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BEFORE THE ARIZONA CORPORATION COMMISSION

2009 APR 24 P 4: 11 Arizona Corporation 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

**THE SOLAR ALLIANCE'S MOTION
FOR PROCEDURAL CONFERENCE**

The Solar Alliance (the "Alliance") hereby moves that the assigned Administrative Law Judge schedule a procedural conference to discuss the further processing of this case. This Motion is supported by the following points and authorities.

BACKGROUND

On October 3, 2008, the Alliance filed its Application for a Declaratory Order that Providers of Certain Solar Service Agreements Would Not be Public Service Corporations ("Application"). On November 24, 2008 the Arizona Corporation Commission ("Commission") convened a procedural conference to discuss potential alternatives for processing the Application. On January 12, 2009, a Procedural Order was issued directing the Commission's Utilities Division ("Staff") to file its Staff Report indicating whether there are disputed issues of fact and making a recommendation regarding the need for a hearing. The Procedural Order also directed the Alliance to publish and otherwise provide notice of its Application, permitted intervention, and

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1 provided that intervenors file any responses to the Staff Report by a date certain.¹ Staff
2 filed its Staff Report on March 11, 2009, and responses/comments to the Staff Report
3 were filed on April 17, 2009 by the Residential Utility Consumer Office (“RUCO”),
4 Arizona Public Service Company (“APS”), Tucson Electric Power Company and UNS
5 Electric, Inc. (collectively, “TEP”), Sulphur Springs Valley Electric Cooperative, Salt
6 River Project (“SRP”), Arizona Electric Power Cooperative, Inc. (“AEPCO”), Freeport-
7 McMoran Copper & Gold, Inc. and Arizonans for Electric Choice and Competition
8 (collectively, “AECC”), Sempra Energy Solutions LLC (“Sempra”) and the Interstate
9 Renewable Energy Council (“IREC”).

10 In their filings, Staff and the Intervenors take a variety of different positions on
11 both procedural and substantive matters. For example, some of the filings suggest that a
12 hearing is either necessary or would be helpful in addressing the Application (Staff,
13 RUCO, TEP, SRP, AECC, Sempra). Two parties raise concerns about the Alliance’s
14 standing to bring the Application (RUCO, AEPCO). A number of parties identify issues
15 that they see as being raised by the Application but are arguably beyond the narrow
16 question of whether a provider of a solar service agreement (“SSA”) is public service
17 corporation (“PSC”) (Staff [whether a light-handed form of regulation for SSAs would
18 be appropriate, safety, reliability], APS [safety, reliability, resource planning; whether a
19 business model beyond that proposed by the Alliance’s 12 characteristics would be a
20 PSC], TEP [appropriate form of regulatory oversight; SSA providers’ financial abilities,
21 transparency of costs], SRP [whether SSA model is necessary to attract solar investment;
22 whether SSAs create stranded costs], AECC [implications of application on provision of
23 electric service as a whole], Sempra [reexamination of whether electric service providers
24 (“ESPs”), meter service providers (“MSPs”) and meter reading service providers

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26 ¹ The initial dates for the Staff Report and Intervenor responses thereto were subsequently amended by a later Procedural Order.

1 (“MRSPs”) should be regarded as PSCs]). Four parties take positions on the ultimate
2 question of whether providers of SSAs are PSCs (TEP, AEPCO, SRP, IREC).

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4 **ALLIANCE’S POSITION ON PROCEDURAL MATTERS**

5 The Alliance is not setting forth its positions on the substantive matters in this
6 Motion, as the Motion is asking the Commission to address only procedural issues
7 (including determining which substantive issues will be considered in this proceeding).
8 The Alliance expects that, upon resolving the procedural questions raised by the filings to
9 date, the Commission will set forth the proper time and format for the Alliance to present
10 its position on the substantive matters within the scope of the proceeding as set forth by
11 the Commission.² In this Motion the Alliance is presenting its position on the procedural
12 issues raised by Staff and Intervenor filings.

13 Standing

14 RUCO and AEPCO question whether the Alliance has standing to bring its
15 Application. Standing is a legal concept that is not often raised before the Commission,
16 and thus it is not clear whether the Commission holds parties before it to the same
17 “standing” requirements that the Arizona courts do. However, Arizona’s Supreme Court
18 has made it clear that standing before the Arizona judiciary is a lower threshold than it is
19 before the federal courts. Because Arizona’s constitution does not contain a “case or
20 controversy” provision analogous to that of the federal constitution, Arizona courts are
21 not constitutionally constrained to decline jurisdiction based on lack of standing. *Sears v.*
22 *Hull*, 192 Ariz. 65, 71 ¶ 24, 961 P.2d 1013, 1019 (1998).

23 Arizona courts have long recognized that a trade association has standing to
24

25 ² The Alliance notes that Staff and several of the Intervenors have not yet taken a position on the ultimate
26 substantive question of whether SSA providers are PSCs. The Alliance expects that the Commission would likewise
establish a process that allows other parties to present their positions on that issue.

1 maintain an action for a declaratory relief regarding the application of constitutional
2 provisions to the business of the association's members. *See State v. Direct Sellers*
3 *Assoc.*, 108 Ariz. 165, 167, 494 P.2d 361, 363 (1972). Like the Direct Sellers
4 Association, the Alliance is an organization of businesses in a common industry (here,
5 solar energy) seeking a determination of the parameters of a constitutional provision
6 (here, Art. XV § 2's definition of a PSC) to their business dealings. The Alliance's
7 Application clearly indicates that its members desire to provide services in Arizona
8 pursuant to SSAs, and are thus affected by the interpretation of the constitutional
9 provision granting the Commission authority over PSCs. Thus, under the Arizona courts'
10 standing requirement, the Alliance has standing to bring its application seeking a
11 declaratory order that SSAs are not PSCs.

12 However, even if the Commission determined that a court-like threshold of
13 standing were required and that Alliance lacked such standing, the Commission could
14 waive a standing requirement. Arizona courts can waive such a requirement in
15 exceptional circumstances, generally in cases involving issues of great public importance
16 that are likely to recur. *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 25, 961 P.2d 1013, 1019 (1998).
17 The Alliance's application undoubtedly raises such an important public issue, as the
18 Commission has previously concluded. In adopting the Renewable Energy Standing
19 Tariff ("REST") Rules, the Commission found that it was necessary to require Arizona
20 utilities to acquire renewable generation resources to promote and safeguard the security,
21 convenience, health and safety of Arizona utility customers. Decision No. 69127 at
22 Finding of Fact Nos. 231-234. The Rules require that a certain portion of the utilities'
23 renewable energy requirement be obtained from distributed resources. A.A.C. R14-2-
24 1805. Thus, the Commission has recognized the importance to the public of renewable,
25 and particularly distributed renewable, generation resources. The Alliance's Application
26 goes the heart of the solar industry's and the regulated utilities' ability to meet the

1 demand for such distributed renewable resources. Further, the issue of whether SSA
2 providers are PSCs is likely to recur if the Commission does not resolve the question in
3 this proceeding. A number of Alliance members are poised to offer SSAs in Arizona, and
4 one or more would likely bring a similar application if the Commission dismissed this
5 Application for a lack of standing. Therefore, the Commission could waive any standing
6 requirement on the basis that the Application involves an issue of great public importance
7 that is likely to recur.

8 Scope of the Proceeding

9 The Alliance's Application raises a narrow, factually specific, question—whether
10 a provider of an SSA that has the 12 characteristics set forth in the Application is or is not
11 a PSC. Staff and Intervenors raise a number of substantive issues that go beyond the
12 Application, and are not necessary to decide the Application.

13 Several parties raise issues of safety, reliability, resource planning, and the
14 potential for stranded costs that may arise as a result of SSA providers doing business in
15 Arizona. However, those issues are a function of distributed generation generally, and are
16 not unique to the SSA form of financing of distributed solar generation facilities. Further,
17 those issues do not impact whether the SSA form of financing results in one being a PSC.
18 While the Alliance does not discount that safety, reliability and resources planning are
19 issues that the Commission may consider and address, they are not issues that are
20 triggered by the Alliance's Application. Rather, as APS's comments recognize, those
21 issues are a product of by the Commission's prior decisions to require distributed
22 renewable generation and net metering. The Commission has already considered the
23 desirability of distributed renewable resources in Arizona's generation resource mix when
24 it adopted the REST distributed generation requirements set forth in A.A.C. R14-2-1805.
25 In any event, issues of safety and reliability have already been addressed by the
26 Commission. In Decision No. 69674, the Commission ordered Staff to begin the process

1 to convert the Staff's Interconnection Document into rules. The Interconnection
2 Document specifies the "minimum safety and protection requirements" with which
3 interconnected generating facilities must comply.³ Additionally, resource planning issues
4 are currently under consideration in Docket No. E-00000E-05-0431, the Commission's
5 generic investigation regarding electric resource planning. To the extent the Commission
6 wishes to consider any potential stranded cost implications of distributed generation, the
7 resource planning docket would likewise be an appropriate forum. The Commission
8 should not interject these extraneous issues into this proceeding.

9 Sempra proposes that the Commission examine again its previous conclusion that
10 ESPs, MSPs and MSRPs are PSCs subject to the Commission's regulation. The Alliance
11 offers several responses to this procedural suggestion. First, the issue fits better in the
12 Commission's ongoing generic examination of electric restructuring, Docket No. E-
13 00000A-02-0051, which is the forum in which the Commission is reviewing, among other
14 matters, whether retail competition is in the public interest. Second, it is not necessary to
15 resolve the issue in order to determine whether SSA providers are PSCs. While there are
16 undoubtedly similarities to the issue because the legal standard of what constitutes a PSC
17 would be the same for both questions, the consideration of whether one is a PSC is fact
18 specific, and the facts necessary to determine whether these entities are PSCs will differ
19 greatly from the facts set forth in the Alliance's Application. Any attempt to link the
20 issue to that of this Application is both unnecessary and would be procedurally awkward
21 in light of the different facts that underlie the two questions.

22 A number of parties have raised the issue of whether some lesser form of
23 regulation by the Commission would be appropriate for SSA providers. Considering this

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25 ³ Decision No. 69674 at Exhibit pg. 6. The Interconnection Document also provides that customers
26 interconnecting on-site generating facilities must be "treated without discrimination" (at 7). Thus, customers who
finance on-site generation through an SSA would be required to adhere to the same safety requirements as all other
interconnecting customers.

1 question at this time would be putting the cart before the horse. If SSA providers are not
2 PSCs, the Commission would have no direct regulatory authority over them.⁴ Further,
3 whether some lesser form of regulation might be sufficient is not a fact in determining
4 whether SSA providers are PSCs in the first instance. Thus, it is premature to consider
5 the degree or form of regulation for SSA providers before the Commission has even
6 determined whether it has authority to regulate them at all. Additionally, consideration of
7 how the Commission might regulate SSA providers (if it even needs to be addressed)
8 should be dealt with in a generic proceeding that can lead to the adoption of whatever
9 rules might be appropriate if some lesser form of regulation were deemed sufficient.
10 Thus, the question of a lesser form of regulation is both premature, and should be dealt
11 with in another type of proceeding.

12 Similarly, issues of consumer protections, SSA providers' financial abilities, and
13 the ability for SSA customers to bring complaints before the Commission are all matters
14 that would be beyond the scope of the Commission's authority if SSA providers are
15 deemed to not be PSCs. Likewise, the existence of such consumer protections is not
16 among the factors to be examined in determining whether SSA providers are PSCs. Thus,
17 only if the Commission denied the Alliance's Application would these issues become
18 relevant. In any event, issues of safety and reliability of interconnecting distributed
19 generation are already addressed by the Staff's Interconnection Document and are in the
20 process of being incorporated into rules.

21 Finally, the fixed nature of the Commission's resources suggests that the
22 Commission should consider only the narrow scope of the Alliance's requested relief at

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24 ⁴ The Commission undoubtedly has the authority to regulate how electric utilities that are PSCs may interact
25 with the SSA providers and their customers, but this is not direct regulation of the SSA providers. Issues of safety
26 and reliability of the electric grid can be addressed by imposing appropriate requirements on the electric utilities
regarding what they must require of those with whom they interconnect.

1 this time. The Commission may find that its resolution of the focused question of
2 whether SSA providers are PSCs is resolved in such a way that it need not address any
3 other loosely-related issues now. For example, there is no need to expend the resources to
4 consider proposals for lesser forms of regulation if the Commission determines that SSA
5 providers are not PSCs. Additionally, expanding the proceeding to a broader scope of
6 issues would postpone the date at which the Commission can answer the narrow question
7 of the Alliance's Application. That delay would continue the uncertainty that currently
8 hampers potential customers' access to renewable generation resources.⁵

9 The Commission should limit the scope of this proceeding to applying the relevant
10 legal standard of what makes one a PSC to the narrow facts presented by the Application.
11 There is no need to burden the Alliance, Staff, Intervenors, the ALJ and the Commission
12 by considering additional matters that are not necessary to either grant or deny the relief
13 that the Alliance seeks. Any additional matters that should be addressed in light of that
14 ruling can be handled (and for many issues that go beyond the SSA form of financing,
15 should be handled) in other proceedings.

16 Whether a Hearing Is Necessary

17 Staff has recommended that a hearing be held in this matter, and most Intervenors
18 either agreed or did not object. Much of the basis for these calls for a hearing is grounded
19 in an expansive view of the nature of this proceeding. However, if the Commission
20 adopts a narrow scope for this proceeding, a hearing is not necessary to resolve the
21 question presented by the Application. The Alliance has set out in its Application the 12
22 characteristics of the SSAs for which it seeks a declaratory order. There is no need for
23 the Commission to examine other facts regarding the proposed transactions between SSA
24 providers and their customers in order to apply the relevant legal standard and make its

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26 ⁵ See, e.g., letters docketed by Scottsdale Unified School District on April 14, 2009 and Laveen Elementary School District on April 17, 2009.

1 ruling. The Alliance has set forth is legal analysis of the application of the law to the
2 facts presented in its Application. Thus, the Alliance recommends that the Commission
3 permit other parties to file responsive legal briefs, and the Alliance to file a reply brief.
4 Upon closing of the briefing schedule, the ALJ can take the matter under advisement and
5 prepare a Recommended Order for consideration by the Commission.

6
7 **REQUEST FOR PROCEDURAL CONFERENCE**

8 Clearly there are number of procedural and substantive issues raised by the Staff
9 Report and Intervenor filings. The Alliance believes that it would be appropriate for the
10 Commission to convene a procedural conference to address the procedural questions
11 raised by the parties filings to date. Specifically, the Alliance requests that the
12 Commission provide direction on the following procedural issues at this time:

- 13 1. Whether the Commission believes the Alliance has standing to bring this
14 Application. If the Commission believes the Alliance lacks standing, it would be
15 more efficient for the Commission to so indicate prior to parties investing further
16 resources in addressing substantive aspects of this docket;
- 17 2. What issues the Commission desires be addressed in this proceeding. As discussed
18 above, the Alliance believes the Commission should maintain a narrow scope and
19 focus on whether providers of SSAs that have the 12 characteristics set forth in the
20 Application would be PSCs or not.
- 21 3. Whether the Commission desires a hearing on the issues that it determines are
22 within the scope of this proceeding. The Alliance believes that the desirability of a
23 hearing in this proceeding cannot be determined until the scope of the proceeding
24 is fixed. The Alliance does not believe that a hearing is necessary to address the
25 narrow legal question it raised in its Application.

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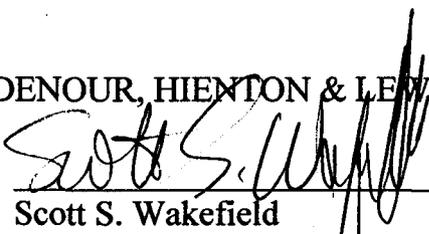
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1 Therefore, the Alliance requests that the Commission convene a procedural
2 conference to address the procedural questions raised to date.

3 Dated this 24 day of April, 2009.

4 RIDENOUR, HENTON & LEWIS, P.L.L.C.

5 By 
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10 Pursuant to A.A.C. R14-3-204,
11 the Original and 13 copies were filed on
12 April 24, 2009 with:

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15 Copy of the above delivered this
16 24 day of April, 2009, to:

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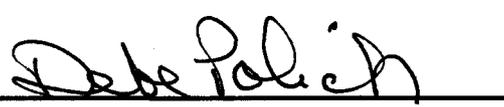
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