 200% the average market value for solar photovoltaic alternative energy credits....*". This language needs to be clarified to ensure that the "average value" used as a baseline includes both the actual SREC value as well as the levelized value of the state rebates. Otherwise it will prove impossible to make a comparison between adjacent markets within PJM like New Jersey and Pennsylvania.

The clarification of the "average market value" is critical because solar project owners in New Jersey or other states may receive both an up-front capital rebate, as well as revenue from the sale of SREC's. In Pennsylvania, solar project owners are not in most cases expected to receive an up-front capital rebate and, therefore, must finance their solar projects solely on the basis of the sale of SREC's from the project.

Proposed Language:

PennFuture recommends the following language as a means to assure the solar ACP is properly calculated:

§ 75.56. Alternative compliance payments.

(b) Each EDC and EGS shall be assessed an alternative compliance payment according to the following formula:

(1) For non-compliance with the solar photovoltaic requirements identified at § 75.51, an EDC and EGS shall make an alternative compliance payment equal to the number of additional alternative credits necessary for compliance times 200% the average market value, INCLUDING THE SREC VALUE AND THE LEVELIZED VALUE OF CAPITAL REBATES RECEIVED BY THE SOLAR PROJECT OWNERS, AS RECORDED IN PJM DURING THE REPORTING PERIOD.

B) Special Funds:

In § 75.56(e) of the draft rulemaking, the language states that the Alternative Compliance Payments (ACP) should be made available to Pennsylvania's sustainable energy funds. While we agree this is appropriate and commend the inclusion of the language requiring the funds to use the money for projects that increase Act 213 approved technologies, further specifications should be added to this section to assure ACP money is being used properly.

Currently the sustainable energy funds are focused on allocating loans to applicants to promote clean energy, not subsidies. In order to effectively grow the alternative energy market the Commission needs to clarify that the sustainable energy funds use the ACP money for subsidies.

Additionally, to make sure ACP funds are being used properly, each sustainable energy fund should be required to submit an annual report solely for the purpose of specifying Act 213 funding received, how much was allocated and to what projects. This is critical in making sure this money goes directly to subsidize the alternative energy market to increase supply and further reduce the need for EDCs and EGSs to rely on making ACP in lieu of compliance.

It is also important to clarify in the regulatory language that ACPs from Tier I compliance are only used for subsidizing Tier I projects, and likewise Tier II ACPs for Tier II projects, and solar ACPs for solar projects. To avoid any conflict later in time, it is critical that this be written into the rulemaking to assure that the different resources are developed as the Act intended.

Proposed Language:

§ 75.56. Alternative compliance payments.

(f) Alternative compliance payments made available to the sustainable energy funds shall be utilized solely TO PROVIDE SUBSIDY for projects that increase the amount of electric energy generated from alternative energy resources for purposes of compliance with § 75.51. ALTERNATIVE COMPLIANCE PAYMENTS FROM TIER I RESOURCES SHALL BE USED SOLELY TO SUBSIDIZE TIER I PROJECTS, ALTERNATIVE COMPLIANCE PAYMENTS FROM TIER II RESOURCES SHALL BE USED SOLELY TO SUBSIDIZE TIER II PROJECTS, AND ALTERNATIVE COMPLIANCE PAYMENTS FROM THE SOLAR SHARE SHALL BE USED SOLELY TO SUBSIDIZE SOLAR PROJECTS. IN ACCORDANCE WITH THIS SECTION THE SUSTAINABLE ENERGY FUNDS ARE TO PROVIDE AN ANNUAL REPORT DETAILING THE USE OF ALTERNATIVE COMPLIANCE PAYMENTS.

IV § 75.59. ALTERNATIVE ENERGY COST-RECOVERY.

Alternative Compliance Payments:

The Commission should not allow for cost recovery for Alternative Compliance Payments (ACP) if the EDC or EGS has not met the specific set of criteria proposed for sections § 75.57 and § 75.58.

By allowing for cost-recovery of an ACP the Commission is taking away the penalty driver of the Act, removing a major incentive for the EDC or EGS to comply. This could create a scenario where EDCs and EGSs will wait until the last minute to attempt compliance with the Act and take limited initiative in issuing RFPs. There will be no motivation for EDCs or EGSs to actively seek alternative energy bids or take the necessary steps if they know they can simply pay $45.00 and then recover their costs, since it will be easier than taking the proper steps to comply. For these reasons, it is critical to the success of Act 213 that cost-recover not be permitted for Alternative

Compliance Payments unless and EDC or EGS can prove they have taken all the necessary steps to procure the required resources.

Proposed Language:

In order to implement the necessary penalty drivers to assure EDCs and EGSs seek to actively comply with Act 213, it is essential that the Commission revise § 75.59(a)(8) to read:

(8) The costs of alternative compliance payments ~~made under §§ 75.57 and 75.58 (relating to general force majeure; and special force majeure).~~IF AN EDC OF EGS MEETS THE CRITERIA LISTED IN §§ 75.57 AND 75.58 (RELATING TO GENERAL FORCE MAJEURE; AND SPECIAL FORCE MAJEURE).

V § 75.51. EDC AND EGS OBLIGATIONS

The current language in subsection § 75.51 (b)(1) – (15) describes the solar share as a percentage of the Act 213 Tier I requirement. Instead the solar photovoltaic requirement should be defined as a percentage of an electric distribution company's (EDC) or electric generation supplier's (EGS) overall retail sales.

Based on the solar share language in Act 213, Pennsylvania has one of the largest renewable portfolio standard solar shares in the nation, requiring 858 megawatts by 2021. However, as currently written in subsection § 75.51 (b)(1) – (15), the language reduces the solar share dramatically. The language in the draft rulemaking defines the solar photovoltaic requirement as a percentage of the Tier I obligation, as opposed to a percentage of total retail sales. This in turn reduces the solar share requirement from 858 megawatts down to a meager 69 megawatts.

PennFuture requests the Commission clarify subsection § 75.51 (b)(1) – (15), to keep the intent of Act 213 that the solar photovoltaic requirement is a percent of the total utility retail sales and not as currently stated in this commission order as a percent of Tier 1.

Proposed Language:

In order to amend the current language, this section should be modified as follows:

§ 75.51. EDC and EGS obligations.

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(b) For each reporting period, EDCs and EGSs shall acquire alternative energy credits in quantities equal to a percentage of their total retail sales of electricity to all retail electric customers for that reporting period, as measured in MWh. The required quantities of alternative energy credits for each reporting period is identified in the following schedule:

(1) For June 1, 2006, through May 31, 2007: The Tier I requirement is 1.5% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .0013% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 4.2% of all retail sales.

(2) For June 1, 2007, through May 31, 2008: The Tier I requirement is 1.5% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .0013% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 4.2% of all retail sales.

(3) For June 1, 2008, through May 31, 2009: The Tier I requirement is 2% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .0013% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 4.2% of all retail sales.

(4) For June 1, 2009, through May 31, 2010: The Tier I requirement is 2.5% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .0013% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 4.2% of all retail sales.

(5) For June 1, 2010, through May 31, 2011: The Tier I requirement is 3% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .0203% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 6.2% of all retail sales.

(6) For June 1, 2011, through May 31, 2012: The Tier I requirement is 3.5% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .0203% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 6.2% of all retail sales.

(7) For June 1, 2012, through May 31, 2013: The Tier I requirement is 4% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .0203% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 6.2% of all retail sales.

(8) For June 1, 2013, through May 31, 2014: The Tier I requirement is 4.5% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF**

.0203% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 6.2% of all retail sales.

(9) For June 1, 2014, through May 31, 2015: The Tier I requirement is 5% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .0203% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 6.2% of all retail sales.

(10) For June 1, 2015, through May 31, 2016: The Tier I requirement is 5.5% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .25% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 8.2% of all retail sales.

(11) For June 1, 2016, through May 31, 2017: The Tier I requirement is 6% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .25% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 8.2% of all retail sales.

(12) For June 1, 2017, through May 31, 2018: The Tier I requirement is 6.5% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .25% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 8.2% of all retail sales.

(13) For June 1, 2018, through May 31, 2019: The Tier I requirement is 7% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .25% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 8.2% of all retail sales.

(14) For June 1, 2019, through May 31, 2020: The Tier I requirement is 7.5% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .25% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 8.2% of all retail sales.

(15) For June 1, 2020, through May 31, 2021, and each successive twelve month period thereafter: The Tier I requirement is 8% of all retail sales, **WHICH SHALL INCLUDE** the solar photovoltaic requirement [~~is~~] **OF** .5% of [~~Tier I~~] **ALL RETAIL** sales, and the Tier II requirement is 10% of all retail sales.

VI) LONG-TERM CONTRACTS:

Issue:

We commend the Commission for stating in the discussion section of the draft rulemaking that "prevailing market prices" do not exclude long-term contracts. As PennFuture and representatives of the solar and wind industries have commented, long-term contracts are essential to the growth of the alternative energy market and for complying with Act 213. However, in order to assure the EDCs and EGSs that they are able to receive cost-recovery for long-term contracts, the Commission needs to clarify this in § 75.59(c).

Discussion:

Prevailing market conditions require long-term contracts to initiate development of alternative energy resources. Without this assurance, investors are not willing to put the upfront capital into a project.

Alternative energy sources need minimum contract lengths of at least 10 to 15 years, as they are still developing in the marketplace. Investors will not be willing to finance a project, unless there are credit worthy institutions committed to purchasing the power and Alternative Energy Credits produced.

Within the regulatory language for cost-recovery, it is essential the Commission include specific language that states cost-recovery is allowed for long-term contracts entered into in order to comply with the requirements of Act 213. EDCs and EGSs will not enter into contracts if they are unsure they will be able to receive cost-recovery. If they do not enter into long-term contracts the needed alternative energy resources will not be built, and it will become impossible to comply with Act 213.

Neighboring states are specifically requiring long-term contracts. For example, The New York State Energy Research and Development Authority's (NYSERDA) *Renewable Portfolio Standard Program Purchase of Renewable Energy Attributes Request for Proposals (RFP No. 1037)* states that all bidders offering RPS attributes from non-fuel based facilities must bid a fixed contract duration of 10 contract years.

Proposed Language:

In order to clarify this in the regulatory language we recommend § 75.59(c) be amended as follows:

> <u>§ 75.59(c) A competitive procurement process for alternative energy and alternative energy credits must comply with the standards for competitive procurement processes identified in the default service provisions in Chapter 54</u> **<u>INCLUDING PROCURING RESOURCES UTILIZING LONG-TERM CONTRACTS FOR A DURATION OF UP TO TEN (10) YEARS IN LENGTH, AND FIFTEEN (15) YEARS IN LENGTH FOR SOLAR.</u>**

VII VOLUNTARY MARKET:

Issue:

PennFuture gathers through the discussion section of the draft rulemaking that the Commission understands the importance of the voluntary market and wants to preserve and protect it within Act 213. The language of the proposed rule, however, does not reflect this intent. The language is currently not as clear as it should be and may leave the door open for misinterpretation down the road, where voluntary purchases of alternative energy could be used to comply with the Act, which is not the intention of the original legislation.

Discussion:

When drafting Act 213, its creators were aware of the importance of the voluntary renewable energy market. It is that market which helped to create the momentum behind the passage of the Act and brought the very first wind farms to Pennsylvania. The voluntary market continues to be an important signal of public support for clean energy in the private sector. The Act was intended to jumpstart the market, not establish a ceiling. Into the future, these are the market purchases that will allow real customer choice and provide the opportunity for more renewable energy than is required by law.

Let's be clear, nobody will make clean energy purchases in the voluntary market if a utility can use those purchases made by others to satisfy its Act 213 requirement. We have already seen signs of such potential interpretations. Without absolute clarity, we have concern that abuses will occur.

PennFuture is 100 percent powered by wind and solar power through our voluntary market purchases and solar generation on site. We and every other voluntary market buyer will stop buying clean energy if our purchases made with our money satisfy the Act 213 mandates of utilities. The key word in the phrase "voluntary market" is voluntary. Counting these purchases toward Act 213 compliance requirements will destroy 100 percent of the voluntary market by making the volunteers leave the market.

In order to assure voluntary purchasers do not vacate the marketplace, the Commission needs to clearly state that whoever buys and then owns the credit gets to determine how it will be used. If that is a retail consumer who has paid more for a clean energy product, they own the credit and it may not be used by others for compliance. The best fix to this uncertainty is to specifically state in the language that any alternative energy credit sold at retail shall not be sold, retired, claimed or represented for compliance under the Act. Voluntary purchases above the requirements set forth will further help to improve our electric supply, improve our air quality and increase economic development.

Proposed Language:

In order to assure that the voluntary market is protected the followings sections of the draft rulemaking need to be amended:

§ 75.54 Alternative energy credit certification.

(c) An alternative energy credit may not be certified for a MWh of electricity generation or electricity conservation that has already been used **TO SATISFY VOLUNTARY ALTERNATIVE ENERGY PURCHASES, OR** another state's renewable energy portfolio standard, alternative energy portfolio standard, or other comparable standard.

§ 75.55. Alternative energy credit program administrator.

(d) (2) The program administrator may not certify alternative energy credit for a MWh of electricity generation or electricity conservation that has already been used **TO SATISFY VOLUNTARY ALTERNATIVE ENERGY PURCHASES, OR** another state's renewable energy portfolio standard, alternative energy portfolio standard, or other comparable standard.

§ 75.60. Alternative energy market integrity.

(a) **ALL** sales ~~of electricity~~ by EDCs and EGSs to retail electric customers **OF ALTERNATIVE ENERGY CREDITS OR ELECTRICITY** marketed as deriving from alternative energy sources ~~that exceed the requirements of § 75.51 (relating to EDC and EGS obligations) at the time of the sale~~ shall be supported by alternative energy credits separate from and in addition to alternative energy credits counted for compliance with § 75.51.

VIII § 75.61. BANKING OF ALTERNATIVE ENERGY CREDITS:

Issue:

While the Commission has not excluded participation by entities other than generators and those with Act 213 obligation, it has not explicitly extended to other entities comparable authority with respect to banking credits to be used for compliance with Act 213. PennFuture strongly suggest that the banking provisions be extended to include all market participants.

We also recommend that the Commission allow longer banking terms for solar renewable energy credits (SRECs) for compliance with the solar share.

Discussion:

One component of a successful market for renewable energy is a robust and efficient market for alternative energy credits ("credits"). Such a market, like the market in any commodity, must be flexible and deep, and it requires multiple participants, including generators, EGSs, EDCs, wholesale traders (who may also trade energy, but who may trade only credits or other non-energy commodities), aggregators, and other market participants. The various market participants will maintain an account with the PJM GATS, the credit registry. For the sake of efficiency and cost-effectiveness for consumers, the market for credits must be more than a market between the owner of a generation facility and an electric generation supplier with an obligation under Act 213.

We support the credit banking terms currently in the draft rulemaking that have been extended to generators and to EGSs and EDCs, but strongly suggests that those terms be extended to all market participants. This can be accomplished by establishing a vintage standard for all qualifying credits, like that the Commission has included in its order (i.e. credits are valid for compliance purposes during the year in which they were created or in either of the following two compliance years).

Another area in which the banking provisions can be improved is in regards to the solar share. The ramp-up period for compliance with the solar share jumps from 0.465 megawatts of installed solar power in year four to 19.46 megawatts of installed solar in year five. This increase is significant enough that EDCs and EGSs may find it hard to meet the requirements set forth in year five. To help avoid a force majeure situation and to grow the solar market, PennFuture asks the Commission to extend the banning period for SRECs from 2 years to 5 years.

Proposed Language:

In order to expand the banking provisions to include all market participants, and to extend the time in which SRECs can be banked, we recommend the following change in §75.61. Banking of alternative energy credits:

§ 75.61. Banking of alternative energy credits.

(a) Alternative energy credits are valid for compliance during the year in which they are created or in either of the two (2) following compliance periods. Solar alternative energy credits are valid for compliance during the year in which they are created or in the five (5) following compliance periods.

(b) An EDC and EGS or a generator, broker, aggregators, or other market participant with an account with the credit registry may bank alternative energy credits certified in one reporting period for use in either or both of the two (2) immediately following reporting periods, and may bank solar alternative energy credits certified in one reporting period for use in any of the five (5) immediately following reporting periods.