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ARIZONA CORPORATION COMMISSION
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BEFORE THE ARIZONA CORPORATION COMMISSION

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E-20690A-09-0346

**IN THE MATTER OF THE)
APPLICATION OF SOLARCITY)
FOR A DETERMINATION THAT)
WHEN IT PROVIDES SOLAR)
SERVICE TO ARIZONA SCHOOLS,)
GOVERNMENTS, AND NON-)
PROFIT ENTITIES IT IS NOT)
ACTING AS A PUBLIC SERVICE)
CORPORATION PURSUANT TO)
ART. 15, SECTION 2 OF THE)
ARIZONA CONSTITUTION)**

**APPLICATION AND REQUEST FOR
EXPEDITED RULING**

Arizona Corporation Commission

DOCKETED

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SolarCity Corporation (“SolarCity” or “Applicant”) by and through undersigned counsel hereby submits this Application requesting that the Arizona Corporation Commission (“Commission”) declare that when the Applicant enters into a Solar Services Agreement (“SSA”) as described herein with schools, non-profit organizations and governmental entities, Applicant is not acting as a public service corporation (“PSC”) as defined in Article 15, Section 2 of the Arizona Constitution. The Scottsdale Unified School District (The “School District”) supports the Applicant in this request (*see* Letter from School District at **Exhibit “A”**). Applicant and the School District further request that the Commission expedite this Application and rule without a hearing because expedited review is necessary to allow Arizona to maximize its allocation of Federal stimulus funding under the American Reinvestment and Recovery Act

1 (“ARRA”) and to maximize available Federal tax incentives, one of which expires this year.
2 This Application sets out the following; 1) an introduction to the Application; 2) a background of
3 the Applicant and its relationship with School District; 3) the need for an expedited ruling given
4 the time sensitive nature of this request as it relates to Federal stimulus dollars; 4) an analysis of
5 the SSA at issue in this case; and 5) an analysis of the applicable legal and public policy
6 standards which will demonstrate that the Applicant’s request is consistent with the Arizona
7 Constitution, case law, prior Commission decisions, and is in the best interest of the people of
8 Arizona. *Under these facts, the Commission must find that Applicant is not a Public Service
9 Corporation.*

10 **I. BACKGROUND AND REQUEST FOR EXPEDITED REVIEW**

11 **a. Introduction**

12 In this case, the Commission is being asked to decide whether or not schools, the
13 government, and other non-profit organizations will be able to utilize solar power to reduce their
14 operating expenses during these particularly difficult economic times. Specifically, the
15 Applicant has reached an agreement to install solar panels on the rooftops of two School District
16 schools. This agreement will enable these schools to realize significant operating savings while
17 avoiding up-front costs that would otherwise exceed \$10 million. In addition to avoiding this
18 prohibitive up-front expense, these agreements will save the schools millions of dollars in
19 electricity costs. As a result, the School District can use these savings to advance its academic
20 mission. Furthermore, with the availability of ARRA funding, and the overwhelming need of
21 the schools to take every opportunity to allocate these funds for student advancement, the time is
22 absolutely right for this decision. Indeed, this decision must come quickly, as some of the
23 essential federal stimulus benefits and ARRA funds expire as quickly as the end of this year and
24 the need for cost savings at the schools has never been greater.

25 **b. Applicant SolarCity Background**

26 SolarCity is a Delaware company headquartered in California, with 36 employees in
27 Arizona. SolarCity is a national leader in solar power system design, financing, installation,
28 monitoring and related services. The company’s mission is to help millions of homeowners,

community organizations and businesses adopt solar power by lowering or eliminating the up-front costs. As a result, Americans will be protected from rising electricity costs and our environment will be protected from polluting power sources. SolarCity estimates that the thousands of solar systems it has installed to date will collectively offset more than 600 million pounds of greenhouse gas pollution.

c. Scottsdale School District RFP

The Scottsdale Unified School District issued a Request for Proposals (“RFP”) from solar installers for the installation of solar systems at Coronado and Desert Mountain high schools. SolarCity proposed financing the project with a Solar Services Agreement (“SSA”). The School District determined that SolarCity’s bid was the most advantageous to the District, and that other options were impractical because of the high up-front capital costs and inability to realize federal tax benefits. An SSA financing arrangement is the only way for the School District to adopt solar as it is the only arrangement for non-profits that utilizes federal tax incentives to enable reduction of costs (*see* detailed discussion below). SolarCity’s SSA financing allows it to offer these two School District schools solar systems which are expected to save them combined **\$4.7 million** over the next 15 years with **zero** up-front capital cost. This is as opposed to an approximately \$10 million upfront installation cost. The effect of these reduced capital costs and significant tax benefits is such that ***there would be no solar on these schools without SolarCity’s SSA financial proposal.***

The School District is excited to be able to immediately utilize solar energy and begin realizing immediate savings. The proposal from SolarCity will also provide the District with a long-term hedge against escalating utility rates on a significant portion of their demand, thus allowing the District to continue to lower its operating costs. In addition, as part of the RFP, SolarCity has agreed to provide an integrated educational component with the systems, which will allow students to learn about solar energy and to directly monitor their energy consumption/reduction and positive environmental impacts via kiosk computer screens, located in common areas of the schools. This is the very definition of a win-win situation for students, schools, taxpayers and the environment. However, as this filing will discuss, this cannot be accomplished without regulatory certainty from the Commission regarding this specific SSA.

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d. Relation to Solar Alliance Filing

The Applicant is aware of the general Solar Alliance application regarding the regulatory status of solar service providers (Docket No. E-20633A-08-0513) and recognizes that many of the same legal concepts will apply to this Application. However, SolarCity was compelled to file this case because of the imminent matter of statewide importance reflected by the Scottsdale RFP award and its associated timelines for Federal Stimulus and ARRA incentive eligibility. We believe that this case presents the Commission with a specific financing arrangement and concrete fact pattern, which will clearly demonstrate that the Applicant is not a PSC when it enters into an SSA with a school, non-profit, or governmental entity. We believe both matters are extremely important but the circumstances surrounding this Application require a specific examination and a swift resolution.

SSA financing is effectively the *only* way for schools, non-profit, and governmental entities to leverage the valuable tax incentives and Federal ARRA stimulus dollars for solar, which can reduce the cost of solar by half or more. Because of the utilization of the Federal ARRA stimulus dollars, an expeditious ruling (separate from the Solar Alliance case) is not only justified but also vital for the best interests of the State. Simply put, timely resolution of this matter will prevent Arizona from losing millions of Federal stimulus dollars that should be flowing to our most important institutions at a time when they are desperately needed.

e. Expedited Ruling—Imminent Matter of State-Wide Importance

There are several tax and incentive programs that are set to quickly expire making an immediate ruling and resolution of this issue essential. The Economic Stimulus Act of 2008 allows a 50% bonus depreciation to be taken on solar equipment if such equipment is installed on or before December 31, 2009. If a decision on this application is not rendered in enough time to allow installation of the panels on the schools before the end of the year, this opportunity will be lost. Given the sensitivity of construction around school children it should be noted that installation of these facilities could take at least 6 months as work can only take place during weekends and afterhours to assure the children's safety. This further demonstrates the need for

1 an expedited ruling on this matter as it is imperative that the system is operational by the end of
2 the year to fully utilize bonus depreciation and ARRA stimulus funds.

3 Further, as part of the ARRA, Arizona has been allocated \$10 million for State Building
4 Energy Performance Contracting and \$20 million for Energy Efficiency and Renewable Energy
5 in Schools. Energy efficiency is mandated for government buildings (*see* A.R.S. § 34-451),
6 however, these funds are barely enough to make a dent in schools' budgets or in the amount of
7 solar installed without the added leverage of private investment.

8 As this Application will discuss, this private investment is only made possible for these
9 entities through the use of the SSA financing arrangement. For example, \$10 million would
10 barely cover the costs of the systems contemplated for the two high schools in the Scottsdale
11 RFP. However, SSA financing allows private investment to utilize the otherwise stranded tax
12 incentives, (or the temporary Section 48 Grant-In-Lieu-Of-Taxes equivalent to be offered
13 through the US Department of the Treasury,) thereby allowing-schools to go solar with zero up-
14 front capital expenditures, while reserving ARRA funds for other vital facility improvements.

15 If the point of the stimulus funds is to leverage private investment and maximize the
16 economic effect, then approval of SSA financing for schools, non-profits and governmental
17 entities is the single most effective way to accomplish that goal. ***In short, swift approval of this***
18 ***Application would have more positive economic impact for the State than all other programs***
19 ***combined.*** SSA financing must be used to leverage private investment and maximize the benefit
20 of the ARRA funds (*see* discussion regarding tax credit implications for non-profits below).

21 The ARRA also includes a provision that allows the tax credits for solar installations to
22 be converted to Treasury grants (again, only available to for-profit entities). By significantly
23 reducing the tax equity required for investment in any one project, this provision significantly
24 broadens the pool of potential private investment in solar. However, to qualify for these
25 payments, the installation must begin by December 31, 2010. Given a typical construction cycle,
26 this tax equity alternative is a further factor driving towards quick resolution of the PSC status of
27 SSA providers.
28

II. FACTS UPON WHICH THIS APPLICATION IS BASED – THE SSA

SolarCity has proposed utilizing an innovative financing tool known commonly as an SSA because of the disproportionate front-end cost associated with purchasing and installing a solar panel system and the inability of non-profits to capitalize on tax incentives for solar (*see Exhibit “B”* SolarCity’s executed SSA with the School District). The SSA or other power purchase or solar-as-a-service arrangements are—the only feasible way for non-profit organizations and government entities without a federal tax burden to take advantage of the significant federal tax and depreciation incentives associated with solar technology. Without an SSA the federal solar tax credits cannot be realized because they do not apply to non-profit entities while the IRS rules require an SSA in order for a third-party financier to be able to utilize these credits (*see Exhibit “C”*, IRS Guidance and Solar Energy Industries Association Tax Manual).

The typical characteristics and structure of SolarCity’s SSA for schools, non-profits, and governmental agencies are as follows:

- The Customer gives SolarCity access to its property to install the solar panel system;
- SolarCity provides the customer with the financing, design, installation, operation and maintenance of a solar panel system on the customer’s property, the terms of which are described in the SSA;
- The customer pays nothing for the acquisition, installation, or maintenance of the solar panel system;
- The Customer becomes the owner of all electricity produced the moment the electricity is produced;
- SolarCity retains initial ownership and “use” of the system as defined in the Federal tax code, thus allowing them to capitalize on the available tax incentives which would otherwise be stranded;
- The Customer makes payments to SolarCity for the equipment and related maintenance thereof, and such payments are calculated in relation to the amount of electricity the system produces;

- 1 • SolarCity provides a buyout option to the customer for the entire solar panel system in
2 years six (6), ten (10), and fifteen (15)—The amount of the buyout is reduced by the
3 number of payments made by the Customer;
- 4 • While the electricity that the solar panel system produces results in a reduction of the
5 customer's overall demand from the electric utility, the customer must remain connected
6 to the utility grid; and
- 7 • SolarCity installs the system pursuant to all applicable codes and regulations and must
8 meet the requirements for interconnection to the utility. All activity in this regard is on
9 the customer's side of the meter.

10 The analysis below will show that the application of these facts in the context of
11 SolarCity's proposed SSA with the Scottsdale Unified School District do not make SolarCity a
12 PSC under the Arizona Constitution; and further, SSAs are the only viable option for schools,
13 non-profits, and governmental entities to adopt solar and for Arizona to maximize Federal
14 stimulus dollars under the Economic Stimulus Act and the ARRA.

15 **III. SOLARCITY IS NOT A PUBLIC SERVICE CORPORATION WHEN IT**
16 **ENTERS INTO SSA FINANCING WITH A SCHOOL, NON-PROFIT OR**
17 **GOVERNMENTAL ENTITY**

18 As examined in more detail below, the Courts look first to the text of the Arizona
19 Constitution before examining the merits of governmental intervention on behalf of the ratepayer
20 and the extent to which a given corporation is indispensable to a large enough number of people
21 that it demands regulation. As you will see below, SolarCity is not acting as a PSC, and its
22 actions do not need regulating when it is entering into SSAs with school, non-profit and
23 governmental entities.

24 **a. SolarCity Does Not Meet the Textual Definition of a Public Service**
25 **Corporation Under Art. 15, § 2 of the Arizona Constitution**

26 The Arizona Constitution defines a "public service corporation" as a corporation, other
27 than municipal, "engaged in furnishing . . . electricity for light, fuel, or power" Art. 15, § 2.
28 The SSA at issue in this Application makes it clear that SolarCity is in the business of furnishing
equipment and ongoing maintenance thereof to the School District and not "electricity for light,

1 fuel, or power.” In fact, the specific language of the SSA itself indicates that SolarCity actually
2 never really owns the electricity that its solar equipment creates. The SSA states that,
3 “...Purchaser will take title to all electric energy that the System generates from the moment the
4 System produces such energy...” SSA, at Exhibit 7 ¶4(a) (see **Exhibit “B”**).

5 From the moment it is created the electricity is the sole legal possession of the School
6 District which draws a clear distinction between this SSA and the factual situation at issue in
7 *Southwest Transmission Cooperative, Inc. v. Arizona Corporation Commission*, 213 Ariz. 427,
8 142 P.3d 1240 (App. 2007) wherein the Court of Appeals found that Southwest Transmission
9 Cooperative qualified as a PSC under the Arizona Constitution because as an electrical
10 transmission company it possessed power while that power was being transferred from the
11 generator to the distributor along its transmission lines. *Southwestern Transmission Cooperative*,
12 213 Ariz. at 431, 142 P.3d at 1244. Under the terms of this SSA SolarCity’s role nearly is
13 indistinguishable from a contractor who may design and build a gas generating power plant.
14 Certainly, the contractor in this example is not a PSC merely because what he designed and
15 constructed can be used to create electric power. The contractor never owns the power and
16 therefore, never furnishes the power to anyone. The only difference in this situation is that
17 because the cost of building, installing and maintaining the solar equipment is prohibitively
18 expensive to the School District, the School District must finance the equipment that it then uses
19 to make the power that it consumes. It simply cannot be the case that the mere fact that the
20 School District cannot afford to pay SolarCity for all the equipment up front subjects the
21 Agreement between SolarCity and the School District to regulation.

22 **b. The SSA at Issue Does Not Require Government Intervention on**
23 **Behalf of the Ratepayer**

24 Even if the Commission for some reason finds that SolarCity meets the definition of a
25 PSC under the Arizona Constitution the law still does not support regulating them under the
26 circumstances presented herein. In *Southwest Transmission Cooperative*, the Court of Appeals
27 held that while the Commission has broad authority to regulate public service corporations, the
28 purpose of such regulations must be to “to preserve those services indispensable to the population
and to ensure adequate service at fair rates where the disparity in bargaining power between the
service provider and the utility ratepayer is such that government intervention on behalf of the

1 *ratepayer is necessary.” Id. at 432, 1245. (emphasis added.)* The facts of this Application
2 plainly demonstrate that governmental intervention on behalf of the School District is not needed
3 to balance any disparity in bargaining power or to assure adequate service.

4 The mere fact that the School District was in a position to issue the RFP and to solicit
5 competitive offers from various sources shows just how different this situation is from one that
6 involves a public service corporation or common utility. In fact, the District received six
7 qualifying offers for a system, each of which was in the form of SSA, PPA, or similar
8 arrangements. This indicates that there is no monopolistic structure at play and the customer is
9 in a position to negotiate price and search for the best deal which will result in a fair rate.

10 It is safe to say that the School District did not have the same opportunity when
11 connecting to the electric grid and was faced with a situation where it only had one option for its
12 electric utility provider. In such a situation the Commission and the Courts routinely and
13 understandably have and found that the playing field is not equal and that the electric customer
14 needs government intervention to assure fair rates where no alternatives exist.

15 The SSA at issue in this Application requires no government intervention to ensure fair
16 rates and adequate service for several reasons:

17
18 1) The customer (the School District) solicited bids and had options prior to awarding
19 the contract to SolarCity. This indicates that there is no monopolistic structure at play and the
20 customer is in a position to negotiate price and search for the best deal which will result in a fair
21 rate. The customer has the power;

22 2) SolarCity is not providing an essential service without which the customer (the School
23 District) could not do business or exist. In this case, the School District will benefit from
24 SolarCity’s services but the School District does not *need* SolarCity’s services as it would need
25 the water and electricity that public service corporations commonly provide under Commission
26 regulations. Obviously, this means that the School District will not be in a position where it has
27 to have the service and therefore, is forced to pay for it no matter what it costs;

28 3) Because the School District’s decision to enter into the SSA is purely voluntary it can
be presumed that it will only enter into such an agreement if it provides a savings or financial

benefit to the School District. As a result it is a virtual certainty that the amount that SolarCity charges for its equipment and services will be equal to or less than the equivalent amount that the regulated PSC charges for directly providing energy to the School District. In other words, if the customer does not derive a benefit from the equipment and services then they are not going to enter into the SSA with SolarCity and the Commission therefore, can be assured that the amounts charged are fair and that government intervention on behalf of the School District is not necessary;

4) The customer will remain connected to the electrical grid and will continue to receive substantial amounts of electricity from its electrical provider. This is important because if for any reason the solar panels failed to operate for any period of time the electricity flow to the School District would be uninterrupted. For this reason, Commission regulation is not necessary to assure the adequacy of the service provided.

c. SolarCity Is Not a PSC Under the Eight (8) Criteria of *Natural Gas Serv. Co. v. Serv-Yu Coop* When it Enters into SSA Financing with a School, Non-Profit or Governmental Entity

The School District can utilize the equipment that SolarCity designs, installs and maintains to produce electricity for the School District's use; however, the fact that the equipment can create electricity is only incidental to the primary service that SolarCity is providing. In analyzing these questions the Arizona Supreme Court has articulated eight (8) factors to be considered in identifying those corporations "clothed with a public interest and subject to [the Commission's] regulation because they are indispensable to large segments of our population." *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 237-238, 219 P.2d 324, 325-326 (1950). Those eight factors are: 1) what the corporation actually does; 2) a dedication to public use; 3) the company's articles of incorporation, authorization, and purposes; 4) dealing with the service of a commodity in which the public has been generally held to have an interest; 5) monopolizing or intending to monopolize the territory with a public service commodity; 6) acceptance of substantially all requests for service; 7) service under contracts and reserving the right to discriminate is not always controlling; and 8) actual or potential competition with other corporations whose business is clothed with public interest. *Id.* After these eight factors are

1 reviewed it will be clear that SolarCity's agreement with the School District is not "clothed with
2 a public interest" such that it must be "subject to regulation because they are indispensable to
3 large segments of our population." *Id.*

4 i. Factor 1: SolarCity Will Not Provide an Indispensable Service to a
5 Large Segment of the Population

6
7 The Arizona Supreme Court has held that "[a] corporation that serves such a substantial
8 part of the public as to make its rates, charges, and methods of operation a matter of public
9 concern, welfare, and interest subjects itself to regulation". *Serv-Yu Coop.*, 70 Ariz. at 238, 219
10 P.2d at 326. In contrast to this, SolarCity does not provide an indispensable service and limits
11 SSA financing to a small segment of the population, on the basis of individually negotiated
12 contracts.

13 In 2006, the Court of Appeals upheld the Commission's findings that Southwest
14 Transmission Cooperative ("SWTC") was a public service corporation because it constituted a
15 "critical link" in the chain of electricity generation, which was "integral in providing electricity
16 to the public." *Southwest Transmission Coop.*, 213 Ariz. at 433, 142 P.3d at 1246; *see also*,
17 Decision No. 66835, In the matter of the Application of Southwest Transmission Cooperative,
18 Docket No. E-04100A-02-0321 (March 12, 2004). Unlike SWTC, SolarCity's bundle of
19 services is not "integral to providing electricity to the public." The solar panel systems are
20 placed on the private property of schools or other non-profit organizations that then own all of
21 the electricity output that the system generates. However, the solar facility will not fulfill 100%
22 of the customer's electricity needs, which will necessitate the customer remaining connected to
23 the public utility grid in order to compensate for any electricity supply shortfalls. As such,
24 SolarCity is not a "critical link" in the chain of electricity generation nor does it provide service
25 to a large segment of the population. Rather, SolarCity provides an optional service to a limited
26 customer base. It is clear that the SSA at issue in this Application satisfies the first factor of
27 *Serv-Yu Coop* case.

28 ii. Factor 2: SolarCity Will Not Dedicate its Property to a Public Use

1 In applying this factor, the *Southwest Transmission Coop* Court found that, “whether a
2 company has dedicated its property to public use is a question of intent shown by the
3 circumstances of the individual case.” Id. 213 Ariz. at 432, 142 P.3d at 1245. SolarCity has no
4 intention of dedicating private property for a public use. On the contrary, the property that
5 SolarCity provides is only dedicated to the individual school, non-profit organization or
6 government entity on whose private property the solar panel system is located (in this case the
7 School District), and to whose electrical load the system is coupled directly and behind the
8 meter. The solar electricity generation and consumption takes place entirely on the customer’s
9 private property. Simply put: there is no property dedicated to a public use in an SSA financing
10 arrangement for non-profits. It is clear that the SSA at issue in this Application satisfies the
11 second factor of *Serv-Yu Coop* case.

12 **iii. Factor 3: SolarCity’s Articles of Incorporation Do Not Authorize it**
13 **to Act as a Public Utility**

14 The Arizona Supreme Court stated that “while the articles of incorporation authorizing
15 the corporation to act as a public utility are not conclusive, the fact of such authorization may be
16 considered in the determination of the ultimate question.” *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at
17 326. SolarCity’s Certificate of Incorporation does not authorize, or even contemplate, acting in
18 the capacity of a public utility (See **Exhibit “D”**). Rather SolarCity provides a unique financial
19 solution which allows non-profit entities to leverage tax incentives to make solar adoption
20 feasible. It is clear that the SSA at issue in this Application satisfies the third factor of *Serv-Yu*
21 *Coop* case.

22 **iv. Factor 4: SolarCity’s SSA Financing of Solar Equipment for**
23 **Schools, Non-profits and Governmental Entities is Not a**
24 **Commodity Subject to the Public Interest, and is Not Subject to**
25 **Regulation**

26 In examining this factor the Supreme Court of Arizona declared that “State regulation of
27 private property . . . is wholly dependent upon the dedication of private property to a public use
28 with a public interest.” *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818. Under this specific set of

1 facts and subject to the SSA at issue in this Application there is simply no public interest present
2 to justify any State regulation.

3 Also, regarding the limited scope of State regulation, the *Nicholson* Court stated,

4 Such invasion of private right cannot be allowed by implication or strained
5 construction. **It was never contemplated that the definition of public service**
6 **corporations as defined by our constitution be so elastic as to fan out and**
7 **include businesses in which the public might be incidentally interested**
8

9 *Id.*, at 321, 497 P.2d at 819 (emphasis added). While the solar panel systems that SolarCity
10 designs, finances, installs, and operates may be used by the schools to produce electricity, the
11 SSA arrangement in the context of a non-profit entity is fundamentally a financing tool; the fact
12 that a commodity is produced is merely incidental to the purpose of the SSA for a non-profit.
13 This conclusion is supported when we examine why SSAs exist in the first place. The extremely
14 high capital cost of installing solar means that solar panel systems are only financially feasible
15 due to the tax incentives that exist for installing them. However, non-profit entities cannot take
16 advantage of tax incentives and therefore, were previously unable to install solar systems. This
17 is how the SSA came to be. This creative financing solution allows a third-party investor to
18 benefit from the tax advantages while allowing the installation of solar at a non-profit entity.
19 Other commercial and residential solar installations can be made financially feasible through a
20 lease; however the tax-code makes this impossible for non-profits (*see Exhibit "C"*). Thus, in
21 this particular Application, the SSA is at its core a financing tool and the fact that the solar panel
22 systems produce a commodity is merely incidental to the arrangement and does not create a
23 public interest.

24 The fact that the SolarCity SSA provides the non-profit customers with options to
25 purchase the system at various times during the agreement is further evidenced in support of this
26 Argument. This fact alone clearly shows that the SSA, as it relates to non-profits, is a financing
27 mechanism and not the provision of a commodity in which the public has an interest requiring
28 regulation. It is clear that the SSA at issue in this Application satisfies the fourth factor of *Serv-
Yu Coop* case.

1 vii. Factors 7: SolarCity provides its equipment and services to
2 schools, nonprofits and governmental entities through very specific
3 SSA's

4 Solar City provides the services at issue in this Application through very detailed and
5 specific agreements (the SSA in this case). The fact that individual contracts are required is a
6 factor that weighs in favor of finding that the SSA in this instance does not require regulation.
7 See, *Southwest Transmission Coop.*, 213 Ariz. at 433, 142 P.3d at 1246.

8 viii. Factor 8: SolarCity Will Only Serve Non-Profit Organizations and
9 Government Agencies, and Will Not be Competing with Other
10 Public Service Corporations

11
12 In *Southwest Transmission Coop.*, the Court penalized SWTC because it was positioned
13 to compete with other similarly situated utilities. The Court wrote, "because SWTC can contract
14 to provide service to non-members in some circumstances, it appears that it is at least possible
15 for SWTC to compete with these other companies." *Southwest Transmission Coop.*, 213 Ariz. at
16 432, P.3d at 1243. In contrast, SolarCity does not compete for customers with the other PSCs
17 because they provide fundamentally different services. SolarCity does not propose to provide its
18 customers with baseload electricity, and simply cannot provide many customers with any
19 services, due to the site evaluation factors mentioned above. SolarCity will provide non-profits
20 with SSA financing, allowing them to install and eventually purchase a solar system; the PSC
21 still provides the customer with necessary electricity and always will. It is clear that the SSA at
22 issue in this Application satisfies the eighth factor of *Serv-Yu Coop* case.

23 When the eight (8) factors outlined in *Serv-Yu Coop* are weighed against the
24 circumstances presented in this Application it becomes clear that the SSA between the School
25 District and SolarCity does not require the Commission's regulation. Specifically, SolarCity will
26 not be providing an indispensable service to a large segment of the population; SolarCity will not
27 dedicate its property to a public use; SolarCity's Articles of Incorporation do not authorize it to
28 act as a public utility; SolarCity's SSA financing of solar panel systems for schools, non-profit
 organizations, and government entities is not a commodity, subject to the public interest;

SolarCity will not be asserting any monopoly rights over a public service commodity; SolarCity will not be accepting requests for service from the general public; SolarCity utilizes very specific and detailed contracts for service; and SolarCity will not be competing with other existing PSCs. For the foregoing reasons, SolarCity should not be classified as a PSC and, therefore, should not be subject to regulation by the Commission.

d. Neither the law nor public policy support regulation in this case.

The legal analysis provided above demonstrates that there is simply no legal requirement that the Commission regulate the SSA at issue in this Application. SolarCity does not meet the Constitutional definition of a PSC and none of the other legal tests or factors support regulating the company in this instance. Further, public policy certainly argues for the provision of equipment and services to schools, non-profits, and governmental entities that lower their operating costs and allow them to better execute their core functions. The case law and Commission holdings on this subject support a finding that the SSA at issue in this Application need not be regulated and the School District, or other schools, non-profits and government entities that would enter into an SSA with the same terms are free to save the money they so desperately need.

IV. CONCLUSION AND REQUEST FOR EXPEDITED RELIEF

The specific facts of this Application show that the SSA between SolarCity and the School District and any SSA involving the same terms as the SSA at issue herein do not cause SolarCity to meet the criteria of a PSC. Further, because a non-profit is not able to take advantage of the available tax incentives for solar, an SSA is the only feasible option for these entities to adopt solar. Because an analysis of the Arizona Constitution and *Serv-yu* factors show that SolarCity is not a PSC, it not necessary for the Commission to assert its jurisdiction and to regulate in this instance.

On the contrary, as discussed above, the public interest demands that the Commission *not* assert its jurisdiction when the SSA at issue in this Application is utilized for schools, non-profits and governmental entities, lest these entities (and ultimately taxpaying residents) lose out on millions of dollars of Federal stimulus dollars available only for a limited time under the ARRA

1 and the Economic Stimulus Act of 2008. Only with the Commission's quick blessing can
2 schools and other non-profits rapidly adopt solar at which time ARRA and other stimulus funds
3 (and significant private investment) can and will flow into the State; a multitude of jobs will be
4 saved and created; and ultimately every single taxpayer of the State will benefit economically
5 and environmentally.

6 For these reasons, the Applicant respectfully requests that the Commission expeditiously
7 enter a ruling finding that SolarCity is not a PSC when it enters into SSAs with schools, non-
8 profits, and governmental entities consistent with the facts presented in this Application.

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13 **RESPECTFULLY SUBMITTED this 2nd day of July, 2009.**

14
15 **Rose Law Group pc**

16 

17 **Jordan R. Rose**
18 **Court S. Rich**
19 **M. Ryan Hurley**
20 **6613 N. Scottsdale Road, Suite 200**
21 **Scottsdale, Arizona 85250**
22 **Direct: 480.505.3936**
23 **Fax: 480.505.3925**
24 **Attorneys for Applicant SolarCity Corp.**
25
26
27
28

EXHIBIT A



Scottsdale *Unified* School District

Arizona's Most *Excelling* School District

Education Center
3811 North 44th Street
Phoenix, Arizona 85018-5420

Telephone: 480-484-6128
FAX: 480-484-6294
Web site: www.susd.org

June 25, 2009

Dear Chairman Mayes and Members of the Commission,

I am writing on behalf of the Scottsdale Unified School District #48 and specifically our recent award of an RFP for solar systems at two of our high schools (Coronado and Desert Mountain). As you may already know, after a great deal of analysis and comparison of different bids with our consultant, we awarded the RFP to provider SolarCity. Their bid stood out from the rest of the pack by offering our schools the greatest amount of savings with zero up-front capital expenditure via a form of financing known as a Solar Services Agreement ("SSA"). Unfortunately, however, unless the Commission approves the form of SSA financing contemplated by the SolarCity/SUSD RFP award, then we will be unable to install solar systems on our schools without a significant up front capital expense.

As you know, these are difficult times for our schools and specifically our budgets. The recent expiration Excess Utilities combined with State budget cuts for education are putting extraordinary strain on our operations and maintenance budget and will likely translate directly to undesired layoffs. The solar RFP was designed to help alleviate these budget constraints by providing the schools with immediate energy savings with no up-front costs. Installation of these systems would not only save us thousands over the next several years, but they will also allow us to hedge against long term energy costs and to fix those costs in our budget; thereby freeing up dollars for other vital operations.

Because this RFP award is so important to our fiscal health, we feel compelled to join SolarCity in its Application requesting that the Commission hold that SolarCity is not a Public Service Corporation when it provides SUSD with solar systems through an SSA. Simply put, without the Commission's blessing on this Application, we will be unable to adopt solar energy in the foreseeable future due to the prohibitively high up-front costs.

Finally, we also ask that the Commission rule expeditiously on this Application. Not only are the Federal Economic Stimulus dollars and available Federal tax incentives for solar, which are required to make solar energy for schools a reality expiring soon, but the State stimulus money for school improvements (School K-12 Grant Program and Energy Performance Contracting and Distributed Energy Leadership Program) which we had hoped to capture will expire at the end of 2009. We are very concerned we will be unable to take advantage of these programs. Expedited approval of this application is not only justified but necessary for the economic health of our schools. Thank you for your consideration on this important matter.

Sincerely,

David J. Peterson

Assistant Superintendent for Operations

EXHIBIT B



Solar Services Agreement

This Solar Services Agreement (this "**Agreement**") is entered into by the parties listed below (each a "**Party**" and collectively the "**Parties**") as of the date signed by Seller below (the "**Effective Date**").

Purchaser:		Seller:	
Name and Address	Scottsdale Unified School District Coronado High School 2501 North 74 th Street Scottsdale, AZ 85257 Attention: David Peterson	Name and Address	SolarCity Corporation 393 Vintage Park Drive, Suite 140 Foster City, CA 94404 Attention: Lease/License Administrator
Phone	(480)484-6139	Phone	(650) 638-1028
Fax	(480)484-6294	Fax	(650) 638-1029
E-mail	djpeterson@susd.org	E-mail	contractadministrator@solarcity.com
Purchaser (check one)	<input checked="" type="checkbox"/> owns the Facility <input type="checkbox"/> leases the Facility		

This Agreement sets forth the terms and conditions of the finance, design installation, operation and maintenance of the turnkey solar panel system described in **Exhibit 2** (the "**System**") to be installed at the Purchaser's facility described in **Exhibit 3** (the "**Facility**").

The exhibits listed below are incorporated by reference and made part of this Agreement.

- | | |
|-----------|--|
| Exhibit 1 | Finance Attachment |
| Exhibit 2 | System Description |
| Exhibit 3 | Purchaser's Facility |
| Exhibit 4 | Delivery Point |
| Exhibit 5 | License Area |
| Exhibit 6 | Memorandum of License |
| Exhibit 7 | General Terms and Conditions (<i>Revised May 27, 2009</i>) |

Purchaser:

Signature: _____

Printed Name: David Peterson _____

Title: Assistant Superintendent _____

Date: 22 Jun 09

SolarCity Corporation

Signature: _____

Printed Name: Lyndon Rive

Title: CEO

Date: June 25, 2009

Exhibit 1
Finance Attachment

1. **Term:** Fifteen (15) years, beginning on the Commercial Operation Date.
2. **Additional Terms:** Up to Two (2) Additional Terms of Five (5) years each.
3. **Environmental Incentives and Environment Attributes** Accrue to **Seller**.
4. **Contract Price:**

Contract Year	\$/kWh
1	\$0.11
2	\$0.11
3	\$0.11
4	\$0.11
5	\$0.11
6	\$0.11
7	\$0.11
8	\$0.11
9	\$0.11
10	\$0.11
11	\$0.11
12	\$0.11
13	\$0.11
14	\$0.11
15	\$0.11

5. **Condition Satisfaction Date:** September 15, 2009
6. **Anticipated Commercial Operation Date:** October 1, 2009
7. **Outside Commercial Operation Date:** October 15, 2009
8. **Purchase Option Price:**

End of Contract Year	Option Price*:
6	\$1,238,820.17
10	\$1,166,521.33
15	\$1,102,632.84

* Higher of Fair Market Value of System or amount specified

9. **Termination Value:**

Contract Year	Termination Value
1	\$4,061,015.84
2	\$2,312,809.17
3	\$1,936,204.32
4	\$1,618,134.38
5	\$1,330,720.91
6	\$1,029,289.83
7	\$976,191.33
8	\$955,441.30
9	\$934,001.56
10	\$911,835.90
11	\$888,906.28
12	\$865,172.78
13	\$840,593.51
14	\$815,124.46
15	\$788,719.45

10. **Rebate Variance.** All prices in this Agreement are calculated based on a rebate of SRP \$2.50/W. If the actual rebate is lower than calculated, prices will be adjusted pro-rata to reflect the actual rebate received, provided however that Buyer shall have the right to terminate this Agreement if it does not accept the pro-rata adjustment.

Exhibit 2

System Description

1. **System Location:** Coronado High School: 7501 East Virginia Avenue, Scottsdale, AZ 85257
2. **System Size (DC kW):** 399.6kW
3. **Expected First Year Energy Production:** 712,834
4. **Scope:** This is a 399.6kW, producing approx 1783 kWh's kW for a total of 712,834 in the first year. The installation is a roof mount on a flat roof.
5. **Expected Module(s):** First Solar FS-275 75watt thin film modules
6. **Expected Inverter(s):** SatCon PowerGate AE-100-60-PV (4)
7. **Expected Structure:** Roof mount using the best technology determined upon intense engineering site visits and recommendation from roofers, either penetrating or non-penetrating mounting hardware. The Seller shall be solely responsible for verifying the structural integrity of the Roof.
8. **Includes:** n/a
9. **Excludes:** n/a

Exhibit 3
Purchaser's Facility

A PARCEL OF LAND LOCATED IN THE STATE OF ARIZONA, COUNTY OF MARICOPA, WITH A SITUS ADDRESS OF 2501 N 74TH ST, SCOTTSDALE AZ 85257-1502 CURRENTLY OWNED BY SCOTTSDALE UNIFIED SCHOOL DISTRICT 48 HAVING A TAX ASSESSOR NUMBER OF 131-27-001 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS SE4 NW4 EX BEG AT NW COR TH N 89D 40' 30" E 35.74' S 45D 07' W 50.34' & N 0D 7' W 35.33' TO POB & EX S 33' & E40' RD WITH ARC OF 20' RAD IN SE & NE COR TH/OF 37.83 AC.

Exhibit 4
Delivery Point

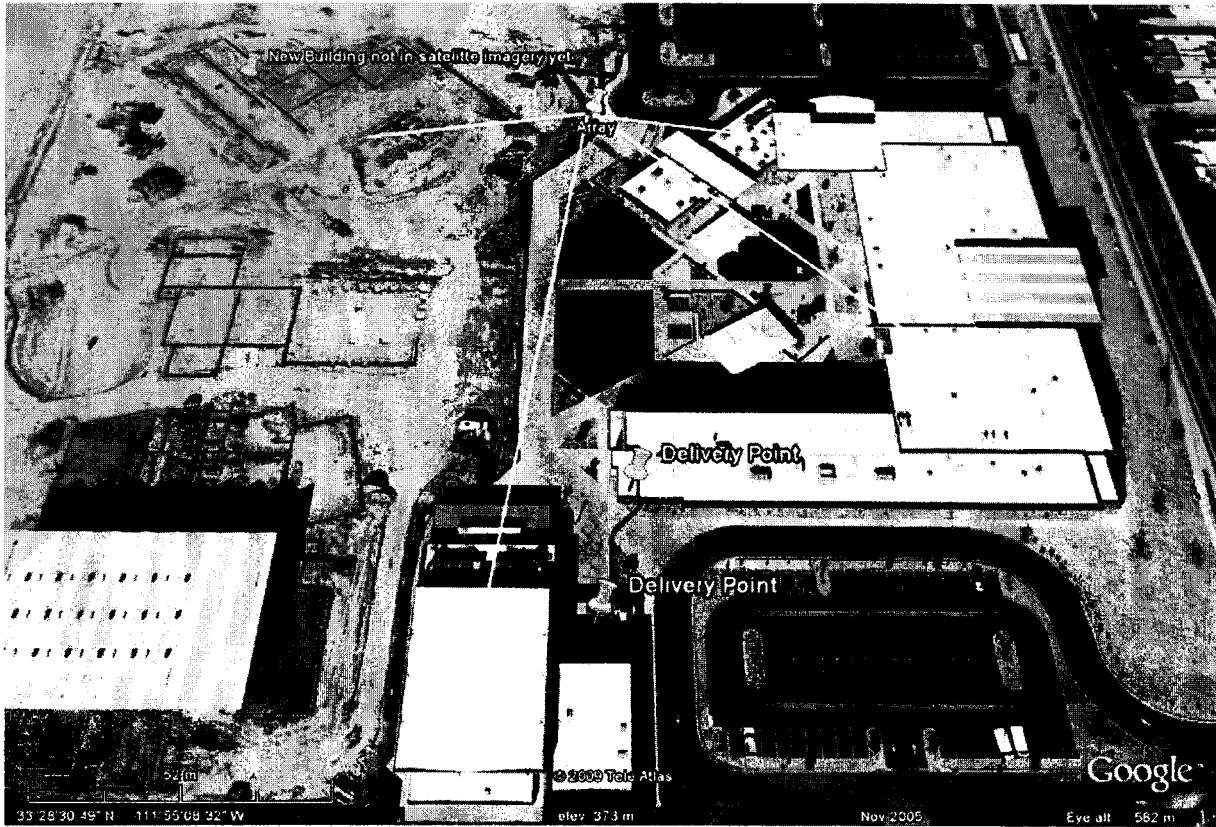


Exhibit 5
License Area

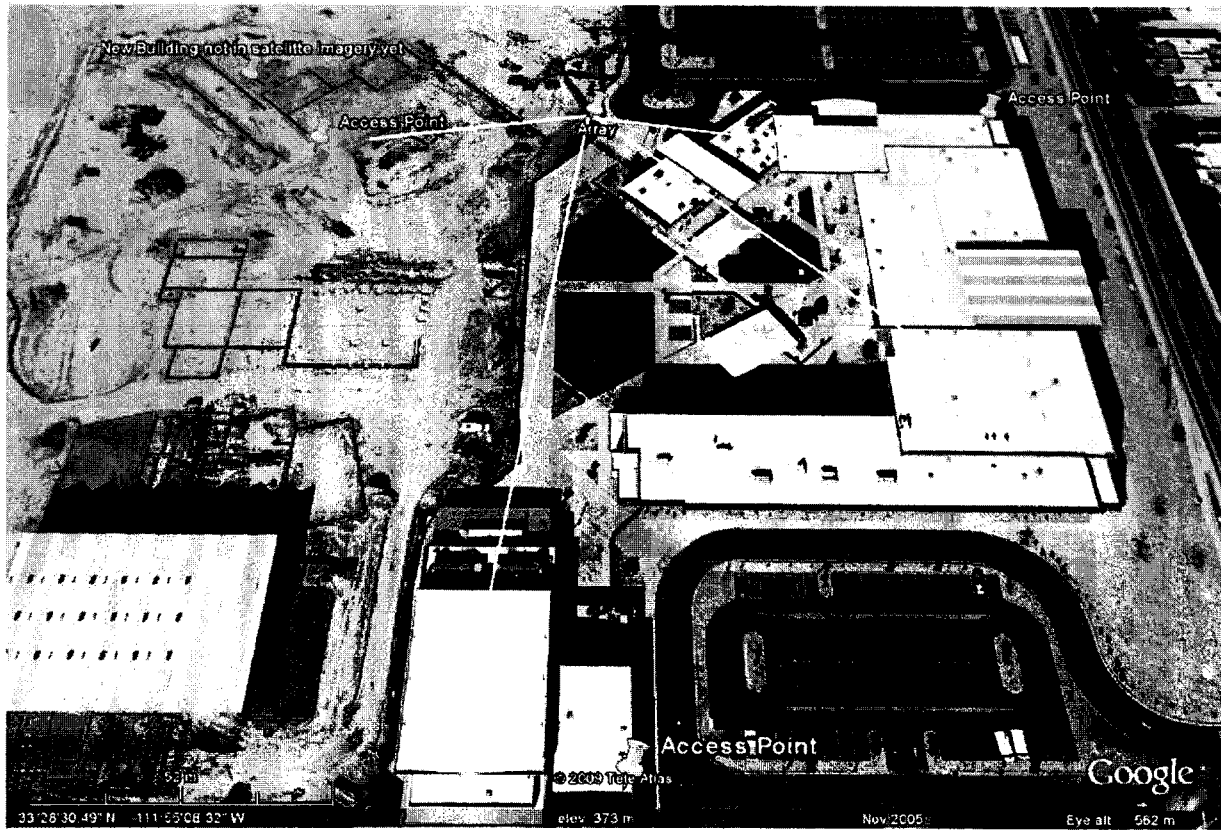


Exhibit 6
Memorandum of License

RECORDING REQUESTED BY AND WHEN

RECORDED RETURN TO:

SolarCity Corporation
393 Vintage Park Drive, Suite 140
Foster City, CA 94404
Attention: Lease/License Administrator

(space above this line reserved for recorder's use)

MEMORANDUM OF LICENSE

THIS MEMORANDUM OF LICENSE is made and entered into this ____ day of June, 2009, by and between Coronado High School, whose address is 2501 North 74th Street, Scottsdale, AZ 85257 ("**Licensor**"), and SOLARCITY CORPORATION, whose address is 393 Vintage Park Drive, Suite 140, Foster City, CA 94404 ("**Licensee**").

- A. Licensor is the owner of certain real property ("**Premises**"), located in the County of Maricopa, State of Arizona, described in Exhibit A attached to and incorporated herein by reference.
- B. Licensor and Licensee have entered into a Solar Services Agreement dated as of June ____, 2009 ("**Agreement**") under which Licensee finances, designs, develops and operates a photovoltaic electric generating system ("**System**") for Licensor. The Agreement is for a term of Fifteen (15) years, beginning June ____, 2009 and ending on June ____, 2024, with an option to extend the Agreement for up to Two (2) extended terms of Five (5) years each. Pursuant to the Agreement, Licensor has granted Licensee an irrevocable, non-exclusive license ("**License**") over the Premises for the purposes and on the terms set forth in the Agreement.

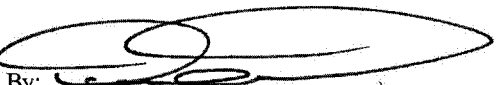
Licensor and Licensee agree as follows:

1. Licensor hereby grants to Licensee the License over the Premises on and subject to the terms and conditions set forth in the Agreement which is incorporated herein by reference.
2. The term of the License begins on June ____, 2009 and continues until one hundred and twenty (120) days after the termination of the Agreement.
3. This Memorandum of License shall not be deemed to modify, alter or amend in any way the provisions of the License or the Agreement. In the event of any conflict between the terms of the License and/or the Agreement and this Memorandum, the terms of the License and/or the Agreement, as applicable, shall control.

The undersigned have executed this Memorandum of License as of the date first written above.

LICENSOR

Scottsdale Unified School District #48

By: 

Name: DAVID D. PETERSON
Title: ASSISTANT SUPERINTENDENT

LICENSEE

SOLARCITY CORPORATION

By: 

Name: Lyndon Rive
Title: CEO

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ACKNOWLEDGEMENT PAGE FOLLOWS]

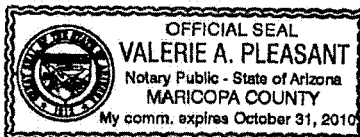
STATE OF ARIZONA)
COUNTY OF Maricopa) ss.

On June 22, 2009, before me, Valerie Pleasant, Notary Public, personally appeared David Peterson, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Arizona that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Valerie A. Pleasant
Signature of Notary Public



STATE OF ARIZONA)
COUNTY OF _____) ss.

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Arizona that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary Public

Exhibit A
To Memorandum of License

Legal Description of Premises

That certain real property located in the County of Maricopa, State of Arizona, described as follows:

A PARCEL OF LAND LOCATED IN THE STATE OF ARIZONA, COUNTY OF MARICOPA, WITH A SITUS ADDRESS OF 2501 N 74TH ST, SCOTTSDALE AZ 85257-1502 CURRENTLY OWNED BY SCOTTSDALE UNIFIED SCHOOL DISTRICT 48 HAVING A TAX ASSESSOR NUMBER OF 131-27-001 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS SE4 NW4 EX BEG AT NW COR TH N 89D 40' 30" E 35.74' S 45D 07' W 50.34' & N 0D 7' W 35.33' TO POB & EX S 33' & E40' RD WITH ARC OF 20' RAD IN SE & NE COR TH/OF 37.83 AC .

Exhibit 7

Solar Services Agreement General Terms and Conditions

Revised May 27, 2009

Purpose: The purpose of this Agreement is to set forth the terms and conditions by which SolarCity will provide the Purchaser with the financing, design, installation, operation and maintenance of a solar panel system at Purchaser's Facility.

1. **Definitions and Interpretation:** Unless otherwise defined or required by the context in which any term appears: (a) the singular includes the plural and vice versa; (b) the words "herein," "hereof" and "hereunder" refer to this Agreement as a whole and not to any particular section or subsection of this Agreement; (c) references to any agreement, document or instrument mean such agreement, document or instrument as amended, modified, supplemented or replaced from time to time; and (d) the words "include," "includes" and "including" mean include, includes and including "without limitation." The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.
2. **Finance, Design, Development and Operation of Solar Panel System.** Seller shall provide for Buyer the financing, design, development and operation of the System during the Initial Term and any Additional Term (as defined in **Exhibit 1**, and collectively the "**Term**"). At the end of the sixth (6th) and tenth (10th) Contract Years and at the end of the Initial Term and each Additional Term, so long as Purchaser is not in default under this Agreement, Purchaser may purchase the System from Seller as set forth more fully in Section 16 of this Agreement.
3. **Term and Termination.**
 - a. **Initial Term.** The initial term ("**Initial Term**") of this Agreement shall commence on the Commercial Operation Date (as defined below) and continue for the length of time specified in **Exhibit 1**, unless earlier terminated as provided for in this Agreement. The "**Commercial Operation Date**" is the date Seller gives Purchaser written notice that the System is mechanically complete and capable of providing electric energy to the Delivery Point. Upon Purchaser's request, Seller will give Purchaser copies of certificates of completion or similar documentation from Seller's contractor and the interconnection or similar agreement with the Utility. This Agreement is effective as of the Effective Date and Purchaser's failure to enable Seller to provide the electric energy by preventing it from installing the System or otherwise not performing shall not excuse Purchaser's obligations to make payments that otherwise would have been due under this Agreement.
 - b. **Additional Terms.** If Purchaser has not exercised its option to purchase the System by the end of the Initial Term, either Party may give the other Party written notice of its desire to extend this Agreement on the terms and conditions set forth herein for the number and length of additional periods specified in **Exhibit 1** (each an "**Additional Term**"). Such notice shall be given, if at all, not more than one hundred twenty (120) and not less than sixty (60) days before the last day of the Initial Term or the then current Additional Term, as applicable. The Party receiving the notice requesting an Additional Term shall respond positively or negatively to that request in writing within thirty (30) days after receipt of the request. Failure to respond within such thirty (30) day period shall be deemed a rejection of the offer for an Additional Term. If both Parties agree to an Additional Term, the Additional Term shall begin immediately upon the conclusion of the then current term or Additional Term on the same terms and conditions as set forth in this Agreement. If the Party receiving the request for an Additional Term rejects or is deemed to reject the first Party's offer, this Agreement shall terminate at the end of the Initial Term (if the same has not been extended) or the then current Additional Term.
4. **Billing and Payment.**
 - a. **Monthly Charges.** The Purchaser and Seller agree that Purchaser will take title to all electric energy that the System generates from the moment the System produces such energy and that such energy will be delivered to Purchaser at the delivery point identified on **Exhibit 4** (the "**Delivery Point**") and Purchaser shall purchase all such electric energy as and when produced by the System. Each month, Purchaser shall pay Seller for the benefit it receives under this Agreement. Purchaser agrees that it will make such monthly payments to Seller and that the such electricity monthly at the \$/kWh rate shown in **Exhibit 1** (the "**Contract Price**") is a fair and reasonable price in light of the benefit that the Purchaser receives under this Agreement. The Parties agree that the benefit to Purchaser under this Agreement is best measured in relation to the electricity that the System produces and as such the monthly payment will be equal to the applicable \$/kWh rate multiplied by the number of kWh of energy generated during

that applicable month, as measure by the System meter.. **Monthly Invoices.** Seller shall invoice Purchaser monthly. Such monthly invoices shall state (i) the amount of electric energy produced by the System and delivered to the Delivery Point, (ii) the rates applicable to, and charges incurred by, Purchaser under this Agreement and (iii) **the total amount due from Purchaser.**

- b. **Utility Invoices.** Purchaser shall authorize the Utility to send to Seller duplicates of any bills sent to Purchaser. If Utility does not permit duplicate bills to be sent to Seller, Purchaser shall, promptly upon receipt of each bill, make a photocopy of each bill and mail the copy to Seller. Purchaser **shall pay** all **charges assessed** by the Utility to the Facility.
- d. **Taxes.** Purchaser shall either pay or reimburse Seller for any and all taxes assessed on the generation, sale, delivery or consumption of electric energy produced by the System or the interconnection of the System to the Utility's electric distribution system, including property taxes on the System; provided, however, Purchaser will not be required to pay or reimburse Seller for any taxes during periods **when Seller fails** to deliver electric energy to Purchaser for reasons other than Force Majeure. For purposes of this Section 4(c), "Taxes" means any federal, state and local ad valorem, property, occupation, generation, privilege, sales, use, consumption, excise, transaction, and other taxes, regulatory fees, surcharges or other similar charges but shall not include any income taxes or similar taxes imposed on net revenues imposed on Seller due to the sale of energy under this Agreement, which shall be Seller's responsibility.
- e. **Payment Terms.** All amounts due under this Agreement shall be due and payable net twenty (20) days from receipt of invoice. Any undisputed portion of the invoice amount not paid within the twenty (20) day period shall accrue interest at the annual rate of two and one-half percent (2.5%) over the Prime Rate (but not to exceed the maximum rate permitted by law).

5. **Environmental Attributes and Environmental Incentives.**

Unless otherwise specified on Exhibit 1, Seller is the owner of all Environmental Attributes and Environmental Incentives and is entitled to the benefit of all Tax Credits, and Purchaser's purchase of electricity under this Agreement does not include Environmental Attributes, Environmental Incentives or the right to Tax Credits or any other attributes of ownership and operation of the System, all of which shall be retained by Seller. Purchaser shall cooperate with Seller in obtaining, securing and transferring all Environmental Attributes and Environmental Incentives and the benefit of all Tax Credits, including by using the electric energy generated by the System in a manner necessary to qualify for such available Environmental Attributes, Environmental Incentives and Tax Credits. Purchaser shall not be obligated to incur any out-of-pocket costs or expenses in connection with such actions unless reimbursed by Seller. If any Environmental Incentives are paid directly to Purchaser, Purchaser shall immediately pay such amounts over to Seller. To avoid any conflicts with fair trade rules regarding claims of solar or renewable energy use, Purchaser, if engaged in commerce and/or trade, shall submit to Seller for approval any press releases regarding Purchaser's use of solar or renewable energy and shall not submit for publication any such releases without the written approval of Seller. Approval shall not be unreasonably withheld, and Seller's review and approval shall be made in a timely manner to permit Purchaser's timely publication.

"**Environmental Attributes**" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the System, the production of electrical energy from the System and its displacement of conventional energy generation, including (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SO_x), nitrogen oxides (NO_x), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO₂), methane (CH₄), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and (3) the reporting rights related to these avoided emissions, such as Green Tag Reporting Rights and Renewable Energy Credits. Green Tag Reporting Rights are the right of a party to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party, and include Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Environmental Attributes do not include Environmental Incentives and Tax Credits. Purchaser and Seller shall file all tax returns in a manner consistent with this Paragraph 5. Without limiting the generality of the foregoing, Environmental Attributes include carbon trading credits, renewable energy credits or certificates, emissions reduction credits, investment credits, emissions allowances, green tags, tradeable renewable credits and Green-e® products.

"**Environmental Incentives**" means any and credits, rebates, subsidies, payments or other incentives that relate to self-generation of electricity, the use of technology incorporated into the System, environmental benefits of using the System, or

other similar programs available from the Utility, any other regulated entity, the manufacturer of any part of the System or any Governmental Authority.

"Governmental Authority" means any national, state or local government (whether domestic or foreign), any political subdivision thereof or any other governmental, quasi-governmental, judicial, public or statutory instrumentality, authority, body, agency, bureau or entity (including the Federal Energy Regulatory Commission or the California Public Utilities Commission), or any arbitrator with authority to bind a party at law.

"Tax Credits" means any and all (i) investment tax credits, (ii) production tax credits and (iii) similar tax credits under federal, state or local law relating to the construction, ownership or production of energy from the System.

6. Conditions to Obligations.

a. Conditions to Seller's Obligations.

Seller's obligations under this Agreement are conditioned on the completion of the following conditions to Seller's reasonable satisfaction on or before the Condition Satisfaction Date:

- i. Completion of a physical inspection of the Facility and the property upon which the Facility is located (the **"Premises"**) including, if applicable, geotechnical work, and real estate due diligence to confirm the suitability of the Facility and the Premises for the System;
- ii. Approval of (i) this Agreement and (ii) the Construction Agreement (if any) for the System by Seller's Financing Parties. **"Construction Agreement"** as used in this subsection means an agreement between SolarCity and a subcontractor to install the System.
- iii. Confirmation that Seller will obtain all applicable Environmental Incentives and Tax Credits;
- iv. Receipt of all necessary zoning, land use and building permits; and
- v. Execution of all necessary agreements with the Utility for interconnection of the System to the Utility's electric distribution system.
- vi. Prior to Seller commencing construction and installation of the System, Purchaser shall give Seller proof of insurance for all insurance required to be maintained by Purchaser under this Agreement.

b. Conditions to Purchaser's Obligations.

- i. Purchaser's obligations under this Agreement are conditioned on the occurrence of the Commercial Operation Date for the System on or before the Outside Commercial Operation Date (See **Exhibit 1**).

c. Failure of Conditions.

If any of the conditions listed in subsections a) or b) above are not satisfied by the applicable dates specified in those subsections, the Parties will attempt in good faith to negotiate new dates for the satisfaction of the failed conditions. If the parties are unable to negotiate new dates then the Party that has not failed to meet an obligation may terminate this Agreement upon ten (10) days written notice to the other Party without liability for costs or damages or triggering a default under this Agreement.

7. Seller's Rights and Obligations.

a. Permits and Approvals. Seller, with Purchaser's reasonable cooperation, shall use commercially reasonable efforts to obtain, at its sole cost and expense:

- i. any zoning, land use and building permits required to construct, install and operate the System; and
- ii. any agreements and approvals from the Utility necessary in order to interconnect the System to the Utility's electric distribution system.

Purchaser shall cooperate with Seller's reasonable requests to assist Seller in obtaining such agreements, permits and approvals.

- b. **Standard System Repair and Maintenance.** Seller shall finance, design, develop, operate and install the System at the Facility. During the Term, Seller will operate and perform all routine and emergency repairs to and maintenance of the System at its sole cost and expense, except for any repairs or maintenance resulting from Purchaser's negligence, willful misconduct or breach of this Agreement or the Site Lease (if applicable). Seller shall not be responsible for any work done by others on any part of the System unless Seller authorizes that work in advance in writing. Seller shall not be responsible for any loss, damage, cost or expense arising out of or resulting from improper environmental controls or improper operation or maintenance of the System by anyone other than Seller or Seller's contractors. If the System requires repairs for which Seller is not responsible, Purchaser shall pay Seller for diagnosing and correcting the problem at Seller or Seller's contractors' then current standard rates. Seller shall provide Purchaser with reasonable notice prior to accessing the Facility to make standard repairs.
- c. **Non-Standard System Repair and Maintenance.** If Seller incurs incremental costs to maintain the System due to conditions at the Facility or due to the inaccuracy of any information provided by Purchaser and relied upon by Seller, the pricing, schedule and other terms of this Agreement will be equitably adjusted to compensate for any work in excess of normally expected work required to be performed by Seller. In such event, the Parties will negotiate such equitable adjustment in good faith.
- d. **Breakdown Notice.** Seller shall notify Purchaser within twenty-four (24) hours following Seller's discovery of (a) any material malfunction in the operation of the System or (b) an interruption in the supply of electrical energy from the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays. Purchaser shall notify Seller immediately upon the discovery of an emergency condition affecting the System.
- e. **Suspension.** Notwithstanding anything to the contrary herein, Seller shall be entitled to suspend delivery of electricity from the System to the Delivery Point for the purpose of maintaining and repairing the System and such suspension of service shall not constitute a breach of this Agreement; provided, that Seller shall use commercially reasonable efforts to minimize any interruption in service to the Purchaser.
- f. **Use of Contractors and Subcontractors.** Seller shall be permitted to use contractors and subcontractors to perform its obligations under this Agreement. However, Seller shall continue to be responsible for the quality of the work performed by its contractors and subcontractors. If a list of pre-approved contractors and subcontractors is desired, such list shall be scheduled on an appendix to Exhibit 7. All Contractors and subcontractors other than those that may be scheduled on an appendix to Exhibit 7 shall be subject to Purchaser's prior written consent, not to be unreasonably withheld.
- g. **Liens and Payment of Contractors and Suppliers.** Seller shall pay when due all valid charges from all contractors, subcontractors and suppliers supplying goods or services to Seller under this Agreement and shall keep the Facility free and clear of any liens related to such charges, except for those liens which Seller is permitted by law to place on the Facility following non-payment by Purchaser of amounts due under this Agreement. Seller shall indemnify Purchaser for all claims, losses, damages, liabilities and expenses resulting from any liens filed against the Facility or the Premises in connection with such charges; provided, however, that Seller shall have the right to contest any such lien, so long as it provides a statutory bond or other reasonable assurances of payment that either remove such lien from title to the Facility and the Premises or that assure that any adverse judgment with respect to such lien will be paid without affecting title to the Facility and the Premises.
- h. **No Warranty.** NO WARRANTY OR REMEDY, WHETHER STATUTORY, WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, OR WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE SHALL APPLY. The remedies set forth in this Agreement shall be Purchaser's sole and exclusive remedies for any claim or liability arising out of or in connection with this Agreement, whether arising in contract, tort (including negligence), strict liability or otherwise.

8. **Purchaser Rights and Obligations.**

- a. **Facility Access Rights.** Purchaser grants to Seller and to Seller's agents, employees and contractors an irrevocable non-exclusive license running with the Premises (the "License") for access to, on, over, under and across the Premises as more particularly described in Exhibit 5 (the "License Area") for the purposes of (a) installing,

constructing, operating, owning, maintaining, accessing, removing and replacing the System; (b) performing all of Seller's obligations and enforcing all of Seller's rights set forth in this Agreement; and (c) installing, using and maintaining electric lines and equipment, including inverters and meters, necessary to interconnect the System to Purchaser's electric system at the Facility and/or to the Utility's electric distribution system or that otherwise may from time to time be useful or necessary in connection with the construction, installation, operation, maintenance or repair of the System. Seller shall notify Purchaser prior to entering the Facility except in situations where there is imminent risk of damage to persons or property. The term of the License shall continue until the date that is one hundred and twenty (120) days following the date of expiration or termination of this Agreement (the "**License Term**"). During the License Term, Purchaser shall ensure that Seller's rights under the License and Seller's access to the License Area are preserved and protected and shall not interfere with or permit any third parties to interfere with such rights or access. The grant of the License shall survive termination of this agreement by either Party. Purchaser agrees that Seller may record a memorandum of license in substantially the same form attached hereto as **Exhibit 6** in the land records respecting the License.

- b. **OSHA Compliance.** Purchaser shall ensure that all Occupational Safety and Health Act (OSHA) requirements and other similar applicable safety laws or codes are adhered to in its performance under this Agreement.
- c. **Maintenance of Facility.** Purchaser shall, at its sole cost and expense, maintain Purchaser's Facility in good condition and repair. Purchaser will ensure that the Facility remains interconnected to the local utility grid at all times and will not permit cessation of electric service to the Facility from the local utility. Purchaser is fully responsible for the maintenance and repair of the Facility's electrical system and of all of Purchaser's equipment that utilizes the System's outputs. Purchaser shall properly maintain in full working order all of Purchaser's electric supply or generation equipment that Purchaser may shut down while utilizing the System. Purchaser shall promptly notify Seller of any matters of which it is aware pertaining to any damage to or loss of use of the System or that could reasonably be expected to adversely affect the System.
- d. **No Alteration of Facility.** Purchaser shall not make any alterations or repairs to the Facility which may adversely affect the operation and maintenance of the System without Seller's prior written consent. If Purchaser wishes to make such alterations or repairs, Purchaser shall give prior written notice to Seller, setting forth the work to be undertaken (except for emergency repairs, for which notice may be given by telephone), and give Seller the opportunity to advise Purchaser in making such alterations or repairs in a manner that avoids damage to the System, but, notwithstanding any such advice, Purchaser shall be responsible for all damage to the System caused by Purchaser or its contractors. To the extent that temporary disconnection or removal of the System is necessary to perform such alterations or repairs, such work and any replacement of the System after completion of Purchaser's alterations and repairs, shall be done by Seller or its contractors at Purchaser's cost. All of Purchaser's alterations and repairs will be done in a good and workmanlike manner and in compliance with all applicable laws, codes and permits.
- e. **Outages.** Purchaser shall be permitted to be off line for two (2) full twenty-four (24) hour days (each, a "**Scheduled Outage**") per calendar year during the Term, during which days Purchaser shall not be obligated to accept or pay for electricity from the System; provided, however, that Purchaser must notify Seller in writing of each such Scheduled Outage at least forty-eight (48) hours in advance of the commencement of a Scheduled Outage. In the event that Scheduled Outages exceed two (2) days per calendar year or there are unscheduled outages, in each case for a reason other than a Force Majeure event, Seller shall reasonably estimate the amount of electricity that would have been delivered to Purchaser during such excess Scheduled Outages or unscheduled outages and shall invoice Purchaser for such amount in accordance with **Section 4**. Purchaser may purchase electricity from any source during the Term of this Agreement.
- f. **Liens.** Purchaser shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Purchaser shall immediately notify Seller in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Seller, and shall indemnify Seller against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.
- g. **Security.** Purchaser shall be responsible for maintaining the physical security of the License Area and for any damage or vandalism to the System as a result of failure to maintain such security. Purchaser will not conduct activities on, in or about the License Area or the Facility that have a reasonable likelihood of causing damage, impairment or otherwise adversely affecting the System. Purchaser shall provide and take reasonable measures for security of the System, including commercially reasonable monitoring of the Facility's alarms.

- h. **Insolation.** Purchaser understands that unobstructed access to sunlight ("**Insolation**") is essential to Seller's performance of its obligations and a material term of this Agreement. Purchaser shall not in any way cause and, where possible, shall not in any way permit any interference with the System's Insolation. If Purchaser becomes aware of any activity or condition that could diminish the Insolation of the System, Purchaser shall notify Seller immediately and shall cooperate with Seller in preserving the System's existing Insolation levels.
- i. **Data Line.** Purchaser shall provide Seller a high speed internet data line during the Term to enable Seller to monitor and operate the System. If Purchaser fails to provide such high speed internet data line, or if such line ceases to function and is not repaired, Seller may reasonably estimate the amount of electric energy that was generated and invoice Purchaser for such amount in accordance with Section 4. Provided, however, that Purchaser shall have a reasonable period of time to review and contest such estimate.
- j. **Breakdown Notice.** Purchaser shall notify Seller within twenty-four (24) hours following the discovery by it of (A) any material malfunction in the operation of the System; or (B) any occurrences that could reasonably be expected to adversely affect the System. Purchaser shall notify Seller immediately upon (A) an interruption in the supply of electrical energy from the System; or (B) the discovery of an emergency condition respecting the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays.
- k. **Metering.** Electricity delivered to the Facility shall be measured by the SolarGuard monitoring system installed and maintained by Seller as part of the System.

9. **Change in Law.**

"Change in Law" means (i) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any applicable law or regulation; (ii) the imposition of any material conditions on the issuance or renewal of any applicable permit after the Effective Date of this Agreement (notwithstanding the general requirements contained in any applicable Permit at the time of application or issue to comply with future laws, ordinances, codes, rules, regulations or similar legislation), or (iii) a change in any utility rate schedule or tariff approved by any Governmental Authority which in the case of any of (i), (ii) or (iii), establishes requirements affecting owning, supplying, constructing, installing, operating or maintaining the System, or other performance of the Seller's obligations hereunder and which has a material adverse effect on the cost to Seller of performing such obligations; provided, that a change in federal, state, county or any other tax law after the Effective Date of this Agreement shall not be a Change in Law pursuant to this Agreement.

If any Change in Law occurs that has a material adverse effect on the cost to Seller of performing its obligations under this Agreement, then the Parties shall, within thirty (30) days following receipt by Purchaser from Seller of notice of such Change in Law, meet and attempt in good faith to negotiate amendments to this Agreement as are reasonably necessary to preserve the economic value of this Agreement to both Parties. If the Parties are unable to agree upon such amendments within such thirty (30) day period, then Seller shall have the right to terminate this Agreement without further liability to either Party except with respect to payment of amounts accrued prior to termination.

10. **Relocation of System.**

If Purchaser ceases to conduct business operations at and/or vacates the Facility or is prevented from operating the System at the Facility prior to the expiration of the Term, Purchaser shall have the option to provide Seller with a mutually agreeable substitute premises located within the same Utility district as the terminated System or in a location with similar Utility rates and Insolation. Purchaser shall provide at least sixty (60) but not more than one hundred eighty (180) days prior written notice prior to the date that it wants to make this substitution. In connection with such substitution, Purchaser shall execute an amended agreement that shall have all of the same terms as this Agreement except for the (i) Effective Date; (ii) License, which will be amended to grant rights in the real property where the System relocated to; and (iii) Term, which will be the remainder of the Term of this Agreement and such amended agreement shall be deemed to be a continuation of this Agreement without termination. Purchaser shall also provide any new Purchaser, owner, lessor or mortgagee consents or releases required by Seller or Seller's Financing Parties in connection with the substitute facility. Purchaser shall pay all costs associated with relocation of the System, including all costs and expenses incurred by or on behalf of Seller in connection with removal of the System from the Facility and installation and testing of the System at the substitute facility and all applicable interconnection fees and expenses at the substitute facility, as well as costs of new title search and other out-of-pocket expenses connected to preserving and refiling the security interests of Seller's Financing Parties in the System. Seller shall remove the System from the vacated Facility prior to the termination of Purchaser's ownership, lease or other rights to use such Facility. Seller will not be required to restore the Facility to its prior condition but shall promptly pay Purchaser for any damage caused by Seller during removal of the System, but not for normal wear and tear. If the substitute

facility has inferior Insulation as compared to the original Facility, Seller shall have the right to make an adjustment to **Exhibit 1** such that Purchaser's payments to Seller are the same as if the System were located at the original Facility. If Purchaser is unable to provide such substitute Facility and to relocate the System as provided, any early termination will be treated as a default by Purchaser.

11. Removal of System at Expiration.

Upon the expiration or earlier termination of this Agreement (provided Purchaser does not exercise its purchase option), Seller shall, at its expense, remove all of its tangible property comprising the System from the Facility on a mutually convenient date but in no event later than ninety (90) days after the expiration of the Term. The Facility shall be returned to its original condition, except for System mounting pads or other support structures, which may be left in place, and ordinary wear and tear. In no case shall Seller's removal of the System affect the integrity of Purchaser's roof, which shall be as leak proof as it was prior to removal of the System. Seller shall leave the Facility in neat and clean order. If Seller fails to remove or commence substantial efforts to remove the System by such agreed upon date, Purchaser shall have the right, at its option, to remove the System to a public warehouse and restore the Facility to its original condition (other than System mounting pads or other support structures and ordinary wear and tear) at Seller's cost. Purchaser shall provide sufficient space for the temporary storage and staging of tools, materials and equipment and for the parking of construction crew vehicles and temporary construction trailers and facilities reasonably necessary during System removal.

12. Intentionally Deleted.

13. Default, Remedies and Damages.

a. **Default.** Any Party that fails to perform its responsibilities as listed below or experiences any of the circumstances listed below shall be deemed a "Defaulting Party" and each event of default shall be a "Default Event":

- (1) failure of a Party to pay any amount due and payable under this Agreement, other than an amount that is subject to a good faith dispute, within ten (10) days following receipt of written notice from the other Party (the "Non-Defaulting Party") of such failure to pay ("Payment Default");
- (2) failure of a Party to substantially perform any other material obligation under this Agreement within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure; provided, that such thirty (30) day cure period shall be extended (but not beyond ninety (90) days) if and to the extent reasonably necessary to cure the Default Event, if (i) the Defaulting Party initiates such cure with the thirty (30) day period and continues such cure to completion and (ii) there is no material adverse affect on the Non-Defaulting Party resulting from the failure to cure the Default Event;
- (3) if any representation or warranty of a Party proves at any time to have been incorrect in any material respect when made and is material to the transactions contemplated hereby, if the effect of such incorrectness is not cured within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure;
- (4) Purchaser loses its rights to occupy and enjoy the Premises; or
- (5) a Party, or its guarantor, becomes insolvent or is a party to a bankruptcy, reorganization, insolvency, liquidation, receivership, dissolution, winding-up or relief of debtors, or any general assignment for the benefit of creditors or other similar arrangement or any event occurs or proceedings are taken in any jurisdiction with respect to the Party which has a similar effect.
- (6) Purchaser prevents Seller from installing the System or otherwise failing to perform in a way that prevents the delivery of electric energy from the System. (Such Default Event shall not excuse Purchaser's obligations to make payments that otherwise would have been due under this Agreement.)

b. **Remedies.**

- (1) **Remedies for Payment Default.** If a Payment Default occurs, the Non-Defaulting Party may suspend performance of its obligations under this Agreement. Further, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages

and termination of this Agreement, upon five (5) days prior written notice to the Defaulting Party following the Payment Default.

- (2) Remedies for Other Defaults. On the occurrence of a Default Event other than a Payment Default, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement or suspension of performance of its obligations under this Agreement, upon five (5) days prior written notice to the Defaulting Party following the occurrence of the Default Event. Nothing herein shall limit either Party's right to collect damages upon the occurrence of a breach or a default by the other Party that does not become a Default Event.
- (3) Damages Upon Termination by Default. Upon a termination of this Agreement by the Non-Defaulting Party as a result of a Default Event by the Defaulting Party, the Defaulting Party shall pay a Termination Payment to the Non-Defaulting Party determined as follows (the "**Termination Payment**"):
 - A. Purchaser. If Purchaser is the Defaulting Party and Seller terminates this Agreement, the Termination Payment to Seller shall be equal to the sum of (i) the termination value set forth in Exhibit 1 (the "**Termination Value**") for such Contract Year, (ii) removal costs as provided in Section 13(b)(3)(C) and (iii) any and all other amounts previously accrued under this Agreement and then owed by Purchaser to Seller. The Parties agree that actual damages to Seller in the event this Agreement terminates prior to the expiration of the Term as the result of an Default Event by Purchaser would be difficult to ascertain, and the applicable Termination Value set forth in Exhibit 1 is a reasonable approximation of the damages suffered by Seller as a result of early termination of this Agreement. The Termination Payment shall not be less than zero.
 - B. Seller. If Seller is the Defaulting Party and Purchaser terminates this Agreement, the Termination Payment to Purchaser shall be equal to the sum of (i) the present value (using a discount rate of 9.5%) of the excess, if any, of the reasonably expected cost of electric energy from the Utility over the Contract Price for the reasonably expected production of the Facility for the remainder of the Initial Term or the then current Additional Term, as applicable; (ii) all costs reasonably incurred by Purchaser in re-converting its electric supply to service from the Utility; (iii) any removal costs incurred by Purchaser, and (iv) any and all other amounts previously accrued under this Agreement and then owed by Seller to Purchaser. The Termination Payment shall not be less than zero.
 - C. Obligations Following Termination. If a Non-Defaulting Party terminates this Agreement pursuant to this Section 13(b)(3)(C), then following such termination, Seller shall, at the sole cost and expense of the Defaulting Party, remove the equipment (except for mounting pads and support structures) constituting the System. The Non-Defaulting Party shall take all commercially reasonable efforts to mitigate its damages as the result of a Default Event.

14. Representations and Warranties.

a. General Representations and Warranties. Each Party represents and warrants to the other the following:

- (1) Such Party is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation; the execution, delivery and performance by such Party of this Agreement have been duly authorized by all necessary corporate, partnership or limited liability company action, as applicable, and do not and shall not violate any law; and this Agreement is valid obligation of such Party, enforceable against such Party in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws now or hereafter in effect relating to creditors' rights generally).
- (2) Such Party has obtained all licenses, authorizations, consents and approvals required by any Governmental Authority or other third party and necessary for such Party to own its assets, carry on its business and to execute and deliver this Agreement; and such Party is in compliance with all laws that relate to this Agreement in all material respects.

b. **Purchaser's Representations and Warranties.** Purchaser represents and warrants to Seller the following:

- (1) **License.** Purchaser has the full right, power and authority to grant the License contained in Section 8(a). Such grant of the License does not violate any law, ordinance, rule or other governmental restriction applicable to Purchaser or the Facility and is not inconsistent with and will not result in a breach or default under any agreement by which Purchaser is bound or that affects the Facility.
- (2) **Other Agreements.** Neither the execution and delivery of this Agreement by Purchaser nor the performance by Purchaser of any of its obligations under this Agreement conflicts with or will result in a breach or default under any agreement or obligation to which Purchaser is a party or by which Purchaser or the Facility is bound.
- (3) **Accuracy of Information.** All information provided by Purchaser to Seller, as it pertains to the Facility's physical configuration, Purchaser's planned use of the Facility, and Purchaser's estimated electricity requirements, is accurate in all material respects.
- (4) **Purchaser Status.** Purchaser is not a public utility or a public utility holding company and is not subject to regulation as a public utility or a public utility holding company.
- (5) **No Pool Use.** No electricity generated by the System will be used to heat a swimming pool.

15. **System Damage and Insurance.**

a. **System Damage.**

- (1) **Seller's Obligations.** If the **System** is damaged or destroyed other than by Purchaser's negligence or willful misconduct, Seller shall promptly repair and restore the System to its pre-existing condition; provided, however, that if more than fifty percent (50%) of the System is destroyed during the last five (5) years of the Initial Term or during any Additional Term, Seller shall not be required to restore the System, but may instead terminate this Agreement, unless Purchaser agrees (i) to pay for the cost of such restoration of the System or (ii) to purchase the System "AS-IS" at the greater of (A) then current fair market value of the System and (B) the sum of the amounts described in Section 13.b(3)A(i) (using the date of purchase to determine the appropriate Contract Year) and Section 13.b(3)A(iii).
- (2) **Purchaser's Obligations.** If the **Facility** is damaged or destroyed by casualty of any kind or any other occurrence other than Seller's negligence or willful misconduct, such that the operation of the System and/or Purchaser's ability to accept the electric energy produced by the System are materially impaired or prevented, Purchaser shall promptly repair and restore the Facility to its pre-existing condition; provided, however, that if more than 50% of the Facility is destroyed during the last five years of the Initial Term or during any Additional Term, Purchaser may elect either (i) to restore the Facility or (ii) to pay the Termination Value set forth in Exhibit 1 and all other costs previously accrued but unpaid under this Agreement and thereupon terminate this Agreement.

b. **Insurance Coverage.** At all times during the Term, Seller and Purchaser shall maintain the following insurance:

- i. **Seller's Insurance.** Seller shall maintain (i) comprehensive general liability insurance with coverage of at least \$1,000,000 per occurrence and \$2,000,000 annual aggregate, (ii) employer's liability insurance with coverage of at least \$1,000,000 and (iii) worker's compensation insurance as required by law.
- ii. **Purchaser's Insurance.** Purchaser shall maintain (i) "all risk" property insurance on the System for the full replacement cost thereof and name Seller as a loss payee, (ii) comprehensive general liability insurance with coverage of at least \$1,000,000 per occurrence and \$2,000,000 annual aggregate, (iii) employer's liability insurance with coverage of at least \$1,000,000 and (iv) worker's compensation insurance as required by law.

c. **Policy Provisions.** All insurance policies provided hereunder shall (i) contain a provision whereby the insurer agrees to give the party not providing the insurance thirty (30) days (ten (10) days in the event of non-payment of

premiums) written notice before the insurance is cancelled, terminated or materially altered, (ii) be written on an occurrence basis, (iii) with respect to the casualty insurance policies, name Seller as loss payee thereunder, (iv) with respect to the liability insurance policies, include the other Party as an additional insured as its interest may appear, (iv) include waivers of subrogation, (v) provide for primary coverage without right of contribution from any insurance of the other Party, and (vi) be maintained with companies either rated no less than A- as to Policy Holder's Rating in the current edition of Best's Insurance Guide or otherwise reasonably acceptable to the other party.

d. **Certificates.** Within thirty (30) days after execution of this Agreement and upon the other Party's request and annually thereafter, each Party shall deliver the other Party certificates of insurance evidencing the above required coverage.

e. **Deductibles.** Unless and to the extent that a claim is covered by an indemnity set forth in this Agreement, each Party shall be responsible for the payment of its own deductibles.

16. **Ownership; Option to Purchase.**

a. **Ownership of System.** Throughout the Term, Seller shall be the legal and beneficial owner of the System at all times, including all Environmental Attributes, and the System shall remain the personal property of Seller and shall not attach to or be deemed a part of, or fixture to, the Facility or the Premises. Each of the Seller and Purchaser agree that the Seller is the tax owner of the System and all tax filings and reports will be filed in a manner consistent with this Agreement. The System shall at all times retain the legal status of personal property as defined under Article 9 of the Uniform Commercial Code. Purchaser covenants that it will use commercially reasonable efforts to place all parties having an interest in or a mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on the Facility or the Premises on notice of the ownership of the System and the legal status or classification of the System as personal property. If there is any mortgage or fixture filing against the Premises which could reasonably be construed as prospectively attaching to the System as a fixture of the Premises, Purchaser shall provide a disclaimer or release from such lienholder. If Purchaser is the fee owner of the Premises, Purchaser consents to the filing of a disclaimer of the System as a fixture of the Premises in the office where real estate records are customarily filed in the jurisdiction where the Facility is located and Seller shall provide such disclaimer to Purchaser to file. If Purchaser is not the fee owner, Purchaser will obtain such consent from such owner. Purchaser agrees to deliver to Seller a non-disturbance agreement in a form reasonably acceptable to Seller from the owner of the Facility (if the Facility is leased by Purchaser), any mortgagee with a lien on the Premises, and other Persons holding a similar interest in the Premises.

b. **Option to Purchase.** At the end of the sixth (6th) and tenth (10th) Contract Years and at the end of the Initial Term and each Additional Term, so long as Purchaser is not in default under this Agreement, Purchaser may purchase the System from Seller on any such date for a purchase price equal to (i) with respect to an option exercised at the end of the sixth (6th) or tenth (10th) Contract Years or at the end of the Initial Term, the greater of (A) the amount set forth at such time in the Purchase Option Price schedule in Exhibit 1, and (B) the Fair Market Value of the System, and (ii) with respect to an option exercised at the end of an Additional Term, the Fair Market Value of the System. The "Fair Market Value" of the System shall be determined by mutual agreement of Purchaser and Seller; provided, however, if Purchaser and Seller cannot agree to a Fair Market Value within thirty (30) days after Purchaser has exercised its option, the Parties shall select a nationally recognized independent appraiser with experience and expertise in the solar photovoltaic industry to determine the Fair Market Value of the System. Such appraiser shall act reasonably and in good faith to determine the Fair Market Value of the System on an installed basis and shall set forth such determination in a written opinion delivered to the Parties. The valuation made by the appraiser shall be binding upon the Parties in the absence of fraud or manifest error. The costs of the appraisal shall be borne by the Parties equally. Purchaser must provide a notification to Seller of its intent to purchase at least ninety (90) days and not more than one hundred eighty (180) days prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable, and the purchase shall be complete prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable. Upon purchase of the System, Purchaser will assume complete responsibility for the operation and maintenance of the System and liability for the performance of the System, and Seller shall have no further liabilities or obligations hereunder.

17. **Indemnification and Limitations of Liability.**

a. **General.** Each Party (the "Indemnifying Party") shall defend, indemnify and hold harmless the other Party and the directors, officers, shareholders, partners, members, agents and employees of such other Party, and the respective affiliates of each thereof (collectively, the "Indemnified Parties"), from and against all loss, damage, expense, liability and other claims, including court costs and reasonable attorneys' fees (collectively, "Liabilities") resulting

from any third party actions relating to the breach of any representation or warranty set forth in Section 14 and from injury to or death of persons, and damage to or loss of property to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnifying Party (or its contractors, agents or employees) in connection with this Agreement; provided, however, that nothing herein shall require the Indemnifying Party to indemnify the Indemnified Party for any Liabilities to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnified Party. This Section 17(a) however, shall not apply to liability arising from any form of hazardous substances or other environmental contamination, such matters being addressed exclusively by Section 17(c).

- b. **Notice and Participation in Third Party Claims.** The Indemnified Party shall give the Indemnifying Party written notice with respect to any Liability asserted by a third party (a "**Claim**"), as soon as possible upon the receipt of information of any possible Claim or of the commencement of such Claim. The Indemnifying Party may assume the defense of any Claim, at its sole cost and expense, with counsel designated by the Indemnifying Party and reasonably satisfactory to the Indemnified Party. The Indemnified Party may, however, select separate counsel if both Parties are defendants in the Claim and such defense or other form of participation is not reasonably available to the Indemnifying Party. The Indemnifying Party shall pay the reasonable attorneys' fees incurred by such separate counsel until such time as the need for separate counsel expires. The Indemnified Party may also, at the sole cost and expense of the Indemnifying Party, assume the defense of any Claim if the Indemnifying Party fails to assume the defense of the Claim within a reasonable time. Neither Party shall settle any Claim covered by this Section 17(b) unless it has obtained the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. The Indemnifying Party shall have no liability under this Section 17(b) for any Claim for which such notice is not provided if that the failure to give notice prejudices the Indemnifying Party.
- c. **Environmental Indemnification.** Seller shall indemnify, defend and hold harmless all of Purchaser's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the License Area of any Hazardous Substance (as defined in Section 17(c)(i)) to the extent deposited, spilled, released or otherwise caused by Seller or any of its contractors or agents. Purchaser shall indemnify, defend and hold harmless all of Seller's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the Premises of any Hazardous Substance, except to the extent deposited, spilled, released or otherwise caused by Seller or any of its contractors or agents. Each Party shall promptly notify the other Party if it becomes aware of any deposit, spill or release of any Hazardous Substance on or about the License Area or the Premises generally.
- i. **"Hazardous Substance"** means any chemical, waste or other substance (a) which now or hereafter becomes defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "extremely hazardous wastes," "restricted hazardous wastes," "toxic substances," "toxic pollutants," "pollution," "pollutants," "regulated substances," or words of similar import under any laws pertaining to the environment, health, safety or welfare, (b) which is declared to be hazardous, toxic, or polluting by any Governmental Authority, (c) exposure to which is now or hereafter prohibited, limited or regulated by any Governmental Authority, (d) the storage, use, handling, disposal or release of which is restricted or regulated by any Governmental Authority, or (e) for which remediation or cleanup is required by any Governmental Authority.
- d. **Limitations on Liability.**
- i. **No Consequential Damages.** Neither Party nor its directors, officers, shareholders, partners, members, agents and employees subcontractors or suppliers shall be liable for any indirect, special, incidental, exemplary, or consequential loss or damage of any nature arising out of their performance or non-performance hereunder even if advised of such.
- ii. **Actual Damages.** Seller's aggregate liability under this Agreement arising out of or in connection with the performance or non-performance of this Agreement shall not exceed the *lesser* of (A) the total payments made by Purchaser under this Agreement as of the date that the events that first gave rise to such liability occurred; and (B) the total of the prior twelve (12) monthly payments preceding the date that the events that first gave rise to such liability occurred. The provisions of this Section (17)(d)(ii) shall apply whether such liability arises in contract, tort (including negligence), strict liability or otherwise. Any action against Seller must be brought within one (1) year after the cause of action accrues.

18. **Force Majeure.**

- a. **"Force Majeure"** means any event or circumstances beyond the reasonable control of and without the fault or negligence of the Party claiming Force Majeure. It shall include, without limitation, failure or interruption of the production, delivery or acceptance of electricity due to: an act of god; war (declared or undeclared); sabotage; riot; insurrection; civil unrest or disturbance; military or guerilla action; terrorism; economic sanction or embargo; civil strike, work stoppage, slow-down, or lock-out; explosion; fire; earthquake; abnormal weather condition or actions of the elements; hurricane; flood; lightning; wind; drought; the binding order of any Governmental Authority (provided that such order has been resisted in good faith by all reasonable legal means); the failure to act on the part of any Governmental Authority (provided that such action has been timely requested and diligently pursued); unavailability of electricity from the utility grid, equipment, supplies or products (but not to the extent that any such availability of any of the foregoing results from the failure of the Party claiming Force Majeure to have exercised reasonable diligence); and failure of equipment not utilized by or under the control of the Party claiming Force Majeure.
- b. Except as otherwise expressly provided to the contrary in this Agreement, if either Party is rendered wholly or partly unable to timely perform its obligations under this Agreement because of a Force Majeure event, that Party shall be excused from the performance affected by the Force Majeure event (but only to the extent so affected) and the time for performing such excused obligations shall be extended as reasonably necessary; provided, that: (i) the Party affected by such Force Majeure event, as soon as reasonably practicable after obtaining knowledge of the occurrence of the claimed Force Majeure event, gives the other Party prompt oral notice, followed by a written notice reasonably describing the event; (ii) the suspension of or extension of time for performance is of no greater scope and of no longer duration than is required by the Force Majeure event; and (iii) the Party affected by such Force Majeure event uses all reasonable efforts to mitigate or remedy its inability to perform as soon as reasonably possible. Seller shall not be liable for any damage to the System or the Facility resulting from a Force Majeure event. The Term shall be extended day for day for each day performance is suspended due to a Force Majeure event.
- c. Notwithstanding anything herein to the contrary, the obligation to make any payment due under this Agreement shall not be excused by a Force Majeure event.
- d. If a Force Majeure event continues for a period of one hundred (180) days or more within a twelve (12) month period and prevents a material part of the performance by a Party hereunder, the Party not claiming the Force Majeure shall have the right to terminate this Agreement without fault or further liability to either Party (except for amounts accrued but unpaid).

19. **Assignment and Financing.**

- a. **Assignment.** This Agreement may not be assigned in whole or in part by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, Seller may, without the prior written consent of Purchaser, (i) assign, mortgage, pledge or otherwise collaterally assign its interests in this Agreement to any Financing Party, (ii) directly or indirectly assign this Agreement to an affiliate of Seller, (iii) assign this Agreement to any entity through which Seller is obtaining financing or capital for the System and (iv) assign this Agreement to any person succeeding to all or substantially all of the assets of Seller (provided that Seller shall be released from liability hereunder as a result of any of the foregoing permitted assignments only upon assumption of Seller's obligations hereunder by the assignee). Purchaser's consent to any other assignment shall not be unreasonably withheld if Purchaser has been provided with reasonable proof that the proposed assignee (x) has comparable experience in operating and maintaining photovoltaic solar systems comparable to the System and providing services comparable to those contemplated by this Agreement and (y) has the financial capability to maintain the System and provide the services contemplated by this Agreement in the manner required by this Agreement. This Agreement shall be binding on and inure to the benefit of the successors and permitted assignees.
- b. **Financing.** The Parties acknowledge that Seller may obtain construction and long-term financing or other credit support from lenders or third parties ("**Financing Parties**") in connection with the installation, construction, ownership, operation and maintenance of the System. Both Parties agree in good faith to consider and to negotiate changes or additions to this Agreement that may be reasonably requested by the Financing Parties; provided, that such changes do not alter the fundamental economic terms of this Agreement. The Parties also agree that Seller may assign this Agreement to the Financing Parties as collateral, and in connection with any such assignment, Purchaser agrees to execute a consent to assignment in customary form and reasonably acceptable to the Financing Parties.

20. Confidentiality and Publicity.

- a. **Confidentiality.** If either Party provides confidential information, including business plans, strategies, financial information, proprietary, patented, licensed, copyrighted or trademarked information, and/or technical information regarding the design, operation and maintenance of the System or of Purchaser's business ("Confidential Information") to the other or, if in the course of performing under this Agreement or negotiating this Agreement a Party learns Confidential Information regarding the facilities or plans of the other, the receiving Party shall (a) protect the Confidential Information from disclosure to third parties with the same degree of care accorded its own confidential and proprietary information, and (b) refrain from using such Confidential Information, except in the negotiation and performance of this Agreement. Notwithstanding the above, a Party may provide such Confidential Information to its, officers, directors, members, managers, employees, agents, contractors and consultants (collectively, "Representatives"), and affiliates, lenders, and potential assignees of this Agreement (provided and on condition that such potential assignees be bound by a written agreement or legal obligation restricting use and disclosure of Confidential Information), in each case whose access is reasonably necessary to the negotiation and performance of this Agreement. Each such recipient of Confidential Information shall be informed by the Party disclosing Confidential Information of its confidential nature and shall be directed to treat such information confidentially and shall agree to abide by these provisions. In any event, each Party shall be liable (with respect to the other Party) for any breach of this provision by any entity to whom that Party improperly discloses Confidential Information. The terms of this Agreement (but not its execution or existence) shall be considered Confidential Information for purposes of this Section 20(a), except as set forth in Section 20(b). All Confidential Information shall remain the property of the disclosing Party and shall be returned to the disclosing Party or destroyed after the receiving Party's need for it has expired or upon the request of the disclosing Party. Each Party agrees that the disclosing Party would be irreparably injured by a breach of this Section 20(a) by the receiving Party or its Representatives or other person to whom the receiving Party discloses Confidential Information of the disclosing Party and that the disclosing Party may be entitled to equitable relief, including injunctive relief and specific performance, in the event of a breach of the provision of this Section 20(a). To the fullest extent permitted by applicable law, such remedies shall not be deemed to be the exclusive remedies for a breach of this Section 20(a), but shall be in addition to all other remedies available at law or in equity.
- b. **Permitted Disclosures.** Notwithstanding any other provision in this Agreement, neither Party shall be required to hold confidential any information that (i) becomes publicly available other than through the receiving Party, (ii) is required to be disclosed to a Governmental Authority under applicable law or pursuant to a validly issued subpoena (but a receiving Party subject to any such requirement shall promptly notify the disclosing Party of such requirement to the extent permitted by applicable law), (iii) is independently developed by the receiving Party or (iv) becomes available to the receiving Party without restriction from a third party under no obligation of confidentiality. If disclosure of information is required by a Governmental Authority, the disclosing Party shall, to the extent permitted by applicable law, notify the other Party of such required disclosure promptly upon becoming aware of such required disclosure and shall cooperate with the other Party in efforts to limit the disclosure to the maximum extent permitted by law.

21. **Goodwill and Publicity.** Neither Party shall use any name, trade name, service mark or trademark of the other Party in any promotional or advertising material without the prior written consent of such other Party. The Parties shall coordinate and cooperate with each other when making public announcements related to the execution and existence of this Agreement, and each Party shall have the right to promptly review, comment upon and approve any publicity materials, press releases or other public statements by the other Party that refer to, or that describe any aspect of, this Agreement. Neither Party shall make any press release regarding or public announcement or the specific terms of this Agreement (except for filings or other statements or releases as may be required by applicable law) without the specific prior written consent of the other Party. Without limiting the generality of the foregoing, all public statements must accurately reflect the rights and obligations of the Parties under this Agreement, including the ownership of Environmental Attributes and Environmental Incentives and any related reporting rights.

22. General Provisions

- a. **Choice of Law.** Arizona law shall govern this Agreement without giving effect to conflict of laws principles.
- b. **Arbitration and Attorneys' Fees.** Any dispute arising from or relating to this Agreement shall be arbitrated in Phoenix, Arizona. The arbitration shall be administered by the AAA in accordance with its Comprehensive Arbitration Rules and Procedures, and judgment on any award may be entered in any court of competent jurisdiction. If the Parties agree, a mediator may be consulted prior to arbitration. The prevailing party in any dispute arising out of this Agreement shall be entitled to reasonable attorneys' fees and costs.

- c. **Notices.** All notices under this Agreement shall be in writing and shall be by personal delivery, facsimile transmission, electronic mail, overnight courier, or regular, certified, or registered mail, return receipt requested, and deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices shall be sent to the person identified in this Agreement at the addresses set forth in this Agreement or such other address as either party may specify in writing. Each party shall deem a document faxed to it as an original document.
- d. **Survival.** Provisions of this Agreement that should reasonably be considered to survive termination of this Agreement shall survive. For the avoidance of doubt, surviving provisions shall include, without limitation, Section 4 (Representations and Warranties), Section 7(h) (No Warranty), Section 15(b) (Insurance), Section 17 (Indemnification), Section 20 (Confidentiality and Publicity), Section 22(a) (Choice of Law), Section 22 (b) (Arbitration and Attorneys' Fees), Section 22(c) (Notices), Section 22 (g) (Comparative Negligence), Section 22(h) (Non-Dedication of Facilities), Section 22(j) (Service Contract), Section 22(k) (No Partnership) Section 22(l) (Full Agreement, Modification, Invalidity, Counterparts, Captions) and Section 22(n) (No Third Party Beneficiaries).
- e. **Further Assurances.** Each of the Parties hereto agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.
- f. **Right of Waiver.** Each Party, in its sole discretion, shall have the right to waive, defer or reduce any of the requirements to which the other Party is subject under this Agreement at any time; provided, however that neither Party shall be deemed to have waived, deferred or reduced any such requirements unless such action is in writing and signed by the waiving Party. No waiver will be implied by any usage of trade, course of dealing or course of performance. A Party's exercise of any rights hereunder shall apply only to such requirements and on such occasions as such Party may specify and shall in no event relieve the other Party of any requirements or other obligations not so specified. No failure of either Party to enforce any term of this Agreement will be deemed to be a waiver. No exercise of any right or remedy under this Agreement by Purchaser or Seller shall constitute a waiver of any other right or remedy contained or provided by law. Any delay or failure of a Party to exercise, or any partial exercise of, its rights and remedies under this Agreement shall not operate to limit or otherwise affect such rights or remedies. Any waiver of performance under this Agreement shall be limited to the specific performance waived and shall not, unless otherwise expressly stated in writing, constitute a continuous waiver or a waiver of future performance.
- g. **Comparative Negligence.** It is the intent of the Parties that where negligence is determined to have been joint, contributory or concurrent, each Party shall bear the proportionate cost of any Liability.
- h. **Non-Dedication of Facilities.** Nothing herein shall be construed as the dedication by either Party of its facilities or equipment to the public or any part thereof. Neither Party shall knowingly take any action that would subject the other Party, or other Party's facilities or equipment, to the jurisdiction of any Governmental Authority as a public utility or similar entity. Neither Party shall assert in any proceeding before a court or regulatory body that the other Party is a public utility by virtue of such other Party's performance under this agreement. If Seller is reasonably likely to become subject to regulation as a public utility, then the Parties shall use all reasonable efforts to restructure their relationship under this Agreement in a manner that preserves their relative economic interests while ensuring that Seller does not become subject to any such regulation. If the Parties are unable to agree upon such restructuring, Seller shall have the right to terminate this Agreement without further liability, and Seller shall remove the System in accordance with Section 11 of this Agreement.
- i. **Estoppel.** Either Party hereto, without charge, at any time and from time to time, within five (5) business days after receipt of a written request by the other party hereto, shall deliver a written instrument, duly executed, certifying to such requesting party, or any other person specified by such requesting Party: (i) that this Agreement is unmodified and in full force and effect, or if there has been any modification, that the same is in full force and effect as so modified, and identifying any such modification; (ii) whether or not to the knowledge of any such party there are then existing any offsets or defenses in favor of such party against enforcement of any of the terms, covenants and conditions of this Agreement and, if so, specifying the same and also whether or not to the knowledge of such party the other party has observed and performed all of the terms, covenants and conditions on its part to be observed and performed, and if not, specifying the same; and (iii) such other information as may be reasonably requested by the requesting Party. Any written instrument given hereunder may be relied upon by the recipient of such instrument, except to the extent the recipient has actual knowledge of facts contained in the certificate.

- j. **Service Contract.** The Parties intend this Agreement to be a "service contract" within the meaning of Section 7701(e)(3) of the Internal Revenue Code of 1986. Purchaser will not take the position on any tax return or in any other filings that is inconsistent with this section of the Code. .
- k. **No Partnership.** No provision of this Agreement shall be construed or represented as creating a partnership, trust, joint venture, fiduciary or any similar relationship between the Parties. No Party is authorized to act on behalf of the other Party, and neither shall be considered the agent of the other.
- l. **Full Agreement, Modification, Invalidity, Counterparts, Captions.** This Agreement, together with any Exhibits, completely and exclusively states the agreement of the parties regarding its subject matter and supersedes all prior proposals, agreements, or other communications between the parties, oral or written, regarding its subject matter. This Agreement may be modified only by a writing signed by both Parties. If any provision of this Agreement is found unenforceable or invalid, such unenforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole. In such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law. This Agreement may be executed in any number of separate counterparts and each counterpart shall be considered an original and together shall comprise the same Agreement. The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.
- m. **Forward Contract.** The transaction contemplated under this Agreement constitutes a "forward contract" within the meaning of the United States Bankruptcy Code, and the Parties further acknowledge and agree that each Party is a "forward contract merchant" within the meaning of the United States Bankruptcy Code.
- n. **No Third Party Beneficiaries.** Except as otherwise expressly provided herein, this Agreement and all rights hereunder are intended for the sole benefit of the Parties hereto and shall not imply or create any rights on the part of, or obligations to, any other Person.

End of Document

EXHIBIT C

2008



Department of the Treasury
Internal Revenue Service

Instructions for Form 3468

Investment Credit

Section references are to the Internal Revenue Code unless otherwise noted.

General Instructions

What's New

The Housing and Economic Recovery Act of 2008 allows the rehabilitation credit to offset the alternative minimum tax for periods after 2007.

The Tax Extenders and Alternative Minimum Tax Relief Act of 2008 increased the rehabilitation credit for certain properties damaged or destroyed as a result of the severe storms, tornados, or flooding in the Midwestern disaster area.

The Energy Improvement and Extension Act of 2008:

- Added three new energy properties eligible for the energy credit for property placed in service after October 3, 2008.
- Increased the qualified fuel cell limit from \$500 per half kilowatt capacity to \$1,500 per half kilowatt capacity.
- Allow the energy credit to offset the alternative minimum tax for tax years beginning after October 3, 2008.

The American Recovery and Reinvestment Act of 2009:

- Added a new investment credit for qualifying advanced energy project credit for periods after February 17, 2009.
- Repealed the credit limitation for qualified small wind energy property for periods after December 31, 2008.
- Provides an election to treat qualified facilities as energy property for facilities placed in service after December 31, 2008.

Purpose of Form

Use Form 3468 to claim the investment credit. The investment credit consists of the rehabilitation, energy, qualifying advanced coal project, qualifying gasification project, and qualifying advanced energy project credits.

Investment Credit Property

Investment credit property is any depreciable or amortizable property that qualifies for the rehabilitation credit, energy credit, qualifying advanced coal project credit, qualifying gasification project credit, or qualifying advanced energy project credit.

You cannot claim a credit for property that is:

- Used mainly outside the United States (except for property described in section 168(g)(4));
- Used by a governmental unit or foreign person or entity (except for a qualified rehabilitated building leased to that unit, person, or entity; and property used under a lease with a term of less than 6 months);
- Used by a tax-exempt organization (other than a section 521 farmers' cooperative) unless the property is used mainly in an unrelated trade or business or is a qualified rehabilitated building leased by the organization;
- Used for lodging or in the furnishing of lodging (see section 50(b)(2) for exceptions); or
- Certain MACRS business property to the extent it has been expensed under section 179 of the Internal Revenue Code.

Qualified Progress Expenditures

Qualified progress expenditures are those expenditures made before the property is placed in service and for which the taxpayer has made an election to treat the expenditures as progress expenditures. Qualified progress expenditure property is any property that is being constructed by or for the taxpayer

and which (a) has a normal construction period of two years or more, and (b) it is reasonable to believe that the property will be new investment credit property in the hands of the taxpayer when it is placed in service. The placed in service requirement does not apply to qualified progress expenditures.

Qualified progress expenditures for:

- Self-constructed property means the amount that is properly chargeable (during the tax year) to capital account with respect to that property; or
- Non-self-constructed property means the lesser of: (a) the amount paid (during the tax year) to another person for the construction of the property, or (b) the amount that represents the proportion of the overall cost to the taxpayer of the construction by the other person which is properly attributable to that portion of the construction which is completed during the tax year.

For more information on qualified progress expenditures, see section 46(d) (as in effect on November 4, 1990). For details on qualified progress expenditures for the rehabilitation credit, see section 47(d).

At-Risk Limit for Individuals and Closely Held Corporations

The cost or basis of property for investment credit purposes may be limited if you borrowed against the property and are protected against loss, or if you borrowed money from a person who is related or who has other than a creditor interest in the business activity. The cost or basis must be reduced by the amount of this "nonqualified nonrecourse" financing related to the property as of the close of the tax year in which the property is placed in service. If, at the close of a tax year following the year property was placed in service, the nonqualified nonrecourse financing for any property has increased or decreased, then the credit base for the property changes accordingly. The changes may result in an increased credit or a recapture of the credit in the year of the change. See sections 49 and 465 for details.

Recapture of Credit

You may have to refigure the investment credit and recapture all or a portion of it if:

- You dispose of investment credit property before the end of 5 full years after the property was placed in service (recapture period);
- You change the use of the property before the end of the recapture period so that it no longer qualifies as investment credit property;
- The business use of the property decreases before the end of the recapture period so that it no longer qualifies (in whole or in part) as investment credit property;
- Any building to which section 47(d) applies will no longer be a qualified rehabilitated building when placed in service;
- Any property to which section 48(b) applies will no longer qualify as investment credit property when placed in service;
- Before the end of the recapture period, your proportionate interest is reduced by more than one-third in an S corporation, partnership (other than an electing large partnership), estate, or trust that allocated the cost or basis of property to you for which you claimed a credit;
- You return leased property (on which you claimed a credit) to the lessor before the end of the recapture period;



Guide to **Federal Tax Incentives for Solar Energy**

Version 3.0
Released May 21, 2009

This document is for the exclusive use of Solar Energy Industries Association (SEIA) members.

Do not distribute this document in printed or electronic form.

Version Guide

The US tax code is a perpetually moving target, and future rulings and code adjustments by the IRS, the courts or Congress may alter the interpretation of the law. We endeavor to ensure that this document is up to date at the time of printing; make sure that you have the latest copy.

1.0 – Released January 27, 2006

Initial interpretation of the code is based on legislative language and intent, and existing precedent, especially for the commercial tax credit. Includes existing tax forms as a guide only.

1.1 – Released March 10, 2006

- Includes improved explanation of acquisition vs. construction for solar equipment.
- Incorporates new state taxation office interpretation of commercial solar installations under the Hawaii state tax credit.
- Includes new discussion of model homes.
- Typographical correction in Commercial Tax Credit Section 11, Example # 3
- We do not anticipate that the IRS will issue specific regulations on the solar tax credits in the near term. SEIA will monitor this situation closely and will offer an updated version of this guide with current and valid IRS forms if the IRS does develop rules for implementing the solar tax credit.

1.2 – Released May 26, 2006

- Reflects new legislative changes to the Hawaii state tax credit.
- Reflects new information on utility eligibility for credits.

2.0 – Released October 21, 2008

- Reflects first comprehensive update of the original guide.
- Broadens focus beyond tax credits also to cover depreciation.
- Adds new sections about how tax benefits are “monetized” by developers who cannot use them.
- Reflects changes to the tax code as a result of the “Emergency Economic Stabilization Act” in October 2008.

3.0 – Released May 21, 2009

- Reflects changes to the tax code made by the “American Recovery and Reinvestment Act” in February 2009.
- Adds new sections on depreciation, Treasury grants in lieu of tax credits, tax credit bonds, federal loan guarantees, a new investment tax credit for manufacturing facilities and answers to a list of frequently-asked questions.

This manual has been prepared by Chadbourne & Parke LLP and is brought to you by the members of the Solar Energy Industries Association (SEIA). If you are not a member of SEIA, we hope you will join at <http://www.seia.org/cs/membership>.

Redistribution and copying of any portion of this manual are prohibited without the prior written consent of SEIA. Although the information in the manual is intended to be current as of April 2009, SEIA makes no warranty or guarantee of any kind that it is correct, complete or wholly up-to-date. Please note that this manual is intended to provide only general guidance. You should not rely upon or construe the information in this manual as legal advice, and you should not act or fail to act based upon the information herein without first seeking professional counsel from a competent specialist. Reliance on this manual will not prevent the Internal Revenue Service (IRS) from imposing penalties if it takes a different view of the law. Readers are strongly urged to obtain specific advice from a tax specialist, as the US tax code is complex. Interpretations of tax law are frequently established based on the merits of individual cases that come before the IRS, as opposed to pre-conceived rules.

Please also note that, by providing this manual, neither SEIA nor Chadbourne & Parke is providing, or intending to provide, you or any other reader of this manual with legal advice or to establish an attorney-client relationship with you or any other reader of this manual. To the extent you have questions concerning any legal issues, you should consult a lawyer. Neither SEIA nor any member of SEIA nor Chadbourne & Parke shall be responsible for your use of this manual or for any damages resulting therefrom.



805 15th Street, NW Suite 510
Washington, DC 20005
(202) 682-0556

May 21, 2009

To the Solar Energy Industry and Users:

This is an exciting time for the solar energy industry in the United States. In October 2008, Congress passed, and the President signed, legislation that extended the 30-percent federal solar tax credits for eight more years. In February 2009, Congress took steps in an economic stimulus bill to increase the supply of capital flowing into the renewable energy sector. The U.S. is poised to become the global leader in solar energy, and the solar energy industry is projected to create more than 440,000 jobs and unleash more than \$325 billion in investment by 2016.

Several improvements to the solar tax credits were made in the "Emergency Economic Stabilization Act" in October 2008: the \$2,000 cap for tax credits on residential solar electric installations was eliminated, creating a true 30-percent residential tax credit (effective for property placed in service after December 31, 2008). The prohibition against utilities benefiting from the tax credit was removed and alternative minimum tax (AMT) filers, both businesses and individuals, are now allowed to take the credit.

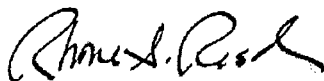
The "American Recovery and Reinvestment Act (ARRA)" in February 2009 made several enhancements to the existing incentives and embraced several new policies designed to support solar energy and other renewable energy technologies. These changes will help address the solar financing challenges caused by the weak credit and tax equity markets. The stimulus bill authorized the U.S. Department of Energy to guarantee repayment of loans to build new renewable energy projects, manufacturing facilities that make components for such projects and transmission lines. A project must start construction by September 2011 to potentially qualify for loan guarantees. The stimulus also directed the U.S. Treasury to pay the cash equivalent of the investment tax credit to owners of renewable energy projects that are completed in 2009 or 2010 or that start construction in those years and are completed by 2016. The stimulus bill provided a new 30% tax credit for building manufacturing facilities that make products like solar panels for the new green economy. It authorized a series of new tax credit bonds that can be issued to build

renewable energy projects and manufacturing facilities. The lender must pay taxes on the interest it receives, but it receives tax credits from the federal government that offset most or all of the income taxes that would otherwise have to be paid on the interest. The bill also eliminated a rule that the investment tax credit was subject to reduction to the extent a project benefited from tax-exempt financing or subsidized energy financing.

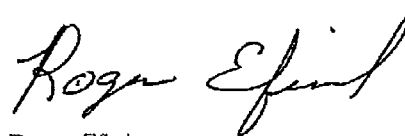
To reflect these significant changes, SEIA and Chadbourne & Parke LLP revised the SEIA Solar Tax Manual in May 2009. We expect further agency guidance for new ARRA Provisions this summer and plan to update this guide to reflect that guidance.

This major revision of SEIA's Solar Tax Manual will serve as an important resource as you begin your research into how to take full advantage of federal solar incentives. This is only a starting point. This guide should not be your only resource as you conduct your research. It is vital that you contact a local tax attorney for legal counsel.

Sincerely,



Rhone Resch
President



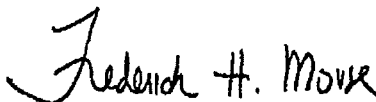
Roger Efird
Chairman



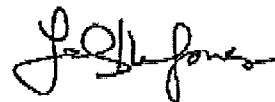
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Solar Thermal Division Chair



Jeff Wolfe
Photovoltaics Division Chair



Fred Morse
Utility-Scale Solar Power Division Chair



Laura Jones
Solar Advocates Division Chair

Executive Summary


The U.S. government encourages investment in new solar equipment by offering tax credits, tax deductions and grants. Homeowners installing solar equipment potentially qualify for a tax credit. Businesses potentially qualify for both a tax credit or the cash equivalent and the ability to deduct most of the equipment cost on an accelerated basis over five years. For businesses, the subsidies are worth roughly 56% to 58% of the cost of the equipment. For homeowners, the subsidy is worth 30%.

The **SEIA Guide to Federal Tax Incentives for Solar Energy** provides detailed information about how the incentives for both commercial and residential applications may be claimed. Key considerations in calculating the value of federal incentives for a solar project include:

- What types of solar equipment are "eligible property" for each of the incentives;
- Amount of the incentives;
- Conditions for a system to meet the definition of "placed in service," which is important because the tax subsidies are claimed in the year that equipment goes into service;
- Project timing issues arising because the tax credits, although long-term, are still not permanent;
- The ownership structure of the project; and
- The effect of rebates, state tax credits and other subsidies on the federal tax benefits.

There may be tradeoffs for developers who take advantage of tax-exempt financing or other forms of government help that fall under the heading "subsidized energy financing." Use of these may lead to a reduction in the federal tax subsidies for the project. There is no longer any reduction in tax credits or cash grants for spending on a project after 2008. However, use of tax-exempt financing will adversely affect the depreciation that can be claimed on a commercial project.

Most project developers are not in a position to use the tax subsidies and must enter into transactions to "monetize" the tax subsidies, or convert them into cash that can be used to help pay the project cost. There are many misconceptions in the market about who is an appropriate counterparty for such a monetization transaction. For example, passive loss and at-risk rules in the U.S. tax code make it hard for individuals or smaller corporations to use the tax subsidies. They are not an appropriate counterparty.



Care must be exercised when entering into transactions with schools, municipal utilities, some electric cooperatives, government agencies, charities and other tax-exempt organizations. Solar equipment cannot be leased to such entities and still claim the full tax subsidies. However, a developer can sign a power contract to supply electricity to such an entity. Care should be taken to make sure that what looks in form like a power contract is in fact one in substance.

The IRS has rules for treating some arrangements as leases even though they are documented to look like power contracts.

Commercial projects that qualify for a tax credit will have the option during 2009 and 2010 — and in some cases after 2010 — to forego the tax credit and receive the cash value from the U.S. Treasury instead. This option to trade in tax credits for cash is a temporary measure meant to help keep renewable energy development on track during 2009 and 2010 when the economy is expected to remain weak.

This manual is organized in seven sections. The first section covers general project issues, as well as issues that are unique to the commercial credit. The second section covers issues specific to the residential credit. However, it is recommended that readers who intend only to take the residential credit still read through the first section on the commercial credit.

At the end of these first two sections, the guide provides workbook examples for calculating the value of the commercial and residential tax credits under different project conditions.

The remaining sections address tax credit bonds, new loan guarantees that may be available for commercial solar projects through the U.S. Department of Energy, a tax credit that encourages construction of new factories to make solar panels, inverters and other components for renewable energy projects, state tax considerations and frequently-asked questions.

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Section 1.

Commercial Solar Tax Benefits in Detail

The commercial solar tax credit is in section 48(a) (energy credit) of the U.S. tax code.

The commercial solar credit is 30% of the "basis" that a company has invested in "eligible property" that is "placed in service" during the period 2006 through 2016. The commercial credit will drop to 10% of the basis for property put into service after December 31, 2016, and the residential credit will drop to zero for property put into service after that date, unless the deadline is extended again by Congress. A tax credit is a dollar-for-dollar reduction of the income taxes that the person claiming the credit would otherwise have to pay the federal government.

Determining what constitutes "eligible property," when it is "placed in service," and what is the "basis" in the property are among the keys to calculating the value of the commercial solar tax credit. Each of these items, along with additional special considerations, are discussed in detail in the following paragraphs.

The same solar equipment that qualifies for the commercial tax credit can usually be depreciated over five years on an accelerated basis, meaning the cost of the equipment can be deducted and the deductions are front loaded. When a 30% tax credit is claimed, only 85% of the equipment cost is subject to depreciation. The depreciable basis must be reduced by one half of the solar tax credit. The special depreciation allowance for solar equipment is in section 168(e)(3)(B)(vi)(I) of the US tax code.

Solar equipment placed in service in 2008 and 2009 qualifies for a "depreciation bonus." The owner can deduct half its depreciable "basis" in the equipment immediately. Since only 85% of the basis in equipment on which the 30% tax credit has been claimed can be recovered through depreciation, the depreciation bonus allows 42.5% of the equipment cost -- half of 85% -- to be deducted immediately. The other half is depreciated over five years. (See section 1.6.3.)

The owner of any commercial solar project placed in service in 2009 or 2010 -- or that starts construction during 2009 or 2010 and is completed by 2016 -- has the option to forego the tax credit and receive a check for the cash value from the US Treasury. The owner would qualify for the same depreciation as if the owner claimed the tax credit. (See section 1.5.)

1.1 Eligible Property

1.1.1 Types of Eligible Property

The commercial solar credit may be claimed for spending on two types of equipment including spending on installation costs, like labor.

1. "[E]quipment which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat, excepting property used to generate energy for the purposes of heating a swimming pool," and
2. "[E]quipment which uses solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight."

1.1.1 (a) Photovoltaics and Concentrating Solar Power Plants

All equipment associated with a photovoltaic or concentrating solar power system is eligible property for the credit. The key word is "equipment." If the system includes a building, a credit could not be claimed on the cost of the building. Roofs are sometimes replaced when photovoltaic panels are installed on top of a building. The tax credit cannot normally be claimed on the cost of the roof. Structures that hold up photovoltaic panels -- for example, over a parking lot -- may or may not be eligible equipment. They are normally considered part of the solar system on which the tax credit can be claimed as long as the solar array is designed primarily with electricity generation in mind and any other use, like providing shelter, is merely incidental. IRS regulations explain that eligible equipment includes storage devices, power conditioning equipment and transfer equipment. However, where batteries or other storage devices are used, the credit can only be claimed on such devices that store solar-generated electricity and not electricity drawn from the grid.

The commercial solar credit can only be claimed on the equipment in a solar power plant up to the transmission stage. Thus, no credit can be claimed on a radial line or substation to move the electricity from the power plant to the grid. The statute suggests that no credit can be claimed at all if any electricity from the solar equipment is used to heat a swimming pool.

1.1.1 (b) Solar Heating and Cooling Systems

The commercial credit can be claimed on equipment that is part of a solar heating or cooling system, but only if at least 75% of the energy used to run the system comes from the sun. If the energy source is at least 75% sunlight and also relies upon an additional

fuel source, then there must be an allocation based on the mix of energy in the year the system is first put into service. (The relevant year is the tax year of the company claiming the credit.) For example, if 10% other energy is used in the year the system is first put into service, then the solar tax credit can be calculated on 90% of the cost. However, a dip in the solar energy use below 90% in any of the next four years would lead to the IRS recapturing part of the tax credit claimed. (See section 1.10 for more on recapture.) The opposite is not true: an increase in the amount of solar energy used in a later year will not allow the company to claim an additional tax credit.

1.1.1 (c) Solar Lighting

All equipment associated with fiber-optic solar lighting systems qualifies, but only if put into service during the period 2006 through 2016. Solar tube-type systems do not qualify.

1.1.1 (d) Passive Solar Systems

Passive solar systems do not qualify. IRS regulations define passive solar systems as ones that use "conductive, convective, or radiant energy transfer." The IRS gives as examples of such systems: greenhouses, solariums, roof ponds, glazing, and mass or water Trombe walls. In systems that include both eligible property and passive solar equipment, the credit can only be claimed on the portion of total spending associated with the eligible property.

1.1.2 Age of Eligible Property

The equipment must be new to qualify for a commercial solar tax credit. The tax credit can only be claimed by the first person to use the equipment. A company that buys a refurbished solar installation may be able to treat it as new if the vendor has put enough money into upgrading it. The Internal Revenue Service applies an "80-20 test" to determine whether equipment has been so extensively modified that it is essentially a different piece of equipment. The test is $A + B$, where A is the value of the used parts retained from the original equipment and B is the cost of the improvements. If B is more than 80% of the total $A + B$, then the equipment will be considered brand new. The improvements include labor to install the equipment.



1.1.3 Use of Eligible Property

Equipment must be used in the United States to qualify for a commercial solar tax credit. In addition, commercial solar tax credits cannot be claimed on equipment that is "used" by someone who is not subject to U.S. income taxes.

Thus, "use" of the equipment by a school, municipal utility, government agency, charity or other

tax-exempt organization (unless the equipment is used in a taxable side business) or in some cases by an electric cooperative will rule out a credit on the equipment. This means that solar equipment cannot be leased to such an entity. A lessee “uses” the equipment it is leasing. However, a lease with a term of less than six months does not count as a “use.” The credit is calculated in the year equipment is first put into service. Ineligible use of the equipment at any time during the first five years would cause part of the tax credit claimed to be recaptured. (See section 1.10.)

The key when dealing with such an entity is to sign a contract merely to sell it electricity. Someone who merely buys electricity from solar equipment owned by someone else is not considered to “use” the equipment. Care should be taken to make sure the contract is not characterized by the IRS as a lease of the solar equipment in substance even though it looks in form like a power contract. (See sections 1.8.4 and 1.8.5 for more details and consult a tax attorney for project specific applications.)

Electric utilities were not able to claim the tax credit on solar equipment that they own or lease and that was put into service before February 14, 2008. The credit could not be claimed before then on any solar equipment used to generate electricity that is sold at rates that are regulated on a rate-of-return basis. Congress removed the restriction in October 2008 and made the credit retroactive to the previous February.

1.1.4 Original Equipment Manufacturer and Integrated Equipment

A billboard or highway warning sign does not qualify for the credit, even if powered by sunlight, but the cost of a distinct device that generates electricity from sunlight to illuminate the sign would qualify. Similarly, a livestock pump would not qualify, but a PV attachment designed to drive the pump would; a careful and conservative allocation of cost between solar and non-solar equipment must be made.

The credit belongs to the customer who places the equipment in service, not to the manufacturer or integrator of the final device. The credit is claimed by the owner of the equipment after the equipment is placed in service. Except in rare cases, a manufacturer or vendor holding equipment out for sale does not place it in service.

1.2 Placed in Service

1.2.1 General Requirements

Equipment is considered “placed in service” once it has been fully installed and delivered to the owner and is capable of being used by the owner for its intended purpose. Ordinarily, four things must have happened for this to be true:

- The equipment must have been delivered and physical construction or installation on site must have been completed, although contractor personnel can remain at the site to handle minor tasks like fixing punch list items.
- The taxpayer must have taken legal title and control over the equipment.
- The taxpayer must have the licenses and permits needed to operate it. Thus, for example, in states where a building owner is not allowed legally to turn on a solar system until the local utility has inspected the system and declared it safe for use, the system is not normally in service until a letter has been received from the local utility authorizing “parallel operation” with the grid.
- Pre-operational tests must have demonstrated that the equipment can serve its intended function. (“Pre-operational” means before the equipment is put to use.) Other testing to determine whether the equipment can operate at the design capacity and to identify and eliminate defects can occur after the equipment is already operating.

Equipment bought off the shelf is usually assumed to be in workable condition. Solar equipment sold in a ready-to-use state (e.g., solar-powered warning devices, pumps, etc.,) as opposed to that which is constructed on site (as with a typical solar rooftop system) is ordinarily considered to be placed in service immediately upon purchase and installation.

1.2.2 New Businesses

The “placed in service” requirement is different for a taxpayer entering a new business than for a taxpayer already in that business. In the case of someone going into a new business, the courts have held that he or she must actually have put the equipment to use - it is not enough merely to show it was capable of operating.¹

1. See, e.g., *Piggly Wiggly Southern, Inc. v. Commissioner*, 84 TC 739 (1985) (refrigerators installed in new stores not in service until the stores opened to customers); General Counsel Memorandum 37449 (March 6, 1978) (taxpayer already in the trade or business does not have to use equipment before it is deemed in service, unlike taxpayers entering a new business).

1.2.3 Power Plants

Utility-scale power projects that will sell electricity via the grid must have been synchronized with the grid before they are considered in service. They must be able to deliver their electricity to market.

1.2.4 "Daily Operation" as a Condition for Meeting the Requirement

The IRS takes the position that equipment must be in "daily operation" to be considered in service.² This is a more conservative view of the law than held by many tax lawyers. In a technical advice memorandum in 1993, the IRS said a power plant "is considered in daily operation when it is routinely operating to supply power to the transmission grid for sale to customers."³ (A "technical advice memorandum" is a ruling by the IRS national office to settle a dispute between a taxpayer and an IRS agent on audit.)

If a solar system is considered part of an "integrated facility," then the rest of the facility must also be working before any part of it is in service. An example is a factory where the solar equipment is the power source, but the factory is not in a position to turn out product until all three sections of the assembly line are fully functioning.

1.3 Tax Basis

A company's "basis" is the portion of its investment in eligible property upon which the commercial solar tax credit can be claimed. It is normally what the taxpayer paid for the equipment, including the cost of installation. Thus, for example, if equipment cost \$100,000, the solar credit during the period 2006 through 2016 is 30% of the tax basis of \$100,000, or \$30,000.

Interest paid during construction of larger solar projects that take more than a year to build and cost more than \$1 million is added to the basis of the equipment.

Interest paid on loans to acquire other solar equipment and any sales and use taxes paid are normally deducted when paid and do not add to the basis. However, an election can be made under section 266 of the tax code to fold them into the basis, in which case these expenditures would have to be deducted over time through depreciation, but they would also enter into calculation of the commercial solar tax credit.

2. See, e.g., Private Letter Ruling 9529019 (April 24, 1995) (landfill gas facility not in service for purposes of section 29 credits until it is in "daily operation"); PLR 9627022 (April 9, 1996) (same statement); PLR 9831006 (April 23, 1998) (same statement).

3. See Technical Advice Memorandum 9405006 (October 15, 1993)

1.4 Effect of Rebates, Buydowns, Grants and Other Incentives

State rebates, buydowns, grants or other incentives do not decrease the amount eligible for the commercial solar credit if the company is required to pay federal income tax on the incentive. The majority of incentives represent income on which federal income taxes are paid and, therefore, do not decrease the basis for the solar tax credit. However, there is a limited class of incentives that are not taxable; for these incentives, the tax basis must be reduced prior to calculating the credit.

The following table describes different types of incentives and their impact on the tax basis. If you are uncertain which category your particular rebate program falls under, we urge you to get in touch with the state or utility energy program contacts listed at www.dsireusa.org, or contact a tax attorney for project-specific clarification.

1.4.1 Incentives that Reduce the Tax Basis

Type of Incentive	Comment
<p>Nontaxable Rebates from a State or Utility</p> <p>(Note: most rebates are taxable - see below.)</p>	<p>In rare cases, cash received from a state government does not have to be reported as taxable income. An example — outside the solar industry — is where a state reimburses a railroad for the cost of putting tracks on an overpass so as not to block traffic on a public highway. The railroad is no better off with the overpass than without. It has no income in the sense of an accession to wealth. It is rare to find such cases.</p> <p>Utilities in some states pay rebates to customers as an inducement to install solar equipment. A rebate from a utility should ordinarily be considered taxable, except if a rebate is paid by a utility to a customer as an inducement to take energy efficiency measures in connection with a <u>dwelling unit</u> (e.g., an apartment building). Such a rebate is exempted from tax under section 136 of the US tax code, and the basis must be reduced by the amount of the rebate.</p> <p>As a general rule, all money or value received in a business setting must be reported as income unless one can point to a specific section of the US tax code that excludes the amount from income.</p>

1.4.2 Incentives that Do Not Reduce the Tax Basis

Type of Incentive	Comment
Taxable State or Nonprofit Grants, Rebates, or Buydowns	If you pay federal income tax on money received from a grant program, you need not reduce the tax basis of your system as long as the grant is reported as income. Most grants must be reported as taxable income. A company will enjoy a greater tax advantage by claiming a rebate or grant as taxable income.
Credits Against State and Local Income Tax	State and local income tax credits do not affect the tax basis.
Taxable Rebates or Credits Funded by a Utility	<p>Rebates funded by a utility are generally treated as taxable income, and do not affect the tax basis in solar equipment. Two things used to reduce the tax basis for the credit before 2009. They were if the system cost is paid with help from tax-exempt financing or "subsidized energy financing."</p> <p>Tax-exempt financing involves bonds issued by a state or local government to borrow money for a public project or quasi-public use. The lenders who buy the bonds do not have to pay taxes on the interest they receive. "Subsidized energy financing" is a government program that provides subsidized financing for energy measures. An example is where a state makes direct loans to businesses at below-market rates to help them finance solar panels.</p> <p>The IRS ruled that it is not "subsidized energy financing" (see section 1.4.3) for an investor-owned utility to make rebates on electricity bills to homeowners who buy hot water heaters that use renewable energy in a case where the money the utility uses for the program comes solely from its own revenues. It does not matter that the utility was ordered by the state public service commission to conduct the program. A program is not "subsidized energy financing" unless it is a government program involving government funds.</p>

Type of Incentive	Comment
Taxable Rebates or Credits Funded by a Utility (cont.)	<p>Similarly, It is not subsidized energy financing for a federal utility like the Bonneville Power Administration or Tennessee Valley Authority to make loans at below-market interest rates to customers of utilities to whom BPA or the TVA supplies power. By law, the federal utility must cover its full costs through its own revenues.</p> <p>The "American Recovery and Reinvestment Act" in February 2009 eliminated the rule that use of tax-exempt or subsidized energy financing reduces the tax basis on which the tax credit is claimed. The change applies to spending on a project in 2009 or later. Therefore, if construction of a project started in 2008 but was completed later, the tax credit may not be claimed on the portion of the construction cost that accrued in 2008 and was paid with help from tax-exempt or subsidized energy financing. It may be claimed on the portion of the cost incurred in 2009.</p> <p>Use of tax-exempt financing will still cause the project to have to be depreciated more slowly. A solar project financed with tax-exempt debt must be depreciated on a straight-line basis largely over 12 years rather than on an accelerated basis largely over five years. Use of subsidized energy financing does not affect how a commercial project is depreciated.</p>
State Performance-Based Incentives	<p>Direct payments by a state to solar producers as an operating subsidy never caused a reduction in tax credit basis. Operating subsidies paid directly to a generator may be a grant, but they are not subsidized energy financing. (This assumes that the incentives do not have to be repaid.) The IRS has ruled on a number of occasions that the only financial assistance that caused a reduction in the tax credit is help paying the capital cost of the project. It is not subsidized energy financing to subsidize operating costs.⁴ Subsidized energy financing was a problem before 2009. It is not a problem for project costs that are incurred on or after January 1, 2009.</p>

4. See for example <http://text.nyserda.org/programs/pdfs/taxcreditpaper.pdf>

Type of Incentive	Comment
Renewable Energy Credit Sales or Requirements	Renewable energy credits or "RECs," "green tags," carbon allowances and other saleable environmental attributes awarded for using sunlight to generate electricity have no effect on the commercial solar credit.
Loan Guarantees	The IRS said in a private letter ruling that a loan guarantee from a federal or state agency or a utility is not "subsidized" energy financing, even if the guarantee looks in form like a direct loan by the government to the private party. The interest rate on the loan was the same rate that a bank would charge to lend with a federal guarantee.
Grants administered by non-governmental organizations and funded from non-governmental funding sources	The IRS ruled privately that production incentive payments delivered by a private charity out of funds contributed by a private utility company did not constitute "subsidized energy financing." ⁵ However, it suggested that the program might have been viewed as subsidized energy financing if a government agency administered the program, even if it was privately funded. ⁶

1.4.3 Subsidized Loans and Financing

Generally, borrowing money does not adversely affect the basis that a taxpayer has in his or her solar equipment. It does not matter whether the money to pay for the equipment comes out of the pocket of the taxpayer or is borrowed; the basis on which the tax credit is calculated is what the taxpayer paid for the equipment. Two exceptions to this general rule are:

- For spending prior to January 1, 2009, basis had to be reduced to the extent subsidized borrowing in the form of "tax-exempt financing" or "subsidized energy financing" was used to pay the equipment cost; and
- at-risk limitations could come into play to limit the credit that can be claimed in situations where the taxpayer borrows to pay the equipment cost on a nonrecourse basis, meaning on terms where the lender has no claim against the borrower if he fails to repay the loan. The only recourse of the lender is to foreclose on the equipment. See section 1.4.4 for more detail.

5. Private Letter Ruling 200202048

6. Private Letter Ruling 8530004

The details follow.

1.4.3 (a) Calculation Method

When either tax-exempt financing or subsidized energy financing is used to pay equipment costs that were incurred before 2009, the tax basis in the equipment must be reduced. The basis reduction is calculated by putting the cost of the equipment in the denominator of a fraction. The numerator is the amount of subsidized or tax-exempt financing used to pay such costs. The fraction is the percentage reduction in the tax basis. (For example, a system put in service before 2009 and financed entirely with tax-exempt bonds would be ineligible for the commercial solar credit.)

1.4.3 (b) Tax-Exempt Financing

The IRS defines "tax-exempt financing" as borrowing through bonds issued by a state or local government to finance a public or quasi-public project. The holders of such bonds do not have to pay taxes on the interest they receive. This means a borrower benefiting from such bonds does not have to pay as high an interest rate as he would otherwise. Tax-exempt financing can usually be used only for schools, roads, hospitals and other public facilities. However, the US tax code makes 15 exceptions where such financing can be used for private projects that Congress felt create some public benefits (e.g. privately-owned sewage treatment plants or sports stadiums). Smaller projects may also qualify for financing using "small-issue" bonds.

1.4.3 (c) Subsidized Energy Financing

Financing The IRS defines this as "financing provided under a federal, state or local program a principal purpose of which is to provide subsidized financing for projects designed to conserve or produce energy." An example of such financing is where a state offers low-interest loans directly to help pay for renewable energy projects or where the state makes payments to a bank to buy down the interest rate on loans that the bank makes to finance such projects.

It is important to note that the "subsidized energy financing" is the full financing extended under a government program, not just the cost to the government of the subsidy. The IRS took this position in regulations under the residential energy credit that used to be on the statute books from 1977 to 1990.⁷

7. In the example given by the IRS, a bank lent \$3,000 to a homeowner to install a solar hot water heater and the bank used \$500 it received under a federal energy conservation program to reduce the principal amount of the loan the homeowner had to repay to \$2,500. The amount of "subsidized energy financing" in this case was the full \$3,000.

For example, if a commercial customer planning to build a \$100,000 project borrows \$80,000 and benefits from an interest rate subsidy on the loan funded out of a state energy program, then the basis eligible for the tax credit would be reduced by \$80,000 and the credit would only apply to the remaining \$20,000. No basis reduction is required for spending on a project after 2008.

1.4.3 (d) Tax-Exempt or Subsidized Energy Financing and Depreciation

Use of tax-exempt or subsidized energy financing will not reduce the depreciable basis of a project. However, if tax-exempt financing is used, the project will have to be depreciated more slowly -- largely over 12 years on a straight-line basis.

1.4.4 At-Risk Limitations on Financing

Certain taxpayers may not be able to claim the full cost of eligible property as tax basis immediately if they borrow on a nonrecourse basis to pay the cost. "Nonrecourse" means the taxpayer has no personal liability to repay the loan, and the lender looks mainly to the project being financed for repayment. The taxpayers subject to this rule are individuals (including individuals who own a project through a partnership or limited liability company treated as a partnership), S corporations and "closely-held" C corporations. A C corporation is "closely held" if five or fewer individuals own more than half the stock. (The rule does not apply to publicly-held companies. It also does not apply to a small developer that brings in an institutional investor as a partner.) Such taxpayers cannot include in the tax basis any portion of the eligible property cost paid with nonrecourse financing when calculating their commercial solar tax credit for the year a solar project is placed in service. For example, if a solar project cost \$100,000, but \$80,000 of the cost was paid with the help of a nonrecourse loan, then the tax credit initial basis is \$20,000 of the cost.

There are two key exceptions to this rule requiring a basis reduction when nonrecourse financing is used. These exceptions should apply to most solar projects:

1. If the equipment financed through a nonrecourse loan would have qualified as "solar energy property" under section 46(c)(8)(F) of the tax code before that section was repealed in 1990, then the basis reduction is not required. (Solar equipment that qualifies today for the commercial solar tax credit would have qualified under that section, with the exception of solar hybrid lighting.⁸) However, this exception applies only if no more than 75% of the cost of the equipment is paid with nonrecourse debt and the nonrecourse debt is a level-payment loan, meaning that there is a straight-line amortization schedule for repayment of the loan. Level debt service payments are more interest than principal in early years and more principal than interest in later years.

8. Omnibus Budget Reconciliation Act of 1990 - H.R.5835 ENR

2. A basis reduction is also not required if the nonrecourse financing is "qualified commercial financing." The requirements of "qualified commercial financing" are:

- The taxpayer must not acquire the solar equipment from a "related party."
- The nonrecourse financing cannot be used to pay more than 80% of the cost.
- The money must either be borrowed from a commercial lender or through a federal, state or local government program. A loan whose repayment is merely guaranteed by a federal, state or local government agency will still be considered to have been made under such a program. A commercial lender must be regularly engaged in the business of lending. The commercial lender cannot be related to the taxpayer or be the vendor who sold the equipment or be someone who receives a fee tied to the taxpayer's investment in the equipment.

The at-risk rules merely affect the timing of tax credits rather than the final amount. If part of the cost of the eligible property cannot be included in the first year's tax credit basis due to use of nonrecourse financing, then as the loan principal is later repaid, the taxpayer can claim a new credit calculated on the reduction in loan principal as the tax credit basis. Additional credits can be claimed in each year as the loan principal is repaid. No additional credits can be claimed on interest payments.

1.5 Cash Grants in Lieu of Tax Credits

Developers of new commercial solar projects placed in service in 2009 or 2010 have the option to take a cash payment from the U.S. Treasury for the same amount they would have been able to claim as a commercial tax credit. This option is also available for solar projects that start construction in 2009 or 2010 and are completed by 2016. The grants will be paid within 60 days after the project is placed in service or, if later, 60 days after the owner applies for the grant. The Treasury has no discretion whether to pay. Applications must be submitted by October 2011.

The option is only available on commercial projects -- not residential. Solar panels that are owned by a solar company and used by it to supply electricity to a homeowner under a power purchase agreement or that are leased by it to a homeowner are considered put to commercial use, assuming the contract with the homeowner is respected for tax purposes as a power contract or lease and is not recharacterized as an installment sale of the panels to the homeowner.

Any grant paid will be subject to recapture if the solar equipment is disposed of within five years. Only the "unvested" portion of the grant is recaptured. The grant vests at the rate of 20% a year.

Thus, if the solar equipment is sold after it has been in use for three years, then 40% of any cash grant paid will be recaptured. In this sense, the recapture rules are similar to what happens to the commercial tax credit. (See section 1.10 for more on recapture.)

Congress directed the Treasury to sort out whether the recapture rules for the grant are identical or whether they differ from the rules for the tax credit. The tax credit is also subject to recapture if equipment is owned by a partnership (including a limited liability company treated for tax purposes as a partnership) and a partner sells his interest or his share of partnership income is reduced by more than a third. It is unclear to what extent changes at the partner level will lead to recapture of cash grants. A grant may be spent by the partnership and never distributed to the partners, unlike commercial tax credits that are necessarily passed through to partners and claimed by them on their tax returns.

The Treasury will also have to decide when a project is considered to have started construction. It has five precedents from which to choose. Under these precedents, the earliest construction would be considered to start is when physical assembly of major components starts at a factory off site. The latest construction would be considered to start is when foundations start to be laid at the site (for example, in the case of a utility-scale solar project). Site clearance or engineering work would not count. A decision is not expected before July 2009.

Solar companies that are treated as partnerships for tax purposes and have raised money from private equity funds may be barred from receiving any cash grants. This is only a problem if the private equity fund invests directly and not through a US "blocker" corporation. Section 1603(g) of the "American Recovery and Reinvestment Act" prohibits the Treasury from paying any grant on a project owned by a "partnership or other pass-thru entity any partner (or other holder of an equity or profits interest) of which" is a federal, state or local government agency or instrumentality, a tax-exempt entity or an electric cooperative. Most private equity funds have state pension plans, university endowments and similar entities as investors. Congress may rewrite the prohibition to narrow it, but it would not do so before the summer or fall 2009. Also, be aware that if a blocker corporation is owned 50% or more by a tax-exempt entity, it may itself be considered a tax-exempt entity. The issue was still under discussion with the Treasury when this edition of the manual was completed and further guidance is expected.

1.6 Depreciation

1.6.1 Asset Breakdown

The owner of solar equipment can depreciate, or deduct, 85% of his or her tax basis in the same equipment on which the commercial tax credit can be claimed over five years. The deductions are claimed on a 200% declining-balance basis, meaning the deductions are front-loaded rather than taken in equal amounts each year over the period.

Any part of a solar project that is considered a building is depreciated over 39 years on a straight-line basis. Not all structures are buildings for tax purposes. A structure is usually only considered a building if it includes office or storage space or a control room.

Landscaping and other site improvements, like a parking lot, are depreciated over 15 years on a 150% declining-balance basis.

Transmission equipment used to transmit at 69 kV or higher voltage is depreciated over 15 years using 150% declining-balance depreciation. Other transmission and distribution equipment is depreciated over 20 years using 150% declining-balance depreciation. Utilities usually make owners of utility-scale solar projects reimburse them for the cost of any substation upgrades, grid improvements and other equipment required for interconnection that the utility will own. Some of the costs may be classified as "network upgrades" for regulatory purposes and the utility will collect the cost from the generator but then repay it later with interest or transmission credits. Any payments a generator makes for network upgrades are treated for tax purposes as a loan by the generator to the utility and the generator is not allowed to deduct them. The generator may also have to reimburse the utility for "direct intertie" costs that will not be repaid by the utility. The generator recovers any such payments on a straight-line basis over 20 years.

Property on an Indian reservation can be depreciated more rapidly. The part that would be depreciated over five years can be depreciated over three years instead. This only applies to equipment placed in service by December 2009 unless the deadline is extended by Congress. Depreciation must be taken more slowly to the extent tax-exempt financing is used to pay part of the equipment cost. It is also slower for assets used predominantly outside the United States and for any assets that are considered "tax-exempt use property." Examples of tax-exempt use property are solar panels leased to a tax-exempt entity or a project owned in a partnership between a private developer and a municipal utility. In the case of such a partnership, a fraction of the project is "tax-exempt use property." The fraction is the highest share of partnership income that the municipal utility will be allocated during the life of the partnership. Thus, if the municipal utility starts with a 10% share of income but this increases later to 50%, then 50% of the project will be "tax-exempt use property" from the start.

1.6.2 Basis Reduction

The owner of solar equipment on which an investment credit is claimed or on which a cash grant is paid by the Treasury can depreciate only 85% of the cost. The "basis" for depreciation must be reduced by half the amount of the investment credit or cash grant.

1.6.3 Depreciation Bonus

Solar equipment placed in service in 2008 or 2009 qualifies for a 50% "depreciation bonus,"

meaning that half the basis in the equipment can be deducted immediately. The remaining basis is deducted normally as depreciation. Thus, the bonus the first year on the part of a solar project that qualifies for an investment credit or cash grant is 42.5% of the equipment cost. The bonus can only be claimed on equipment that the owner was not committed to purchase before January 1, 2008. In larger solar projects, just because a contract was signed with someone before 2008 to build the project does not mean the owner was committed to the project when the contract was signed. In some cases, the owner is not considered committed until physical work started on the project at the site. Commitment to purchase depends on the facts of the individual case.

1.7 Project Timing Issues

1.7.1 Transition Issues for Some Projects

Projects that straddle a date when Congress changed the tax subsidies for solar equipment raise transition issues. There are potentially such issues with both tax credits and the Treasury cash grants.

The tax credit for commercial solar projects was increased from 10% to 30% in 2006 and it will drop back to 10% in 2017, unless Congress votes again to extend it. What happens when a solar energy system is installed partly in 2016, but not placed in service until 2017?

The answer is the taxpayer will probably qualify only for a 10% credit. However, it depends on whether the project is considered to be "self constructed" or "acquired" by the taxpayer.

1.7.1(a) Self-Constructed Projects

For the purposes of evaluating transition issues, a project is considered "self constructed" when:

- It is assembled and installed by the taxpayer, or
- "stick built" for a taxpayer by a construction contractor - at least in most cases where the taxpayer retains control over the design.

In cases where a project is considered self constructed, a 30% tax credit can only be claimed on the percentage of construction work done during the period 2006 through 2016. However, that assumes that the project will be completed in 2016. If work starts during 2016, but is not completed until 2017, then the taxpayer will get only a 10% credit unless he elects to claim credits on a "progress payments basis" or unless Congress extends the deadline to qualify for the 30% credit. (See section 7.2 under the commercial credit discussion for a discussion about progress expenditures.) It does not matter when

the construction contractor is actually paid. Thus, there is no advantage to paying the contractor in 2016 for work that will be done in 2017. Where work started in 2005 and finished in 2006, part of the cost of the project qualified for a 30% credit -- the part of the work completed during 2006. The portion of the project completed in 2005 qualified for a 10% credit.

1.7.1(b) Acquired Projects

A project is considered "acquired" when property ready for use is purchased ready for use without any associated construction or assembly delay.

If the taxpayer "acquires" the solar equipment rather than self constructs it, then a 30% credit can only be claimed if the property is both acquired and placed in service during the period 2006 through 2016. Thus, for example, if a taxpayer signs a contract to buy photovoltaic property in 2016, but it is not delivered or ready for use until 2017, then only a 10% energy credit can be claimed.

Treasury cash grants are paid on solar equipment that is placed in service in 2009 or 2010 or on which construction starts in 2009 or 2010 and is completed by 2016. It does not matter that the equipment was ordered or largely installed before 2009. The key is when it was placed in service.

1.7.2 Progress Expenditures

The commercial solar tax credit is ordinarily claimed in full in the year that eligible property is put into service. However, a taxpayer can elect to claim a commercial solar tax credit on his or her construction progress payments in situations where the eligible property is expected to take at least two years to build.

This could become relevant in cases where work starts on a project in 2016 when there is still a 30% commercial solar tax credit, but it will not be completed until after the credit has reverted to 10%. The 30% credit could be claimed on construction progress payments during 2016. Some developers of utility-scale solar projects that will take at least two years to construct and that are expected to get underway by 2010 also plan to take tax credits on construction progress payments and then pay back the amount of tax credits claimed and take a cash payment from the Treasury within 60 days after the project is placed in service. This would provide a time-value benefit.

The amount the taxpayer is considered to have paid toward construction in any year depends on a number of complicated rules.

The taxpayer must first determine whether a project is "self constructed" or "non-self constructed."

The progress expenditure rules use a much tighter definition of self construction than the transition rules do. That is, while most stick-built projects are considered self constructed for purposes of the transition rules, few projects are considered self constructed for progress payments purposes. To be self constructed for progress payments purposes, the taxpayer must expect to spend more than half the construction expenditures on wages for the taxpayer's own employees and on materials that they will install. This test is applied to each unit of property. A single project may consist of more than one unit. For example, each turbine, boiler and other large component at a power plant is probably considered a separate unit of property.

Spending on non-self-constructed property counts only when amounts are actually paid to a third party and, even then, one can only count the spending in a year "to the extent [it is] attributable to progress made in construction . . ." The IRS regulations say, "Progress will generally be measured in terms of the manufacturer's incurred cost, as a fraction of the anticipated cost . . ."

More spending counts earlier in time as progress payments for self-constructed property. The rule for self-constructed property is that spending counts when the amount "accrues," meaning when the taxpayer is legally obligated to make the payment and the amount is known. However, spending on components comes under a special rule. It cannot be counted before the components are built at the factory (in the case of components that are specially designed for a project), or when they are delivered to the site (in the case of other components that would be "economically impractical to remove" after delivery), or when they are physically attached to the project (in the case of any remaining components).

1.8 Project Ownership Considerations

Subtleties associated with specific ownership structures that affect the commercial solar tax credit are discussed in the following paragraphs.

Commercial solar tax credits and depreciation are claimed by the owner of eligible property. Any owner that cannot use these tax incentives because he does not pay enough in taxes should explore one of several options:

- Take the cash value of the tax credit from the U.S. Treasury and finance the rest of the project with debt, perhaps with the help of a federal loan guarantee, to the extent the project will generate enough cash to cover the debt service. However, this will leave the project owner with "stranded" depreciation that he may not be able to use efficiently. The depreciation can be carried forward for up to 20 years and used when the project starts generating income. The depreciation will not have as great a time value as if the depreciation deductions could be used immediately.

- Do a "tax equity deal" to try to get value for the depreciation (and the tax credit if the developer chooses to claim it rather than take the cash value from the Treasury. Any tax equity deal might take one of four forms.
 - Sell the project to another company that can use the tax benefits and lease it back, thereby sharing indirectly in the tax subsidies in the form of reduced rent for use of the equipment.
 - Bring in an institutional equity investor that can use the tax benefits as a partner to own the project in a so-called "flip" partnership and allocate 99% of the tax subsidies to the institutional investor in exchange for the capital to build the project.
 - Do an "inverted pass-through lease" where the developer leases the project to a tax equity investor and elects to pass through the commercial tax credit or cash payment from the Treasury to the tax equity investor.
 - Let someone else own the project and just buy the electricity under a long-term contract.

1.8.1 Sale-Leasebacks

In a sale-leaseback, the developer sells the project to an institutional equity investor who can use the tax credits and depreciation on the project and then leases it back. The lessor claims the tax credits and depreciation. If the parties choose to receive cash from the Treasury in lieu of the tax credit, then the cash payment will go the lessor if the sale-leaseback occurs within three months after the project is originally placed in service. It will go the developer if the sale-leaseback occurs more than three months after the project is originally placed in service. The terms of the lease financing will be less generous if the payment goes to the developer.

The lease should not run longer than 80% of the expected life and value of the project. The developer can have one or more options to renew the lease, but the options should be at market rent determined at renewal. Any options to renew at a fixed rent count as part of the original lease term for purposes of testing whether the lease term is too long. The lease back must be to the same legal entity that placed the project in service.

In larger projects that take some time to construct and that are financed by borrowing the construction funds from a bank, the lessor commits at the start of construction to buy the project after construction is completed. The closing on the sale-leaseback must occur within three months after the project is put into service, or the lessor cannot claim any commercial solar tax

credits. (It would still be able to claim depreciation.) If cash will be paid by the Treasury in place of tax credits, the cash payment would have already been made to the developer and there would not be any recapture of the payment by the U.S. government. (See section 1.10.) The lessee will have a taxable gain on the sale if it charges the lessor more for the project than the lessor just paid to construct the project. However, the lessor must not pay more than the fair market value of the project. Commercial solar tax credits can only be claimed on new equipment. A special rule preserves the status of the equipment as new as long as it is sold and leased back within three months.

The lessor in a sale-leaseback can elect to leave the tax credit or Treasury cash payment with the lessee and claim only the tax depreciation on the project. The lessor must otherwise qualify for the tax credit. Thus, for example, the election cannot be made by a foreign lessor unless at least 50% of the gross rents are subject to U.S. income taxes.

A taxpayer must usually reduce his tax basis for depreciation by one half the solar tax credit. Thus, where a 30% credit is claimed, only 85% of the equipment cost can be depreciated. However, in a case where the project is sold and leased back and the lessor elects to leave the tax credit or Treasury cash grant with the lessee, then the lessor can claim depreciation on the full cost of the project without any basis reduction. However, the lessee would have to report half the credit it claims or cash grant it receives as taxable income over a five-year period.⁹

1.8.2 Partnership Flips

Another way for a developer to get value for tax subsidies it cannot use is to bring an institutional equity investor in as a partner to own the project and pay part of the capital cost. The project is owned by a partnership of the developer and the institutional investor. The partnership allocates 99% of the economic returns to the investor until the investor reaches a target internal rate of return, after which the investor's interest in the project drops as low as 4.95% and the developer's interest increases automatically to 95.5%. The developer has an option at that point to buy out the investor for the fair market value of its remaining 4.95% interest. In some transactions, cash is distributed 100% to the developer until the developer gets back any capital it has invested in the project. After that, cash follows other partnership items and is distributed 99% to the investor until the flip.

⁹ Most lessors are corporations. It is hard for an individual or other "non-corporate" lessor to claim commercial solar tax credits. Such a lessor can claim tax credits only in two situations. One is where he or she manufactured the equipment. The other is where the amount of business expense deductions the lessor can claim in the first 12 months in connection with the equipment is more than 15% of the rent he or she earns during the same period. An example of a business expense deduction is wages paid to employees. The lease would also have to have a term less than half the "class life" of the equipment. Thus, the lease in a solar project with a non-corporate lessor would have to be shorter than six years.

In a partnership, the investor must come into the deal before the solar project is placed in service (unlike a sale-leaseback where the investor has up to three months after the in-service date to invest).¹⁰

Even though the parties intend to allocate 99% of the tax benefits to the investor, the investor may not be able to absorb that much of the tax subsidy in fact due to partnership accounting rules. Anyone using a partnership flip structure should be careful to model the transaction, paying particular attention to the "capital account" and "outside basis" of the investor, as these determine its capacity to absorb tax benefits. They are a function partly of how much the investor invests in relation to the tax benefits.

Commercial solar tax credits must be shared among partners in the same ratio that they share in income for the year the project is placed in service.

It does not matter whether the partnership actually has any income that year. (Most solar projects show tax losses for the first three to four years.) However, care must be exercised when switching the ratio for sharing income before the partnership turns tax positive. For example, suppose there are two partners -- A and B -- who agree to allocate 99% of income to B for the first three years in order to get B 99% of the solar credits and then share everything 50-50 from year four onward. If the partnership has tax losses in each of the first three years, the IRS may argue on audit that the 99-1 sharing ratio for income that was used in year one to give the investor 99% of the solar tax credit is illusory. For that reason, it is important to hold the sharing ratio used in year one in place at least until a full year when the partnership has income.

The flip should not occur until at least five years after the project is put in service. Otherwise, part of the solar tax credit may be recaptured. The credit takes five years to vest fully. (See section 1.10 on credit recapture for a more detailed discussion.)

It is not clear whether a shift in partner sharing ratios will lead to recapture of any cash payment made to the partnership by the Treasury. Guidance is not expected from the Treasury until July 2009 at the earliest.

1.8.3 Inverted Pass-Through Leases

In an inverted lease, the developer owns the solar project, but leases it to an investor. The investor as lessee holds a power contract to sell the electricity to an off-taker. It takes in revenue from electricity sales and uses it to pay rent to the developer as lessor. The developer makes an election to allow the lessee to claim the commercial solar credit.

10. If the parties take a cash payment from the Treasury in place of the tax credit, then the sale-leaseback can be done more than three months after the project goes into service, but the cash payment would remain with the developer.

The developer keeps the tax depreciation and uses it to shelter the rents from income taxes. The investor as lessee claims the commercial tax credit and deductions for rent that may mirror the depreciation that it would have received as owner. It pays an additional amount as prepaid rent for the tax benefits.

The main attraction to the developer is it gets back the project at the end of the lease without having to pay anything for it. The lease might run as short as six or seven years. However, it is unclear how much continuing currency the structure will have after the economic stimulus bill in February 2009 given that the government is now monetizing tax credits. If it has continuing utility, it is because tax equity investors have been paying \$1.21 per dollar of tax credit under the structure. The tax equity pays more than 100¢ on the dollar because it can deduct the amount it pays for the tax benefits as rent.

The structure can get very complicated. In some versions, the developer retains an interest as the managing member of the lessee and, instead of having the investor pay for the tax credits as prepaid rent, the developer makes a capital contribution to the lessee that the lessee contributes, in turn, to a lessor entity that is owned 51% by the developer and 49% by the lessee.

A lessor who elects to allow the investor as lessee to claim the commercial tax credit does not have to reduce its depreciable basis by half the credit. However, the investor must report half the credit as income spread ratably over five years.

1.8.4 Power Contracts

Another alternative for a company that cannot use the tax subsidies is simply to buy the electricity from the project under a long-term contract from someone else who owns the project and can use the tax subsidies. Some states have retail sale restrictions that bar anyone other than a regulated utility from supplying electricity at retail. It would be a good idea to limit the term of the power contract so that it does not run longer than 80% of the expected life and value of the project. The power purchaser can have options to renew the contract, but the electricity price should be reset to the current market level at time of renewal. The power purchaser can have an option to purchase the project at the end of term, but it would be best if the option were at market value determined at time of exercise rather than a fixed price.

1.8.5 Prepaid Service Contracts

In some larger solar projects, particularly where electricity is sold to a municipal utility or electric cooperative, a developer may suggest that the purchaser of the electricity prepay for a large share of the electricity to be delivered over the contract term. The prepayment can be used to help pay the project cost. It does not have to be reported immediately as taxable income by the developer,

provided the power contract is properly structured. The prepayment is reported as income over the period the electricity is delivered. The developer cannot report the income any more rapidly for book purposes.

The parties must be careful to ensure the prepayment is only for electricity and not for anything else like capacity or renewable energy credits. They should state in the contract that they intend it to be treated as a "service contract" within the meaning of section 7701(e)(3) of the U.S. tax code. The contract should be drafted to avoid four "foot faults." Transactions involving prepaid service contracts are complicated. Anyone planning to use the structure should get help from competent tax counsel.

The structure has two main attractions. One is that the developer raises part of the capital for the project. The prepayment is economically equivalent to soft debt that the developer repays over time by delivering electricity in kind. The attraction to a municipal utility or electric cooperative is that it is a way to come as close to ownership of a project as possible while still allowing the project to benefit from federal tax subsidies. The municipal utility or co-op is usually offered a discount on the electricity price by the developer in exchange for making the prepayment. It may raise the prepayment by issuing tax-exempt debt or borrowing on special terms through the Rural Utilities Service or other co-op lenders.

1.8.6 Regulated Utilities

Solar equipment owned or leased by a regulated utility did not qualify for commercial solar tax credits before February 14, 2008. Commercial credits could be claimed on "public utility property" before that date. A solar project is "public utility property" if the rates for the sale of electricity from the project are regulated on a rate-of-return basis. Congress dropped the restriction in October 2008 retroactively to the preceding February.

1.8.7 Model Homes

The commercial tax credit or Treasury cash payment can be claimed on solar equipment installed as part of a model home retained for a period by a homebuilder if the homebuilder can make the case that the home had been "placed in service" for tax purposes – the same test used to determine whether a homebuilder can depreciate the house. However, this is unlikely to be the optimal tax treatment. Practically, if the home was retained for fewer than five years, some portion of the credit or cash payment would not have vested with the homebuilder and would therefore be recaptured. (See section 1.10.)

1.8.8 Passive Loss and At-Risk Restrictions

It is hard for individuals, S corporations and closely-held C corporations to make full use of the solar credits and depreciation on commercial solar projects. For this reason, they are not usually appropriate investors for a developer to bring into a deal in the hope of bartering tax benefits the developer cannot use to an investor in exchange for capital to build the project. A corporation is "closely held" if five or fewer individuals own more than half the stock.

Unless such an investor is involved personally in operating the project, he or she will be considered to have made a passive investment. The investor will end up only able to use the tax benefits as shelter against taxes on income from other passive solar investments, and possibly even just from the particular project.

The passive loss rules limit the ability of such an investor to use both tax credits and depreciation. "At-risk" rules are a second hurdle. The at-risk limits on the use of tax credits are different from the at-risk limits on the use of depreciation. The at-risk limits for tax credits were discussed earlier in section 1.4.4. The at-risk rules for depreciation limit such an investor to claiming an amount of depreciation equal to the amount the investor has at risk in the project -- basically the amount of equity he or she has invested plus any debt at the project level whose repayment has been guaranteed by the investor. Developers would do better to look for more widely-held corporations as investors, since they are not subject to either set of passive loss or at-risk restrictions.

1.9 Applying the Credit to Taxes

1.9.1 Alternative Minimum Tax and Floor

A corporation must calculate both its regular income taxes at a 35% rate and its "alternative minimum taxes" at a 20% rate but on a broader definition of taxable income and pay essentially whichever amount is greater. The commercial solar credit could not be used before 2009 to reduce a taxpayer's regular income taxes by more than 75%, or below the level the alternative minimum tax (AMT) kicked in.¹¹ Therefore, companies that paid the minimum tax were unable to use solar tax credits — at least in the year they paid the AMT. The credits could be carried to another tax year. These limits were limits not only on use of commercial solar tax credits, but also on most other "business credits." Thus, the commercial solar tax credits in combination with other business credits could not reduce a taxpayer's tax liability in a given year below the AMT floor. The law changed in October 2008. The solar credit can now be used to offset minimum taxes in tax years starting after October 3, 2008.

¹¹. A corporation must pay, essentially, whichever amount is greater - its regular income taxes at a 35% rate, or its "alternative minimum taxes" at a 20% rate, but on a broader definition of taxable income.

Thus, for example, if a corporation has a tax year that ends on November 30, it would be able to use credits against minimum taxes for solar equipment placed in service on or after December 1, 2008. Most U.S. companies use a calendar tax year. They will benefit starting with solar equipment put into service in 2009. A tax credit earned in 2009 can be carried back to an earlier year and used against AMT liability in that year. However, the reverse is not also true: tax credits that went unused in 2008 because a company was on AMT cannot be used to reduce AMT in 2009.

1.9.2 Carryback and Carryforward of Tax Benefits

A commercial solar tax credit that a taxpayer cannot use can be carried back one year and forward 20 years. In general, a 30% credit cannot be carried back to a period when the credit was only 10%. However, the full 30% credit can be carried forward. If a taxpayer ends up carrying unused solar credits forward for 20 years and is still unable to use them, then the unused credit can be deducted in the year after the carryforward period ends. However, only half the credit can be deducted. The rest is lost.

Unused depreciation can be carried back two years and forward for 20 years. However, the economic stimulus bill allows small businesses to carry back any unused net operating loss in 2008 as far back as five years and get a refund of any taxes paid during that period. Unused depreciation deductions would be part of the company's net operating loss. (If the company uses a different tax year than the calendar year, then it can choose as its 2008 net operating loss to carry back either its loss in its tax year that ended in 2008 or the loss in its tax year that started in calendar year 2008.) A company would have to have gross receipts of \$15 million or less in the loss year to take advantage of this provision.

1.10 Recapture of Credit Taken in Prior Years

1.10.1 General Recapture Rules

Although the credit is usually claimed in full in the year the solar project is put in service, commercial tax credits "vest" over five years at the rate of 20% a year. This means that if something happens to solar equipment in the four years after the equipment is put into service that would have prevented the taxpayer from claiming the credit had it happened at the start, then the "unvested" part of the credit will be recaptured (paid back to the IRS). For example, the unvested credit will be recaptured if the taxpayer sells the solar equipment or leases it for use by a government agency.

A taxpayer should take the potential for recapture into account when considering whether to sell solar equipment on which tax credits have been claimed before the recapture period has expired. The unvested portion of the credit will have to be reported as income in the year the recapture event occurs. The taxpayer can add back to his depreciable basis half the recapture income reported in the recapture year. The amount added back to the depreciable basis can be deducted over time as additional depreciation if the taxpayer continues to own the project. If the recapture event is a sale of the project, then the taxpayer will have less gain to report from the sale because of the upward tax basis adjustment. The taxpayer will also have a potential mismatch in tax rates. Recapture income is ordinary income. Gain from a sale in many cases will be capital gain. The combination of credit recapture and the upward basis adjustment has the effect of converting income from capital gain into ordinary income.

1.10.2 Recapture Rules for Nonrecourse Financed Projects

(Please note that these considerations apply only to projects not covered under the exemptions under section 1.4.4.)

Taxpayers covered by the at-risk rules should be careful not to increase the amount of nonrecourse debt secured by the project in a later year as that could lead to recapture of a commercial solar credit claimed earlier. Also, a credit will be recaptured to the extent that principal repayments fall short, at the end of any tax year, of the nonrecourse principal that would have had to be repaid by then under a level-payment loan. "Level payment" for this purpose means straight-line amortization of debt service over the term of the loan or, if shorter, the "class life" of the equipment. Most solar equipment has a class life of 12 years.

1.10.3 Recapture Rules for Partnerships

Partners face an added risk of recapture of the commercial credit.

For example, suppose there are two partners — A and B — who agree to allocate 99% of taxable income to B initially in order to allocate 99% of the solar tax credit to B. The project is placed in service in year one. B claims 99% of the credit in year one. Starting in year four, the allocations change to 50-50. B would suffer recapture of part of the solar tax credit when the sharing ratio shifts.

There will be recapture of a portion of B's unvested credits if B's share of taxable income during the next four years after the project is put in service drops to less than two thirds of his ratio in the first year. Thus, B's ratio could drop to 70% without any recapture, but a drop to 50% would trigger recapture of roughly half of B's unvested credits in year four when the shift occurs. Once B has suffered any recapture, then another shift will not cause any further recapture, unless the drop is to

less than one third of the share B had in taxable income in the year the project went into service.

1.10.4 Recapture of Treasury Cash Payments

Any cash payment made by the Treasury is expected to be subject to recapture in the same circumstances as the commercial solar credit, with one exception. It is unclear whether a sale of a partner interest or shift in the ratio in which partners share in partnership income will trigger recapture. The Treasury is not expected to issue guidance before July 2009.

1.11 Impact of Credits and Cash Grants on Depreciation Calculations

For the purpose of calculating depreciation on a commercial solar system, the tax basis for depreciation is a distinct value – separate from the tax credit basis. The depreciable basis that the taxpayer claims for the solar equipment must be reduced by 50% of the tax credit or Treasury cash grant. For example, if a 30% credit is claimed on a commercial solar energy system that cost \$100,000, then the owner will have a depreciable basis in the equipment of $\$100,000 - (50\% \times \$30,000) = \$85,000$. The depreciable basis is also used to calculate taxable gain or loss when the solar panel is later resold.

However, a corporation ignores the downward basis adjustment for purposes of calculating its “earnings and profits.” Distributions by a corporation to its shareholders are dividends to the extent of the “earnings and profits” of the corporation. Earnings and profits are a form of net income. Thus, gross earnings are reduced by depreciation -- among other things -- to arrive at earnings and profits, but the depreciation subtracted in arriving at earnings and profits would be depreciation on the full basis of \$100,000 in the example, notwithstanding the fact that a solar tax credit was claimed.

There is no basis adjustment where the owner of solar equipment leases it to someone else and elects to let the lessee claim the solar tax credit. (See section 1.8.1 on sale-leasebacks.) However, the lessee must report taxable income equivalent to the basis adjustment. The income is spread over five years.

1.12 Claiming the Credit or Cash Grant and IRS Forms

Business energy credits are claimed by attaching a Form 3468 to one's tax return. This form is available from the IRS website at www.irs.gov. The Treasury is expected to explain soon how and where to apply for a cash payment in lieu of the tax credit.

1.13 Commercial Solar Tax Credit Examples

Example 1 – The Basic Commercial Credit

Company A pays \$100,000, including on labor and equipment, to install a photovoltaic system on its corporate headquarters. The panels are purchased in 2008 and installed in 2009.

2009 Tax Basis		= \$ 100,000
(The purchase and installation are both fully qualified under the credit.)		
2009 Tax Credit	\$ 100,000 x 30%	= \$ 30,000
(The full tax credit basis is multiplied by the 2008 tax credit.)		
Depreciable Basis	\$ 100,000 - (30,000 x ½)	= \$ 85,000
(The depreciable basis must be reduced by half to reflect the tax credit.)		

Example 2 – Commercial Credit Where Work Straddles Window Period

Company A acquires and pays for a pre-integrated, fully-designed and ready-to-run piece of solar equipment in 2016, but does not receive delivery until 2017. Assume the solar credit is not extended at a 30% rate by Congress.

2017 Tax Basis		= \$ 100,000
(The purchase and installation are both fully qualified.)		
2017 Tax Credit	\$ 100,000 x 10%	= \$ 10,000
(The credit is claimed in the year equipment is placed in service.)		
Depreciable Basis	\$ 100,000 - (\$ 10,000 x ½)	= \$ 95,000
(The depreciable basis must be reduced by half to reflect the tax credit.)		

Example 3 – Commercial Credit with Progress Payments

Company C hires a construction contractor to build a \$10,000,000 multi-megawatt concentrating solar power facility. Forty percent of the construction work is completed in 2016, and the remaining 60% in 2017, at which time the project is put into use. Company C qualifies for a 30% credit on \$4,000,000 and a 10% credit on \$6,000,000. C has a tax basis of \$9,100,000 in the project for depreciation purposes. This assumes that Congress does not extend the credit at a 30% rate and that the project has a long enough construction period to be able to claim credits on a progress payments basis.

2016 Tax Basis	$\$10,000,000 \times 40\%$	= \$ 4,000,000
2017 Tax Basis	$\$10,000,000 \times 60\%$	= \$ 6,000,000
(The project cost must be allocated between the two years it was under construction.)		
2016 Tax Credit	$\$4,000,000 \times 30\%$	= \$ 1,200,000
2017 Tax Credit	$\$6,000,000 \times 10\%$	= \$ 600,000
Total Credit		= \$ 1,800,000
(The tax credits are claimed on a progress payments basis, and Company C must have a sufficient tax burden to realize the credits.)		
Depreciable Basis	$\$10,000,000 - (\$1,800,000 \times 1/2)$	= \$ 9,100,000
(The depreciable basis must be reduced by half the tax credits claimed.)		

Example 4 – Commercial Credit with Sale and Recapture

Company A pays \$100,000, including labor and equipment, to install a photovoltaic system on its corporate headquarters. The panels are purchased in 2008 and installed in 2009. The system is sold in 2012 to Company B. Company A must recapture the unvested portion of the energy credit that it claimed in 2009. The unvested portion is 40%.

2009 Tax Basis		= \$ 100,000
(The purchase and installation are both fully qualified under the credit.)		
2009 Tax Credit	$\$100,000 \times 30\%$	= \$ 30,000
(The full tax credit basis is multiplied by the credit.)		
Recapture Amount	$\$30,000 \times 40\%$	= \$ 12,000
(As in section 8.1, the credits "vest" over 5 years. The credits here have only vested in 2009, 2010, and 2011. Since two of the five years are missing, 40% of the credit is subject to recapture. Company A will have to report this "recapture income" as part of its ordinary income stemming from the sale to B.)		

EXHIBIT D

Exhibit A

Fifth Amended and Restated Certificate of Incorporation

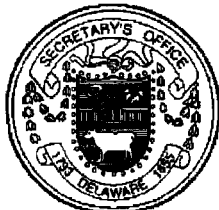
Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "SOLARCITY CORPORATION", FILED IN THIS OFFICE ON THE TWENTY-EIGHTH DAY OF OCTOBER, A.D. 2008, AT 12:23 O'CLOCK P.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.



4178768 8100

081071748

You may verify this certificate online
at corp.delaware.gov/authver.shtml

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 6935840

DATE: 10-28-08

**FIFTH AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION**

OF

SOLARCITY CORPORATION

The undersigned, Lyndon Rive, hereby certifies that:

1. He is the duly elected Chief Executive Officer and President of SolarCity Corporation, a Delaware corporation.

2. The Certificate of Incorporation of this corporation was originally filed with the Secretary of State of Delaware on June 21, 2006; an Amended and Restated Certificate of Incorporation was filed with the Secretary of State of Delaware on July 6, 2006; a Second Amended and Restated Certificate of Incorporation was filed with the Secretary of State of Delaware on April 9, 2007; a Third Amended and Restated Certificate of Incorporation was filed with the Secretary of State of Delaware on August 7, 2007; and a Fourth Amended and Restated Certificate of Incorporation was filed with the Secretary of State of Delaware on March 14, 2008.

3. The Certificate of Incorporation of this corporation shall be further amended and restated to read in full as follows:

ARTICLE I

The name of this corporation is SolarCity Corporation (the "Corporation").

ARTICLE II

The address of the Corporation's registered office in the State of Delaware is 2711 Centerville Road, Suite 400, Wilmington, County of New Castle, Delaware 19808. The name of its registered agent at such address is Corporation Service Company.

ARTICLE III

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

ARTICLE IV

(A) **Classes of Stock.** The Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares which the Corporation is authorized to issue is forty five million nine hundred seventy two thousand one hundred fifty one (45,972,151) shares, each with a par value of \$0.0001 per share. Twenty eight million five hundred thousand (28,500,000) shares shall be Common Stock and seventeen million

four hundred seventy two thousand one hundred fifty one (17,472,151) shares shall be Preferred Stock.

(B) **Rights Preferences and Restrictions of Preferred Stock.** The Preferred Stock authorized by this Fifth Amended and Restated Certificate of Incorporation may be issued from time to time in one or more series. The first series of Preferred Stock is designated "**Series A Preferred Stock**" and consists of six million nineteen thousand six hundred twenty four (6,019,624) shares. The rights, preferences, privileges and restrictions granted to and imposed on the Series A Preferred Stock are as set forth below in this Article IV(B). The second series of Preferred Stock shall be designated "**Series B Preferred Stock**" and shall consist of two million five hundred and four thousand nine hundred and six (2,504,906) shares. The rights, preferences, privileges and restrictions granted to and imposed on Series B Preferred Stock are as set forth below in this Article IV(B). The third series of Preferred Stock shall be designated "**Series C Preferred Stock**" and shall consist of six million fifty seven thousand two hundred thirty one (6,057,231) shares. The rights, preferences, privileges and restrictions granted to and imposed on Series C Preferred Stock are as set forth below in this Article IV(B). The fourth series of Preferred Stock shall be designated "**Series D Preferred Stock**" and shall consist of two million eight hundred ninety thousand three hundred ninety (2,890,390) shares. The rights, preferences, privileges and restrictions granted to and imposed on Series D Preferred Stock are as set forth below in this Article IV(B).

1. **Dividend Provisions.** The holders of shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock shall be entitled to receive dividends, on a pari passu basis, out of any assets legally available therefor, prior and in preference to any declaration or payment of any dividend (payable other than in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock of the Corporation) on the Common Stock of the Corporation, at the rate of \$0.02 per share (as adjusted for stock splits, stock dividends, reclassification and the like) per annum on each outstanding share of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock or Series D Preferred Stock, payable when, as and if declared by the Board of Directors. Such dividends shall not be cumulative. The holders of Preferred Stock shall be entitled to participate pro rata in any dividends or other distributions paid on the Common Stock on an as-converted basis that exceeds the dividends or distributions paid on the Preferred Stock.

2. **Liquidation.**

(a) **Series D Liquidation Preference.** In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, the holders of the Series D Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets of the Corporation to the holders of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock or Common Stock, by reason of their ownership thereof, an amount per share equal to the greater of (i) \$10.4034 (as adjusted for stock splits, stock dividends, reclassification and the like) for each share of Series D Preferred Stock then held by them, plus declared but unpaid dividends or (ii) such amount per share as would have been payable had each such share been converted into Common Stock pursuant to Section 4 immediately prior to such liquidation, dissolution or winding up. If, upon the occurrence of such event, the assets and funds

thus distributed among the holders of the Series D Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amounts, then the entire assets and funds of the Corporation legally available for distribution shall be distributed ratably among the holders of the Series D Preferred Stock in proportion to the preferential amount each such holder is otherwise entitled to receive.

(b) **Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock Liquidation Preference.** After payment has been made to the holders of Series D Preferred Stock of the full amounts to which they are entitled pursuant to Section 2(a) above, the holders of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets of the Corporation to the holders of Common Stock, by reason of their ownership thereof, an amount per share equal to \$0.38 (as adjusted for stock splits, stock dividends, reclassification and the like) for each share of Series A Preferred Stock, an amount per share equal to \$1.20 (as adjusted for stock splits, stock dividends, reclassification and the like) for each share of Series B Preferred Stock and an amount per share equal to \$4.80 (as adjusted for stock splits, stock dividends, reclassification and the like) for each share of Series C Preferred Stock then held by them, plus declared but unpaid dividends. If, upon the occurrence of such event, the assets and funds thus distributed among the holders of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amounts, then the entire assets and funds of the Corporation legally available for distribution shall be distributed ratably among the holders of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock in proportion to the preferential amount each such holder is otherwise entitled to receive.

(c) **Remaining Assets.** Upon the completion of the distributions required by Sections 2(a) and 2(b) above, if assets remain in the Corporation, such remaining assets shall be distributed ratably among the holders of the Common Stock in proportion to the number of shares held by each such holder.

(d) **Certain Acquisitions.**

(i) **Deemed Liquidation.** For purposes of this Section 2, a liquidation, dissolution, or winding up of the Corporation shall be deemed to occur if the Corporation shall sell, convey, or, otherwise dispose of all or substantially all of its property or business or merge with or into or consolidate with any other corporation, limited liability company or other entity or effect any other transaction or series of related transactions in which more than 50% of the voting power of the Corporation is disposed of, provided that this Section 2(d)(i) shall not apply to a merger effected exclusively for the purpose of changing the domicile of the Corporation, (ii) an equity financing in which the Corporation is the surviving corporation, or (iii) a transaction in which the stockholders of the Corporation immediately prior to the transaction own 50% or more of the voting power of the surviving corporation following the transaction.

(ii) **Valuation of Consideration.** In the event of a deemed liquidation as described in Section 2(d)(i) above, if the consideration received by the Corporation is other than cash, its value will be deemed its fair market value. Any securities shall be valued as follows:

(A) Securities not subject to investment letter or other similar restrictions on free marketability:

(1) If traded on a securities exchange, the value shall be deemed to be the average of the closing prices of the securities on such exchange over the thirty-day period ending three days prior to the closing of such transaction;

(2) If actively traded over-the-counter, the value shall be deemed to be the average of the closing bid or sale prices (whichever is applicable) over the thirty-day period ending three days prior to the closing of such transaction; and

(3) If there is no active public market, the value shall be the fair market value thereof, as mutually determined by the Board of Directors of the Corporation and the holders of at least sixty-six and two-thirds percent (66 2/3%) of the then outstanding shares of Preferred Stock, voting together as a single class on an as-converted basis.

(B) The method of valuation of securities subject to investment letter or other restrictions on free marketability (other than restrictions arising solely by virtue of a stockholder's status as an affiliate or former affiliate) shall be to make an appropriate discount from the market value determined as above in Section 2(d)(ii)(A) to reflect the approximate fair market value thereof, as mutually determined by the Board of Directors of the Corporation and the holders of at least sixty-six and two-thirds percent (66 2/3%) of the then outstanding shares of Preferred Stock, voting together as a single class on an as-converted basis.

(iii) **Notice of Transaction.** The Corporation shall give each holder of record of Preferred Stock written notice of such impending transaction not later than ten days prior to the stockholders' meeting called to approve such transaction, or ten days prior to the closing of such transaction, whichever is earlier, and shall also notify such holders in writing of the final approval of such transaction. The first of such notices shall describe the material terms and conditions of the impending transaction and the provisions of this Section 2, and the Corporation shall thereafter give such holders prompt notice of any material changes. The transaction shall in no event take place sooner than ten days after the Corporation has given the first notice provided for herein or sooner than ten days after the Corporation has given notice of any material changes provided for herein; provided, however, that such periods may be shortened upon the written consent of the holders of at least sixty-six and two-thirds percent (66 2/3%) of the then outstanding shares of Preferred Stock, voting together as a single class on an as-converted basis.

(iv) **Effect of Noncompliance.** In the event the requirements of this Section 2(d) are not complied with, the Corporation shall forthwith either cause the closing of the transaction to be postponed until such requirements have been complied with, or cancel such transaction, in which event the rights, preferences and privileges of the holders of the Preferred Stock shall revert to and be the same as such rights, preferences and privileges existing immediately prior to the date of the first notice referred to in Section 2(d)(iii) hereof.

3. **Redemption.**

(a) **Series D Redemption.** Shares of Series D Preferred Stock shall be redeemed by the Corporation out of funds lawfully available therefor at a price per share equal to the Series D Redemption Price (as defined below), within 60 days after receipt by the Corporation at any time on or after October 28, 2015, from the holders of at least 51% of the then outstanding shares of Series D Preferred Stock, of written notice requesting redemption of all shares of Series D Preferred Stock (the date of such payment being referred to as a "Series D Redemption Date") provided, however, that redemption shall be available if (and only if) the Corporation's financial statements prepared in accordance with Generally Accepted Accounting Principles (which financial statements shall be certified in writing by the Corporation's principal financial officer) reflect that the following conditions exist as of immediately prior to such redemption on the Series D Redemption Date: (i) the annual gross revenue of the Corporation exceeded \$100 million for the most recent fiscal year; and (ii) the Corporation has no less than \$15 million in available cash. On the Series D Redemption Date, the Corporation shall redeem all of the outstanding shares of Series D Preferred Stock owned by each holder. If the Corporation does not have sufficient funds legally available to redeem on any Series D Redemption Date all shares of Series D Preferred Stock and of any other class or series of stock to be redeemed on such Series D Redemption Date, the Corporation shall redeem a pro rata portion of each holder's redeemable shares of such stock out of funds legally available therefor, based on the respective amounts which would otherwise be payable in respect of the shares to be redeemed if the legally available funds were sufficient to redeem all such shares, and shall redeem the remaining shares to have been redeemed as soon as practicable after the Corporation has funds legally available therefor.

For purposes of this Section 3(a), "Series D Redemption Price" shall mean the greater of (i) \$10.4034 plus all declared and unpaid dividends payable to the holders of Series D Preferred Stock and (ii) the fair market value of such share of Series D Preferred Stock, such valuation to be determined by an independent appraisal, exclusive of liquidity or minority ownership discounts, performed by an independent third party appraiser mutually agreeable to the holders of a majority of the outstanding shares of Series D Preferred Stock and the Board of Directors of the Corporation.

(b) **Series C Redemption.** Shares of Series C Preferred Stock shall be redeemed by the Corporation out of funds lawfully available therefor at a price equal to \$4.80 per share, plus all declared but unpaid dividends thereon (the "Series C Redemption Price" and together with the Series D Redemption Price, the "Redemption Price"), within 60 days after receipt by the Corporation at any time on or after October 28, 2015, from the holders of at least 51% of the then outstanding shares of Series C Preferred Stock, of written notice requesting redemption of all shares of Series C Preferred Stock (the date of such payment being referred to as a "Series C Redemption Date" and together with the Series D Redemption Date, the "Redemption Date") provided, however, that redemption shall be available if (and only if) the Corporation's financial statements prepared in accordance with Generally Accepted Accounting Principles (which financial statements shall be certified in writing by the Corporation's principal financial officer) reflect that the following conditions exist as of immediately prior to such redemption on the Series C Redemption Date: (i) the annual gross revenue of the Corporation exceeded \$100 million for the most recent fiscal year; and (ii) the Corporation has no less than \$15 million in available cash. On the Series C Redemption Date, the Corporation shall redeem all of the outstanding shares of Series C Preferred Stock owned

by each holder. If the Corporation does not have sufficient funds legally available to redeem on any Series C Redemption Date all shares of Series C Preferred Stock and of any other class or series of stock to be redeemed on such Series C Redemption Date, the Corporation shall redeem a pro rata portion of each holder's redeemable shares of such stock out of funds legally available therefor, based on the respective amounts which would otherwise be payable in respect of the shares to be redeemed if the legally available funds were sufficient to redeem all such shares, and shall redeem the remaining shares to have been redeemed as soon as practicable after the Corporation has funds legally available therefor.

(c) **Redemption Notice.** Written notice of the mandatory redemption (the "Redemption Notice") shall be mailed, postage prepaid, to each holder of record of Series C Preferred Stock or Series D Preferred Stock, as applicable, at its post office address last shown on the records of the Corporation, or given by electronic communication in compliance with the provisions of the General Corporation Law, not less than 40 days prior to each Redemption Date. Each Redemption Notice shall state:

(i) the number of shares of Series C Preferred Stock or Series D Preferred Stock, as applicable, held by the holder that the Corporation shall redeem on the Redemption Date specified in the Redemption Notice;

(ii) the Redemption Date and the Redemption Price;

(iii) the date upon which the holder's right to convert such shares terminates (as determined in accordance with Section 4(a)); and

(iv) that the holder is to surrender to the Corporation, in the manner and at the place designated, his, her or its certificate or certificates representing the shares of Series C Preferred Stock or Series D Preferred Stock, as applicable, to be redeemed.

If the Corporation receives, on or prior to the 20th day after the date of delivery of the Redemption Notice to a holder of Series C Preferred Stock or Series D Preferred Stock, as applicable, written notice from such holder that such holder elects to be excluded from the redemption provided in this Section 3, then the shares of Series C Preferred Stock or Series D Preferred Stock, as applicable, registered on the books of the Corporation in the name of such holder at the time of the Corporation's receipt of such notice shall thereafter be "Excluded Shares."

(d) **Surrender of Certificates; Payment.** On or before the applicable Redemption Date, each holder of shares of Series C Preferred Stock or Series D Preferred Stock, as applicable, to be redeemed on such Redemption Date (other than Excluded Shares), unless such holder has exercised his, her or its right to convert such shares as provided in Section 4 hereof, shall surrender the certificate or certificates representing such shares to the Corporation, in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price for such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof, and each surrendered certificate shall be canceled and retired. In the event less than all of the shares of Series C Preferred Stock or Series D Preferred Stock, as applicable, represented by a certificate are redeemed, a new certificate representing the unredeemed

shares of Series C Preferred Stock or Series D Preferred Stock, as applicable, shall promptly be issued to such holder.

(e) **Rights Subsequent to Redemption.** If the Redemption Notice shall have been duly given, and if on the applicable Redemption Date the Redemption Price payable upon redemption of the shares of Series C Preferred Stock or Series D Preferred Stock, as applicable, to be redeemed on such Redemption Date is paid or tendered for payment or deposited with an independent payment agent so as to be available therefor, then notwithstanding that the certificates evidencing any of the shares of Series C Preferred Stock or Series D Preferred Stock, as applicable, so called for redemption shall not have been surrendered, dividends with respect to such shares of Preferred Stock shall cease to accrue after such Redemption Date and all rights with respect to such shares shall forthwith after the Redemption Date terminate, except only the right of the holders to receive the Redemption Price without interest upon surrender of their certificate or certificates therefor.

(f) **Redeemed or Otherwise Acquired Shares.** Any shares of Preferred Stock which are redeemed or otherwise acquired by the Corporation or any of its subsidiaries shall be automatically and immediately canceled and shall not be reissued, sold or transferred. Neither the Corporation nor any of its subsidiaries may exercise any voting or other rights granted to the holders of Series C Preferred Stock or Series D Preferred Stock, as applicable, following redemption.

4. **Conversion.** The holders of the Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

(a) **Right to Convert.**

(i) Subject to Section 4(c), each share of Series D Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing \$10.4034 by the Conversion Price (as defined below) applicable to such share, determined as hereafter provided, in effect on the date the certificate is surrendered for conversion. The initial Conversion Price per share of Series D Preferred Stock shall be \$10.4034. Such initial Conversion Price shall be subject to adjustment as set forth in Section 4(d).

(ii) Subject to Section 4(c), each share of Series C Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing \$4.80 by the Conversion Price applicable to such share, determined as hereinafter provided, in effect on the date the certificate is surrendered for conversion. The initial Conversion Price per share of Series C Preferred Stock shall be \$4.80. Such initial Conversion Price shall be subject to adjustment as set forth in Section 4(d).

(iii) Subject to Section 4(c), each share of Series B Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such

share, at the office of the Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing \$1.20 by the Conversion Price applicable to such share, determined as hereinafter provided, in effect on the date the certificate is surrendered for conversion. The initial Conversion Price per share of Series B Preferred Stock shall be \$1.20. Such initial Conversion Price shall be subject to adjustment as set forth in Section 4(d).

(iv) Subject to Section 4(c), each share of Series A Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing \$0.38 by the Conversion Price applicable to such share, determined as hereinafter provided, in effect on the date the certificate is surrendered for conversion. The initial Conversion Price per share of Series A Preferred Stock shall be \$0.38. Such initial Conversion Price shall be subject to adjustment as set forth in Section 4(d).

(v) "Conversion Price" shall mean, as of the date of the filing of this Fifth Amended and Restated Certificate of Incorporation, \$0.38 per share for the Series A Preferred Stock, \$1.20 per share for the Series B Preferred Stock, \$4.80 per share for the Series C Preferred Stock and \$10.4034 per share for the Series D Preferred Stock, in each case, subject to adjustment as set forth in Section 4(d).

(b) **Automatic Conversion.**

(i) **Automatic Conversion of Series D Preferred Stock.** Each share of Series D Preferred Stock shall automatically be converted into shares of Common Stock at the Conversion Price at the time in effect for such share immediately upon the earlier of (i) except as provided below in Section 4(c), the Corporation's sale of its Common Stock in a firm commitment underwritten public offering pursuant to a registration statement under the Securities Act of 1933, as amended (the "Securities Act"), in which (A) the pre-public offering market capitalization of the Corporation is at least \$250,000,000 (as determined by multiplying all capital stock of the Corporation on a fully diluted basis prior to the public offering by the price per share at which the shares are sold to the public in the public offering) and (B) which results in aggregate cash proceeds to the Corporation of not less than \$50,000,000 (net of underwriting discounts and commissions) or (ii) the date specified by written consent or agreement of the holders of a majority of the then outstanding shares of Series D Preferred Stock.

(ii) **Automatic Conversion of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock.** Each share of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall automatically be converted into shares of Common Stock at the Conversion Price at the time in effect for such share immediately upon the earlier of (i) except as provided below in Section 4(c), the Corporation's sale of its Common Stock in a firm commitment underwritten public offering pursuant to a registration statement under the Securities Act, in which (A) the pre-public offering market capitalization of the Corporation is at least \$250,000,000 (as determined by multiplying all capital stock of the Corporation on a fully diluted basis prior to the public offering by the price per share at which the shares are sold to the

public in the public offering) and (B) which results in aggregate cash proceeds to the Corporation of not less than \$50,000,000 (net of underwriting discounts and commissions) or (ii) the date specified by written consent or agreement of the holders of a majority of the then outstanding shares of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock, voting together as a single class on an as-converted basis.

(c) **Mechanics of Conversion.** Before any holder of Preferred Stock shall be entitled to convert the same into shares of Common Stock, he shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for such series of Preferred Stock, and shall give written notice to the Corporation at its principal corporate office, of the election to convert the same and shall state therein the name or names in which the certificate or certificates for shares of Common Stock are to be issued. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Preferred Stock, or to the nominee or nominees of such holder, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of such series of Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock as of such date. If the conversion is in connection with an underwritten offering of securities registered pursuant to the Securities Act, the conversion may, at the option of any holder tendering such Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event the person(s) entitled to receive Common Stock upon conversion of such Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such sale of securities.

(d) **Conversion Price Adjustments of Preferred Stock for Certain Dilutive Issuances, Splits and Combinations.** The Conversion Price of the Preferred Stock shall be subject to adjustment from time to time as follows:

(i) **Issuance of Additional Stock below Purchase Price.** If the Corporation shall issue, after the date of the filing of this Fifth Amended and Restated Certificate of Incorporation (the "Purchase Date" with respect to such series), any Additional Stock (as defined below) without consideration or for a consideration per share less than the Conversion Price for such series in effect immediately prior to the issuance of such Additional Stock, the Conversion Price for such series in effect immediately prior to each such issuance shall automatically be adjusted as set forth in this Section 4(d)(i), unless otherwise provided in this Section 4(d)(i).

(A) **Adjustment Formula.** Whenever the Conversion Price is adjusted pursuant to this Section 4(d)(i), the new Conversion Price shall be determined by multiplying the Conversion Price then in effect by a fraction, (x) the numerator of which shall be the number of shares of Outstanding Common (as defined below) plus the number of shares of Common Stock that the aggregate consideration received by the Corporation for the total number of shares of Additional Stock so issued (or deemed to be issued) would purchase at such Conversion Price; and (y) the denominator of which shall be the number of shares of Outstanding Common plus the number of shares of Additional Stock so issued (or deemed to be issued). As used herein, the term

"Outstanding Common" shall mean all shares of Common Stock outstanding immediately prior to any such issuance of Additional Stock (treating for this purpose as outstanding (1) all shares of Common Stock issuable upon exercise of any options to purchase or rights to subscribe for Common Stock outstanding immediately prior to such issuance, (2) all shares of Common Stock issuable upon conversion or exercise of any securities (including, without limitation, evidences of indebtedness) by their terms convertible into or exchangeable for Common Stock outstanding immediately prior to such issuance and (3) all shares of Common Stock issuable upon conversion or exercise of any convertible or exchangeable securities issuable upon conversion or exercise of any options to purchase or rights to subscribe for such convertible or exchangeable securities outstanding immediately prior to such issuance).

(B) Definition of "Additional Stock". For purposes of this Section 4(d)(i), "Additional Stock" shall mean any shares of Common Stock issued (or deemed to have been issued pursuant to Section 4(d)(i)(E)) by the Corporation after the Purchase Date other than:

(1) Common Stock issued pursuant to a transaction described in Section 4(d)(ii) hereof;

(2) Shares of Common Stock issuable or issued to employees, consultants or directors of the Corporation directly or pursuant to a stock option plan or restricted stock plan approved by the Board of Directors of the Corporation;

(3) Shares of Common Stock or Preferred Stock issuable upon exercise of options, warrants, notes or other rights to acquire securities of the Corporation outstanding as of the date of this Fifth Amended and Restated Certificate of Incorporation;

(4) Shares of Common Stock issuable or issued to financial institutions, lessors or other lenders in connection with commercial credit arrangements, equipment financings, bridge financings, commercial property lease transactions, or similar transactions, the terms of which have been approved by the Board of Directors;

(5) Up to 2,403,051 shares of Common Stock (as adjusted for stock splits, stock dividends, reclassification and the like) issuable or issued in strategic partnership transactions or other transactions the terms of which have been approved by the Board of Directors;

(6) Shares of Common Stock issued or issuable upon conversion of the Preferred Stock; and

(7) Shares of Common Stock issued or issuable in a public offering prior to or in connection with which all outstanding shares of Preferred Stock will be converted to Common Stock.

(C) No Fractional Adjustments. No adjustment of the Conversion Price for the Preferred Stock shall be made in an amount less than one cent per share.

provided that any adjustments which are not required to be made by reason of this sentence shall be carried forward and shall be either taken into account in any subsequent adjustment made prior to three years from the date of the event giving rise to the adjustment being carried forward, or shall be made at the end of three years from the date of the event giving rise to the adjustment being carried forward.

(D) **Determination of Consideration.** In the case of the issuance of Common Stock for cash, the consideration shall be deemed to be the amount of cash paid therefor before deducting any reasonable discounts, commissions or other expenses allowed, paid or incurred by the Corporation for any underwriting or otherwise in connection with the issuance and sale thereof. In the case of the issuance of the Common Stock for a consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof (exclusive of liquidity or minority discounts in the case of securities) as determined in good faith by the Board of Directors irrespective of any accounting treatment.

(E) **Deemed Issuances of Common Stock.** In the case of the issuance (whether before, on or after the Purchase Date) of options to purchase or rights to subscribe for Common Stock, securities (including, without limitation, evidences of indebtedness) by their terms convertible into or exchangeable for Common Stock or options to purchase or rights to subscribe for such convertible or exchangeable securities, the following provisions shall apply for all purposes of this Section 4(d)(i):

(1) The aggregate maximum number of shares of Common Stock deliverable upon exercise (assuming the satisfaction of any conditions to exercisability, including without limitation, the passage of time, but without taking into account potential antidilution adjustments) of such options to purchase or rights to subscribe for Common Stock shall be deemed to have been issued at the time such options or rights were issued and for a consideration equal to the consideration (determined in the manner provided in Section 4(d)(i)(D)), if any, received by the Corporation upon the issuance of such options or rights plus the minimum exercise price provided in such options or rights (without taking into account potential antidilution adjustments) for the Common Stock covered thereby.

(2) The aggregate maximum number of shares of Common Stock deliverable upon conversion of or in exchange (assuming the satisfaction of any conditions to convertibility or exchangeability, including, without limitation, the passage of time, but without taking into account potential antidilution adjustments) for any such convertible or exchangeable securities or upon the exercise of options to purchase or rights to subscribe for such convertible or exchangeable securities and subsequent conversion or exchange thereof shall be deemed to have been issued at the time such securities were issued or such options or rights were issued and for a consideration equal to the consideration, if any, received by the Corporation for any such securities and related options or rights (excluding any cash received on account of accrued interest or accrued dividends), plus the minimum additional consideration, if any, to be received by the Corporation (without taking into account potential antidilution adjustments) upon the conversion or exchange of such securities or the exercise of any related options or rights (the consideration in each case to be determined in the manner provided in Section 4(d)(i)(D)).

(3) In the event of any change in the number of shares of Common Stock deliverable or in the consideration payable to the Corporation upon exercise of such options or rights or upon conversion of or in exchange for such convertible or exchangeable securities, including, but not limited to, a change resulting from the antidilution provisions thereof, the Conversion Price of the Preferred Stock, to the extent in any way affected by or computed using such options, rights or securities, shall be recomputed to reflect such change, but no further adjustment shall be made for the actual issuance of Common Stock or any payment of such consideration upon the exercise of any such options or rights or the conversion or exchange of such securities.

(4) Upon the expiration of any such options or rights, the termination of any such rights to convert or exchange or the expiration of any options or rights related to such convertible or exchangeable securities, the Conversion Price of the Preferred Stock, to the extent in any way affected by or computed using such options, rights or securities or options or rights related to such securities, shall be recomputed to reflect the issuance of only the number of shares of Common Stock (and convertible or exchangeable securities which remain in effect) actually issued upon the exercise of such options or rights, upon the conversion or exchange of such securities or upon the exercise of the options or rights related to such securities.

(5) The number of shares of Common Stock deemed issued and the consideration deemed paid therefor pursuant to Sections 4(d)(i)(E)(1) and 4(d)(i)(E)(2) shall be appropriately adjusted to reflect any change, termination or expiration of the type described in either Section 4(d)(i)(E)(3) or 4(d)(i)(E)(4).

(F) **No Increased Conversion Price.** Notwithstanding any other provisions of this Section 4(d)(i), except to the limited extent provided for in Sections 4(d)(i)(E)(3) and 4(d)(i)(E)(4), no adjustment of the Conversion Price pursuant to this Section 4(d)(i) shall have the effect of increasing the Conversion Price above the Conversion Price in effect immediately prior to such adjustment.

(ii) **Stock Splits and Dividends.** In the event the Corporation should at any time or from time to time after the Purchase Date fix a record date for the effectuation of a split or subdivision of the outstanding shares of Common Stock or the determination of holders of Common Stock entitled to receive a dividend or other distribution payable in additional shares of Common Stock or other securities or rights convertible into, or entitling the holder thereof to receive directly or indirectly, additional shares of Common Stock (hereinafter referred to as "Common Stock Equivalents") without payment of any consideration by such holder for the additional shares of Common Stock or the Common Stock Equivalents (including the additional shares of Common Stock issuable upon conversion or exercise thereof), then, as of such record date (or the date of such dividend distribution, split or subdivision if no record date is fixed), the Conversion Price of the Preferred Stock shall be appropriately decreased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be increased in proportion to such increase of the aggregate of shares of Common Stock outstanding and those issuable with respect to such Common Stock Equivalents with the number of shares issuable with respect to Common Stock Equivalents determined from time to time in the manner provided for deemed issuances in Section 4(d)(i)(E).

(iii) **Reverse Stock Splits.** If the number of shares of Common Stock outstanding at any time after the Purchase Date is decreased by a combination of the outstanding shares of Common Stock, then, following the record date of such combination, the Conversion Price for the Preferred Stock shall be appropriately increased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be decreased in proportion to such decrease in outstanding shares.

(e) **Other Distributions.** In the event the Corporation shall declare a distribution payable in securities of other persons, evidences of indebtedness issued by the Corporation or other persons, assets (excluding cash dividends) or options or rights not referred to in Section 4(d)(ii), then, in each such case for the purpose of this Section 4(e), the holders of Preferred Stock shall be entitled to a proportionate share of any such distribution as though they were the holders of the number of shares of Common Stock of the Corporation into which their shares of Preferred Stock are convertible as of the record date fixed for the determination of the holders of Common Stock of the Corporation entitled to receive such distribution.

(f) **Recapitalization.** If at any time or from time to time there shall be a recapitalization of the Common Stock (other than a subdivision, combination or merger or sale of assets transaction provided for elsewhere in this Section 4 or Section 2) provision shall be made so that the holders of the Preferred Stock shall thereafter be entitled to receive upon conversion of such Preferred Stock the number of shares of stock or other securities or property of the Corporation or otherwise, to which a holder of Common Stock deliverable upon conversion would have been entitled on such recapitalization. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 4 with respect to the rights of the holders of such Preferred Stock after the recapitalization to the end that the provisions of this Section 4 (including adjustment of the Conversion Price then in effect and the number of shares purchasable upon conversion of such Preferred Stock) shall be applicable after that event and be as nearly equivalent as practicable.

(g) **No Impairment.** The Corporation will not, by amendment of this Fifth Amended and Restated Certificate of Incorporation or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 4 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of Preferred Stock against impairment. This provision will not restrict the Corporation's right to amend this Fifth Amended and Restated Certificate of Incorporation with the requisite stockholder consent and in compliance with applicable law.

(h) **No Fractional Shares and Certificate as to Adjustments.**

(i) No fractional shares shall be issued upon the conversion of any share or shares of the Preferred Stock, and the number of shares of Common Stock to be issued shall be rounded down to the nearest whole share. The number of shares issuable upon such conversion shall be determined on the basis of the total number of shares of Preferred Stock the holder is at the

time converting into Common Stock and the number of shares of Common Stock issuable upon such aggregate conversion.

(ii) Upon the occurrence of each adjustment or readjustment of the Conversion Price of Preferred Stock pursuant to this Section 4, the Corporation, at its expense, shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of such Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustment and readjustment, (B) the Conversion Price for the Preferred Stock at the time in effect, and (C) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of a share of the Preferred Stock.

(i) **Notices of Record Date.** In the event of any taking by the Corporation of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend (other than a cash dividend) or other distribution, any right to subscribe for, purchase or otherwise acquire any shares of stock of any class or any other securities or property, or to receive any other right, the Corporation shall mail to each holder of Preferred Stock, at least ten days prior to the date specified therein, a notice specifying the date on which any such record is to be taken for the purpose of such dividend, distribution or right, and the amount and character of such dividend, distribution or right.

(j) **Reservation of Stock Issuable Upon Conversion.** The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of such series of Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of such series of Preferred Stock, in addition to such other remedies as shall be available to the holder of such Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purposes, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to this Fifth Amended and Restated Certificate of Incorporation.

(k) **Waiver of Adjustment of Conversion Price.** Notwithstanding anything herein to the contrary, any downward adjustment of the Conversion Price of any series of Preferred Stock may be waived, either prospectively or retroactively and either generally or in a particular instance, with the prior written consent of the holders of at least a majority of the then outstanding shares of such series. Any such waiver shall bind all future holders of shares of such series of Preferred Stock.

(l) **Notices.** Any notice required by the provisions of this Section 4 to be given to the holders of shares of Preferred Stock shall be deemed given if deposited in the United

States mail, postage prepaid, and addressed to each holder of record at his address appearing on the books of the Corporation.

5. **Voting Rights.**

(a) Except as otherwise expressly provided herein or by law, the holder of each share of Preferred Stock shall have the right to one vote for each share of Common Stock into which such Preferred Stock could then be converted, and with respect to such vote, such holder shall have full voting rights and powers equal to the voting rights and powers of the holders of Common Stock, and shall be entitled, notwithstanding any provision hereof, to notice of any stockholders' meeting in accordance with the bylaws of the Corporation, and shall be entitled to vote, together with holders of Common Stock, with respect to any question upon which holders of Common Stock have the right to vote. Fractional votes shall not, however, be permitted and any fractional voting rights available on an as-converted basis (after aggregating all shares into which shares of Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward). Except as otherwise expressly provided herein or as required by law, the holders of Preferred Stock and the holders of Common Stock shall vote together and not as separate classes.

(b) The Board of Directors shall consist of nine members by vote as described in this paragraph. So long as at least 3,070,008 shares of the Series A Preferred Stock remain issued and outstanding (as adjusted for stock splits, stock dividends, reclassification and the like), the holders of the Series A Preferred Stock, voting as a separate class, shall be entitled to elect up to two members of the Board of Directors (the "Series A Preferred Directors") at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors and to remove from office such director(s) and to fill any vacancy caused by the resignation, death or removal of such director. So long as at least 1,277,502 shares of the Series B Preferred Stock remain issued and outstanding (as adjusted for stock splits, stock dividends, reclassification and the like), the holders of the Series B Preferred Stock, voting as a separate class, shall be entitled to elect up to one member of the Board of Directors (the "Series B Preferred Director") at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors and to remove from office such director(s) and to fill any vacancy caused by the resignation, death or removal of such director. So long as at least 2,229,871 shares of the Series C Preferred Stock remain issued and outstanding (as adjusted for stock splits, stock dividends, reclassification and the like), the holders of the Series C Preferred Stock, voting as a separate class, shall be entitled to elect up to two members of the Board of Directors (the "Series C Preferred Directors") at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors and to remove from office such director(s) and to fill any vacancy caused by the resignation, death or removal of such director. So long as at least 1,474,099 shares of the Series D Preferred Stock remain issued and outstanding (as adjusted for stock splits, stock dividends, reclassification and the like) (the "Series D Share Limitation"), the holders of the Series D Preferred Stock, voting as a separate class, shall be entitled to elect up to one member of the Board of Directors (the "Series D Preferred Director") at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors and to remove from office such director(s) and to fill any vacancy caused by the resignation, death or removal of such director (provided, however, that the Series D Share Limitation shall not apply during any period of time in which the Corporation is then in default of its

obligation to redeem the full number of shares of Series D Preferred Stock required to be redeemed pursuant to the terms of Section 3 hereof). The holders of the Common Stock, voting as a separate class, shall be entitled to elect two members of the Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors and to remove from office such director(s) and to fill any vacancy caused by the resignation, death or removal of such director. The holders of the Common Stock and Preferred Stock, voting together as a single class on an as-converted basis, shall be entitled to elect one member of the Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors and to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director. If at any time the issued and outstanding shares of a series of Preferred Stock, considered separately as a class, falls below the threshold specified for such series in this Section 5(b), then a majority of the remaining issued and outstanding Preferred Stock, voting together as a single class on an as-converted basis, shall be entitled to elect the members of the Board of Directors otherwise designated for such series in this Section 5(b), unless the remaining issued and outstanding shares of Preferred Stock considered together as a single class amount to fewer than 8,051,480 shares in the aggregate (as adjusted for stock splits, stock dividends, reclassification and the like), in which case a majority of the remaining issued and outstanding Preferred Stock and Common Stock, voting together as a single class on an as-converted basis, shall be entitled to elect the members of the Board of Directors otherwise designated for such series in this Section 5(b).

6. **Protective Provisions.** So long as at least 5,500,000 shares of Preferred Stock remain issued and outstanding (as adjusted for stock splits, stock dividends, reclassification and the like), the Corporation shall not without first obtaining the approval (by vote or written consent, as provided by law) of the holders of at least sixty-six and two-thirds percent (66 2/3%) of the then outstanding shares of Preferred Stock, voting together as a single class on an as-converted basis:

- (a) effect a transaction described in Section 2(d)(i) above;
- (b) alter or change the rights, preferences or privileges of the shares of any series of Preferred Stock so as to affect adversely the shares of such series, including without limitation, by amendment, modification or repeal of any provision of this Fifth Amended and Restated Certificate of Incorporation or the Bylaws of the Corporation or by merger, consolidation, reclassification or otherwise;
- (c) increase or decrease (other than by redemption or conversion) the total number of authorized shares of Preferred Stock;
- (d) authorize or issue, or obligate itself to issue, any other equity security, including any other security convertible into or exercisable for any equity security, having a preference over, or being on a parity with, the Preferred Stock with respect to voting, redemption, dividends, conversion, anti-dilution rights, registration rights or upon liquidation;
- (e) redeem, purchase or otherwise acquire (or pay into or set funds aside for a sinking fund for such purpose) any share or shares of Preferred Stock or Common Stock other

than in accordance with Section 3 hereof; provided, however, that this restriction shall not apply to the repurchase of shares of Common Stock from employees, officers, directors, consultants or other persons performing services for the Corporation or any subsidiary pursuant to agreements under which the Corporation has the option to repurchase such shares at no greater than cost upon the occurrence of certain events, such as the termination of employment, or through the exercise of any right of first refusal;

(f) increase or decrease the total number of authorized members of the Board of Directors;

(g) dismiss, suspend, replace or demote the Corporation's Chief Executive Officer or Chief Operating Officer;

(h) declare or pay any dividend on Common Stock; or

(i) amend this Section 6.

7. **Status of Converted Stock.** In the event any shares of Preferred Stock shall be converted pursuant to Section 4 hereof, the shares so converted shall be cancelled and shall not be issuable by the Corporation. This Fifth Amended and Restated Certificate of Incorporation of the Corporation shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

(C) **Common Stock.**

1. **Dividend Rights.** Subject to the prior rights of holders of all classes of stock at the time outstanding having prior rights as to dividends, the holders of the Common Stock shall be entitled to receive, when and as declared by the Board of Directors, out of any assets of the Corporation legally available therefor, such dividends as may be declared from time to time by the Board of Directors.

2. **Liquidation Rights.** Upon the liquidation, dissolution or winding up of the Corporation, the assets of the Corporation shall be distributed as provided in Section 2 of Article IV(B).

3. **Redemption.** The Common Stock is not redeemable.

4. **Voting Rights.** The holder of each share of Common Stock shall have the right to one vote, and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation, and shall be entitled to vote upon such matters and in such manner as may be provided by law.

ARTICLE V

The Board of Directors of the Corporation is expressly authorized to make, alter or repeal Bylaws of the Corporation.

ARTICLE VI

Elections of directors need not be by written ballot unless otherwise provided in the Bylaws of the Corporation.

ARTICLE VII

(A) To the fullest extent permitted by the Delaware General Corporation Law, as the same exists or as may hereafter be amended, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director.

(B) The Corporation shall indemnify to the fullest extent permitted by law any person made or threatened to be made a party to an action or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that he, his testator or intestate is or was a director or officer of the Corporation or any predecessor of the Corporation, or serves or served at any other enterprise as a director or officer at the request of the Corporation or any predecessor to the Corporation.

(C) Neither any amendment nor repeal of this Article VII, nor the adoption of any provision of the Corporation's Certificate of Incorporation inconsistent with this Article VII, shall eliminate or reduce the effect of this Article VII in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this Article VII, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

ARTICLE VIII

The Corporation renounces any interest or expectancy of the Corporation in, or in being offered an opportunity to participate in, any Excluded Opportunity. An "Excluded Opportunity" is any matter, transaction or interest that is presented to, or acquired, created or developed by, or which otherwise comes into the possession of (i) the Series D Preferred Director or (ii) First Solar, Inc. or any affiliate, partner, member, director, stockholder, employee or agent of First Solar, Inc. (collectively, "Covered Persons"), unless such matter, transaction or interest is presented to, or acquired, created or developed by, or otherwise comes into the possession of, a Covered Person expressly and solely in such Covered Person's capacity as a director of the Corporation.

* * *

The foregoing Fifth Amended and Restated Certificate of Incorporation has been duly adopted by this corporation's Board of Directors and stockholders in accordance with the applicable provisions of Sections 223, 242 and 245 of the General Corporation Law of the State of Delaware.

Executed at Foster City, California, on October 28, 2008.

/s/ Lyndon Rive

Lyndon Rive, Chief Executive Officer &
President

Exhibit B

Second Amended and Restated Bylaws

Exhibit C

Form of Indemnification Agreement