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December 13, 2006

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

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

Dear Secretary McNulty:

Enclosed for filing with the Commission are the original and fifteen copies of the *Comments of The Reinvestment Fund and its Sustainable Development Fund to the Commission's Proposed Chapter 75 Subchapter D Rules on the Alternative Energy Portfolio Requirement.*

Sincerely,

A handwritten signature in black ink that reads "Roger E. Clark". The signature is written in a cursive, slightly slanted style.

Roger E. Clark, Esq.

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Enclosure:

*Comments of The Reinvestment Fund and its Sustainable Development Fund to the Commission's Proposed Chapter 75 Subchapter D Rules on the Alternative Energy Portfolio Requirement.*

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**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

**Implementation of the Alternative Energy  
Portfolio Standards Act of 2004**

Docket No. L-00060180

**COMMENTS OF THE REINVESTMENT FUND  
AND ITS SUSTAINABLE DEVELOPMENT FUND  
TO THE COMMISSION'S PROPOSED CHAPTER 75 SUBCHAPTER D RULES  
ON THE ALTERNATIVE ENERGY PORTFOLIO REQUIREMENT**

**INTRODUCTION**

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On July 20, 2006, the Commission approved a Proposed Rulemaking Order in the above-cited docket that contained proposed rules for the implementation of the Alternative Energy Portfolio Standards Act of 2004. This Order, entered on July 25, 2006, was published in the *Pennsylvania Bulletin* on October 14, 2006 (36 Pa.B. 6289). Public comments on the Proposed Rulemaking Order are due December 13, 2006.

These comments are filed by The Reinvestment Fund and its Sustainable Development Fund (SDF), which has been actively supporting the development of wind, solar, biomass, fuel cells, energy conservation and other clean energy resources in Pennsylvania since it began official business in December 1999. The vast majority of wind and solar development in Pennsylvania has been supported by SDF and we believe we have gained some useful experience and expertise in deploying clean energy resources.<sup>1</sup>

We recognize the massive effort that the Commission has undertaken to date to implement Act 213 and we congratulate the Commission for building a good foundation with these proposed

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<sup>1</sup> We also admit that we have a direct organizational interest in this matter as SDF could be a recipient of alternative compliance payments under §75.56(e):

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rules and its earlier rulemaking. Our suggested changes to the proposed rules are relatively modest.

However, building the clean energy resources required by Act 213 will be anything but modest. SDF has estimated how many megawatt-hours (MWHs) and megawatts (MWs) will be needed to satisfy the Act and the figures are shown on the table below:<sup>2</sup>

	Tier I		Solar Share		Tier II		Total	
	MWHs	MWs	MWHs	MWs	MWHs	MWs	MWHs	MWs
RY 2007	21,814	8	19	0.02	61,133	9	82,966	17
RY 2008	87,658	33	76	0.07	245,654	35	333,388	68
RY 2009	244,770	93	159	0.15	514,351	73	759,281	167
RY 2010	948,345	361	493	0.47	1,594,049	227	2,542,888	589
RY 2011	3,028,127	1,152	20,630	19.5	6,300,765	899	9,349,522	2,071
RY 2012	5,526,705	2,103	32,242	30.4	9,847,278	1,405	15,406,225	3,539
RY 2013	6,416,511	2,442	32,730	30.9	9,996,323	1,426	16,445,564	3,899
RY 2014	7,332,076	2,790	33,226	31.3	10,147,749	1,448	17,513,051	4,269
RY 2015	8,274,009	3,148	33,729	31.8	10,301,595	1,470	18,609,334	4,650
RY 2016	8,855,482	3,370	421,690	397.8	13,831,419	1,974	23,108,590	5,741
RY 2017	9,846,143	3,747	428,093	403.9	14,041,456	2,004	24,315,692	6,154
RY 2018	10,864,982	4,134	434,599	410.0	14,254,856	2,034	25,554,437	6,578
RY 2019	11,912,660	4,533	441,210	416.2	14,471,675	2,065	26,825,545	7,014
RY 2020	12,989,853	4,943	447,926	422.6	14,691,972	2,096	28,129,751	7,462
RY 2021	13,642,502	5,191	909,500	858.0	18,190,003	2,596	32,742,006	8,645

<sup>2</sup> SDF has shared its AEPS spreadsheet with a number of stakeholders and the consensus is that it is a reasonable estimate of the MWHs and MWs required by Act 213. The key assumptions of the spreadsheet are the total sales of electricity throughout the 15 year period (we used the growth rates reported in *Electric Power Outlook for Pennsylvania 2005 - 2010* and extended those same growth rates throughout the entire period), the capacity factor of Tier I projects (we used 30%), the capacity factor of the solar projects (we used an output of 1,060 kWh per year per kW<sub>DC</sub>) and the capacity factor for the Tier II projects (we used 80%). It is easy to change these assumptions in the spreadsheet if anyone wants to use different values. Anyone wishing an electronic copy of the Excel spreadsheet should email [roger.clark@trfund.com](mailto:roger.clark@trfund.com) to request a copy.

It should be obvious to all of us that we face a great challenge. We hope it is equally obvious that the value of meeting this challenge – in terms of downward price pressure on fossil fuels, expanded clean energy jobs and local community development, increased energy security, improvements to our environment and to our health, etc. – is well worth the time, talent and treasure that will be required to succeed.

### **SUMMARY OF COMMENTS**

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The most important comments we offer address the issue of force majeure (see pages 11-17 below). If we are to achieve the goals of Act 213, we will need the electric distribution companies (EDCs) and the electric generation suppliers (EGSs) to affirmatively and vigorously work to help bring these clean energy resources on line. Unfortunately we believe the Commission's first pass at the force majeure provisions found in §§ 75.57 and 75.58 sets the bar far too low. These draft provisions have the potential to undermine Act 213's implementation and cast a shadow over clean energy development in Pennsylvania and the region. We suggest ways to better define the affirmative duty of EDCs and EGSs to support the development of alternative energy by listing a series of issues that EDCs and EGSs must address in any request to invoke the force majeure provisions.

Beyond the force majeure issues, we address an additional twelve topics that we consider to be important fixes to the Proposed Rule. Our comments are organized by the order of the provisions in the Proposed Rule.

#### **§ 75.51. EDC and EGS obligations.**

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In calculating the solar photovoltaic share, the proposed rule takes the solar percentages contained in Act 213 and multiplies them by the Tier I requirements. Instead, as Commission staff and many others now recognize, the solar share percentages should be multiplied by the amount of all retail sales, not the amount of Tier I. We recommend stating the Tier I requirement

net of the solar share percentage.<sup>3</sup> The amended language suggested below simplifies the math and shows separate percentages for Tier I and the solar share. We also recommend adding a reference to the appropriate Reporting Year for each annual period.

**TRF Recommended Language for § 75.51(b):<sup>4</sup>**

(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: Solar credits may be used to satisfy Tier I requirements.

(1) For June 1, 2006, through May 31, 2007 (Reporting Year 1): The Tier I requirement is 1.4987 ~~1.5~~ % of all retail sales, the solar photovoltaic requirement is .0013% of all retail Tier-I sales, and the Tier II requirement is 4.2% of all retail sales.

(2) For June 1, 2007, through May 31, 2008 (Reporting Year 2): The Tier I requirement is 1.4987 ~~1.5~~ % of all retail sales, the solar photovoltaic requirement is .0013% of all retail Tier-I sales, and the Tier II requirement is 4.2% of all retail sales.

(3) For June 1, 2008, through May 31, 2009 (Reporting Year 3): The Tier I requirement is 1.9987 ~~2~~ % of all retail sales, the solar photovoltaic requirement is .0013% of all retail Tier-I sales, and the Tier II requirement is 4.2% of all retail sales.

(4) For June 1, 2009, through May 31, 2010 (Reporting Year 4): The Tier I requirement is 2.4987 ~~2.5~~ % of all retail sales, the solar photovoltaic requirement is .0013% of all retail Tier-I sales, and the Tier II requirement is 4.2% of all retail sales.

(5) For June 1, 2010, through May 31, 2011 (Reporting Year 5): The Tier I requirement is 2.9797 ~~3~~ % of all retail sales, the solar photovoltaic requirement is .0203% of all retail Tier-I sales, and the Tier II requirement is 6.2% of all retail sales.

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<sup>3</sup> Technically solar energy credits in excess of the solar share could be applied to the Tier I obligation, but it is unlikely an EDC or EGS would do this. The solar credits, because of their higher value, would be banked for the coming years.

<sup>4</sup> In all of these edited sections of the Proposed Rule, we follow the standard practice of indicating our proposed additions with an underline and our proposed deletions with a strikethrough.

- (6) For June 1, 2011, through May 31, 2012 (Reporting Year 6): The Tier I requirement is 3.4797 3.5 % of all retail sales, the solar photovoltaic requirement is .0203% of all retail Tier-I sales, and the Tier II requirement is 6.2% of all retail sales.
- (7) For June 1, 2012, through May 31, 2013 (Reporting Year 7): The Tier I requirement is 3.9797 4 % of all retail sales, the solar photovoltaic requirement is .0203% of all retail Tier-I sales, and the Tier II requirement is 6.2% of all retail sales.
- (8) For June 1, 2013, through May 31, 2014 (Reporting Year 8): The Tier I requirement is 4.4797 4.5 % of all retail sales, the solar photovoltaic requirement is .0203% of all retail Tier-I sales, and the Tier II requirement is 6.2% of all retail sales.
- (9) For June 1, 2014, through May 31, 2015 (Reporting Year 9): The Tier I requirement is 4.9797 5 % of all retail sales, the solar photovoltaic requirement is .0203% of all retail Tier-I sales, and the Tier II requirement is 6.2% of all retail sales.
- (10) For June 1, 2015, through May 31, 2016 (Reporting Year 10): The Tier I requirement is 5.25 5.5 % of all retail sales, the solar photovoltaic requirement is .25% of all retail Tier-I sales, and the Tier II requirement is 8.2% of all retail sales.
- (11) For June 1, 2016, through May 31, 2017 (Reporting Year 11): The Tier I requirement is 5.75 6 % of all retail sales, the solar photovoltaic requirement is .25% of all retail Tier-I sales, and the Tier II requirement is 8.2% of all retail sales.
- (12) For June 1, 2017, through May 31, 2018 (Reporting Year 12): The Tier I requirement is 6.25 6.5 % of all retail sales, the solar photovoltaic requirement is .25% of all retail Tier-I sales, and the Tier II requirement is 8.2% of all retail sales.
- (13) For June 1, 2018, through May 31, 2019 (Reporting Year 13): The Tier I requirement is 6.75 7 % of all retail sales, the solar photovoltaic requirement is .25% of all retail Tier-I sales, and the Tier II requirement is 8.2% of all retail sales.
- (14) For June 1, 2019, through May 31, 2020 (Reporting Year 14): The Tier I requirement is 7.25 7.5 % of all retail sales, the solar photovoltaic requirement is .25% of all retail Tier-I sales, and the Tier II requirement is 8.2% of all retail sales.
- (15) For June 1, 2020, through May 31, 2021 (Reporting Year 15), and each successive twelve month period thereafter: The Tier I requirement is 7.5 8 % of all retail sales, the solar photovoltaic requirement is .5% of all retail Tier-I sales, and the Tier II requirement is 10% of all retail sales.

**§ 75.52. Fuel and technology standards for alternative energy sources.**

There are three comments SDF has about the proposed fuel and technology standards for alternative energy sources that are contained in §75.52.

First, we propose that the standard for fuel cells should explicitly state that the source of the hydrogen-rich fuel is immaterial. Some states require that fuel cells be powered by fuel derived from renewable resources, but Act 213 does not make that requirement and this should be explicit in the rule.

**TRF Recommended Language for § 75.52(a)(9):**

(9) Fuel cells – Electricity produced from an electrochemical device that converts chemical energy in a hydrogen-rich fuel directly into electricity, heat and water without combustion. All fuel sources are permitted for fuel cells.

Second, we agree with the Commission's comment that the standard for distributed generation systems should not be limited to Tier II fuels and we believe that should be made explicit in the rule. We also believe that there should be a minimum efficiency performance level required for eligible combined heat and power (CHP) units to prevent gaming. An overall efficiency of 70% or more is feasible and a good floor for the performance requirement.

**TRF Recommended Language for § 75.52(b)(4):**

(4) Distributed generation system – Small-scale power generation of electricity and useful thermal energy, regardless of fuel type, provided the unit has an overall efficiency of at least 70% when considering both the electricity generation and the useful thermal production on an annual basis.

Third, we believe there is an error in Act 213 with respect to what the Act calls "integrated combined coal gasification." What the Act clearly intended to refer to is "integrated gasification combined cycle" technology. Support for this can be found in the Department of Environmental

Protection's technical guidance on Section 2 technologies.<sup>5</sup> IGCC is discussed in the website for the U.S. Department of Energy clean coal program<sup>6</sup> IGCC is the new generation of clean coal plants that Pennsylvania, the U.S. Department of Energy and others are supporting and beginning to build and that Act 213 sought to support.

**TRF Recommended Language for § 75.52(b)(5):**

(5) Integrated ~~combined-coal~~ gasification combined cycle technology – IGCC ~~IGCC~~ - Electricity generated from combined cycle format with a gas turbine driven by the combusted syngas, while exhaust gases are heat exchanged with water/steam to generate superheated steam to drive a steam turbine. Alternative energy credits shall only be certified for electricity produced by IGCC ~~IGCC~~ technology. The use of IGCC ~~IGCC~~ to create feedstocks for manufacturing or liquid fuels not used to generate electricity may not be eligible for the certification of alternative energy credits.

**§ 75.54. Alternative energy credit certification.**

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We see two elements in this section of the proposed rule that we recommend be modified.

First, Pennsylvania has become renowned for its development of a voluntary market for clean energy. State and local governments, universities, businesses and citizens are purchasing alternative energy in significant numbers. It is critical that Act 213 not undermine this voluntary market. The proposed rule prevents double counting of a credit which is used for another state's RPS and it should do the same for a credit which was purchased in the voluntary market.<sup>7</sup>

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<sup>5</sup> This DEP document is available at [www.depweb.state.pa.us/energy/lib/energy/docs/section2technicalguidancefinal.pdf](http://www.depweb.state.pa.us/energy/lib/energy/docs/section2technicalguidancefinal.pdf).

<sup>6</sup> See [www.fossil.energy.gov/programs/powersystems/cleancoal/index.html](http://www.fossil.energy.gov/programs/powersystems/cleancoal/index.html).

<sup>7</sup> The voluntary market issue also appears in §75.55(d)(2) below.

**TRF Recommended Language for § 75.54(c):**

(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 a voluntary purchase of alternative energy or another state's renewable energy portfolio standard, alternative energy portfolio standard, or other comparable standard.

The second issue is the requirement of metered data for all alternative energy systems, regardless of size. We support the general premise that all output ought to be measured, but the issue is whether the higher cost of the metering equipment is justified for small systems. We propose that for a five year period (through the end of Reporting Year 2011), small systems of 10 kW or less may use conservative engineering estimates of output rather than a meter for purposes of earning and quantifying alternative energy credits. This estimating methodology would have to be reviewed and approved by the Commission. A new generation of inverters with sophisticated metering features is coming into the market now, so we think this estimate process will be needed only for five years, after which time the output of all new systems must be metered.

**TRF Recommended Language for § 75.54(f):**

(f) Alternative energy credit certification shall be verified by metered data pursuant to standards approved by the Commission. Through the end of Reporting Year 2011, alternative energy installations of 10 kW or less may use conservative engineering estimates of production rather than metered data, provided the estimating methodologies have been accepted by the Commission.

**§ 75.55. Alternative energy credit program administrator.**

The issue of the voluntary market appears again in §75.55(d)(2) in an almost identical repeat of the language in §75.54(c). In addition to certifying that an alternative energy credit has not already been used to satisfy another state's RPS, we again suggest the administrator should ensure the credit has not already been used in a voluntary sale.

**TRF Recommended Language for § 75.55(d)(2):**

(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 a voluntary purchase of alternative energy or another state's renewable energy portfolio standard, alternative energy portfolio standard, or other comparable standard.

**§ 75.56. Alternative compliance payments.**

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We have three recommendations for the alternative compliance payment section.

First, Act 213 sets the value of the alternative compliance payment for solar credits at "200% of the average market value of solar renewable energy credits sold during the reporting period within the service region of the regional transmission organization." Within PJM, the most active market for solar credits is found in New Jersey, where solar credits have been recently trading for about \$200 in the New Jersey Clean Energy Program Solar REC trading market.<sup>8</sup> This figure is deceptive as New Jersey has a robust solar grant program that subsidizes over 50% of the cost of New Jersey solar installations. Pennsylvania currently has no comparable grant program.<sup>9</sup> It is therefore necessary to adjust the average market value of the solar credit to reflect a levelized value of the incentives available in New Jersey or elsewhere. Otherwise the solar credit market value will misrepresent the Pennsylvania solar credit value.

**TRF Recommended Language for § 75.56(b)(1):**

(1) For non-compliance with the solar photovoltaic requirements identified at § 75.31, an EDC and EGS shall make an alternative compliance payment equal to the number of additional alternative credits necessary for compliance times 200% the

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<sup>8</sup> See [www.njcep.com/srec/trading-statistics.html](http://www.njcep.com/srec/trading-statistics.html) for the trading statistics.

<sup>9</sup> Solar support in Pennsylvania has come from the Sustainable Development Fund's Solar PV Grant Program (which is not currently accepting new applications as all available funds have been committed) and from the PA Department of Environmental Resources' Energy Harvest Program and the Pennsylvania Energy Development Authority. These initiatives have provided a small fraction of the support of the New Jersey Clean Energy Program.

average market value for solar photovoltaic alternative energy credits sold during the reporting period in the RTO control area where the non-compliance occurred. The average market value for solar photovoltaic alternative energy credits in states with solar incentives or rebates shall include the levelized value of those incentives for the purpose of calculating average market value in this section.

Second, it is critical that the Commission and all interested ratepayers have confidence that the Pennsylvania Sustainable Energy Board (PASEB) and the regional sustainable energy funds are using any alternative compliance payments in an effective manner. We recommend that §75.56(e) of the proposed rule be strengthened to explicitly require both public notice and input of proposed alternative compliance payments spending and public reporting on the use of the alternative compliance payments by the regional sustainable energy funds.

**TRF Recommended Language for § 75.56(e):**

(e) Alternative compliance payments shall be made available to the sustainable energy funds established through the Commission's orders entered pursuant to 66 Pa.C.S. §2806(f) (relating to Commission review of restructuring filings), under procedures and standards proposed by the Pennsylvania Sustainable Energy Board and approved by the Commission. These procedures and standards shall include provisions for public notice and written input on proposed alternative compliance payment spending and public reporting on the uses of the alternative compliance payments by the sustainable energy funds.

Third, § 75.56(f) of the proposed rule requires that the sustainable energy funds use any alternative compliance payments "solely for projects that increase the amount of electric energy generated from alternative energy resources for purposes of compliance with § 75.31." What we recommend should be made more explicit is that alternative compliance payments that are paid because of a failure to meet the solar share requirements should only be used to support new solar installations. Similarly, monies paid to PASEB because of a failure to meet the Tier I requirements should only be used to support Tier I projects and the same for Tier II. Also, the

rule should make clear that the alternative compliance payments should be deployed as grants unless PASEB determines that an alternative program design is likely to result in greater alternative energy in the future than grants.<sup>10</sup>

**TRF Recommended Language for § 75.56(f):**

(f) Alternative compliance payments made available to the sustainable energy funds shall be utilized solely for projects that increase the amount of electric energy generated from alternative energy resources for purposes of compliance with § 75.31. Payments received because of a failure to satisfy Tier I requirements shall be used for Tier I eligible projects. Payments received because of a failure to satisfy the solar share requirements shall be used for solar eligible projects. Payments received because of a failure to satisfy Tier II requirements shall be used for Tier II eligible projects. The sustainable energy funds are to deploy the alternative compliance payments as grants unless they can satisfy the Pennsylvania Sustainable Energy Board that an alternative program design will be more effective in supporting the appropriate resources.

**§ 75.57 and 75.58. Force majeure.**

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As noted at the beginning of these comments, we believe the force majeure provision will determine in large part whether Act 213 leads to significant new alternative energy generation or simply to repeated findings that there are just not enough alternative energy credits to meet the requirements of Act 213. We believe the Commission needs to send a strong signal to the EDCs and the EGSs that they are expected to be partners with the developers and prospective owners of alternative energy projects and the most effective way to do send this signal is to narrow the provisions for force majeure. As these sections appear in the proposed rule, an EDC or EGS could decide to procure their Tier I, solar and Tier II credits through a series of annual auctions for one-year credit purchases. Even though these one-year auctions would not provide the financial security to allow new projects to obtain financing, there is nothing in the proposed rule

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<sup>10</sup> For example, one program design that could be effective is some sort of insurance floor on the value of alternative energy credits.

that would preclude this, so long as the EDC or EGS files a verified statement that they made a "good faith effort to comply" but were "unable to acquire a sufficient quantity of alternative energy credits to meet their obligations..." §75.57(e) and §75.58(e). There will continue to be an inadequate supply of credits if this or similarly limited approaches to compliance are permitted to occur. It is not hyperbole to state that these overly permissive force majeure provisions in the proposed rule threaten to undermine and undo all of the other progress the Commission and Act 213 have made.

We oppose the §75.57 provision for a general force majeure and recommend it be deleted in its entirety. The obligation should be on the EDC or EGS to show why force majeure is appropriate in their specific situation. The general force majeure provision is counter-productive. The specific force majeure process is the only way to ensure the Commission can fully address the issues and merits of each individual force majeure petition.

We oppose force majeure on the sole basis that the credit cost is even so little as one penny above the \$45 value in Act 213 for Tier I and Tier II credits. Certainly extremely expensive credits could be one element of a force majeure finding, but it cannot on its own support force majeure. There is not support for this in Act 213.

We believe the specific force majeure provision - §75.58 – should be amended to address more fully the issues that the EDC or EGS must address in its petition. The EDC or EGS should be required to inform the Commission and other interested parties what specific actions it has taken with respect to such things as:

- What effort was made by the EDC or EGS to procure resources?
- How did the EDC or EGS conduct a solicitation for credits?
- Was the solicitation sufficiently in advance of the obligation?
- Were there multiple solicitations at different times?
- Did the solicitation request bids for a mix of contract terms (i.e. short, medium and long)? Was the solicitation hampered by overly restrictive provisions?
- Was the bidding process open and effective?

- Would a successful bidder be able to obtain project financing based on the EDC's or EGS's contract for credits?
- Did the EDC or EGS proceed diligently to execute contracts with the winning bidders?
- Did the EDC or EGS have a back-up plan to secure credits in the event the solicitation was inadequate?
- How did the EDC or EGS amend its solicitation following an unsuccessful solicitation?
- Did the EDC or EGS take any actions to foster development beyond the solicitation for credits?
- How does the EDC or EGS intend to catch up on the missing credits?

**We believe that if one Pennsylvania EDC or EGS is able to satisfy its credit obligations, the Commission should not allow other EDCs or EGSs to assert force majeure. The Commission needs to reward performance rather than facilitate noncompliance.**

**We believe that force majeure should be granted on an extremely limited basis. We cannot imagine a situation where an EDC or EGS would be excused from the majority of its obligation or excused for more than a very short time.**

**We think all interested persons should be permitted to respond to a petition from an EDC or EGS for force majeure. These interested persons need both public notice and an opportunity to be heard.**

**We support the recovery of the cost of alternative compliance payments in rates only to the extent that the Commission has granted a force majeure petition. We believe that if an EDC or EGS falls short of credits and the Commission does not find sufficient grounds for force majeure for all of the shortfall, the EDC should be prevented from recovering its alternative compliance payments for that shortfall from its ratepayers.**

**TRF Recommended Language for § 75.57 and 75.58:**

~~§ 75.57. General force majeure:~~

~~(a) At least 30 days prior to the beginning of a 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.~~

~~(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.~~

~~(c) The Commission may find that force majeure exists for the non-solar photovoltaic requirement of § 75.51 if the average price for a non-solar photovoltaic alternative energy credit purchased by a Pennsylvania EDC and EGS exceeds \$45 in the 6-month period ending 30 days prior to the issuance of the order referenced in § 75.57(a).~~

~~(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. This payment shall equal \$ 45 for each alternative energy credit needed to satisfy the Tier I and Tier II requirements of § 75.51. 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. 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), 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. The option to make an alternative compliance payment in lieu of compliance with § 75.51 may not be~~

available to EDCs and EGSs that have already acquired sufficient alternative energy credits for compliance with the requirements of that reporting period.

~~— (e) Alternative compliance payments made by EDCs pursuant to § 75.57(d) shall be deemed a cost of compliance with this chapter and may be recovered pursuant to § 75.59.~~

~~— (f) EDCs and EGSs shall provide the Commission all information necessary for it to render a force majeure determination.~~

§ 75.58. ~~Special f~~Force majeure.

(a) Within 45 days of the conclusion of a reporting period for which the Commission did not find force majeure to exist for the Tier I alternative energy source, Tier II alternative energy source, and solar photovoltaic requirements of § 75.51, an EDC or EGS not in compliance with § 75.51 may petition the Commission for a force majeure determination with respect to its shortfall.

(b) A force majeure petition must address the following issues:

- (1) Whether the EDC or EGS was unable to meet the credit requirements in previous years and what have they done since then to come into compliance.
- (2) What effort was made by the petitioner to procure the credits?
- (3) How did the petitioner conduct a solicitation for credits?
- (4) Was the solicitation sufficiently in advance of the obligation?
- (5) Were there multiple solicitations at different times?
- (6) Did the solicitation request bids for a mix of contract terms (i.e. short, medium and long)?
- (7) Was the solicitation hampered by overly restrictive provisions?
- (8) Was the bidding process open and effective?
- (9) Would a successful bidder be able to obtain project financing based on the petitioner's contract for credits?
- (10) Did the petitioner proceed diligently to execute contracts with the winning bidders?

(11) Did the petitioner have a back-up plan to secure credits in the event the solicitation was inadequate?

(12) How did the petitioner amend its solicitation following an unsuccessful solicitation?

(13) Did the petitioner take any actions to foster development beyond the solicitation for credits?

(14) How does the petitioner intend to catch up on the missing credits?

~~(c b)~~ The Commission ~~shall will~~ provide public notice of all requests for a force majeure ~~petitions determination during the true-up period and will provide an opportunity for interested persons to submit written comments about a petition for force majeure.~~

~~(d e)~~ The Commission may find that force majeure exists only if its finds:

(1) if when there are insufficient alternative energy credits to completely satisfy the Tier I alternative energy source, Tier II alternative energy source, and solar photovoltaic obligations for the petitioning ~~all~~ EDCs ~~or and~~ EGSs requesting force majeure determinations under this section. Price alone will not be a sufficient justification to a force majeure finding, but could be an important factor if it is supported by other issues.

(2) The petitioning EDC or EGS has taken all reasonable actions to secure the needed credits and comply with the Act but has been unsuccessful through no fault of its own.

(3) The petitioning EDC or EGS has implemented a realistic and effective plan to minimize its shortfall of credits in subsequent years

~~(d)~~ The Commission may find that force majeure exists for the non-solar photovoltaic requirement of § 75.31 when the average price for a non-solar photovoltaic alternative energy credit purchased by a Pennsylvania EDC and EGS exceeds \$45 for the just concluded reporting period in § 75.37(a).

(e) Whether If the Commission determines that force majeure exists for a petitioner or not, for the true-up period, an EDC or EGS requesting a force majeure determination the petitioner shall have the option of making make alternative

~~compliance payments in lieu of compliance with § 75.51 for the just concluded reporting period. Any payments shall be accompanied by a statement filed with the Commission and verified by oath of affirmation, consistent with § 1.36 (relating to verification), 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 § 75.31, and that an alternative compliance payment is the least cost method of compliance.~~

~~(f) Where the Commission has ruled in favor of force majeure, the alternative compliance payments made by EDCs pursuant to § 75.58(e) shall be deemed a cost of compliance with this chapter and may be recovered pursuant to § 75.59. Where the Commission does not find cause for force majeure, the EDC may not recover the cost of the alternative compliance payments through § 75.59.~~

~~(g) EDCs and EGSs shall provide the Commission all information necessary for it to render a special force majeure determination.~~

### **§ 75.59. Alternative energy cost-recovery.**

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Subsection (c) of this section addresses the requirements of a competitive procurement process for alternative energy credits. We think the reference to 52 Pa. Code §54.186 is helpful, but it is not sufficient. We have proposed a list of specific issues that the Commission should consider when evaluating procurement programs.

#### **TRF Recommended Language for § 75.59:**

(c) A competitive procurement process for alternative energy and alternative energy credits shall comply with the standards for competitive procurement processes identified in the default service provisions at 52 Pa. Code § 54.186 and shall satisfy the following additional issues:

- (1) Terms – Were the terms of the RFP or standard contract offer reasonable in the context of alternative energy development in the region and other similar requests in the marketplace?
- (2) Distribution – Did the EDC or EGS make an adequate effort to publicize their RFP to developers and customer-generators who would be potentially interested?
- (3) Timing – Were the RFPs and standard offer contracts made available a minimum of one year in advance of requirements, with adequate time to respond?
- (4) Response Volume – Was there reasonable response to the RFP or standard offer contract?
- (5) Pricing - Was an adequate volume of credits made available at pricing less than the ACP?
- (6) Contract Length – Were the terms of the credit contracts of an adequate length to attract financing?
- (7) Partial Requirements - Did the utility purchase all credits available to it under the ACP, before seeking regulatory relief?

## **CONCLUSION**

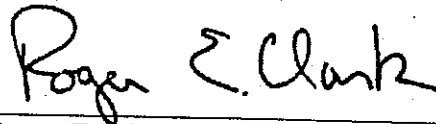
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The Reinvestment Fund appreciates this opportunity to comment on these proposed rules and offer our thoughts on how they might be strengthened. We stand ready to work with the Commission or any other interested person to further explain our comments and to help build a more sustainable energy future for Pennsylvania and her citizens.

Respectfully submitted,

The Reinvestment Fund  
Sustainable Development Fund

by:



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