0000095913

ORIGINAL

RECEIVED

2009 APR 17 P 1:24

Arizona Corporation Commission
DOCKETED
APR 17 2009
DOCKETED BY

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

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 **AEPCO'S COMMENTS ON THE SOLAR ALLIANCE APPLICATION AND RESPONSE TO STAFF REPORT**

GALLAGHER & KENNEDY, P.A.
2575 E. CAMELBACK ROAD
PHOENIX, ARIZONA 85016-9225
(602) 530-8000

Pursuant to the March 6, 2009 Procedural Order, the Arizona Electric Power Cooperative, Inc. ("AEPCO") submits its Comments on the Solar Alliance ("Alliance") Application for a Declaratory Order That Providers of Certain Solar Service Agreements Would Not Be Public Service Corporations ("Application") and its Response to the Report of the Arizona Corporation Commission Staff ("Staff Report").

Introduction

AEPCO and its member cooperatives (the "Cooperatives") are strong supporters of distributed applications of renewable energy resources. Despite the fact that many solar installers do not operate in rural areas, to date the total number of distributed installations supported by the four cooperatives participating in the REST Plan is over 200. Further, that number has been rapidly escalating. In 2008, almost 100 new distributed PV installations were supported by Cooperatives' rebates in addition to rebates provided for construction of 15 small wind systems. Because the Cooperatives face various challenges unique to them and their service territories in increasing the amount of renewables in their resource mix, they are very

anxious to examine and assist in implementing alternative, innovative approaches which will lawfully accomplish that goal.

The problem, however, with the business model presented by the Alliance's Application is it simply isn't permissible under the Arizona Constitution and case law. The facts stated in the Application make it clear that Alliance members will be engaged in furnishing electricity for light, fuel or power. They are (or would be under the Application's hypothetical facts) public service corporations ("PSCs") which must be regulated. Other services provided by Alliance members don't change the fact that electricity would be provided to consumers in violation of the Constitution and statutes. Further complicating the issue—if it were to go to hearing—is the fact that the applicant, the Alliance, does not actually provide services and the actual facts of service will vary among its members. Thus, there is no real party-in-interest with standing to provide the parties, Staff and Commission reliable facts to determine if any different result under the *Serv-Yu* standards is possible.

AEPCO recommends two alternate courses of action. First, dismiss the Application either outright or after further briefing and argument, if necessary, by the parties, but with leave to re-file by a real party-in-interest which can provide evidence and testimony in support of an actual fact set. While it does not appear likely that any set of facts can be developed under *Serv-Yu* standards which will change the conclusion that Alliance members are PSCs subject to regulation, an actual provider with a firm business model would allow the Commission and parties to examine and reach conclusions on, as *Serv-Yu* puts it, "what the corporation actually does."

Alternatively, the Commission could stay any further proceedings on this Application at this time. Then, workshops would be commenced on alternative approaches such as leasing

arrangements, utility buy-back agreements, regulation options or other alternatives which could facilitate Alliance objectives without violating the Constitution and statutes. The results of such discussions might moot the need to proceed further on the Application.

I. The Application Describes a Business Model Which Under Arizona Law Must Be Regulated as a Public Service Corporation.

Article 15, § 2 of Arizona's Constitution provides that all entities "engaged in furnishing...electricity for light, fuel, or power" are PSCs. The balance of Article 15—particularly § 3—and Title 40 of the Arizona Revised Statutes provide that PSCs are subject to various regulatory controls. Although the Application at pages 7-8 does a very good job of attempting to dress up 12 different factors as something other than furnishing electricity, even a casual glance reveals that this Emperor wears no clothes. Every one of the 12 factors stated are simply permutations on the same theme: a Solar Alliance member is, in fact, furnishing electricity to a consumer for light, fuel or power.

For example, as Staff points out at page 14 of its report, the 12 characteristics of the business model in the Application don't demonstrate that the provision of electricity is only "incidental to some other business purpose" and the characteristics could just as easily describe public service corporations. The Alliance hypothetical is not like the trailer park which provided water to its customers as an ancillary service to purchasing a spot in the park. *Ariz. Corp. Comm'n v. Nicholson*, 108 Ariz. 317, 320, 497 P.2d 815, 818 (1972). It's also not like El Paso Natural Gas Company, which hadn't accepted a new retail customer in almost 30 years and had no intention of serving any more customers in the future. *Southwest Gas Corp. v. Ariz. Corp. Comm'n,* 169 Ariz. 279, 282, 818 P.2d 714, 717 (1991). Alliance members also don't resemble

five well owners who sell water to two others and refuse any other request for service. *Ariz. Water Co. v. Ariz. Corp. Comm'n,* 161 Ariz. 389, 391, 778 P.2d 1285, 1287 (1989).

Instead, under the business model described by the Alliance, customers purchase, and an Alliance member furnishes, electrical power to all customers of all classes, wherever situated who request service. The other services salted throughout the 12 characteristics are ancillary to and simply supportive of that business mission and purpose. The Arizona Constitution requires that such businesses be regulated by the Commission as PSCs. Ariz. Const. art. XV, §§ 2, 3.

As stated earlier, the Solar Alliance's goal of furthering the marketing of solar energy to Arizona residents is an admirable one that AEPCO endorses. But, Arizona law cannot be warped to serve that goal. If excepting renewable energy providers from Commission regulation is perceived as better public policy, then Article 15, § 2 will have to be amended to reflect that choice. Other states have done that through an express exception to their definition of utility. *Cf.* Oregon Rev. Stat. 757.005(1) (excepting providers of "solar or wind resources" from its definition of "public utility"); *In re Honeywell Int'l, Inc.*, Dec'l Ruling 40 (Or. Pub. Util. Comm'n, July 31, 2008) (finding that petitioner's business model of "building and operating solar facilities on premises belonging to utility customers" was not subject to regulation as "public utility" because of express statutory exception for such activities in Oregon. Rev. Stat. 757.005(1)).

The Staff Report, after expressing concerns about the ambiguity of the Application and the hypothetical business model described in it, nonetheless recommends that the Commission go forward with a hearing. While normally that could be an option, the problem here is there is no applicant who will actually provide services before the Commission and there is no actual fact set upon which to proceed. Therefore, the Application cannot go forward until a real party-in-

interest with standing who can provide the specific information required by the *Serv-Yu* case[1] to evaluate the Application is before the Commission.

The current applicant, the Alliance, is a solar energy trade group organized to promote the solar energy industry. In responses to Staff data requests, the Alliance makes it clear that it will not provide service to any customer. Response to DR 2.3. It also stresses that none of its members—the entities who will actually supply electricity to customers—are applicants. Response to DR 1.1. Further, the Alliance admits that "no specific entity [is seeking] adjudication as not a public service corporation" (Response to DR 2.1) and that it is asking the Commission to make a "generic determination" without reference to the specific characteristics of any of its members or the nature of their business transactions. Application at p. 6, ll. 11-19.

In other words, the Alliance asks the Commission and parties to go to hearing on a wholly hypothetical fact set which the Alliance states may change from a package of less than a dozen to perhaps eighteen different characteristics and services[2] offered by a provider who will not appear before the Commission. Therefore, there is no entity which will offer reliable testimony and facts as to (1) what the provider will actually do, (2) the precise details of the services provided or (3) information on any of the eight criteria which the *Serv-Yu* decision requires to be considered. In this form, the Commission in its quasi-judicial role obviously cannot move forward on the Application.

Arizona courts invoke the doctrine of standing to refrain from hearing cases where the plaintiff is not an actual party-in-interest. *City of Tucson v. Pima County*, 199 Ariz. 509, 514 ¶ 11, 19 P.3d 650, 655 (App. 2001) (holding that "a party must have a direct stake in the

---

[1] *Natural Gas Serv. Co. v. Serv-Yu Cooperative,* 70 Ariz. 235, 219 P.2d 324 (1950).
[2] Responses to DRs 2.4-2.6.

outcome of a case in order to have standing" (internal quotation marks omitted)). Similarly, relief under the Arizona Declaratory Judgment Act is only available for "real" controversies, not "merely theoretical" ones based upon "a state of facts which may or may not arise in the future." *Hunt v. Richardson*, 216 Ariz. 114, 125 ¶¶ 37-38, 163 P.3d 1064, 1075 (App. 2007).

The elements set forth in *Serv-Yu* for determining whether an entity is a public service corporation are very fact-specific. They cannot be evaluated against a generic, unknown and constantly changing set of facts offered by someone with no direct stake in the outcome. *See* Staff Report at 6-9 (noting that the Solar Alliance has not provided sufficient facts as to safety concerns, financial aspects of the proposed business model, why the provision of electricity was incidental to other services and other issues). Further, without a real party-in-interest that can provide actual facts for the Commission and interested parties to evaluate, reaching an informed decision on the merits of the Application and one supportable on appeal is simply impossible.

Again, AEPCO is not certain that any set of facts will change the conclusion that Alliance members will be PSCs. But, it's absolutely clear that the Application at this point is not positioned to be effectively adjudicated by the Commission. There is no firm fact set upon which to evaluate the eight *Serv-Yu* criteria to see if any different result can be reached other than the obvious one, i.e., that Alliance members will provide electricity for light, fuel or power.

Further, without a real service provider prosecuting the Application, acquiring the factual evidence necessary to analyze the Application will require extensive use of the Commission's subpoena power to attempt to obtain relevant information on consumer protection, safety, market penetration, market targets and other subjects from non-parties. This will create a procedural nightmare for everyone involved. It will delay adjudication of the Application for many months.

Therefore, AEPCO recommends that the Application be dismissed, either summarily or after briefing, for failure to state a claim upon which relief can be granted. However, the dismissal should be without prejudice in order to allow an Alliance provider(s) to bring an actual fact set for evaluation to determine if the *Serv-Yu* criteria can or cannot be met.

II. The Issues Raised in the Application May Be Able to Be Resolved Cooperatively.

As an alternative to dismissal, AEPCO suggests that the Commission hold the Application in abeyance to allow for workshops involving Staff, members of the Alliance, regulated utilities and other interested parties. The purpose of the workshops would be to explore various alternative approaches which could be used to facilitate distributed generation deployment, but in ways that would not raise the PSC constitutional issues presented by the Application. AEPCO would defer to others with more expertise on this subject as to what alternates should be considered and might work. But, customer leasing arrangements or options to purchase, utility agreements to purchase output and alternative forms of regulation are some possible lawful solutions.

Conclusion

The Cooperatives are strongly supportive of lawful business models which encourage the deployment of distributed renewables. But, for the reasons discussed, this Application in its current form simply cannot go forward. The Commission should either dismiss the Application without prejudice so that a real party-in-interest can bring it at a later date or order briefing on the issue of dismissal. Although AEPCO is not certain that a case can be made for non-PSC status under this model even if a real party-in-interest files a "live" set of facts, it is certain that a rational determination of those issues cannot be reached given the current illusory nature of the

Application. Alternatively, there appears to be a strong possibility that workshops could produce different models which would encourage distributed deployment in a lawful way.

RESPECTFULLY SUBMITTED this 17th day of April, 2009.

GALLAGHER & KENNEDY, P.A.

By _____
Michael M. Grant
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Attorneys for Arizona Electric Power Cooperative, Inc.

Original and 13 copies filed this 17th day of April, 2009, with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copies of the foregoing mailed this 17th day of April, 2009, to:

Scott S. Wakefield
Ridenhour, Heinton, Kelhoffer & Lewis, P.L.L.C.
201 North Central Avenue, Suite 3300
Phoenix, Arizona 85004-1052
Attorneys for The Solar Alliance

Deborah R. Scott
Linda J. Benally
Pinnacle West Capital Corporation
400 North 5th Street, M/S 8695
Phoenix, Arizona 85004
Attorneys for Arizona Public Service Company

Timothy M. Hogan
Arizona Center for Law in the Public Interest
202 East McDowell Road, Suite 153
Phoenix, Arizona 85004
Attorneys for Western Resource Advocates and Interstate Renewable Energy Council

David Berry
Western Resource Advocates
P.O. Box 1064
Scottsdale, Arizona 85252-1064

Kenneth C. Sundlof, Jr.
Jennings, Strouss & Salmon, P.L.C.
201 East Washington Street, 11th Floor
Phoenix, Arizona 85004-2385
Attorneys for Salt River Project and New West Energy

Jana Brandt
Kelly J. Barr
Salt River Project Agricultural Improvement & Power District
Regulatory Affairs & Contracts, PAB 221
P.O. Box 52025
Phoenix, Arizona 85072-2025

Philip Dion, Jr.
Michelle Livengood
Dave Couture
Tucson Electric Power Company
One South Church Street, Suite 200
Tucson, Arizona 85702

Michael W. Patten
J. Matthew Derstine
Roshka DeWulf & Patten, PLC
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004
Attorneys for Tucson Electric Power Company and UNS Electric, Inc.

Russell E. Jones
D. Michael Mandig
Waterfall Economidis Caldwell Hanshaw & Villamana, PC
5210 East Williams Circle, 8th Floor
Tucson, Arizona 85711
Attorneys for Trico Electric Cooperative, Inc.

C. Webb Crockett
Patrick J. Black
Fennemore Craig, P.C.
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012-2913
Attorneys for Freeport-McMoRan Copper & Gold Inc. and Arizonans for Electric Choice and Competition

Daniel Pozefsky, Chief Counsel
Residential Utility Consumer Office
1110 West Washington Street, Suite 220
Phoenix, Arizona 85007

Michael A. Curtis
William P. Sullivan
Ian D. Quinn
Curtis, Goodwin, Sullivan, Udall & Schwab, PLC
501 East Thomas Road
Phoenix, Arizona 85012-3205
Attorneys for Mohave Electric Cooperative, Inc. and Navopache Electric Cooperative, Inc.

Bradley S. Carroll
Snell & Wilmer L.L.P.
One Arizona Center
400 East Van Buren
Phoenix, Arizona 85004-2202
Attorneys for Sulphur Springs Valley Electric Cooperative, Inc.

Lawrence V. Robertson, Jr.
P.O. Box 1448
Tubac, Arizona 85646
Attorney for Sempra Energy Solutions LLC

Kevin T. Fox
Keyes & Fox LLP
5727 Keith Avenue
Oakland, California 94618
Attorneys for Interstate Renewable Energy Council

Janice Alward
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Ernest Johnson
Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

10421-60/2075967v2