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Docket No. E-20633A-08-0513

IN THE MATTER OF THE APPLICATION OF  
THE SOLAR ALLIANCE FOR A  
DECLARATORY ORDER THAT PROVIDERS  
OF CERTAIN SOLAR SERVICE  
AGREEMENTS WOULD NOT BE PUBLIC  
SERVICE CORPORATIONS.

**ARIZONA ELECTRIC  
POWER COOPERATIVE,  
INC.'S REPLY COMMENTS  
ON STANDING AND OTHER  
ISSUES FOR HEARING**

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

The Arizona Electric Power Cooperative, Inc. ("AEPCO"), pursuant to the Procedural Order dated May 13, 2009, files its list of issues that should be considered at a hearing, if held, on this matter as well as its reply comments on the issue of the Solar Alliance's standing.

The Procedural Order directs each party who believes that a hearing is needed to provide a list of issues to be considered at the hearing. AEPCO does not believe that a hearing is appropriate until a real-party-in-interest or parties, who can present actual facts upon which to evaluate the Application, appears in this matter. Absent that, the Commission simply cannot perform the factual analysis on the public service corporation ("PSC") issue required of it by the case law.

1           However, should the Commission determine to proceed on the Application in its  
2 current posture, the issues AEPCO suggests should be addressed are set forth below.

3           **I.     The Alliance lacks standing to bring this Application.**

4           “Standing” describes the situation where a case cannot be determined because the  
5 lack of a real-party-in-interest prevents adjudication of the issues based on actual facts.  
6 *See Sears v. Hull*, 192 Ariz. 65, 71 ¶ 24, 961 P.2d 1013, 1019 (1998) (standing is  
7 important because “the presence of standing sharpens the legal issues presented by  
8 ensuring that true adversaries are before the court and thereby assures that our courts [and  
9 administrative agencies] do not issue merely advisory opinions”); *see also Fernandez v.*  
10 *Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6, 108 P.3d 917, 919 (2005) (noting Arizona  
11 courts’ “rigorous standing requirement”); *Home Builders Ass’n of Cent. Ariz. v. Kard*,  
12 219 Ariz. 374, 377 ¶ 9, 199 P.3d 629, 632 (App. 2008) (holding that standing “concerns  
13 ‘prudential or judicial restraint’ to ensure that [courts or administrative agencies] do not  
14 issue advisory opinions, address moot cases or deal with issues that have not been fully  
15 developed by true adversaries”).

17           The Solar Alliance claims it can sponsor this Application because it is a solar  
18 energy trade group. Although trade groups do have standing in some circumstances,<sup>1</sup>  
19 they don’t have standing in circumstances such as these which involve varying fact sets  
20 for the individual members of the group. *Home Builders*, 219 Ariz. at 377 ¶ 15, 199 P.3d  
21 at 632 (standing denied homebuilders association where claims require individualized  
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24 <sup>1</sup> *State v. Direct Sellers Ass’n*, 108 Ariz. 165, 167, 494 P.2d 361, 363 (1972).

1 proof as to each of the group's members; citing *Warth v. Seldin*, 422 U.S. 490, 515-16  
2 (1977)). That is precisely the case presented here.

3 Alliance members (1) are delivering electricity for light, fuel or power but (2)  
4 nonetheless claim (on fact sets and agreement terms that vary widely from provider to  
5 provider) that they might qualify for non-PSC status nevertheless. *Serv-Yu*<sup>2</sup> requires a  
6 detailed factual inquiry of the real-parties-in-interest to determine whether none, some or  
7 all of these member entities should be subject to Commission regulation. The Solar  
8 Alliance can only offer generic, purely hypothetical facts on these issues. That is not  
9 sufficient to conduct the *Serv-Yu* evaluation. If the Commission proceeds further, it will  
10 not be able to render the factually supported analysis required of it by the case law.  
11

12 The standing issue, the lack of an actual controversy and, most importantly, the  
13 lack of an actual and reliable fact set upon which to render judgment, as required by *Serv-*  
14 *Yu*, require the Application be dismissed with leave to re-file. As the Alliance notes,  
15 dismissal based on standing would allow "one or more [Alliance members to] bring a  
16 similar application." Solar Alliance Mot. for Proc. Conf. at 5:3-5. Once they have done  
17 so, the issues raised in this docket can be efficiently, accurately, reliably and promptly  
18 adjudicated.  
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24 <sup>2</sup> *Natural Gas Serv. Co. v. Serv-Yu Cooperative*, 70 Ariz. 235, 237-38, 219 P.2d 324, 325-26 (1950).

1 **II. Other questions and issues to be addressed in the hearing.**

2 Without waiver of the foregoing, should the Commission elect to proceed, there  
3 are several categories of issues AEPCO suggests be covered at hearing disaggregated as  
4 to each Alliance member and/or business model:

5 Issues relating to whether Alliance members are PSCs under *Serv-Yu*

6 *Serv-Yu* sets forth the criteria for determining whether an entity must be regulated  
7 as a public service corporation. Each of those factors raises issues and questions that  
8 should be addressed or answered at the hearing including, but not limited to:

9  
10 1. *What the corporation(s) actually does.* What are the different  
11 models under which Alliance members furnish electricity? Do Alliance  
12 members, the real parties in interest, perform any other business activities  
13 aside from the provision of solar-generated electrical power? What are  
their business plans? What contract forms are used? What assurances or  
safeguards are in place to assure contract compliance and consumer  
protection?

14 2. *A dedication to public use.* Will services be offered on a uniform  
15 basis to similarly situated customers? Will services be refused to some  
16 customers or markets? To what extent would Solar Alliance members  
displace the functions of other public service corporations? What effect  
would that displacement have on regulated utilities?

17 3. *Articles of incorporation, authorization, and purposes.* The hearing  
18 should address and review the corporate documents of real parties in  
19 interest so as to explore their financial capabilities, fitness, expertise,  
business plans and models.

20 4. *Dealing with the service of a commodity in which the public has*  
21 *been generally held to have an interest.* Does the Alliance dispute this  
factor and, if so, on what basis? Consumer protection, reliability and other  
issues raised by Staff are relevant to this factor.

22 5. *Monopolizing or intending to monopolize the territory with a public*  
23 *service commodity.* What is the potential for Alliance members to capture  
substantial segments of the business of providing electrical power within a  
24

1 given area or market segment? What impact will that have on regulated  
2 utilities?

3 6. *Acceptance of substantially all requests for service.* What are the  
4 circumstances under which a willing customer would not be allowed to  
5 participate in a solar energy arrangement with an Alliance member? What  
6 percentage of requests for service from willing customers do Alliance  
members refuse? What are the reasons or justifications given to those  
customers to explain the Alliance member's refusal to do business with  
them?

7 7. *Service under contracts and reserving the right to discriminate is not*  
8 *always controlling.* Do all Alliance members provide their services  
through the use of contracts? All terms uniform? What is the basis for  
discrimination?

9 8. *Actual or potential competition with other corporations whose*  
10 *business is clothed with public interest.* Do Alliance members provide  
11 electricity to all market segments, *i.e.* business, residential, industrial.  
12 What is the target projection for market penetration for each Alliance  
13 member in each segment in the next 3-5 years? What is the intention of  
Alliance members to "cherry-pick" by providing service to only the most  
profitable customers of public utilities? What impact will this have on  
utility resource, transmission, distribution and other planning?

14 Issues relating to the marketing of the business model and delivery of services proposed  
15 by the Alliance

16 1. What market segments (business, residential, industrial) will  
17 Alliance members target? Why? How will service be offered and  
advertised?

18 2. If any market segments will not be targeted, why not?

19 3. Will service be provided under uniform rates, terms, and conditions?  
20 If not, why not? On what basis will service be provided if not uniform?  
What safeguards/indemnities exist to assure service performance?

21 4. Why can't another transaction form aside from that proposed by the  
22 Alliance be used, such as a long-term lease or sale to and through a  
23 regulated utility, instead of the direct sale of electricity to the end-user?

1 5. Absent regulation, how are consumers assured of receiving service  
2 throughout the term of the contract?

3 Issues identified in the Staff Report

4 Staff noted the following in their March 11, 2009 Report:

5 1. If Alliance members are not PSCs subject to Commission  
6 jurisdiction, how would utility workers, those living on or near the premises  
7 where Alliance member equipment was installed, or any member of the  
8 general public raise or address safety concerns arising out of the  
9 interconnection of outside generation equipment to a utility's distribution  
10 system?

11 2. If Alliance members are not PSCs subject to Commission  
12 jurisdiction, how would pre-activation inspections of the systems connected  
13 to the grid be arranged or conducted?

14 3. What other safety concerns would non-regulation of Alliance  
15 members raise?

16 4. If Alliance members are not PSCs subject to Commission  
17 jurisdiction, what complaint remedies exist for the consumer to resolve  
18 complaints?

19 5. If Alliance members are not PSCs subject to Commission  
20 jurisdiction, what reliability implications may this raise, for example if the  
21 Alliance member energy systems suffered a sudden, catastrophic failure?

22 6. If Alliance members are not PSCs subject to Commission  
23 jurisdiction, what complaint remedies exist for the distribution utility to  
24 resolve problems such as faulty installation or unsafe interconnection  
practices by the Solar Alliance member?

7. Does a leasing arrangement fall within the twelve characteristics of  
the business model suggested by the Alliance?

8. How is the provision of electricity under the business model  
proposed by the Alliance "incidental" to the other services offered?

9. Why is the Alliance seeking adjudication of this issue rather than  
one or several of its members?

1 10. Why wouldn't some form of "light-handed" regulation by the  
2 Commission be appropriate?

3 RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of June, 2009.

4 GALLAGHER & KENNEDY, P.A.

5  
6 By   
7 Michael M. Grant  
8 2575 East Camelback Road  
9 Phoenix, Arizona 85016-9225  
Attorneys for Arizona Electric Power  
Cooperative, Inc.

10 **Original and 13 copies** filed this 15th  
day of June, 2009, with:

11 Docket Control  
12 Arizona Corporation Commission  
13 1200 West Washington Street  
Phoenix, Arizona 85007

14 **Copies** of the foregoing mailed  
this 15<sup>th</sup> day of June, 2009, to:

15 Scott S. Wakefield  
16 Ridenhour, Heinton, Kelhoffer  
& Lewis, P.L.L.C.  
17 201 North Central Avenue, Suite 3300  
18 Phoenix, Arizona 85004-1052  
Attorneys for The Solar Alliance

19 Deborah R. Scott  
20 Linda J. Benally  
Pinnacle West Capital Corporation  
21 400 North 5<sup>th</sup> Street, M/S 8695  
Phoenix, Arizona 85004  
22 Attorneys for Arizona Public Service Company

23

24

1 Timothy M. Hogan  
Arizona Center for Law in the Public Interest  
2 202 East McDowell Road, Suite 153  
Phoenix, Arizona 85004  
3 Attorneys for Western Resource Advocates  
4 and Interstate Renewable Energy Council

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

7  
8 Kenneth C. Sundlof, Jr.  
Jennings, Strouss & Salmon, P.L.C.  
201 East Washington Street, 11<sup>th</sup> Floor  
9 Phoenix, Arizona 85004-2385  
10 Attorneys for Salt River Project and New West Energy

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

14  
15 Philip Dion, Jr.  
Michelle Livengood  
Tucson Electric Power Company  
16 One South Church Street, Suite 200  
Tucson, Arizona 85702

17  
18 Michael W. Patten  
J. Matthew Derstine  
19 Roshka DeWulf & Patten, PLC  
400 East Van Buren Street, Suite 800  
20 Phoenix, Arizona 85004  
Attorneys for Tucson Electric Power  
21 Company and UNS Electric, Inc.

22

23

24

1 Russell E. Jones  
D. Michael Mandig  
2 Waterfall Economidis Caldwell  
Hanshaw & Villamana, PC  
3 5210 East Williams Circle, 8<sup>th</sup> Floor  
Tucson, Arizona 85711  
4 Attorneys for Trico Electric Cooperative, Inc.

5 C. Webb Crockett  
6 Patrick J. Black  
Fennemore Craig, P.C.  
7 3003 North Central Avenue, Suite 2600  
Phoenix, Arizona 85012-2913  
8 Attorneys for Freeport-McMoRan Copper & Gold Inc.  
and Arizonans for Electric Choice and Competition  
9

10 Daniel Pozefsky, Chief Counsel  
Residential Utility Consumer Office  
11 1110 West Washington Street, Suite 220  
Phoenix, Arizona 85007

12 Michael A. Curtis  
13 William P. Sullivan  
Larry K. Udall  
14 Curtis, Goodwin, Sullivan  
Udall; & Schwab, PLC  
15 501 East Thomas Road  
Phoenix, Arizona 85012-3205  
16 Attorneys for Mohave Electric Cooperative, Inc.  
and Navopache Electric Cooperative, Inc.  
17

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

22

23

24

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

5 Kevin T. Fox  
6 Keyes & Fox LLP  
7 5727 Keith Avenue  
8 Oakland, California 94618  
9 Attorneys for Interstate Renewable Energy Council

10  
11  
12  
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