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BEFORE THE ARIZONA CORPORATION COMMISSION

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2008 OCT -3
AZ CORP COMMISSION
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IN THE MATTER OF THE
APPLICATION
OF THE SOLAR ALLIANCE FOR A
DECLARATORY ORDER THAT
PROVIDERS OF CERTAIN SOLAR
SERVICE AGREEMENTS WOULD
NOT BE PUBLIC SERVICE
CORPORATIONS

DOCKET NO. E-20633A-08-0513

APPLICATION FOR A
DECLARATORY ORDER THAT
PROVIDERS OF CERTAIN SOLAR
SERVICE AGREEMENTS WOULD
NOT BE PUBLIC SERVICE
CORPORATIONS

The Solar Alliance (the "Applicant" or the "Alliance:), by and through undersigned counsel, submit this Application for a Declaratory Order that Providers of Certain Solar Service Agreements Would Not Be Public Service Corporations. Further, Applicant requests that the Arizona Corporation Commission ("Commission") act on this matter expeditiously, and without a hearing.

INTRODUCTION

The Alliance is an alliance of solar manufacturers, integrators and financiers dedicated to accelerating the development of photovoltaic (PV) energy in the United States. The Alliance specifically targets its efforts to help legislators, regulators and utilities make the transition to solar power by providing the technical and policy expertise

1 to create programs that are in the best interest of residential, commercial, and government
2 customers and Americans as a whole.

3 The Alliance's members include solar energy services companies that provide
4 services to customers to facilitate their use of clean, renewable energy. These services are
5 provided to customers pursuant to solar service agreements ("SSAs"). SSA providers
6 supply a package of services to customers, including analysis of customer load
7 characteristics; sizing and placement of solar generation facilities; financing of costs of
8 acquiring solar facilities (including the monetizing of tax benefits – an especially
9 important feature for customers who cannot otherwise take advantage of federal tax
10 incentives); ongoing maintenance of solar facilities; electric output of a customer-sited,
11 individual solar facility; and protections to insure that customers receive ongoing value
12 from the solar facility located on their premises. Customers generally include businesses,
13 state or local governmental entities, schools, congregations and non-profit groups that are
14 interested in supporting renewable energy but lack the necessary capital to invest in such
15 facilities or lack a sufficient taxable income to fully capture federal tax incentives that are
16 available to help finance solar systems. For businesses, federal investment tax credits for
17 solar energy systems combined with incentives for accelerated depreciation of solar
18 equipment can reduce the capital cost of new solar energy systems by up to 60 percent.¹
19 SSAs allow customers to capture these benefits by capitalizing projects, installing a solar
20 system on a customer's property, owning and operating a system, and receiving a payment
21 for services provided.

22 The majority of new commercial PV system installations look to solar service
23 agreements as a means of accessing solar power. Such solar service agreements provide
24 public entities and other non-profits a means of benefiting from tax incentives that would
25 otherwise be unavailable, reducing the cost of solar power significantly. Third-party

26 ¹ Solar Energy Industry Association, Guide to Federal Tax Incentives for Solar Energy, Version 1.2, Executive Summary.

1 arrangements also benefit customers who lack the capital to finance a system at the time it
2 is built or simply prefer to let someone else assume the responsibilities of solar system
3 ownership.

4 Unfortunately, the growth of distributed solar power is hampered by uncertainty
5 that the providers of SSAs are not subject to economic regulation by the Commission as
6 public service corporations. Therefore, the Alliance is requesting that the Commission
7 issue an order declaring that providers of SSAs that conform to certain criteria are not
8 public service corporations, and are not subject to the Commission's economic
9 regulations.²

10 **PURPOSES BEHIND COMMISSION'S AUTHORITY FOR ECONOMIC**
11 **REGULATION OF PUBLIC SERVICE CORPORATIONS**

12 On its face, the Arizona Constitution defines the term "public service corporation"
13 broadly, and goes on to grant the Commission broad powers to regulate such public
14 service corporations. ARIZONA CONST., ART. 15, §§ 2, 3. The Constitution's definition
15 of public service corporation includes "[a]ll corporations ... engaged in furnishing gas,
16 oil, or electricity for light, fuel, or power." ARIZONA CONST., ART. 15, § 2. However, the
17 Arizona courts recognize that the language of Article XV, § 2 is too expansive, and that
18 an entity must do more than merely meet the textual language to be considered a public
19 service corporation. See *Southwest Gas Corporation v. Arizona Corporation*
20 *Commission*, 169 Ariz. 279, 285-86, 818 P.2d 714, 720-21 (App. 1991). The courts'
21 limitations of the definition of public service corporation is rooted in their understanding
22 of the purposes of the economic regulation of certain businesses.

23 In interpreting the scope of Article XV, the courts have been guided by the
24 principle that "[f]ree enterprise and competition is the general rule. Government control

25 _____
26 ² Providers of SSAs would, of course, be subject to applicable laws, regulations and orders of other agencies
that exercise the government's police powers to protect Arizona customers.

1 ... [is] the exception.” See *Arizona Corporation Commission v. Nicholson*, 108 Ariz.
2 317, 321, 497 P.2d 815 (1972); *General Alarm, Inc. v. Underdown*, 76 Ariz. 235, 238,
3 262 P.2d 671,672 (1953). The courts have expressed their aversion to “any extension of
4 the power and scope of the corporation commission to businesses not patently in need of
5 the Commission’s control.” *Arizona Corporation Commission v. Continental Security*
6 *Guards*, 103 Ariz. 410, 415, 443 P.2d 406 (1968).

7 In exploring the scope of what entities can be labeled “public service
8 corporations,” the courts repeatedly allude to the purposes for the regulation that the
9 Commission is created to administer. They recognize that the Commission’s regulatory
10 authority is necessary “to preserve those services indispensable to the population and to
11 ensure adequate service at fair rates where the disparity in bargaining power between
12 service provider and the utility ratepayer is such that government intervention on behalf
13 of the ratepayer is necessary.” *Southwest Transmission Co-operative, Inc. v. Ariz. Corp.*
14 *Comm’n* at 432 ¶ 24, 142 P.3d at 1245, citing *Southwest Gas* at 286, 818 P.2d at 721,
15 *Petrolane-Ariz. Gas Service v. Ariz. Corp. Comm’n*, 119 Ariz. 257, 259, 580 P.2d 718,
16 720 (1978). When deciding whether Commission regulation is necessary, the courts will
17 consider whether the business is of such a nature that competition might lead to abuses
18 detrimental to the public interest, including the nature of the business and the means by
19 which it touches the public, and the potential abuses that could be anticipated if the entity
20 were not regulated. *General Alarm* at 239, 262 P.2d 673.

21 To fall within the ambit of the Commission’s regulation, an entity’s “business and
22 activities must be such as to make its rates, charges, and methods of operation a matter of
23 public concern, clothed with a public interest ... its business must be of such a nature that
24 competition might lead to abuse detrimental to the public interest.” *Southwest*
25 *Transmission Cooperative, Inc. v. Arizona Corporation Commission*, 213 Ariz. 427, 431-
26 32, 142 P.3d 1240 (App. 2006) (citations omitted). Further, any small degree of “public
interest” in the business is not enough to cause an entity to be considered a public service

1 corporation. The Arizona Supreme Court has indicated that “[i]t was never contemplated
2 that the definition of public service corporations as defined by our constitution be so
3 elastic as to fan out and include businesses in which the public might be incidentally
4 interested...” *Visco v. State ex. Rel Pickrell*, 95 Ariz. 154, 164, 388 P.2d 155, 162
5 (1964). *See also Ariz. Corp. Comm’n v. Nicholson*, 108 Ariz. 317, 497 P.2d 815 (where
6 provision of a utility service is incidental to the business, the entity is not a public service
7 corporation; protection of the public is provided by other statutes dealing with public
8 health, etc.).

9 In identifying those corporations that are sufficiently “clothed with a public
10 interest” to merit Commission regulation, Arizona courts have considered a number of
11 factors. In one case, the Arizona Supreme Court set forth a list of eight factors to
12 consider the matter. *Natural Gas Service Corporation v. Serv-Yu Cooperative*, 70 Ariz.
13 235, 237-38 219 P.2d 324, 325-26 (1950). These factors included: (1) What the
14 corporation actually does; (2) Whether there is a dedication of property to public use; (3)
15 Articles of incorporation, authorization, and purposes; (4) Dealing with the service of a
16 commodity in which the public has been generally held to have an interest; (5)
17 Monopolizing or intending to monopolize a territory with a public service commodity; (6)
18 Acceptance of substantially all requests for service; (7) Service under contracts and
19 reserving the right to discriminate is not always controlling; (8) Actual or potential
20 competition with other corporations whose business is clothed with public interest.

21 The *Serv-Yu* factors are at most guidelines for analysis of the question of whether
22 an entity is “clothed with the public interest” to the degree that it should be considered a
23 public service corporation. In fact, in a number of instances since the *Serv-Yu* case,
24 Arizona’s courts, including the Supreme Court, have analyzed the question of whether an
25 entity is clothed with the public interest to the degree that it would be considered a public
26 service corporation, without referring to the *Serv-Yu* factors. For example, three years
after *Serv-Yu*, the same court that decided *Serv-Yu* discussed whether an entity was

1 sufficiently "clothed with the public interest" to qualify as a public service corporation,
2 without ever referring to the *Serv-Yu* factors. *General Alarm v. Underdown*, 76 Ariz.
3 235, 262 P.2d 671 (1953). Further, in *Williams v. Pipe Trades Industry Program of*
4 *Arizona*, the Arizona Supreme Court concluded that an entity was not a public service
5 corporation, without ever mentioning the *Serv-Yu* case or its eight factors. 100 Ariz.14,
6 409 P.2d 720 (1966). Thus, in determining whether an entity is a public service
7 corporation, the *Serv-Yu* factors must be regarded in the context of the larger question of
8 whether the entity is clothed with the public interest such that the Commission's
9 economic regulation is necessary to protect the public.³

10 11 **FACTS UPON WHICH THE APPLICATION IS BASED**

12 The Alliance recognizes that this application is unusual in that is not asking the
13 Commission to declare that a particular entity is not a public service corporation, but is
14 asking for a more generic determination that a transaction with certain characteristics
15 would not trigger the Commission's regulatory authority. In putting forth this
16 Application, the Alliance is outlining characteristics that define the SSAs of its members
17 generally. Specific members' SSAs are competitively confidential, and contain terms
18 may go beyond those outlined here. However, to facilitate the clarifying of the matter for
19 a number of SSA providers most expeditiously, this Application is asking that the
20 Commission issue its ruling on the basis of the characteristics set forth herein.

21
22 ³ The courts recognize the distinction between economic regulation, including fixing prices, for "public
23 callings," and regulations in furtherance of the state's police power to secure the public health, safety and general
24 welfare. *See, e.g. Visco v. State ex. Rel Pickrell*, 95 Ariz. 154, 388 P.2d 155 (1964). The mere fact that public
25 protection may be required under the state's police power is not enough to bring an entity into the definition of a
26 public service corporation and thus under the economic regulation of the Commission. *See, e.g. Nicholson*, at 322,
820 (court recognized that an entity was not a public service corporation, but that protection of the public was
provided by other statutes that dealt with public health, water, etc.). For entities that are public service corporations,
the Commission may regulate its rates, and provide for the safety and preservation of health of that entity's
employees and customers. *Ariz. Const. Art. XV, § 3.*

1 The characteristics of the SSAs for which the Alliance seeks a declaratory order
2 are as follows:

- 3 • An SSA provider finances, installs, owns, maintains and operates a solar PV
4 facility that is located on a customer's premises and generates electricity using
5 solar power.
- 6 • The customer provides its premises for the solar facility.
- 7 • The SSA provider provides a number of services to the customer as part of the
8 single package, including analysis of the customer's load characteristics, sizing
9 and placement of the solar facility on the customer's premises, financing of costs
10 of acquiring the solar facility, monetizing tax credits related to the solar facility,
11 ongoing maintenance of solar facility, and electric output of the solar facility.
- 12 • The customer's charges for all of the services under the SSA are computed as a
13 price per kWh for the entire package of services (prices are not broken out by
14 individual service provided).
- 15 • The customer charges are computed based on power actually produced by the solar
16 facility.
- 17 • The customer must remain connected to the utility grid and generally continues to
18 purchase power from the customers' electric utility. Energy produced by the solar
19 facility reduces the energy provided to the customer by the electric utility.
- 20 • Facilities operate in parallel with an electric utility's existing transmission and
21 distribution facilities.
- 22 • The customer purchases the full output generated by the facility at agreed upon
23 prices.⁴

24
25 ⁴ Energy in excess of the customer's concurrent load is supplied to utility distribution system and is credited
26 against energy the customer acquires from the utility when its load is more than that produced by the solar facility
(e.g. at night).

- 1 • Due to practical limitations such as available surface area for facility installation,
2 the electricity generated on-site typically serves less than the customer's total
3 annual electrical load.
- 4 • The SSA Provider owns the solar facility throughout the term of the SSA, but a
5 customer may have an option of purchasing a facility during the term of the
6 agreement.
- 7 • The SSA provider negotiates an individualized price with each customer taking
8 into account factors such as the cost of the solar facilities, the cost of installation,
9 the surface area available for an installation, the efficiency of a solar array and its
10 orientation and tilt, the price paid for electricity from a local utility, and any other
11 values such as those provided by renewable energy credits.
- 12 • At the time an SSA is entered, the customer's billing rate for the services to be
13 provided is established for the term of the contract.

14 **SSA PROVIDERS ARE NOT PUBLIC SERVICE CORPORATIONS BECAUSE**
15 **SERVICES PROVIDED UNDER SSAS ARE NOT "CLOTHED WITH THE**
16 **PUBLIC INTEREST" AND DO NOT REQUIRE THE COMMISSION'S**
17 **ECONOMIC REGULATION.**

18 Based on an analysis of the various factors the courts consider, it is apparent that
19 providers of SSAs are not public service corporations.

20 **1. What an SSA provider does**

21 In evaluating whether an entity is a public service corporation, courts give a broad
22 consideration to the actual business of the entity. For example, in *General Alarm*, the
23 Arizona Supreme Court concluded that the entity was in the business of providing
24 property protection, not merely transmission of messages, and was therefore not a public
25 service corporation (76 Ariz. at 239, 262 P.2d at 673), and in *Nicholson*, the court found
26

1 that the entity was in the business of renting trailer spaces, not providing water. 108 Ariz.
2 at 320, 497 P.2d at 818.

3 Here, an SSA provider supplies a package of services that together allow a
4 customer to purchase less electricity from the electric grid. In this sense, an SSA is
5 similar to services or equipment that allows a customer to decrease its demand for the
6 electricity produced and delivered by its electric utility.

7 That package of services includes financing, designing, installing, owning,
8 maintaining and operating a solar PV facility that is located on a customer's premises and
9 generates electricity using solar power. While electricity is furnished to the customer as a
10 result of the SSA, the SSA provider supplies an array of other services to the customer as
11 a single package of which electricity is only one element. As further discussed below, the
12 facilities through which an SSA provider provides its services are not dedicated to public
13 use, and there is no compelling public interest in regulating the rate by which a customer
14 obtains the services of an SSA.

15 **2. An SSA does not dedicate facilities to public use.**

16 In determining whether a company has dedicated private property to public use,
17 Arizona courts have looked to two factors: (i) a company's intent to serve the public
18 generally and (ii) a company's importance in providing an essential commodity to large
19 segments of the population.

20 **a. SSA providers do not intend to dedicate private property to
21 public use.**

22 In *Serv-Yu*, the Supreme Court of Arizona stated that "[a] dedication to public use
23 is always a question of intention." *Serv-Yu*, 70 Ariz. at 238. The Arizona Court of
24 Appeals echoed this principle in *Arizona Water Company*, a 1989 case dealing with the
25 provision of water service. See *Arizona Water Company v. Arizona Corporation
26 Commission*, 161 Ariz. 389, 391, 778 P.2d 1285 (App. 1989). In *Arizona Water*

1 *Company*, the Court stated:

2 “...while the supplying of water is usually a subject matter of
3 utilities’ service, this alone does not carry the presumption
4 that all use of service in connection with such water is a
5 dedication of public use. Dedication of private property to a
6 public use is a question of intention to be shown by the
7 circumstances of each case.”

8 Unlike a public service corporation that dedicates property to serve the public at
9 large, the property through which an SSA provider provides service is only dedicated to
10 the individual customer on whose site the solar facility resides. Generation and delivery
11 of solar power occurs entirely on a customer’s private property for that customer’s private
12 use without any use of any common infrastructure. Further, SSAs are only practical for a
13 select and restricted group of customers. The suitability of an on-site solar installation
14 must take into account such factors such as the financial viability of the customer, surface
15 area available for an installation, shading issues, development rights on neighboring
16 property, and the orientation and tilt angle available for an installation. As such,
17 Applicants exhibit no intent to dedicate private property to public use but rather aim to
18 facilitate the dedication of private property to private use by a single customer.

19 **b. SSAs do not provide an indispensable service to a large segment
20 of the population.**

21 The package of services that a customer obtains through an SSA are not
22 indispensable to large segments of the population. In *Serv-Yu*, the Supreme Court of
23 Arizona stated that “[a] corporation that serves such a substantial part of the public as to
24 make its rates, charges and methods of operation a matter of public concern, welfare and
25 interest subjects itself to regulation” as a public service corporation. *Serv-Yu*, 70 Ariz. at
26 242. The Arizona Court of Appeals elaborated on this factor in *Southwest Gas Corp.*,
stating that property dedicated to public use must be “indispensable to large segments of
our population.” *Southwest Gas Corp.*, 169 Ariz. at 286.

1 This “dedication to public use” factor was most recently addressed in *Southwest*
2 *Transmission Coop.* In that case, the Arizona Court of Appeals upheld the Commission’s
3 determination by that the Southwest Transmission Cooperative (“SWTC”) was a public
4 service corporation subject to the Commission’s regulations. *Southwest Transmission*
5 *Coop.*, 213 Ariz. at 427. SWTC was a non-profit rural electric transmission cooperative
6 that provided wholesale transmission service to members and non-members. *Id.* at 428.
7 The Commission determined that SWTC warranted regulation because it constituted a
8 “critical link” in the chain of electricity provision. *See* Decision No. 66835, In the matter
9 of the Application of Southwest Transmission Cooperative, Docket No. E-04100A-02-
10 0321 (Mar. 12, 2004). The Arizona Court of Appeals upheld this determination
11 concurring with the Commission that SWTC was “integral in providing electricity to the
12 public.” *Southwest Transmission Coop.*, 213 Ariz. at 433.

13 Unlike SWTC, SSA providers are not integral in providing electricity to the public.
14 SSA providers place solar systems on the private property of a restricted group of
15 customers. The full output of each of these facilities is intended for consumption on the
16 individual customer’s premises and typically serves only a portion of that customer’s
17 electrical load. Generation and consumption of solar energy occur entirely on a
18 customer’s private property without the involvement of any public infrastructure.
19 Additionally, the customer remains connected to the public utility grid, and receives
20 power from that grid to the extent its load exceeds the output of the on-site solar facility
21 at any given moment. In moments when the solar facility is not producing any electricity,
22 the customer will seamlessly receive power from the regulated public service corporation.
23 Accordingly, SSA providers cannot be said to be “integral in providing electricity to the
24 public,” nor are they a “critical link” in the chain of electricity provision.

24 **3. The public does not have an interest in the package of services provided**
25 **through an SSA in the sense that economic regulation is required.**

26 As noted above, the Supreme Court of Arizona determined in *Nicholson* that

1 “State regulation of private property ... is wholly dependent up upon the dedication of
2 private property to a public use with a public interest.” *Nicholson*, 108 Ariz. at 320. The
3 fact that an entity may incidentally provide what is otherwise a public commodity is not
4 sufficient to subject it to regulation; rather, it must be in the business of providing a
5 public service. *See Southwest Transmission Cooperative*, 213 Ariz. at 432. *See also*
6 *Nicholson*, 108 Ariz. at 321. Thus, the Arizona courts have recognized what Professor
7 Bonbright so eloquently noted: “What must justify public utility regulation, then, is the
8 necessity of the regulation and not merely the necessity of the product.” Bonbright, et al.,
9 *Principles of Public Utility Rates*, Chpt. 1. (1988).

10 While electricity has been considered a service in which the public has an interest,
11 the package of services that are provided through SSAs are not services which are
12 “clothed with the public interest” in the same way electricity traditionally is. To begin
13 with, the electricity provided through an SSA is not dependent on common facilities that
14 serve the public, but is both generated and consumed at the customer’s location. Further,
15 an SSA is generally not meant to supply all the customer’s power, or at all times of day.
16 Therefore, the customer remains connected to the public utility grid, and can receive
17 power from its regulated electric utility at any time.

18 Further, the structure of the SSA itself provides protection for the customer, such
19 that there is little need to regulate to protect a “public interest.” An SSA includes terms
20 that require the SSA provider to select the solar facility, install it, and maintain it for the
21 duration of the agreement. In addition, the charges for an SSA’s package of services are
22 based on the kWh’s actually produced by the solar facility. Together, these terms create a
23 powerful incentive for an SSA provider to select quality equipment and maintain it for
24 maximum output. Customer risks are limited in that payments are only made in
25 proportion to energy actually provided.

26 An SSA is largely a financial instrument that enables customers to finance a solar
facility to serve a portion of its electric need. Although electricity one element of the

1 package of services provided in an SSA, these agreements also contain provisions related
2 to a customer's ability to purchase an on-site solar generating system that the SSA
3 provider has installed. In other words, the provision of energy is merely an incidental
4 service to the offering of an attractive financing option that lowers the up-front cost of a
5 solar system thereby assisting customer in decreasing their reliance on electricity that is
6 received through the common infrastructure in which the public does have an interest.

7 **4. Articles of incorporation, authorization, and purposes are not**
8 **necessary for the Commission to reach a determination.**

9 The Alliance respectfully requests that the Commission make a determination
10 based on the facts stated herein. The various SSA providers will differ in their articles of
11 incorporation, authorizations and purposes, but share a commonality in the general
12 structure they employ to finance the installation of solar facilities. It is this financing
13 structure and not any one entity's corporate authorizations that is at issue in this
14 Application. Therefore, the Alliance respectfully requests that the Commission look to
15 the facts stated in this Application as a basis for issuing the requested Declaratory Order.

16 **5. SSA providers do not monopolize or intend to monopolize any territory**
17 **with a public service commodity.**

18 Regulation ensures that companies providing an essential commodity cannot use
19 monopoly status and superior bargaining power to extract unreasonable rates or impose
20 inadequate service on customers. In *Southwest Transmission Coop.*, the court stated that
21 "[t]he purposes of regulation are to preserve those services indispensable to the
22 population and to ensure adequate service at fair rates where the disparity in bargaining
23 power between the service provider and the utility ratepayer is such that government
24 intervention on behalf of the ratepayer is necessary." *Southwest Transmission Coop.*, 213
25 Ariz. at p. 432.

26 This concern is not raised here. As discussed above, SSA providers provide a

1 package of services that are unique and distinguishable from a traditional public service
2 corporation.

3 The solar facilities installed under an SSA operate on an intermittent basis and
4 typically serve only a portion of a customer's electrical load. As a result, an SSA does not
5 replace a customer's need to rely on an existing public service corporation. In fact,
6 without a connection to the common utility infrastructure of the regulated public service
7 corporation the solar facilities of the SSA cannot operate.

8 Because regulated utility service is available to SSA customers at all times, SSA
9 providers are not able to monopolize the provision of electricity service. In addition, SSA
10 customers are fully equal to SSA providers in their bargaining power, given that
11 customers can continue to procure electricity from their local regulated utility if they feel
12 during negotiation of a given solar SSA terms are unsatisfactory.

13 **6. SSA providers cannot accept substantially all requests for service.**

14 As discussed above, SSAs are available only to a restricted group of particular
15 individuals and therefore SSA providers not able to accept substantially all requests for
16 service. The suitability of an installation must take into account such factors such as the
17 financial viability of a customer, the surface area available for an installation, shading
18 issues, development rights on neighboring property, and the orientation and tilt angle
19 available for an installation. This situation is analogous to that of *Nicholson*, in which the
20 Supreme Court of Arizona found that a mobile trailer park that supplied water to park
21 tenants was not a public service corporation. *Nicholson*, 180 Ariz. at 321-22. Although
22 the Court determined in *Nicholson* that the public's right to demand service from a
23 company is not dispositive of whether a company has dedicated private property to public
24 service, the Court nevertheless found that the trailer park was "not open to all" given that
25 tenants of the park were screened and required to meet criteria as to size, make and year
26 of their mobile homes, and compatibility with other tenants. *Id.* at 319-21. Such
restrictions were offered by the Court as a reason for finding that regulation was not

1 appropriate. *Id.*

2 As with the facts in *Nicholson*, SSA providers must screen their customers to
3 ensure that certain eligibility criteria are met. The package of services offered in an SSA
4 is not available to all. Because only a limited portion of the public is suitable to host a
5 third-party financed, on-site, solar generation facility, SSA providers do not accept
6 substantially all requests for service.

7 **7. Although service under contract and reserving the right to refuse**
8 **service is not always controlling, this factor suggests that regulation is**
9 **not appropriate.**

10 According to *Serv-Yu*, “if the service is rendered pursuant to contract or limited
11 membership, it is difficult to hold that one expressly held himself out as ready to serve the
12 public generally.” *Serv-Yu*, 70 Ariz. at 239. Although this factor is determinative on the
13 issue of whether to regulate in some jurisdictions, Arizona courts have expressed a
14 concern that “sham membership organizations open to all subscribers and serving a
15 substantial portion of the public” under contract may evade regulation by claiming the
16 right to refuse a request for service. *Id.* at 239-40; *Arizona Water Co.*, 161 Ariz. at 392.

17 This concern is not raised under the facts of this Application. As discussed above,
18 SSA providers are able to serve only a restricted group of particular individuals, not the
19 public generally. Moreover, SSAs are not shams to avoid regulation. SSAs govern the
20 long-term contractual relationship between a SSA provider and its customers and
21 establish the responsibilities each has with respect to the other, including access to a
22 host’s property; solar system operation, maintenance and repair responsibilities;
23 obligations to protect and not interfere with or shade a solar system; a customer’s
24 obligations in the event it sells its property; liability for damage to solar equipment or a
25 the customer’s property; solar system purchase options; and payment obligations.
26 Further, the SSA structure is used not to evade regulation, but to address real limitations
that impede certain customers from acquiring solar facilities themselves (e.g. high up-

1 front costs and limited availability of certain tax incentives)

2 **8. SSA providers do not engage in wasteful competition with corporations**
3 **whose businesses are clothed with public interest.**

4 One of the primary justifications for regulation is the need to avoid economically-
5 wasteful competition between service providers when a single regulated provider can
6 most effectively serve the needs of the public. In *Trico Electric Cooperative, Inc. v.*
7 *Arizona Corporation Commission*, 86 Ariz. 27, 38-39, 330 P.2d 1046 (Ariz. 1959), the
8 Supreme Court of Arizona emphasized that the “the paramount concern of the state ... is
9 the welfare of individual citizens who, under our economic system, ultimately bear the
10 burden of unbridled and wasteful competition.” In *Trico*, the Court held that regulation
11 of Trico Electric Cooperative was necessary because it was in a position, in the
12 distribution of electricity, to wage a competitive war with local utilities which could
13 “result in undue waste by the duplication of lines or other competitive measures to the
14 detriment of all consumers in the area affected.” *Id.* (“the threatened competitive war
15 between Tucson Gas and Trico makes it imperative that Trico be subjected to the
16 regulatory powers of the Commission.”)

17 Undeniably, SSAs do allow customers to consume less grid-transported electricity.
18 But, to the extent this is “competition” at all, it is not of the wasteful nature that
19 regulation seeks to prevent. On-site solar generation mitigates on-site electricity demand
20 and reduces the load placed on existing public utility infrastructure. Given the ever-
21 increasing demand for electricity in states with exploding populations such as Arizona,
22 this benefits consumers rather than creating wasteful duplication of services, especially
23 considering that on-site solar generation will produce electricity primarily during hours of
24 higher demand, which is typically more costly to serve. Recent studies on the impacts of
25 solar distributed generation in APS’s service territory show a 19% decrease in peak load
26

1 for surveyed houses.⁵ As with energy efficiency technologies and other demand-side
2 management programs, avoiding or delaying the need for new generation and
3 transmission infrastructure creates a public benefit to other customers of the public utility;
4 it does not result in a wasteful duplication of infrastructure.

5 Another justification for regulation is the need to prevent the breakdown of
6 traditional public service corporation regulation. In *Serv-Yu*, the Supreme Court of
7 Arizona expressed a concern that unregulated businesses may offer services that complete
8 with and supplant regulated utility service in a substantial portion of the state. *Serv-Yu*,
9 70 Ariz. at 241. As discussed herein, SSAs do not provide “on demand” electrical
10 service of the sort provided by public service corporations. The solar facilities of an SSA
11 operate on an intermittent basis and typically serve only a portion of a customer’s
12 electrical load. As a result, SSAs could never cause the existing electric public service
13 corporations to lose even a single customer. As such, the package of services provided
14 under an SSA are not of the type that gives rise to the concern raised by the court in *Serv-*
15 *Yu*.

15 **REQUEST FOR RELIEF**

16 In *Southwest Gas Corp.*, the Supreme Court of Arizona stressed the purposes of
17 exercising governmental regulatory power over public service corporations:

18 “... the purposes of regulation are to preserve and promote
19 those services which are indispensable to large segments of
20 our population, and to prevent excessive and discriminatory
21 rates and inferior service where the nature of the facilities
22 used in providing the service and the disparity in the relative
23 bargaining power of a utility ratepayer from demanding a high
24 level of service at a fair price without the assistance of
25 governmental intervention in his behalf.”

24 *Southwest Gas Corp.*, 169 Ariz. at 286.

25
26 ⁵ RWBeck Study for APS, preliminary findings presented August 6, 2008 to stakeholder meeting at APS.

1 As discussed herein, an SSA does not give rise to the purposes for which
2 regulation in the public interest may be necessary. Unlike public service corporations, the
3 services provided through an SSA are not indispensable to large segments of the
4 population. To the contrary, SSAs provide services under negotiated contract to a select
5 and restricted group of customers. Moreover, the solar systems financed by SSAs are
6 dedicated to private use on private property by a single customer. Generation and
7 delivery of solar energy occur entirely on a customer's private property without the use of
8 any public infrastructure. Thus, there is no dedication of private property to a public use
9 and service provided through an SSA is not a matter of public concern. In addition, an
10 SSA provides a unique, clean energy commodity that satisfies only a portion of a
11 customer's on-site electricity needs on an intermittent basis. Thus, SSA providers do not
12 compete with "on demand" local utility service in a manner that produces wasteful
13 duplication of facilities. To the contrary, SSAs finance distributed solar facilities that
14 reduce the load on the public utility's generation and distribution systems which can
15 reduce the need for new utility-scale generation, distribution system upgrades and
16 transmission line extensions. In other words, SSAs provide a public benefit to utilities
and their ratepayers; they do not create a wasteful duplication of service.

17 The majority of new commercial PV system installations look to third-party
18 financing as a means of accessing solar power. Third-party financing arrangements
19 benefit customers who lack the capital to finance a system at the time it is built or simply
20 prefer to let someone else assume the responsibilities of solar system ownership. Third-
21 party arrangements also provide public entities and other non-profits a means of
22 benefiting from tax incentives that would otherwise be unavailable, reducing the cost of
23 solar power significantly.

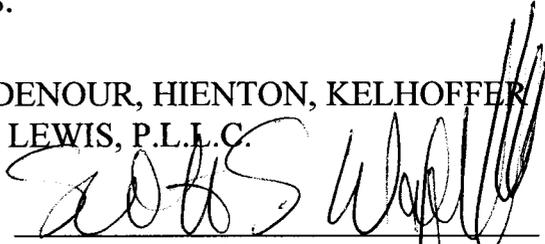
24 For the reasons stated herein, the Alliance respectfully requests that the
25 Commission issue a Declaratory Order that providers of SSAs that have the
26 characteristics set forth in this Application are not public service corporations pursuant to

1 Article 15, Section 2, of the Arizona Constitution and therefore are not subject to
2 regulation by the Commission pursuant to Article 15, Section 3.

3 Arizona courts have found that whether an entity is a public service corporation
4 and therefore subject to the Commission's jurisdiction is a question of law when parties
5 do not dispute the facts. *See Southwest Transmission Coop.*, 213 Ariz. at 430. Given the
6 stipulated facts set forth herein, The Alliance believes that a hearing is not necessary and
7 the Commission may reach an expedited decision on this Application based on the facts
8 stated herein.

9 Dated this 3 day of October, 2008.

10 RIDENOUR, HIENTON, KELHOFFER
11 & LEWIS, P.L.L.C.

12 By 

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1 Pursuant to A.A.C. R14-3-204,
the Original and 25 copies were filed on
2 ~~September 3~~, 2008, with:

3 ~~September~~
4 Docket Control
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

5 Copy of the above delivered this
6 3 day of ~~September~~, 2008, to:

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