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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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7 IN THE MATTER OF THE APPLICATION OF
8 THE SOLAR ALLIANCE FOR A
9 DECLARATORY ORDER THAT
10 PROVIDERS OF CERTAIN SOLAR
SERVICE AGREEMENTS WOULD NOT BE
PUBLIC SERVICE CORPORATIONS

Docket No. E-20633A-08-0513

Arizona Corporation Commission
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RUCO'S NOTICE OF FILING

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12 The Residential Utility Consumer Office ("RUCO") hereby files the following list of

13 issues which RUCO believes should be considered at the hearing pursuant to the

14 Procedural Order of May 13, 2009. However, as RUCO mentioned in its Response to

15 Staff's Memorandum filed on April 17, 2009, RUCO questions the Solar Alliance's

16 ("Alliance") standing to make the request for a declaratory order. In the absence of

17 standing, the Commission should dismiss the Alliance's application. The Alliance

18 addressed the issue of standing in its Motion for a Procedural Conference ("Motion") filed

19 on April 24, 2009. RUCO has not had an opportunity to respond, and RUCO would like to

20 take this opportunity to provide a response, and then provide its list of issues that RUCO

21 believes should be considered at the hearing should the Commission determine that the

22 Alliance has standing.

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1 **THE ISSUE OF STANDING**

2 The Alliance is a group of solar manufacturers, integrators and financiers dedicated
3 to accelerating the development of photovoltaic energy in the United States. Application at
4 1. The Alliance’s members provide various services to their customers pursuant to solar
5 service agreements (“SSA’s”). Application at 2. These services include sizing and placing
6 solar generation facilities; financing of costs of acquiring solar facilities; ongoing
7 maintenance of solar facilities; electric output of a customer-sited individual solar facility;
8 and protections to insure that customers receive ongoing value from the solar facility
9 located on their premises. Application at 3. The Alliance’s Application seeks an order
10 declaring that its members who conform to certain criteria are not public service
11 corporations. Application at 3.

12 In its Motion, the Alliance argues that the Arizona judiciary has a lower standing
13 threshold than the requirements before federal courts since Arizona does not have a Case
14 or Controversy Clause requirement in its Constitution. Motion at 3. The Alliance maintains
15 that it meets this lower threshold since its members are affected by the interpretation of the
16 constitutional provision granting the Commission authority over public service corporations
17 (“PSC”). Regardless, argues the Alliance, should the Commission determine that the
18 Alliance does not meet the standing threshold; the Commission can waive the standing
19 requirement. The Alliance believes that such a requirement can be waived in exceptional
20 circumstances involving issues of great public importance that are likely to recur. Motion
21 at 4. Members of the Alliance are “poised” to offer SSA’s in Arizona, and the Alliance
22 claims would be likely to bring a similar application if the Commission dismissed this
23 Application for lack of standing. Motion at 5.

1 While the Arizona judiciary may have a lower standing standard than the federal
2 courts, it is by no means a low standard. In fact, Arizona courts impose a "rigorous"
3 standing requirement because Arizona's constitution has no counterpart to the Case or
4 Controversy Clause of Article III of the federal constitution. *Home Builders Association v.*
5 *Central Arizona v. Kard*, 219 Ariz. 374, 377, 199P.3d 629, 632 (2008), *Fernandez v.*
6 *Takata Seat Belts, Inc.*, 210 Ariz. 138, 140, pp. 6, 108 P.3d. 917, 919 (2005). *Armory Park*
7 *Neighborhood Association v. Episcopal Community Services*, 148 Ariz. 1, 6, 712 P.2d 914,
8 919 (1985). At a minimum, each party must possess an interest in the outcome. *Armory*
9 *Park*, supra. The interest must be real, and not merely theoretical. *Bianco v. Hess*, 86
10 Ariz. 14, 22, 339 P.2d 1038, 1046 (1959), *Hunt v. Richardson*, 216 Ariz. 114, 125 pp. 37-
11 38, 163 P.3d 1064, 1075 (App. 2007). Moreover, to establish standing in Arizona, a party
12 must allege a "distinct and palpable injury" and that injury must be "particularized" and to
13 the party "themselves." *Arizona Association of Providers for Persons with Disabilities v.*
14 *State of Arizona*, 2009 WL 1156492 (Ariz. App.Div. 1, April 2009), *Bennett v. Brownlow*,
15 211 Ariz. 193, 196, pp. 17, 119 P.3d 460, 463 (2005).

16 **THE ALLIANCE LACKS STANDING TO SEEK A DECLARATORY ORDER**

17 RUCO does not believe that the Alliance has standing to bring this declaratory
18 action. Article 15, §2 of Arizona's Constitution defines "Public service corporations";

19 Section 2. All corporations other than municipal engaged in
20 furnishing gas, oil, or electricity for light, fuel, or power; ...shall be
21 deemed public service corporations.

22 The Alliance is a nonprofit trade association that, by its own definition, does not have a real
23 interest in the outcome of its Application. The Alliance is a group of solar manufacturers,
24 integrators and financiers who target legislators, regulators and utilities to make the

1 transition to solar power by providing technical and policy expertise. Alliance Application
2 at 1-2. An organization whose purpose is to provide technical and policy expertise to
3 regulators and legislators does not have a real interest in the Commission's determination
4 of whether or not the SSA's that its members enter into are subject to regulation. For that
5 matter, it is even difficult to imagine a theoretical interest. The Alliance has not shown a
6 direct stake in the outcome of its Application. *City of Tucson v. Pima County*, 199 Ariz.
7 509, 514 pp. 11, 19 P.3d 650, 655 (App. 2001) ("a party must have a direct stake in the
8 outcome of a case in order to have standing" (internal quotation marks omitted). Whether
9 or not its members are considered regulated public service corporations, the Alliance and
10 its mission remain unaffected.

11 The Alliance, however, must recognize the fact that, at best, its standing is dubious
12 since the Alliance's Application is not seeking that any particular entity be declared a PSC.
13 Rather, the Alliance seeks a generic determination that certain transactions would not
14 trigger the Commission's regulatory authority. Application at 6. The transactions that the
15 Alliance references are the SSA's entered into between the Alliance's members and their
16 customers. The Alliance believes that other transactions entered into between the Alliance
17 members and their customers are clearly beyond the scope of the Commission's
18 jurisdiction. There is no direct relationship between the Alliance, whose purpose it is to
19 provide consultation to regulators and legislators, and the contracts between the Alliance's
20 members and their customers.

21 AEPCO correctly points out that the reality of a hearing in this matter would be a
22 "wholly hypothetical fact set" where there is no real entity that is in a position to offer
23 reliable testimony and facts as to what the provider actually does, the precise details of
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1 services provided or information on any of the eight criteria which the *Serv-Yu* decision
2 requires to be considered. AEPCO comments at 5. In short, the Alliance does not have a
3 real interest in this declaratory action.

4 **THE ALLIANCE HAS NOT DEMONSTRATED ANY INJURY**

5 Furthermore, the Alliance has not shown, or even alleged, a distinct and palpable
6 injury or threat of injury. The Alliance has not demonstrated that the Commission has
7 expressed any concern over any jurisdiction it may or may not have over the Alliance's
8 members. In fact, the only reason that this issue is before the Commission is because the
9 Alliance, on its own initiative, raised it. The Alliance has not shown how it would be
10 harmed by a determination of the Commission that a transaction with certain
11 characteristics would or would not trigger the Commission's regulatory authority. To the
12 extent there is a link, the link between the Alliance, whose purpose is advisory, and the
13 transactions that are subject to determination, is the Alliance's members. The SSA's are
14 agreements made between the members and their customers. There is no direct link
15 between the Alliance and the transactions. The harm, which cannot be merely incidental
16 or inconsequential, may arguably apply to some of the Alliance's members. But the
17 members, whoever they may be, are not a party to this action and have not alleged or
18 shown any harm.

19 In the absence of a showing of harm, the Alliance argues that the Commission
20 could waive the standing requirement in cases involving great public importance that are
21 likely to recur. See Alliance Brief at 4 citing *Sears v. Hull*, 192 Ariz. 65, 71, 961 P.2d 1013,
22 1019 (1998). The Alliance refers to the Commission's REST Rules which require
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1 Arizona's utilities to acquire a portion of their generation from distributed resources. Again,
2 the Alliance's argument is misplaced. The Court in *Sears* noted:

3 Because our state constitution does not contain a "case or
4 controversy" provision analogous to that of the federal constitution, we
5 are not constitutionally constrained to decline jurisdiction based on lack
6 of standing. However, Arizona courts consistently have required as a
7 matter of judicial restraint that a party possess standing to maintain an
8 action. See *Armory Park*, 148 Ariz. at 6, 712 P.2d at 919; *Herrera*, 121
9 Ariz. at 15-16, 588 P.2d at 308-09; *Alliance Marana v. Groseclose*, 191
10 Ariz. 287, 289, 955 P.2d 43, 45 (App.1997); see also *Dail v. City of
11 Phoenix*, 128 Ariz. 199, 624 P.2d 877 (App.1980) (affirming summary
12 judgment against plaintiff because plaintiff did not have standing as a
13 taxpayer or resident to challenge a municipal contract). The
14 requirement is important: the presence of standing sharpens the legal
15 issues presented by ensuring that true adversaries are before the court
16 and thereby assures that our courts do not issue mere advisory
17 opinions. *Armory Park*, 148 Ariz. at 6, 712 P.2d at 919.

18 [14] ¶ 25 Although, as a matter of discretion, we can waive the
19 requirement of standing, we do so only in exceptional circumstances,
20 generally in cases involving issues of great public importance that are
21 likely to recur. The paucity of cases in which we have waived the
22 standing requirement demonstrates both our reluctance to do so and
23 the narrowness of this exception. *Sears*, supra at 71, 961 P.2d 1019.

24 The *Sears* Court emphasized the importance of standing, despite its ability to waive
it. The circumstances must be exceptional and the Arizona Courts have done it only in
very rare circumstances where there have been issues of great public importance that are
likely to recur. The issue here is not a challenge to the constitutionality of the REST Rules.
Nor is the question whether solar is a viable generation resource under the REST Rules.
The Alliance is asking for a determination of whether SSA's are subject to regulation.
Regardless of the outcome, the Alliance's members will be able to continue in their
business. Utilities will still be able to fulfill their REST requirements through distributed
resources including solar. The Alliance will still be able to advise the Commission and

1 legislators on distributed resources. The Alliance has not shown how the solar and/or
2 renewable industry would suffer great or any harm by the Commission requiring an actual
3 party in interest be before the Commission. Nor has the Alliance shown how it would be
4 harmed if the SSA's were subject to Commission oversight. In fact, the Alliance has not
5 even alleged such harm. In order to claim great public importance, it is intuitive that, at the
6 very least, the Alliance must show how a dismissal would affect the public interest. The
7 issues here are not exceptional and of such great public importance that they outweigh the
8 legal necessity for standing in this proceeding.

9 The Alliance claims that the issues here are likely to recur if the matter is dismissed
10 because one or more of its members would likely bring a similar application¹. Of course,
11 this begs the question why one or more of its members are not a party to this Application.
12 This would have been wise from the standpoint of judicial economy. Nonetheless, it is not
13 a compelling argument since the Alliance's request is not extraordinary and/or contains
14 issues of great public importance.

15 **THE ALLIANCE DOES NOT HAVE REPRESENTATIONAL STANDING TO BRING A**
16 **DECLARATORY APPLICATION**

17 It does not appear that the Alliance seeks standing on behalf of its members, since
18 it has not made that representation. But for the sake of argument, RUCO will address the
19 legal argument of representational standing – i.e. where one entity asserts standing in a
20 representative capacity.

21 _____
22 ¹ Coincidentally, shortly after parties pointed out the standing and injury infirmities with the Alliance's
23 Application, letters were filed in the Docket from companies with interests in having the Alliance's members
24 provide SSAs. However, RUCO notes the irony of these letters of concern. There would be no concern but
for the Alliance's Application. Until that filing, the regulatory status of solar installers who enter into SSAs
with customers has not be contemplated. This is, in effect, an emergency manufactured entirely by the
Alliance.

1 But when an entity asserts standing in a representative capacity,
2 the court must determine "whether, given all the circumstances in the
3 case, the association has a legitimate interest in an actual controversy
4 involving its members and whether judicial economy and administration
5 will be promoted by allowing representational appearance." Armory
6 Park, 148 Ariz. at 6, 712 P.2d at 919. A court also may consider
7 relevant factors identified by the United States Supreme Court, which
8 are whether: (a) the association's "members would have standing to
9 sue in their own right; (b) the interests ... the association seeks to
10 protect are relevant to the organization's purpose; and (c) neither the
11 claim asserted nor the relief requested requires the participation of
12 individual members." Id. (citing Warth v. Seldin, 422 U.S. 490, 95 S.Ct.
13 2197, 45 L.Ed.2d 343 (1975); Hunt v. Washington State Apple Adver.
14 Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)) as
15 cited in Home Builders Association v. Central Arizona v. Kard, 219 Ariz.
16 374, 377, 199P.3d 629, 632 (2008)

17 The Alliance does not have a real or legitimate interest in the outcome because an
18 organization whose purpose is to provide technical and policy expertise to regulators and
19 legislators does not have a direct stake or a real interest in the Commission's
20 determination of whether the SSA's its members enter into are subject to regulation.

21 The Commission need not consider the other relevant factors since the Alliance has
22 not identified with detail who its members are, and what their interests are. Without more
23 information, the Commission should not reach a conclusion that the Alliance represents
24 the interests of all its members or that it represents all providers of SSA's. Nor should the
Commission make a determination that the Alliance's members would have standing.
Again, in Arizona, the requirement of standing is important, and the Commission should
not make a finding that the Alliance's members would have standing without knowing who
those members are, and what their interests are, even if it would be judicially efficient to do
so.

1 Based on the above analysis, RUCO does not believe that the Alliance has standing
2 to bring its Application. RUCO believes that the Application should be dismissed at this
3 point for a lack of standing.

4 **RUCO'S LIST OF ISSUES SHOULD THE COMMISSION DETERMINE THE ALLIANCE**
5 **HAS STANDING**

6 If the Commission determines that the Alliance has standing to bring this
7 Application, RUCO believes the following issues should be considered at the hearing.

8 a) The eight Serv-Yu factors:

- 9 1. What the Alliance actually does.
- 10 2. A dedication to public use.
- 11 3. Articles of incorporation, authorization, and purposes.
- 12 4. Dealing with the service of a commodity in which the public has
13 been generally held to have an interest.
- 14 5. Monopolizing or intending to monopolize the territory with a
15 public service commodity.
- 16 6. Acceptance of substantially all requests for service.
- 17 7. Service under contracts and reserving the right to discriminate
18 is not always controlling.
- 19 8. Actual or potential competition with other corporations whose
20 business is clothed with public interest.

21 b) The Alliance's reasons for seeking declaratory relief.

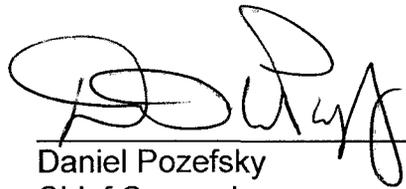
22 c) Whether providing electricity to the public is incidental to Alliance's purpose
23 as argued by the Alliance.

24 d) Whether the Commission can make a generic determination that SSA's with
certain characteristics are subject to Commission regulation.

e) The public policy issues raised by the Alliance's application.

- 1 f) Whether members install other types of renewable energy generation and if
2 so whether the agreements entered into regarding those types of
3 transactions are subject to Commission scrutiny.
- 4 g) Whether members themselves are public service corporations.
- 5 h) Whether regulation would somehow impede the members from conducting
6 business.
- 7 i) Reliability issues if the SSA's are not subject to regulatory oversight.
- 8 j) Whether Commission regulation would make Alliance members "Affected
9 Utilities" and subject to the provisions of the Commission's Renewable
10 Energy Standard and Tariff Rules.
- 11 k) Whether regulated Alliance members would need CC&N's to operate and be
12 subject to other regulatory requirements that other Public Service Company's
13 are subject to.
- 14 l) How regulation would accelerate or impede the expansion of solar energy
15 generation in Arizona.
- 16 m) Any other relevant issues that may be raised upon the resolution of the
17 standing question.

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20 RESPECTFULLY SUBMITTED this 15th day of June, 2009.

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22 
23 Daniel Pozefsky
24 Chief Counsel

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26 AN ORIGINAL AND THIRTEEN COPIES
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