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BEFORE THE ARIZONA CORPORATI

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.)
)
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)

DOCKET NO.
E-20633A-08-0513

PROCEDURAL
CONFERENCE

At: Phoenix, Arizona
Date: June 22, 2009
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1 BE IT REMEMBERED that the above-entitled and
2 numbered matter came on regularly to be heard before the
3 Arizona Corporation Commission, in Hearing Room 1 of said
4 Commission, 1200 West Washington Street, Phoenix, Arizona,
5 commencing at 10:00 o'clock, on the 22nd day of June,
6 2009.

7

8 BEFORE: KRISTIN K. MAYES, Commission Chairman
9 TEENA WOLFE, Administrative Law Judge

10

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1 ALJ WOLFE: Good morning, and welcome to the
2 Arizona Corporation Commission. This is the time and
3 place set for the procedural conference in the matter of
4 the application of The Solar Alliance for a declaratory
5 order that providers of certain solar service agreements
6 would not be public service corporations. The docket
7 number is E-20633A-08-0513.

8 With me here on the bench is Chairman Mayes. My
9 name is Teena Wolfe, and I'm the administrative law judge
10 assigned to this proceeding.

11 We will start this morning by taking appearances.
12 It could take a while. I will call out the parties that
13 have made filings and that have been granted intervention.
14 If I miss anyone, please let me know.

15 For The Solar Alliance?

16 MR. WAKEFIELD: Good morning. Scott Wakefield
17 with Ridenour, Heinton & Lewis for The Solar Alliance.

18 ALJ WOLFE: Okay. Arizona Electric Power
19 Cooperative?

20 MR. GRANT: Judge Wolfe, Chairman Mayes, good
21 morning. Mike Grant of Gallagher & Kennedy on behalf of
22 Arizona Electric Power Cooperative.

23 ALJ WOLFE: Thank you, Mr. Grant.

24 Mohave Electric Cooperative, Inc.?

25 (No response.)

1 ALJ WOLFE: No appearance?

2 Navopache Electric Cooperative, Inc.?

3 (No response.)

4 ALJ WOLFE: No response.

5 Sulphur Springs Valley Electric Cooperative,
6 Inc.?

7 MR. CARROLL: Good morning, Your Honor.

8 Bradley Carroll from the law firm of Snell & Wilmer on
9 behalf of Sulphur Springs Electric Cooperative.

10 ALJ WOLFE: And Trico Electric Cooperative, Inc.?

11 MR. JONES: Russell Jones from the law firm of
12 Waterfall Economidis representing Trico Electric
13 Cooperative.

14 ALJ WOLFE: Okay. Salt River Project Agriculture
15 Improvement and Power District?

16 MR. SUNDLOF: Good morning. Kenneth Sundlof with
17 the law firm of Jennings, Strouss & Salmon representing
18 Salt River Project.

19 ALJ WOLFE: Tucson Electric Power Company?

20 MR. PATTEN: Michael Patten from Roshka DeWulf &
21 Patten on behalf of Tucson Electric Power and UNS
22 Electric.

23 ALJ WOLFE: Okay. Appearances noted as well.
24 Arizona Public Service Company?

25 MS. DEBORAH SCOTT: Good morning, Your Honor and

1 Chairman. Deborah Scott and Linda Benally here on behalf
2 of APS.

3 ALJ WOLFE: Freeport-McMoRan Copper and Gold,
4 Inc.?

5 MR. CROCKETT: Good morning, Your Honor,
6 Chairman Mayes. My name is Webb Crockett. I'm with
7 Fennemore Craig representing Freeport-McMoRan Copper and
8 Gold, Inc., and also Arizonans for Electric Choice and
9 Competition, who I will refer to collectively as AECC.

10 ALJ WOLFE: Okay. That appearance is noted as
11 well.

12 Western Resource Advocates?

13 (No response.)

14 ALJ WOLFE: No appearance.

15 Interstate Renewable Energy Council?

16 MR. FOX: Good morning, Your Honor,

17 Chairman Mayes. Kevin Fox with the law firm of Keyes &
18 Fox, LLP representing Interstate Renewable Energy Council.

19 ALJ WOLFE: Residential Utility Consumer Office?

20 MR. POZEFSKY: Good morning, Your Honor,

21 Chairwoman Mayes. Daniel Pozefsky on behalf of RUCO.

22 ALJ WOLFE: Commission's Utilities Division?

23 MS. NANCY SCOTT: Good morning. Nancy Scott and
24 Janet Wagner on behalf of Commission Staff.

25 ALJ WOLFE: And Sempra Energy Solutions, LLC,

1 filed a motion requesting leave to be excused from today's
2 procedural conference. Under the circumstances that
3 request is reasonable and the motion is hereby granted.

4 Are there any other parties present who I haven't
5 called?

6 MR. QUINN: Yes, Your Honor.

7 ALJ WOLFE: Please come forward.

8 MR. QUINN: Ian Quinn of Curtis, Goodwin,
9 Sullivan, Udall & Schwab on behalf of Mohave Electric
10 Cooperative and Navopache Electric Cooperative.

11 ALJ WOLFE: Mohave and Navopache?

12 MR. QUINN: That's correct.

13 ALJ WOLFE: And your name is Quinn?

14 MR. QUINN: Q-u-i-n-n.

15 ALJ WOLFE: Thank you. Mr. Quinn, you may want
16 to take a seat up closer to the microphones because I will
17 be asking the parties to address some issues. Thank you.

18 MR. QUINN: I will.

19 ALJ WOLFE: On May 13, 2009 a procedural order
20 was issued setting today's procedural conference for the
21 purpose of allowing the parties to address three
22 procedural issues: Number one, whether the Alliance has
23 standing to bring the application; two, what issues should
24 be addressed in this proceeding; and three, whether a
25 hearing should be held, and, if so, the issues that should

1 be considered during the proceeding.

2 That procedural order also directed the parties
3 who believed that a hearing shall be held in this
4 proceeding to file, including all the issues that the
5 parties believe should be considered in the hearing. And
6 on June 15th, 2009 such filings were made by AEPCO, SSVEC,
7 SRP, TEP and UNS jointly, APS, Freeport-McMoRan and AECC
8 jointly, Sempra Energy Solutions, RUCO, and Staff. Those
9 were the filings that I received.

10 At this time I would like to give the parties an
11 opportunity to state their positions on those three issues
12 that were set out in the procedural order. And I am going
13 to call on the parties in the order that I took
14 appearances to state their position.

15 So The Solar Alliance, Mr. Wakefield?

16 MR. WAKEFIELD: Thank you.

17 Your Honor, Chairman Mayes, the Alliance is
18 standing in this proceeding to represent the interests of
19 its members. We have quoted in our filing that asked for
20 this procedural conference the case Direct Sellers, which
21 was a trade association that the court ruled had standing
22 to seek a declaratory judgment regarding the
23 constitutionality of an attempt to regulate the conduct of
24 its member. That is essentially very similar to the
25 question before the Commission in this proceeding, is to

1 whether the Commission feels like it has the authority to
2 attempt to regulate the conduct of The Solar Alliance's
3 members in the provision of SSAs that meet the 12
4 characteristics that we set forth in the application.

5 Several of the other parties have cited to a case
6 from last year of the Court of Appeals in Home Builders
7 Association versus Kard, and it determined that the Home
8 Builders Association did not have standing in that
9 proceeding. But if you look at that case, it comes down
10 to the fact that the court found that the association
11 didn't have standing because it had not asserted that
12 there would be any specific harm to the association or any
13 of its member. In this case the application is asserted.

14 MR. JONES: Speak louder.

15 MR. WAKEFIELD: I will be happy to speak louder.

16 The association -- or the Alliance has indicated
17 in its application that the growth of its members'
18 business has been hampered by the uncertainty about the
19 issue of whether an SSA is or is not -- or the provider of
20 an SSA is or is not a public service company.

21 In addition, there has been a number of public
22 comment letters filed from potential customers who have
23 reiterated that the uncertainty about the question has
24 prevented them from moving forward with deals.

25 In addition, while the Alliance doesn't believe

1 it's necessary, the Commission could waive any standing
2 requirement because of the great public importance of the
3 question that is presented and the likelihood that the
4 question would recur and ultimately be brought to the
5 Commission.

6 The Commission has already recognized the
7 importance of distributed renewal resources to Arizona's
8 future in its REST rules, and we think that they recognize
9 the substantial importance of making these resources
10 available on a distributed basis to customers. And this is
11 an important financing mechanism to make those resources
12 available to customers.

13 With respect to the scope of the proceeding, the
14 parties have expressed widely divergent views about the scope
15 of the issues that the Commission should consider. The
16 Alliance's application, however, asked a very narrow
17 question: Whether providers of SSAs that possess the 12
18 characteristics that were outlined in that application
19 would be public service companies or not.

20 The Alliance is not requesting a determination
21 that any possible SSA that might be offered by any one of
22 its member or anyone who is not a member of the Alliance
23 would trigger regulation by the Commission as a public
24 service company or that any specific SSA contract does not
25 bring one within the definition of a public service

1 company.

2 Thus the questions about whether some other
3 combinations of characteristics might make one a public
4 service company or not are not within the scope of what
5 relief the Alliance is requesting in this proceeding. I
6 can understand why parties and even the Commission might
7 be interested in those questions, but they are not
8 necessary to decide the question that is presented by this
9 application.

10 Let me just specifically address one of the
11 scenarios that was proposed, and I think it was in APS's
12 comments. And just to be clear, the Alliance is not
13 requesting that there be determination that a facility
14 that serves multiple customers would not be a public
15 service company. The 12 characteristics were meant to
16 apply to a single facility serving a single customer, and
17 that is the parameters of characteristics on which we are
18 asking for the Commission's declaratory order.

19 Likewise, it's not necessary to examine the
20 Commission's previous conclusions about whether meter
21 service providers or meter reading services providers are
22 subject to the Commission's regulation. The Commission
23 has addressed that question in the adoption of its
24 competition rules. If the Commission has any desire to
25 address that question again or revisit that question, they

1 are free to do so, but this really isn't the proceeding in
2 which that question should be raised.

3 Several parties have suggested that public
4 interest requires the Commission to examine matters of
5 safety, reliability, resource plans, and the potential to
6 create stranded costs. Now, the Alliance does not dispute
7 that the Commission might have concerns about these
8 issues, but those concerns are not triggered by the use of
9 the SSA model to finance distributed generation; rather,
10 those are triggered by distributed solar generation
11 generally. And the Commission really should address some
12 of those questions but in a more generic way than just a
13 proceeding that talks about SSAs.

14 I don't believe that the Commission would want,
15 as a result of this proceeding, to make statements about
16 how an SSA provider has to interconnect with the incumbent
17 utility. That would only apply to an SSA provider. I
18 think that they would want those rules to apply across the
19 board. So to the extent that those are issues that the
20 Commission needs to speak on, it really needs to do that
21 in a more generic proceeding than one that is limited to
22 the question of SSA providers.

23 The direct customer ownership of solar facilities
24 or customers who lease solar facilities, neither of which
25 I think any party has suggested would trigger regulation

1 by this Commission as a public service company, also
2 raised these same questions about safety, reliability,
3 resource planning, potential stranded cost; yet the
4 Commission has already determined that use of distributed
5 solar resources as part of the state's electric resource
6 is in the public interest. There is no need for the
7 Commission to further consider the issue of whether it's
8 in the public interest to have distributed solar. The
9 Commission has already spoken to that.

10 If the Commission feels they need to speak to the
11 term under which interconnection takes place, things like
12 that, clearly the Commission ought to do that more
13 generically than just with respect to SSAs. And, in fact,
14 the Commission has several dockets that are looking at
15 some of these issues on a more generic basis. The
16 Commission has instructed its Staff to convert its, what
17 had been informally referred to as the interconnection
18 document, into the interconnection rules, and so there is
19 a proceeding in which those issues are relevant for
20 exploration.

21 In addition, the Commission has an integrated
22 resource plan docket that can examine the use of
23 distributed solar generation and how that implicates
24 resource planning. And in that context it can apply to
25 distributed solar generation regardless of what financing

1 mechanism is used to finance it.

2 So those questions -- we don't dispute that the
3 Commission has an interest in those questions; we just
4 think those questions should be addressed in other
5 proceedings, many of which are already underway and fit
6 nicely within some of those other proceedings.

7 Several of the issues that parties have suggested
8 ought to be examined here are also really putting the cart
9 before the horse. They are questions of, if the
10 Commission determines that what the Alliance has proposed
11 does make one a public service company, then something
12 else, for instance, is there a lesser form of regulation
13 that might be appropriate or, you know, again, what kind
14 of safety issues are raised by that?

15 First, though, you have to determine whether or
16 not the financing mechanism is or is not a public service
17 company. Further, I think one party addressed an issue --
18 potential issue of the financial capability of the SSA
19 providers and their fitness to serve. Again, that is
20 putting the cart before the house. If these matters are
21 subject to regulation as public service companies, then
22 those are issues that are raised in the CC&N proceeding
23 where the Commission can look at the specifics of
24 financial capabilities, fitness to serve for the specific
25 providers who are coming forward seeking a certificate and

1 seeking to offer their services recognizing that the
2 Commission at that point has decided that they are subject
3 to that regulation.

4 As to the question of whether a hearing is
5 necessary, the Commission has in the not terribly distant
6 past adjudicated matters, at least one matter, without a
7 hearing. In the Southwestern Transmission Cooperative
8 application the Commission handled that matter without a
9 hearing, and that was not a cut-and-dry application.
10 There was disagreement between the applicant and Staff in
11 that proceeding as to whether the application -- whether
12 the adjudication should or shouldn't be granted.

13 So there were opposing parties. They had very
14 different recommendations to the Commission about whether
15 it should grant such an adjudication. And yet the matter
16 was handled on a prefiled statement of what the facts are.
17 And essentially the application that we filed sets forward
18 the facts in which we ask this Commission to make its
19 declaratory order, that those are the parameters of what
20 we are asking for the Commission to speak on.

21 And so I think that the Commission can resolve
22 this matter without a hearing. Obviously the question of
23 whether there is a hearing or not is largely dependent
24 upon what the Commission feels like the issues should be
25 that it needs to consider. And the Alliance has a narrow

1 view of what issues the Commission needs to consider.

2 If the Commission concluded that it needed a
3 broader perspective of issues, then maybe a hearing would
4 be necessary to examine some of those questions, but we
5 think that the Commission can proceed to issue its
6 declaratory order based on the application and the 12
7 characteristics that we have set forth in our application.

8 Essentially, our application is our opening legal
9 brief as to why an application of those 12 characteristics
10 is not a public service company, and if the Commission
11 wishes to really expedite this proceeding, I think the
12 fastest way to get to the end is to just ask the other
13 parties to file their legal brief, let the Alliance file
14 its reply brief, and then send the matter to the
15 Commission for the ALJ to recommend an order.

16 Thank you.

17 ALJ WOLFE: Thank you, Mr. Wakefield.

18 Mr. Grant, AEPCO.

19 MR. GRANT: Judge Wolfe and Chairman Mayes, good
20 morning again. Mike Grant on behalf of Arizona Electric
21 Power Cooperative. I apologize. I have somewhat of a
22 cold this morning, so I'm a little clogged up.

23 The standing issue has been well briefed, and I
24 won't recover all that ground, but I do want to stress
25 that in the context of standing you actually have two

1 separate but related issues. The first one is standing in
2 its classic sense, that being, does the Commission have
3 before it a real party or real parties in interest, with a
4 sufficient interest in and knowledge and information about
5 this subject to produce something other than a
6 hypothetical or an advisory opinion? And the answer to
7 that question is clearly, no.

8 The Solar Alliance is a trade association, which
9 will not provide any services to the public. In response
10 to Staff data requests the Alliance also has made it clear
11 that it does not represent its members here and doesn't
12 intend to do so.

13 Although the Alliance is familiar with the
14 operation of its members, that familiarity and its ability
15 to operate a 12-point hypothetical business model, which
16 incidentally the Alliance says it might be an 18-point
17 model or it might be a 9-point model, is simply not the
18 vested in and the firsthand knowledge that the cases on
19 standing require.

20 That the response to Mr. Wakefield's point about,
21 well, we have given you 12 points and you can adjudicate
22 that. In large measure, how does the Commission then
23 police whether or not the number of entities and different
24 corporations in the field are, in fact, following that
25 dozen points or going with 18 or going with 9.

1 Further, The Solar Alliance has made it clear
2 that its members, the businesses who do have the interest
3 in the subject, the knowledge and information to provide
4 the Commission a basis upon which to act, are not
5 applicants. Each one of those members is going to have a
6 different business plan, different operational and
7 financial capabilities, a different contract or contracts,
8 a different way of doing business, which simply can't be
9 generalized by The Solar Alliance to produce a reliable
10 fact set upon which the Commission can proceed.

11 The Southwest Transmission Cooperative case was
12 markedly different than this case. You had a corporation
13 actually in the field that the attorney for the applicant
14 and Staff counsel argued for about three months on a
15 stipulated, relevant, and reliable set of facts, at which
16 point we briefed it, and we came to the Commission with
17 oral argument. This Commission knew, and so did the
18 courts, precisely what Southwest Transmission Cooperative
19 was doing, intended to do, what the impact would be on
20 other public service corporations, what the audience was
21 for its services, none of which is known to the Commission
22 in this case.

23 The Alliance simply does not have standing in its
24 classic sense.

25 Second, related to that classic standing

1 deficiency is a somewhat different issue, that being, does
2 this proceeding have jurisdictional standing in its
3 current posture? Can the Commission decide to exempt an
4 entire class of activity from Article 15, Section 2's
5 express wording based upon a hypothetical fact set
6 presented by a nonprovider? The answer to that standing
7 issue is also, no.

8 Here there is no doubt that what The Solar
9 Alliance members are doing or will do is furnish
10 electricity for light, fuel, or power to consumers. That
11 makes them public service corporations under Article 15,
12 Section 2 of our constitution. But, Surv-Yu, and several
13 cases after it, have come along to say that the inquiry
14 doesn't necessarily have to stop there.

15 Based upon consideration of and a balancing of
16 eight very fact-intensive criteria, Surv-Yu acts as what I
17 refer to as a factual steam valve allowing the Commission
18 and the courts to conclude, based upon a set of facts, if
19 appropriate, that even though the literal words of the
20 constitution might apply, a business may not be regulated
21 as a PSC if the balancing of those facts cuts in its
22 favor.

23 But that is where the standing requirement once
24 again comes into play. The Commission and the courts have
25 to base that balancing decision on an actual set or sets

1 of facts, in the words of Surv-Yu, as to what the
2 corporation actually does. Here the corporations, which
3 will actually be doing something, aren't even before the
4 Commission.

5 All The Solar Alliance can do and has done is
6 proffer a hypothetical model loaded with lots the factual
7 questions about scope of activity, nature of activity,
8 intended targets of activity, just to name a few, which
9 its members may or may not actually use in the field.
10 That simply is not a sufficient basis for this Commission
11 or the courts to conclude that the express words of the
12 constitution can be ignored, notwithstanding the fact that
13 what Alliance members would do is furnish electricity for
14 light, fuel, or power.

15 So on both lines of analyses, tradition standing
16 and what I am referring to as jurisdictional standing, The
17 Solar Alliance doesn't have standing. It hasn't conferred
18 upon the Commission's standing to prosecute this
19 application. Its members do, and the application should
20 be dismissed with leave for a real party or parties in
21 interest to refile.

22 Having said that, I would stress that AEPCO and
23 its member-distribution cooperatives have a keen interest
24 in encouraging distributed renewables deployment.
25 Distributed generation has been a cornerstone of the

1 cooperatives REST plan, quite honestly because they have
2 very few other opportunities to deploy renewable
3 technologies, and that is why AEPCO continues to urge this
4 as an excellent candidate for a workshop process, not
5 necessarily to work through the public service corporation
6 issues, because quite candidly I don't think you can
7 defeat the fact that electricity is being supplied for
8 light, fuel, or power, but what workshops can do is
9 explore several alternatives that could make this lawful.

10 Staff and other parties have mentioned several --
11 I'm not an expert in those -- but they include the use of
12 riddle or lease agreements, maybe firm buyout contract
13 options, selling the power to the consumer but through the
14 regulated utility in perhaps a lighter or a different
15 system of regulation. Workshops would be an efficient and
16 a much quicker way to work through what can hopefully be a
17 positive result for utilities, alliance providers, this
18 Commission, and consumers.

19 On hearing issues, we have identified a number of
20 issues in our filing, Judge, and obviously we take the
21 position that a hearing at this point is not appropriate.

22 Thank you very much.

23 ALJ WOLFE: Thank you, Mr. Grant.

24 Mr. Quinn for Mohave and Navopache.

25 MR. QUINN: Mohave and Navopache have nothing

1 substantively to add, but we simply would like to
2 generally support Mr. Grant's comments and other utility
3 parties' comments on these matter.

4 Thank you.

5 ALJ WOLFE: Thank you.

6 Mr. Carroll?

7 MR. CARROLL: Thank you, Your Honor.

8 As Sulphur Springs indicated in the comments that
9 it filed, Sulphur is in support of positions raised beside
10 AEPCO in its June 15th filing as well as the fact that we
11 echo the comments that Mr. Grant just made.

12 We think that there is a threshold legal issue
13 that has been raised with respect to the standing issue,
14 and that before time and resources are spent through a,
15 what looks like would be a very comprehensive evidentiary
16 hearing, that there should be a legal determination made
17 by the Commission on the issue of standing before going
18 forward with a hearing.

19 Because if the Commission does rule that there is
20 no standing, the necessity for a hearing along the lines
21 as set forth in various pleadings would not be necessary,
22 and the individual members of The Solar Alliance would
23 then probably end up filing their own applications for
24 declaratory based on the specific set of facts.

25 So again, we echo AEPCO's comments and believe

1 that that threshold legal issue should be decided prior to
2 having an evidentiary hearing.

3 Thank you.

4 ALJ WOLFE: Thank you, Mr. Carroll.

5 Mr. Jones?

6 MR. JONES: Trico supports AEPCO's legal position
7 on standing as well of that of RUCO's. We believe that
8 that is an issue that should be determined in this
9 particular proceeding. If not, then we support the
10 additional issues raised by AEPCO in its filing.

11 Thank you.

12 ALJ WOLFE: Thank you, Mr. Jones.

13 Mr. Sundlof for SRP.

14 MR. SUNDLOF: Thank you, Hearing Officer Wolfe,
15 Chairman Mayes. Kenneth Sundlof for the Salt River
16 Project.

17 I don't have anything to add to Mr. Grant's
18 excellent presentation. He is right, and he set out all
19 the reasons. It's quite clear that an entity that really
20 has no connection other than a membership to the issues
21 can come in and get a declaratory order for an entire
22 industry. That seem very strange.

23 It seems pretty unusual to us that we don't have
24 some of these providers stepping forward at least
25 intervening or becoming parties in this case so that we

1 can explore the many issues that Mr. Grant mentioned.

2 You know, from the utility perspective, this is
3 an important issue. And everybody -- the utilities and
4 customers and the Commission and the industry in
5 general -- recognize that these providers bring to us a
6 source of capital, an ability to monetize tax credits, and
7 perhaps innovation and marketing skills, all of which will
8 help all of us further the objective of bringing solar
9 energy to the state and replacing fossil fuel kilowatt
10 hours where we can.

11 So for Salt River Project, and I think the rest
12 of the utilities, we say that we are very interested in
13 working for these industries and these companies. And, in
14 fact, we have had a meeting with The Solar Alliance
15 already to further the idea of seeing how we could work
16 cooperatively to further our mutual objectives.

17 And I think what Mr. Grant said is right on, that
18 we will continue our -- we will, of course, continue our
19 individual meetings, but I think the workshop would be in
20 order. There are a lot of business structures that we
21 could put together that may be able to advantage ourselves
22 with the things that these solar providers bring to the
23 state, yet do so in a way that protect consumers and is in
24 accordance with the general law.

25 I think the worst situation would be that the

1 legal issues sort of roll on, roll on, roll on for a long
2 period of time and we miss opportunities. It is probably
3 good that we --

4 I would support Mr. Grant, and this application
5 should be denied. But that shouldn't be the end of it.
6 We should move forward with workshops and one-on-one
7 meetings to see how we could move the whole ball forward
8 in a way that complies with the law and in a way that
9 benefits all the parties.

10 Thank you.

11 ALJ WOLFE: Thank you, Mr. Sundlof.

12 Mr. Patten for TEP and UNS Electric.

13 MR. PATTEN: Thank you, Your Honor.

14 TEP and UNS Electric did not take a position on
15 the standing issue in their papers comments. I do agree
16 that it's a threshold issue that the Commission needs to
17 consider.

18 We do think that the model proposed by The Solar
19 Alliance needs to be clarified if it's going to end up
20 being some sort of guideline to dictate which companies
21 are subject to Commission jurisdiction and which are not.
22 At this point we would have identified concerns, as has
23 Staff and many other parties, about the 12 characteristics
24 that are underlying this particular application.

25 Beyond that, I think the other parties have

1 stated the issues enough at this point.

2 ALJ WOLFE: Thank you, Mr. Patten.

3 Ms. Scott for APS?

4 MS. DEBORAH SCOTT: Your Honor, Chairman Mayes, I
5 think APS has a unique utilities position in this
6 particular case.

7 When we first decided to intervene, it was our
8 intent to simply monitor the proceedings. We are really
9 looking at this from a practical approach based on our
10 business practices currently.

11 It's clear that the Commission has set forth a
12 public policy mandate with the adoption of the REST rules,
13 and the explicit distributed energy requirement is a
14 fundamental component of that, those rules. And we
15 recognize that solar facility providers are fundamental in
16 providing these kinds of facilities and allowing us to
17 meet our REST requirements.

18 So we support arrangements that provide customers
19 with flexibility to acquire solar systems. We have
20 observed that nonresidential customers have a growing
21 interest in a distributed energy model where a third party
22 installs, owns, and operates renewable energy systems.
23 And today APS's business practices is administering our
24 REST incentive to accommodate this approach.

25 We have a distributed energy administrative

1 process that has been reviewed and approved by this
2 Commission. And under that process the payment
3 arrangement between the customer and the third party, and
4 whether or not the customer actually owns the system, are
5 not in consideration when we pay those incentives. The
6 key consideration is whether or not the customer owns the
7 renewal energy credits. We believe that this is a
8 flexible approach and allows our customers more
9 opportunities to meet -- to acquire solar facilities and
10 for to us meet our REST requirements.

11 From a legal perspective, we know that an
12 electric customer has the right to install a renewable
13 energy facility on their premises to offset the amount of
14 energy they need to procure from a utility, similar to an
15 individual's right to drill a well.

16 The facts that are brought forth in the
17 Alliance's application do raise legal issues of, if in
18 fact it was a well driller that was selling the water,
19 would that change the circumstances? I'm not sure. And
20 APS is not weighing in on that issue, and we are not
21 taking a position on standing.

22 APS does have concerns should The Solar Alliance,
23 or any solar provider, attempt to expand that business
24 model where perhaps they would work with a master-planned
25 community and put in a solar substation and provide

1 electricity to all the homes or a shopping center would
2 provide electricity from a sole source to the multiple
3 tenants. We believe that is a different situation.
4 Mr. Wakefield has stated here today that that is not the
5 business model that is being brought to you, but that
6 is -- frankly, that is the one we are concerned about and
7 why we are involved in this case.

8 We have no objection to a hearing.

9 That is our position.

10 ALJ WOLFE: Thank you, Ms. Scott.

11 Mr. Crockett for Freeport-McMoRan and AECC.

12 MR. CROCKETT: Thank you, Judge Wolfe and
13 Chairman Mayes. Webb Crockett for AECC in connection with
14 this matter.

15 I want to just briefly touch on the three points
16 that were raised in the Judge's procedural order in this
17 regard.

18 The first related to standing, I would like to
19 simply point out that I have been involved in many
20 proceedings over the years before this Commission in which
21 you have various organizations, such as councils,
22 projects, other types of organizations, that you could
23 make the same argument as to whether they lack standing or
24 not. It's rather interesting that that issue has been
25 raised in connection with this proceeding because I do

1 believe that what has been raised by the application in
2 connection with this proceeding is of significant public
3 interest.

4 And as Attorney Scott has pointed out with
5 reference to APS, I also know with reference to TEP and
6 Salt River Project and some of these others, one of the
7 major issues now before this Commission, which has been
8 addressed in connection with the renewable energy standard
9 rules, demand-side management, energy efficiency
10 proceedings and hearings, and the resource development,
11 and the development of solar energy, the development of
12 wind power, all of those issues are presently pending in
13 some form or another before this Commission, and I do
14 believe that the application of the applicant, The Solar
15 Alliance, in connection with this matter helps to focus in
16 on some of those issues.

17 And I recall with a number of years of lobbying
18 before the Arizona legislature, that if you wanted to kill
19 a bill, get it assigned to a workshop. And I am very
20 concerned about assigning some of these issues because I
21 do believe that if they are public interest issues that
22 should be addressed as quickly as possible, in order to
23 further the goals and direction of this Commission to our
24 developing of renewable sources of energy as quickly as
25 possible. So I think this is one of the things that will

1 help accomplish that.

2 That doesn't mean to say that in connection with
3 an individual situation, as to whether that entity is
4 acting as a public service corporation, I think
5 Mr. Wakefield pointed out that maybe if one of those
6 entities is providing services to a group of customers,
7 that might constitute a public service undertaking or
8 whatever it is.

9 So I'm not saying that in connection with any
10 particular entity there shouldn't be a hearing held and a
11 determination made on the facts situation involving that
12 entity, as to whether they are a public conservation
13 corporation.

14 Secondly, with reference to the issues, I have
15 outlined in the brief filed with this Commission on page 2
16 the issues that we feel should be addressed in connection
17 with a hearing. And I might state in that regard that we
18 do believe that the hearing would be appropriate to
19 address the issues, not only the issues that have been
20 addressed by AECC, but the issues that have been addressed
21 by many of the other parties. I think they are rather
22 broad, and I think that they do merit some attention being
23 given to those issues that have been raised.

24 But in particular with reference to The Solar
25 Alliance application, I think what they have done is they

1 have stated some facts in which they have raised the
2 question as to whether -- under those fact
3 situations whether they, an entity who complied with that
4 fact situation, constituted as a public service
5 corporation under the laws of the state of Arizona. The
6 issue that arises in that regard is that if you vary some
7 of those facts, would that preclude them of being -- from
8 a determination being made as to whether they were a
9 public service corporation?

10 And in that regard I might point out that some
11 guidance that would come out of this proceeding to the
12 various entities -- and I understand that there are many,
13 many entities out there who are interested in providing
14 solar power, not only solar power, but wind power as well
15 within the state of Arizona -- I think some guidance out
16 of the Commission as to what does constitute a public
17 service offering would be helpful and would be beneficial,
18 not only to the parties that are here appearing today, but
19 to the Staff and Commission themselves to reduce down the
20 fact situations so that when an entity comes in they know
21 the parameters under which they would be directed to
22 provide, as to whether they would -- their service would
23 constitute a public service offering or not.

24 I would like to point out that if this Commission
25 does determine that there is standing on the part of the

1 Alliance and does determine to go forward in connection
2 with a hearing in that regard, I think that one of the
3 major issues would be that the type of regulation that
4 ought to be considered, whether you are talking about a
5 full-blown public utility such as Salt River Project, TEP,
6 Arizona Public Service, the co-ops or whether you would
7 look at the parameters that at one point in time was
8 established for electric service providers for meter
9 reading, coin-operated public telephones. Maybe you ought
10 to look at the issues concerning finances have also been
11 addressed in connection with those issues, as to whether
12 an entity is financially capable of performing and also
13 whether an agency, I guess, who they may lodge complaints.

14 I do remember sitting in this hearing room not
15 too long ago with reference to a provision of reducing
16 demand, and Arizona Public Service entering into an
17 agreement with an entity who will manage the demand
18 requirements and the issue that arose -- and they would do
19 that by -- this entity would contract with customers of
20 Arizona Public Service. And I know the issue was raised
21 by the Commission as to the ability of that entity to
22 perform in a given situation; when Arizona Public Service
23 was in need of a demand, whether they could perform. And
24 if they were unable to perform, what safeguards were there
25 in that regard, that is whether there were bonds, whether

1 there were letters of credit or some of those other
2 things. Those are all things that have been considered by
3 this Commission in connection with other proceedings.

4 So I do believe that with reference to the stress
5 that has been made with reference to renewable energy,
6 these are issues that we ought to be addressing in the
7 context of a hearing as opposed to a workshop so we can
8 move on as quickly as possible and encourage some of these
9 solar providers to do business here within the state of
10 Arizona to help reduce the need to use fossil fuels for
11 purposes of generating electricity.

12 So in that regard I do believe that The
13 Alliance -- that there should be a determination made that
14 the Alliance does have standing; No. 2, that there should
15 be a hearing; and No. 3, that the issues that have been
16 raised by the parties in connection with the filings that
17 they have made in connection with this procedural order
18 hearing should be addressed in connection with that
19 hearing.

20 With that, I conclude my remarks. Thank you.

21 ALJ WOLFE: Thank you, Mr. Crockett.

22 Mr. Fox for the Interstate Renewable Energy
23 Council.

24 MR. FOX: Your Honor, Commissioner Mayes, I
25 appreciate the opportunity to speak on this very important

1 topic.

2 To understand IREC's positions on these issues, I
3 think it's important to understand IREC's interest in this
4 proceeding.

5 IREC is a nonprofit organization that works with
6 State agencies to remove regulatory barriers to deployment
7 of renewable distributed generation.

8 Over the past year IREC has appeared before 20
9 state public utility commissions in 29 proceedings
10 addressing issues related to interconnection, net
11 metering, and third party financing of photovoltaic and
12 other renewable distributed generation systems.

13 The largest source of funding for this work comes
14 from the U.S. Department of Energy Solar Market
15 Transformation Program.

16 Among the proceedings that IREC has been involved
17 in over the past year have included third party financing
18 considerations in the states of Oregon, Nevada, and
19 Colorado. IREC is also presently addressing this
20 important issue in Massachusetts, Utah, and here in
21 Arizona.

22 IREC has two strong interests in this matter.
23 First, SSAs have become a preferred financing option for
24 nonresidential systems. As IREC noted in its comments on
25 the Staff report in this proceeding, an estimated

1 90 percent of nonresidential solar is currently being
2 installed under SSA arrangements. Having been embraced by
3 the market as a preferred means of financing, IREC
4 believes that SSAs are an essential component for
5 continued sustained PV-marked growth.

6 Importantly, of the 10 states that lead in the
7 country for the most installed solar capacity, all but
8 three allows SSAs to be used in an unregulated fashion.
9 Of the three that do not presently openly allow the use or
10 sanctions use of SSAs -- two of these states are Hawaii
11 and North Carolina -- this issue has simply not been
12 addressed in those states. The reason that those states
13 were able to place in the top 10 list is because they have
14 a few large PV installations that increase the overall
15 market penetration of PV in those states.

16 The third state is Arizona. Arizona currently is
17 No. 7 in terms of installed solar PV capacity. It might
18 be tempting to think that if Arizona has been able to
19 place No. 7 so far amongst the states that SSAs may not be
20 important here. I would challenge that.

21 I think it's important to understand that Arizona
22 places No. 7 in a large part because of systems that are
23 currently installed in the state under SSA arrangements,
24 like the system that is currently in place at Arizona
25 State University.

1 Second, IREC has a very close relationship with
2 the Department of Energy's Solar American Cities. IREC
3 assists these cities in deploying their local solar plans.
4 The cities were required to develop these in their
5 application for becoming a solar American city. One of
6 these cities is Tucson.

7 Importantly, Tucson has signed a PPA deal with
8 one of the Solar Alliance members. That installation is
9 presently on hold pending the outcome of this proceeding.

10 IREC believes that The Solar Alliance's standing
11 to bring this application should not be in dispute. At
12 issue is whether numerous members of The Solar Alliance
13 who either have signed SSA agreements or are interested in
14 signing SSA agreements have regulatory requirements that
15 must be complied with prior to or during the provision of
16 service in this state.

17 The Commission would appear to have two options
18 for addressing this issue: Address the potential
19 requirements of one proceeding, thereby providing guidance
20 to all companies and interested Arizonans looking to
21 engage in SSA arrangements, or address the applications
22 serially on either a per-company or per-installation
23 basis.

24 For several reasons IREC believes the first
25 alternative is far superior. First, a number of school

1 districts, commercial enterprises, and other interested
2 stakeholders have asked the Commission to clarify their
3 options for financing solar.

4 Second, requiring a serial application
5 significantly increases the cost for companies who are
6 looking to do business in Arizona. IREC is particularly
7 concerned that the cost of per-installation applications
8 may be prohibited for all but very large SSA agreements.

9 Third, many parties have limited resources and
10 would be unable to effectively participate in a series of
11 proceedings. IREC is one such party.

12 For these reasons IREC respectfully requests that
13 the public interest in this matter requires the Commission
14 to provide guidance through the adjudication of the
15 instant application, that The Solar Alliance may
16 effectively speak for the financial interests of its
17 member should not be in question.

18 Although IREC believes that The Solar Alliance
19 application really raises an important legal question,
20 IREC respectfully disagrees that hearings are necessary to
21 answer this question. Although, parties have raised a
22 number of important issues in suggesting a need for a
23 hearing, IREC believes that the issues that have been
24 raised are either irrelevant to reaching a decision, are
25 outside the scope of this proceeding, or require a

1 second-guessing at decisions already made by this
2 Commission.

3 In regard to issues that are irrelevant to
4 reaching a decision, IREC believes that issues such as the
5 viability of alternative business models, the impact of
6 regulation on SSAs, and the possibility the lighter forms
7 of regulation are simply irrelevant to an application of
8 the Surv-Yu factors to the instant application. These
9 issues are certainly worth discussing depending upon the
10 outcome of this proceeding, but at this time these issues
11 represent a needless expansion of the issues in this
12 docket.

13 Second, IREC believes that issues related to grid
14 safety and reliability, although very important
15 considerations, are beyond the scope of this proceeding.
16 These issues are simply not unique to SSA arrangements.
17 They are concerns regardless of who owns the system; thus,
18 they are best interested in a forum that encompasses all
19 forms of ownerships, including sales and leases. IREC
20 respectfully requests that those issues be more
21 appropriately taken up in the Commission's interconnection
22 docket.

23 Finally, there are issue that have been flagged
24 for possible discussion that are an invitation to rehash
25 policy decisions already made by the Commission. These

1 issues include impacts on utility resource planning and
2 impacts on utility revenue requirements. Not only are
3 these beyond the scope of the proceeding, they invite a
4 second-guessing of policy established by the Commission in
5 its REST rules.

6 In sum, what is before this Commission is the
7 question of whether SSA provision is one of the rare
8 instances where regulation is necessary. As the Supreme
9 Court of this state noted in ACC v. Nicholson, free
10 enterprise and competition is the general rule; government
11 controls the exception.

12 IREC notes that several parties have already
13 stated conclusions on the legal merits in briefs on the
14 Staff report. Apparently these parties believe that
15 sufficient facts already exist in the record to reach a
16 conclusion. As such, IREC believes that hearings would
17 serve as expensive and unproductive venues to discuss
18 issues that are either beyond the scope of the proceeding,
19 simply irrelevant to reach a decision, or to invite a
20 rehashing of decisions that have already been made.

21 Accordingly, IREC respectfully requests that the
22 Commission allow parties to submit briefs on the legal
23 issue, and that the Commission reach a legal determination
24 on the merits of that basis.

25 Thank you.

1 ALJ WOLFE: Thank you, Mr. Fox.

2 Mr. Pozefsky for RUCO.

3 MR. POZEFSKY: Again, good morning, Your Honor.
4 Good morning, Chair Mayes. You know, being able to go
5 last is great because you get to sit and listen to
6 everybody and then respond, and also you get to cut your
7 argument a lot shorter, which is what I'm going to do. I
8 think a lot of what RUCO has to say has been discussed at
9 length, and I surely don't want to reiterate it.

10 Of course we agree with what Mr. Grant had to
11 say. I thought it was eloquently worded and really did
12 cover a lot of the issue of standing.

13 You know, I don't think that the issue of
14 standing is separate from the other issues, the issues
15 that need to be discussed.

16 What we did when we originally got into this --
17 and I think I even advised Mr. Wakefield of this -- we too
18 took a posture that our interest was more in the line of
19 just managing or just watching, not really being too
20 active. But as we read through the application and the
21 comments made by the company, it really -- you can't help
22 but question what is being asked for here, and more
23 importantly, why? And we still don't have an answer to
24 that. And again, I think that is going to go to a lot of
25 the questions that we will have in the end when we do

1 go -- if we do have a hearing here.

2 Well, let me talk about the standing because I
3 think that touches upon all this. The standing, the law
4 is pretty clear on it. The distinctions that are being
5 made really are factual distinctions between the
6 circumstances of different cases, which are the companies
7 that are applying or the entities that are applying.

8 One thing, there are a couple concepts that are
9 pretty basic here with standing. One is that it's not a
10 light standard or a standard which the Commission should
11 simply just ignore and take a little difference to. And I
12 agree with Mr. Crockett. You know, it is kind of unusual
13 that we are discussing this issue of standing. In all of
14 the years I have been here, I can't remember a challenge
15 to standing either, at least one that picked up some
16 wheels and moved.

17 Again, this one, the fact that in what is being
18 requested, the application begs the issue of standing.
19 For instance, one of the things that you need is you need
20 an interest in the outcome. That is a basic standard of
21 standing. And again, the question goes to, well, why
22 would a non-profit trade association that targets
23 legislators and regulators to make the transition to solar
24 power by providing policy expertise, what is their direct
25 connection to whether SSAs of its members actually are

1 subject to public regulation? There's a missing link
2 there.

3 Obviously, as Mr. Grant pointed out, you can make
4 that link with the members, but why would the trade
5 association -- this is also what differentiates this case
6 from a lot of other cases that we have talked about, the
7 Kard case and all. There really is a direct association
8 between the Home Builders Association and its members.

9 Wherein the case of the Armory Park case, which
10 is the one that was issued by the Supreme Court back in
11 1985 and was sort of the template for the case of
12 representational standing -- in fact, that was the first
13 case where the Supreme Court or any court in this state
14 discussed reputational standing and set the parameters for
15 it in that case. What you had was there was a property
16 owners' group over its residents who were being harmed by
17 the community service organization that were giving out
18 free meals to transients. My point is that there really
19 was a direct correlation, and that link was lost in this
20 case.

21 So once you get beyond that question, well, the
22 next requirement for standing is the distinct and palpable
23 injury. And in all the discussions I heard today, I'm
24 still wondering, what is the distinct and palpable injury?

25 Is there an injury if the Commission were to make

1 the decision that it does have regulatory authority over
2 SSAs? Is that an injury or is that not an injury? I
3 don't know. Is there an injury not to have it? Where is
4 the injury here on what the Commission does? I'm at a
5 loss.

6 And then, again, on that interest and even on
7 this injury issue, Article 15, Section 2 -- no one has
8 talked about this -- applies to public service
9 corporations and their ability to be regulated by PSCs.
10 Well, what is being asked for here is for SSAs being
11 regulated by the PSC.

12 Again, there is a lack of connection there. I
13 don't understand how what is being asked for is something
14 that the Commission can actually do under Article 15,
15 Section 2, since it's not a PSC that we are talking about
16 here. It's a contract between the members and the
17 members' customers. So unlike -- that is why this case
18 begs the issue of standing, unlike most of the other
19 requests that I have seen through the years.

20 I know that there is a series of cases. I think
21 it was -- and I just mentioned the issue of -- or the case
22 Home Builders -- not Kard -- but the Armory Park, which
23 talks about the reputational standing requirement. And I
24 realize that there has been some talk about -- well, it's
25 been raised by the Alliance in its briefs and it has to do

1 with whether or not the Commission can actually waive this
2 standing requirement. And there is law, and I think it
3 was in the Armory Park case, where the Supreme Court said,
4 well, yes, there are instances where judicial entities can
5 waive the requirement of standing where it serves such a
6 great public importance.

7 And I -- you know, RUCO believes that solar power
8 energy efficiency is a great public importance, and if
9 that were really what was at issue here, that would be
10 something that we would say, okay, well, maybe we can look
11 past the standing requirement. But that really isn't what
12 is at issue here.

13 What is at issue here is just the decision as to
14 whether SSAs are subject to public service. If they are
15 not subject to them, that is not to say that they can't
16 continue to provide the service under SSAs. And if they
17 are, then the Commission will regulate them as it deems
18 appropriate. But either way, it will still go forward
19 whether they are regulated or not.

20 So I don't think what is not being sought is that
21 they can't participate in SSAs. That would be a different
22 thing, and that maybe would raise a public standard. I
23 don't know. Again, we don't know enough about why this
24 request is being made to know if this is going to happen
25 or not going to happen, depending on whether the

1 Commission makes -- depending on how the Commission's
2 determination goes.

3 A lot of these issues are things that I think
4 need to be raised in the context of a further proceeding.
5 If the Commission does determine that there is standing at
6 this point, I'm not going to go through each one of the
7 things that we have listed. I will say though that we did
8 suggest that a hearing would be appropriate. We followed
9 Staff's recommendations. I think that that ultimately may
10 be a faster resolution of this than a workshop process.

11 And the issues that we believe should be part of
12 it are all the issues I just raised along with the other
13 issues that we brought forth in our response to the
14 motion.

15 Thank you.

16 ALJ WOLFE: Thank you, Mr. Pozefsky.

17 Ms. Scott, for Staff? Ms. Wagner?

18 MS. WAGNER: Good morning, Your Honor, Chairman
19 Mayes. Janet Wagner on behalf of Commission Staff. And
20 again, the benefit of going last is that I will be able to
21 be brief.

22 I agree with many of the parties who have
23 previously spoken on the issue of standing. Staff
24 believes that there is no standing in this matter to bring
25 this application. You have an application before you

1 based on a hypothetical set of facts and there is no
2 actual provider before you to receive any adjudication.

3 And I think it's important to contrast this with
4 what the Commission is being asked to do with what happens
5 in a typical case where there is an adjudication.

6 Adjudication cases are typically very fact
7 specific. Some parties have referred to the Southwest
8 Transmission case today. I would suggest you to take an
9 opportunity at some point and compare that case with
10 another reported Arizona case, El Paso. Those two cases
11 do have some really remarkable similarities on the facts.
12 The court reached a different conclusion in each case. In
13 the Southwest Transmission it found that the company was a
14 public service corporation; in El Paso it found the
15 opposite.

16 So different conclusions can be reached on really
17 very small gradations of facts. I think that is an
18 important thing to keep in mind for adjudication.

19 Now, here there is an application before you,
20 based on hypothetical facts, without an actual provider,
21 and if that application were to be granted, it would have
22 very far-reaching implications for any entity that were to
23 provide a service under the transaction with the
24 characteristics they have described, in other words, not
25 just a single provider, but an essentially unidentified

1 group of providers. We don't know how many. We don't
2 know exactly what they would be doing. We don't know the
3 differences between them. We don't know whether they
4 would be limited to the characteristics they have
5 described or whether they would have more or fewer.

6 This doesn't mean that the lack -- that lack of
7 standing, in Staff's opinion, doesn't mean that the
8 Commission can't move forward to consider what Staff
9 agrees are very important issues in some generic way. We
10 think it's important to try to find a practical approach.

11 I think aside from what the parties in their
12 individual -- with their individual goals and objectives
13 may want, one thing that is important to keep in mind here
14 is that there is an issue before the Commission that would
15 benefit from some analysis and perhaps some statement to
16 the Commission. I think what is important to bear in mind
17 is to find a way that would be helpful to the Commission
18 in determining some analysis or evaluation of these
19 issues.

20 Now, whether that would be a hearing or a
21 workshop or whether that would simply be additional
22 briefing resulting in some sort of Commission order in the
23 form of a policy statement, those are all possibilities.
24 All of those would be acceptable to Staff.

25 I would just note that this case has attracted a

1 number of intervenors, and a number of those intervenors
2 have suggested a hearing, have identified issues in which
3 they have a particular interest. There may now be --
4 there certainly are some due process interests to those
5 parties.

6 I want to make clear, Staff fully supports
7 efforts to making the acquisition of solar distributed
8 renewal facilities more assessable to the public. And
9 although we do fully support those efforts, I think what
10 is important to bear in mind here is that this case may
11 well have jurisdictional implications for the Commission,
12 too.

13 It would be very easy and perhaps tempting to
14 just adjudicate, just grant the application and move on.
15 I think the difficulty with that, and the cautionary note
16 that Staff would offer, is that that may well have
17 implications in cases where other companies come forward
18 that may share in some similarities in circumstances where
19 the Commission may see a need to regulate them.

20 There have been some -- and I think this is a
21 dispute in the facts, frankly. I hear the Alliance
22 essentially asserting that there is no need to regulate
23 these particular kind of agreements. I think Staff is not
24 so certain of that, and we think that some further inquiry
25 on that would be appropriate.

1 There has also been some suggestion that those
2 kind of inquiries are outside of the scope of the
3 application. I think those assertions are absolutely --
4 well, just not in keeping at all in the case law of this
5 subject. I think if you looked at the Surv-Yu factor, if
6 you review the cases, you will see that the kinds of
7 considerations which can bar on that question, once you
8 get past the initial review of Article 15, Section 2,
9 those factors can and do vary widely from case to case.

10 Again, I will reiterate that certain parties have
11 stated it before. In Arizona it's a two-part inquiry.
12 First you look at Article 15, Section 2 to see if the
13 entity falls within the activities described there. I
14 think this transaction or these 12 characteristics clearly
15 do. Then we move on to the Surv-Yu factors and the
16 consideration of all other relevant public interest facts
17 and circumstances, and that is really a pretty broad kind
18 of consideration. And here is the reason why.

19 The Commission cannot make a jurisdiction
20 determination in a vacuum. That why it's important for
21 the Commission's consideration of this issue to be broad
22 based, especially in a case where the application is not
23 asking for the adjudication of a single provider, which
24 may be limited, but a host of essentially unidentified
25 providers who, you know, may or may not share all or very

1 many of these particular characteristics.

2 So I hope I have identified all the issues. We
3 had some concerns about standing. We think The Solar
4 Alliance does not have standing to bring this.
5 Nonetheless there are important issues here, and we think
6 it is important for the Commission to find a way that is
7 going to be helpful to the Commission to move forward to
8 consider these issues.

9 Generic hearings are a possibility. I remember
10 several years ago with the electric competition rules,
11 there was a generic hearing on the stranded cost issue.
12 Workshops may well be appropriate, nor does Staff have
13 objection to just simply additional briefing, if that were
14 to be the Commission's preference. Finally, I would note
15 the due process concerns in light of just the number of
16 parties who have now asked to participate in this
17 proceeding.

18 Thank you.

19 ALJ WOLFE: Thank you, Ms. Wagner.

20 Mr. Wakefield, would you like to have to
21 opportunity to respond?

22 MR. WAKEFIELD: I would. Thank you.

23 Let me start with the standing question. To
24 address some of Mr. Pozefsky's comments, the Alliance --
25 the case law is clear that as a trade association the

1 Alliance can represent the interests of its members, and
2 the injuries of its members, the interests and the outcome
3 of its individual members are sufficient for the
4 Commission to find standing.

5 While the Alliance's purpose itself is to address
6 regulatory issues, clearly the members are implicated --
7 have an interest in the outcome of this proceeding and the
8 question we are asking the Commission.

9 The injury to the clients, to the members of the
10 association, is the injury of not knowing the answer and
11 having the whole market sort of suspended in many ways.
12 Because those who provide financing for these deals are
13 oftentimes unwilling to move ahead because of uncertainty
14 as to whether these transactions subject the providers to
15 regulations or not.

16 So there are injuries to members merely by the
17 Commission not having answered the question. The injury
18 isn't necessarily whether the Commission answers the
19 question one way or another one as to whether they would
20 regulate, but not even knowing the answer is injury to the
21 members of the Alliance.

22 The Commission -- I'm sorry -- the application
23 doesn't ask the Commission to indicate whether the
24 contract -- these are public service companies -- the
25 application asks the Commission to determine whether the

1 entities that would provide SSAs are public service
2 companies. So we are not asking for a metamorphosis
3 determination of whether a deal is a public service
4 company but whether the one that provides the deal is a
5 public service company. So there is a potential tangible
6 entity that would be subject to the regulation if the
7 Commission decided that a provider of an SSA is a public
8 service company.

9 ALJ WOLFE: Mr. Wakefield, before you move on, I
10 have a question.

11 MR. WAKEFIELD: Yes.

12 ALJ WOLFE: This injury in not knowing the
13 answer, there is an alternative procedure for that member
14 to find out the answer, is there not?

15 MR. WAKEFIELD: An individual member could come
16 forward with an application, correct.

17 ALJ WOLFE: Correct.

18 MR. WAKEFIELD: And the reason that the Alliance
19 came forward with an application that is a bit more
20 generic than what we usually see is, because it's not just
21 one member that faces this uncertainty; it's the industry
22 that faces this uncertainty.

23 Members of the Alliance are essentially
24 competitors of one another. And for one member to come
25 forward with an application and expend the resources

1 necessary and then get the first ruling from the
2 Commission that their deal essentially -- maybe if the
3 Commission can agree, that their deal is not -- does not
4 make them a public service company, well, then the other
5 members of the Alliance are in a competitive disadvantage
6 situation because they don't necessarily offer the deal
7 with some of the same minute characteristics.

8 Now, what we are proceeding here are 12
9 characteristics that are generally common to all the
10 providers and we think are sufficient for the Commission
11 to say does not make one a public service company. But to
12 the extent any member would go forward and offer a deal
13 that didn't comply with all 12 of those characteristics,
14 they would do so at their risk.

15 ALJ WOLFE: Commissioner Mayes.

16 CHMN. MAYES: Thank you, Your Honor.

17 Mr. Wakefield, couldn't the Commission take that
18 case and assess those 12 characteristics within that case,
19 and then that case would then be guiding law going
20 forward? I mean, do you understand what I'm trying to
21 say? And wouldn't given the apparent opposition to the
22 way you filed the case, wouldn't that be a preferable way
23 of going about this issue?

24 MR. WAKEFIELD: Chairman, I think the Commission
25 could obviously adjudicate an application in the fullness

1 of what an individual applicant might come forward with,
2 but then the parties would never know, well, what if we
3 just tweaked this one little aspect of that application?
4 Is that going to change the Commission's mind about the
5 conclusion that they reach?

6 And so what we have asked the Commission to tell
7 us is that collectively these are the factors that are
8 necessary for the Commission to reach its conclusion, and
9 as long as they fall out this way, then the matter -- then
10 the provider is not a public service company.

11 Now, if the Commission felt like it needed
12 additional factors beyond the 12 we have set forward to
13 reach that conclusion, I think we would rather know what
14 those factors are and have the Commission as a result of
15 this proceeding tell us, no, we need this 13th or 14th
16 factor.

17 MR. POZEFSKY: But couldn't we do that in the
18 context of adjudicating in an actual case? Say one of
19 your members, Sun Edison, whoever, came to us and said, I
20 have this deal with City X and these 12 characteristics
21 pertain to that case, couldn't we then decide that case
22 and then you have your 12 characteristics?

23 I mean, I know there are several cases. I'm
24 thinking the HOA cases, the case that determines
25 whether -- how you adjudicate something that is not a

1 public service corporation, well, that case lays out the
2 characteristics. Surv-Yu, itself, was a case that laid
3 out characteristics.

4 Do you follow my reasoning there?

5 MR. WAKEFIELD: I do, but I think what we see in
6 the traditional adjudication case from the Commission is
7 that the Commission is making its decision based on the
8 entirety of the record before it, and it doesn't lay out
9 the specific elements of that application that it finds
10 sufficient to allow it to reach its conclusion.

11 ALJ WOLFE: Mr. Wakefield, it sounds like you are
12 talking about a rulemaking. That is the big elephant in
13 the room to me. This sounds -- all the elements of this
14 sounds like we need a rulemaking on it possibly.

15 Could you respond to why that isn't what The
16 Solar Alliance is asking for?

17 MR. WAKEFIELD: Well, I guess I can understand
18 why one would see the similarity there. I think what we
19 expected is that by coming forward with the application
20 that we came forward with, that we presented the
21 Commission the opportunity to address the question in a
22 way that was probably -- we expected could be quicker than
23 rulemaking; secondly, would provide the kind of guidance
24 that the particular members of the Alliance were looking
25 for but didn't necessarily purport to be an exclusive

1 statement of what SSA terms might be -- might lead one to
2 the conclusion that it's not a public service company.

3 So that there could be some future deal put
4 together where that is straight from those 12
5 characteristics, and then the Commission wasn't saying,
6 well, then it was a public service company; it was merely
7 not speaking to what was beyond the scope of the 12
8 characteristics that we set forward.

9 So I think a rulemaking would be more
10 determinative and fixed in terms of future outcomes and
11 the Commission might be a little bit more bound by the
12 parameters of its decision in a rulemaking than it would
13 in granting a declaratory order to this application.

14 ALJ WOLFE: Okay. Thank you for that.

15 CHMN. MAYES: Well, I don't know if it's
16 appropriate now to ask questions, but I have a lot of
17 questions.

18 MR. WAKEFIELD: Your Honor, I'm not --

19 ALJ WOLFE: Let Mr. Wakefield finish with his
20 response. I'm sorry for the interruption.

21 MR. WAKEFIELD: I think I covered the standing
22 issue. Let me just look through my notes on that, and
23 then I have a few more points.

24 Yes. I think that addresses standing. Let me
25 just touch on a few other points that were raised.

1 I heard a number of times today and in some of
2 the filings about the question, well, if the Commission
3 makes a ruling about when an SSA may not be a public
4 service company, how can the Commission police that and
5 how can they know that everybody is offering SSAs that
6 only comply with those characteristics?

7 You know, generally that is an issue for the
8 Commission in the entirety of what it does. I mean,
9 entities could engage in business without the Commission
10 being aware of it, and when the Commission finds out, it
11 initiates whatever process it may feel is necessary to
12 examine whether that entity is providing service that
13 should be regulated by the Commission.

14 So the fact that there might be entities that
15 provide something like an SSA with some variant of the 12
16 characteristics, obviously the Alliance isn't in any
17 position to report to the Commission on that. Its
18 membership is only its membership. It doesn't know
19 everything that goes on in this state.

20 And so there really isn't any different
21 implication from the Commission and it having a difficulty
22 in terms of policing it's order if it were to issue the
23 order that we ask for than there is from any other order
24 that the Commission issues or doesn't issue with respect
25 to the parameters of its jurisdiction.

1 A number of the parties have indicated that
2 whatever process the Commission might undertake can
3 consider alternatives to SSAs as a way to meet distributed
4 generation requirements under the REST or other demand for
5 distributed generation. And while there may be
6 alternatives, the fact that there are alternatives doesn't
7 mean the Commission shouldn't tell us whether we can move
8 ahead with this alternative.

9 There are some very significant reasons that this
10 particular business model is helpful to providing services
11 to certain segments of the market due to tax provisions
12 and monetizing the tax benefits, but that is not to say
13 that the entire market can be met by SSAs or would be met
14 by SSAs. But the fact that other parts of the market may
15 be met by other business models doesn't mean that the
16 Commission shouldn't tell us whether this business model
17 is one that can be used to meet certain segments of the
18 market. So there is really no need for the Commission to
19 dodge this question and merely rely on other business
20 models because they may not find that the entirety of the
21 market can fit within those other business models.

22 And then, finally, a number of the issues that
23 have been raised as potential issues for the Commission to
24 consider that allegedly bear on the need to have
25 regulation of this industry are elements that are not

1 unique to SSAs. I mean, if the Commission feels there are
2 safety considerations that need to be regulated, those are
3 issues -- those are safety issues that exist whether you
4 are using an SSA model or a lease model. And the
5 appropriate way to address those issues is to regulate the
6 terms of the interconnection and regulate it from the side
7 of the utility that is regulated by the Commission and
8 say, you can only interconnect with distributed generation
9 that meets these criteria, whether that be generation that
10 was financed through SSAs or generation that was financed
11 through leases or generation that is customer owned.

12 So you can address those kinds of questions that
13 get to your need to regulate certain aspects of
14 transactions by going through the other side of the deal,
15 the utility that is undoubtedly regulated and the way it
16 interconnects with distributed generation, regardless of
17 whether that distributed generation has been financed by
18 SSA or not.

19 So there are many aspects of what looks like
20 public interest aspects of the application, the need of
21 the Commission to regulate certain things for the
22 protection of employees or the protection of the grid or
23 the protection of customers, and they really are things
24 that the Commission can reach and regulate in some other
25 way or ought to regulate in some other way because they

1 are not issues that are unique to an SSA model. And
2 therefore, to the extent that the Commission needs to
3 address them, they need to address them in more a generic
4 way in a proceeding than just as to SSAs.

5 I think those are all my comments. Thank you.

6 ALJ WOLFE: Thank you, Mr. Wakefield.

7 Commissioner Mayes, do you have questions for any
8 of the parties?

9 CHMN. MAYES: I do, Your Honor.

10 Thank you all for being here, and it's been a
11 very interesting morning.

12 Let me start with a question for SRP.

13 Mr. Sundlof, no offense, but why are you here?
14 Please don't take offense to my question, but it seems to
15 me you assiduously attempt to avoid our jurisdiction in
16 all other instances, and all of a sudden you pop up here
17 in this case. I'm just wondering -- and I read the brief,
18 and I'm unclear why you are here.

19 I mean, you point out in your brief that you are
20 not regulated by the Commission, and, you know, you have
21 your own solar program, as meager as I think it is.

22 Why are you here?

23 MR. SUNDLOF: Chairman Mayes, thank you. That is
24 a good question.

25 The jurisdiction of the Commission is statewide,

1 and the --

2 CHMN. MAYES: Oh, really?

3 MR. SUNDLOF: Oh, yes.

4 And the jurisdiction of the Commission would
5 include activities that take place within the district and
6 the electric service territory of Salt River Project.

7 So, for example, if a public service
8 corporation -- just like electric competition, if a
9 competitor were serving within Salt River Project's
10 service territory, it would still be regulated by the
11 Corporation Commission, were it a public service
12 corporation. Same here. If these entities who want to
13 set up generation and sell the output to customers are
14 located in APS territory or TEP or SRP, same thing, it's
15 still regulated by the Commission.

16 So SRP, on behalf of its business, has an
17 interest in making sure that this integration between the
18 regulation of public service corporations and the
19 activities of public power entities is the right one. And
20 SRP has an interest in making sure that the interest of
21 its customers in SRP service territory are protected the
22 same as customers in other areas by the regulation of the
23 Commission where it does exist.

24 CHMN. MAYES: But can't SRP make its own
25 determining whether it will accept an SSA?

1 MR. SUNDLOF: Yes -- Chairman Mayes, I guess the
2 answer is yes and no. SRP does establish its own solar
3 program and could decide whether or not it's going to pay
4 incentives or allow net metering.

5 But again, I will analogize this to the electric
6 power compensation issue. If there is going to be a
7 system of statewide regulation of companies who are going
8 to sell output from solar plants, then SRP may well want
9 to participate with that and wants to have appropriate
10 oversight of those activities. It doesn't have the
11 jurisdiction itself to regulate a company selling
12 electricity in SRP service territory.

13 CHMN. MAYES: Okay. I'm still confused, but I
14 don't think I will dwell on it.

15 And just out of curiosity, are you here because
16 you are concerned about ASU's efforts to do solar in your
17 service territory?

18 MR. SUNDLOF: That is not -- ASU is not --

19 CHMN. MAYES: They have one campus in your
20 service territory, as I understand it.

21 MR. SUNDLOF: Yes.

22 CHMN. MAYES: And I also understand that they
23 want to do a large-scale solar installation.

24 Is that why you are here?

25 MR. SUNDLOF: Chairman Mayes, that has never been

1 raised with me ever.

2 CHMN. MAYES: Okay, just curious.

3 I do think it's curious, Your Honor, that SRP is
4 here, and I'm wondering whether it's really fair for them
5 to participate in this matter and to oppose the
6 application -- it appears they are opposing the
7 application -- given the fact that we don't regulate them
8 and they largely do not have a renewable energy standard
9 that is concomitant that we require our utilities to
10 follow.

11 So I'm not sure why they are here, and I would
12 just express that concern, about their ability to
13 participate in this process.

14 A couple quick questions, APS and TEP seem to
15 have a different interpretation of the circumstances under
16 which this, the SSA model, would be problematic. APS
17 indicates that it would stray over the line when you are
18 talking about a third party provider who is providing to
19 multiple entities.

20 Is that correct, Ms. Scott? Is that a correct
21 assessment?

22 MS. DEBORAH SCOTT: Yes, Chairman Mayes.

23 CHMN. MAYES: And for TEP, do you think that
24 these are problematic in all instances, even when an SSA
25 is only providing to one entity?

1 MR. PATTEN: I don't know that we have taken that
2 clear delineation. I think there are some questions about
3 the scope of the SSA and understanding that, and
4 clarifying that issue, I think, is an important purpose of
5 this proceeding.

6 I could see on a one-off situation that may be
7 the case, but you also have a situation where it's a
8 business model to go and provide units to a number of
9 households in an area, or something like that, then it
10 does sort of expand, you know, the scope of what they are
11 doing to affect the large number of the public.

12 And then having some sort of consumer protection
13 and consumer recourse on issues there, I think, is
14 something that the Commission would be interested in
15 providing a form to utility customers.

16 But we have not made the delineation that APS has
17 mentioned.

18 CHMN. MAYES: Okay. Here is my concern. I was
19 looking at the original application of The Solar Alliance
20 and the Staff report. You know, I had forgotten that it's
21 been almost a year since this case began. You know, this
22 thing has been in front of us for a year. It was filed on
23 October 3rd, 2008. Here we are and now people are talking
24 about, let's do workshops, let's do a rulemaking.

25 You know, we do workshops. We do a rulemaking.

1 Maybe a rulemaking is ultimately something we need to do.
2 I don't know. I haven't determined that.

3 But you are talking about years before this
4 problem is resolved. And that is unacceptable. And here
5 is why I think that is unacceptable for us to resolve this
6 one way or the other.

7 In the interim between the time that The Solar
8 Alliance filed this and today Congress passed the ARRA
9 Act, the American Reinvestment and Recovery Act, in which
10 it determined that we are going to be spending hundreds of
11 millions of dollars in the state of Arizona on solar
12 energy. The governor has determined where that money is
13 going to be spent. Much of it is going to be spent on
14 solar projects on governmental installations and
15 facilities and schools.

16 And now you are talking -- the parties are
17 talking about more workshops, when schools are and
18 governmental institutions are trying to gear up to put
19 solar on their rooftops? And they have a time frame. I
20 think they have a time frame -- I guess I won't ask the
21 parties and the utilities to talk about that -- in which
22 they need to do it within the next two years.

23 So Ms. Scott and Mr. Patten, could you talk to
24 that issue? I would assume you are seeing an uptake in
25 the number of schools that are wanting to engage in these

1 type of arrangements. We probably are going to be seeing
2 a number of governmental institutions coming before you.

3 Your Honor, for the record, I take notice of the
4 fact that the University of Arizona has written to us.
5 The Embry-Riddle Aeronautical University in Prescott has
6 written to us in favor of us resolving this issue
7 expeditiously. Scottsdale Unified School District has
8 written to us in favor of us resolving this issue
9 expeditiously, so has the Laveen Elementary School
10 District, the Tolleson Union School District, the Madison
11 School District, the Mesa Public School District, and
12 Safeway, which is engaged in a national effort to put
13 solar on its rooftops and would like to do so in the state
14 of Arizona.

15 So, Ms. Scott?

16 MS. DEBORAH SCOTT: Chairman Mayes, I just
17 checked with my client, Barbara Lockwood.

18 In regard to the stimulus money itself, there is
19 still some uncertainty at to the rules. So specific
20 requests related specifically to that are not -- it's just
21 not clear. We clearly are hearing that people are
22 interested and are trying to gear up, but at this point I
23 don't have any specifics to give you.

24 And Ms. Lockwood is available if you had any more
25 specific questions you wanted to ask her.

1 CHMN. MAYES: Well, is Scottsdale Unified in your
2 school district -- I mean, in your service territory?

3 MS. DEBORAH SCOTT: Yes, it is.

4 CHMN. MAYES: And they have come to you wanting
5 to engage in the SSA; is that correct?

6 MS. DEBORAH SCOTT: Let me ask Ms. Lockwood to
7 answer your questions.

8 CHMN. MAYES: Barbara.

9 MS. LOCKWOOD: Your Honor, Chairman Mayes,
10 Barbara Lockwood for APS.

11 We have had conversations with Scottsdale, but at
12 this point in time I don't believe we have a specific
13 project from them. But we know that they are interested
14 in moving forward with solar projects for their schools.

15 CHMN. MAYES: Have you seen their letter to us?

16 MS. LOCKWOOD: Yes.

17 CHMN. MAYES: And are there other entities that
18 have said they are interested in doing SSAs with you?

19 MS. LOCKWOOD: Your Honor, Chairman Mayes, yes.
20 And I think it's generally appropriate to say that
21 almost -- well, the vast majority of the nonresidential
22 installations that we are seeing today are interested in
23 SSAs or some sort of alternative mechanism along those
24 lines.

25 CHMN. MAYES: Did you say the vast majority of

1 them are?

2 MS. LOCKWOOD: Yes, I did.

3 CHMN. MAYES: Do you think you could wait
4 two years to have this issue decided?

5 MS. LOCKWOOD: Your Honor, Chairman Mayes,
6 seriously it would be significant. It would be a
7 significant detriment to our program.

8 CHMN. MAYES: And to your ability to meet the
9 renewable energy standard, which you are under orders to
10 meet; is that correct?

11 MS. LOCKWOOD: That's correct.

12 CHMN. MAYES: Mr. Patten, we heard, I think, from
13 Mr. Fox or from Mr. Wakefield that there is -- that the
14 City of Tucson wants to engage in an SSA with a provider
15 down there, and that is on hold. I assume that is in your
16 service territory.

17 Are you seeing the same thing?

18 MR. PATTEN: Chairman, that would be within the
19 TEP service area. I'm not familiar with that particular
20 project. I do know that TEP has been working with several
21 folks down in the service area to develop a variety of
22 solar projects.

23 We do agree it's important to have this issue
24 resolved. There are business plans that don't seem to be
25 implicated by the public service corporation definition.

1 Back in the time of the telecommunication
2 competition process there were a couple of emergency
3 rulemakings that were done to facilitate particular
4 necessary aspects. I'm not going to opine whether this
5 meets an emergency situation, but setting up a situation
6 where you have rules that would allow a solar provider to
7 come in and maybe a regulation in light of
8 registration-type process with perhaps adequate financial
9 and consumer protection elements to those rules would
10 allow companies to come in and just sort of assure
11 themselves that they are not running afoul of the
12 constitution or the Commission's beliefs.

13 You know, you have telecom providers out there
14 that provide services that are not regulated by the
15 Commission but provide other services that are regulated
16 by the Commission. And they do come into the Commission
17 for authority for the parts of their business plans that
18 require Commission approval. So a rulemaking -- a
19 full-blown rulemaking, I think, is the resolution here.

20 In terms of the timing and having some certainty
21 for both the sole industry as well as those entities --
22 customers, utilities -- interacting with these providers
23 could maybe be solved by emergency rules.

24 So that is just a suggestion.

25 ALJ WOLFE: May I ask a question, Mr. Wakefield.

1 There is a question that I would like to ask you about
2 some of your members.

3 Could someone hand him the mike?

4 MR. WAKEFIELD: I have one. I'm not RUCO
5 anymore. I get my own mike.

6 ALJ WOLFE: If the members believe they are not
7 public service corporations, why do they ask you to file
8 this application on their behalf?

9 MR. WAKEFIELD: Your Honor, my understanding is
10 that the entities that provide the financing in
11 affiliation with the members of the Alliance are hesitant
12 to do that and sometimes have been expressing
13 unwillingness to do that with the uncertainty that remains
14 in the matter.

15 For instance -- my understanding is that, for
16 instance, like Sun Edison, being a member, isn't the one
17 coming up with the millions and millions and millions of
18 dollars necessary to finance this, that they are bringing
19 that money in from outside, forming some kind of joint
20 venture with that finance source, and then that is the
21 entity that would come forward with an SSA with an
22 individual client in that joint venture.

23 That funding source is unwilling to move ahead in
24 many instances with the uncertainty as to whether the deal
25 triggers the Commission's public service company

1 regulation.

2 ALJ WOLFE: So it's the financiers? It's not the
3 utilities who are giving your members the pushback on
4 implementing these SSAs?

5 MR. WAKEFIELD: I am not aware of utilities
6 giving pushback. Maybe they are and I'm just not aware of
7 it.

8 My understanding is that the difficulty in moving
9 ahead with the SSA is at least primarily and largely those
10 that come forward with the financing wanting to go know
11 the answer to this question.

12 ALJ WOLFE: And they really don't care how the
13 answer is arrived at, I would assume?

14 MR. WAKEFIELD: Well, my assumption would be that
15 if they come forward and this joint venture that provides
16 an SSA is regulated, that that would have some impact on
17 the economics of the deals, and therefore their returns
18 might be different. There may be fewer deals that are
19 worth doing, given that the costs of regulation can impact
20 their returns.

21 ALJ WOLFE: Okay. Thank you.

22 CHMN. MAYES: I wanted to ask the parties a
23 question, and, Your Honor, you can shut me down if I get
24 too far down the road on some of these questions. But I
25 do think some of them need to be asked so that we can --

1 the commissioners can decide and you can decide where we
2 want to go with this issue procedurally.

3 Staff raised the prospect of the Commission
4 having some sort of hearing that then -- to analyze these
5 issues that could then potentially lead to an order or a
6 policy statement that would dispose of the questions that
7 have been asked.

8 So I want to ask you, Mr. Wakefield, and then the
9 utilities, whether you believe that such a hearing, call
10 it an expedited hearing -- obviously I have made it clear
11 where I stand on the need to move expeditiously on this
12 issue -- but a hearing followed by an order or a policy
13 statement, would that be adequate to resolve the
14 skittishness of the financial backers of these types of
15 arrangements or not?

16 And I suppose it would somewhat be determined by
17 what the order of the policy statement was, but I'm trying
18 to understand from a procedural standpoint how fast to
19 move forward.

20 MR. WAKEFIELD: If I could have a moment to
21 consult with my client.

22 ALJ WOLFE: Let's go ahead and take a break right
23 now. It would give Mr. Wakefield time to consult with his
24 client. We will take a 15-minute break.

25 (Whereupon, a recess was taken from 11:41 a.m.)

1 until 12:00 p.m.)

2 ALJ WOLFE: Okay. Let's go back on the record.

3 Mr. Wakefield.

4 MR. WAKEFIELD: Thank you. Judge Wolfe,
5 Chairman Mayes, let me just restate what I understood the
6 question to be, and then I will give you the Alliance's
7 response.

8 The question was whether a process, something
9 along the lines of what Staff had alluded to, some kind of
10 hearing, and then the Commission issuing a policy
11 statement as to the parameters under which it might
12 consider a provider of an SSA to not be a public service
13 company.

14 The Alliance believes that if such a policy
15 statement were strongly enough worded and was not
16 ambiguous, that that could provide a level of certainty
17 that the industry needs for financing to move ahead. And
18 it's that lack of ambiguity that is really important. If
19 there is ambiguity there, the financing entities aren't
20 confident as to what the outcome would ultimately be. And
21 so they do need some clarity about those factors.

22 But if that is what the Commission can offer, can
23 produce, we think that that can be enough for the
24 financing of these deals to move ahead.

25 Then the question is, what process is necessary

1 before the Commission might issue such a policy statement?

2 I just pulled out the policy statement from 1987
3 that addresses whether homeowners associations that are
4 providing water to their members are public service
5 companies, and it's not clear from the face of the
6 document that there was any significant process that went
7 into putting that together. That is not to say there
8 wasn't; its just not clear what it is, if there was any.
9 It starts out that, "On February 17th, the Commission held
10 a special meeting to identify issues." And then the
11 Commission's order is issued May 7th. So it's just a few
12 months later you have the Commission issuing its order.

13 What may have come before February 17th isn't
14 clear, but it doesn't indicate that there was any kind of
15 hearing. So if the Commission felt like the discussion of
16 this proceeding today has been sufficient to tee up the
17 issues that it thinks needs to be addressed, you know,
18 maybe the Commission would feel comfortable issuing such a
19 policy statement even without a hearing.

20 But whatever process the Commission felt was
21 necessary before issuing a policy statement, the Alliance
22 would support it if it could be expeditious. Again, the
23 delay in not knowing is what is hindering the industry
24 here.

25 Thank you.

1 CHMN. MAYES: Thank you, Mr. Wakefield.

2 Ms. Scott and perhaps Mr. Grant and Mr. Patten,
3 on that issue?

4 MS. DEBORAH SCOTT: Your Honor, Chairman Mayes,
5 APS would be fine with such a procedure.

6 CHMN. MAYES: Mr. Patten?

7 MR. PATTEN: I think TEP probably would be
8 expecting that procedure. I just have a concern of having
9 a clear enough statement and guidelines resulting from it
10 given this is a little more complex than a homeowners
11 association situation.

12 CHMN. MAYES: Okay. Mr. Grant?

13 MR. GRANT: Judge Wolfe, Chairman Mayes, I just
14 don't know if what is being described is what you have to
15 do under the case law.

16 CHMN. MAYES: So it's AEPCO's position that we
17 need an applicant that in your view would have standing,
18 aka, a provider, an actual SSA provider?

19 MR. GRANT: Chairman Mayes, I mean, that is the
20 only way the cases have ever gone, and probably for good
21 reason. I mean, the literal words of the constitution are
22 being ignored. But the courts decided a long time ago --
23 and I don't disagree with that -- that, yeah, the literal
24 words may not produce the right result in select factual
25 situations. So you had, you know, Surv-Yu and Southwest

1 Gas and Nicholson -- although, I'm not sure on Surv-Yu
2 factors -- but they have always required a specific, not a
3 generic, fact set.

4 So I'm just not sure. Candidly I am not sure.
5 It has been done that way before.

6 CHMN. MAYES: Well, are you going to sue the
7 Commission if we were to precede along those lines?

8 MR. GRANT: Judge Wolfe, Chairman Mayes, I don't
9 know. I'm not inclined to. I don't know.

10 CHMN. MAYES: Is that a yes?

11 MR. GRANT: I don't know.

12 CHMN. MAYES: Well, I have to get down to brass
13 tactics here.

14 MR. GRANT: I can't jump, you know, three or four
15 or five months down the road and let you know what my
16 advice to my client would be on an unknown set of facts.

17 CHMN. MAYES: Well, I don't want you to waste
18 this Commission's resources, so if you are intending to
19 sue us, I would like to know now.

20 MR. GRANT: I will tell you, I am not coming into
21 this proceeding with an intent to sue the Commission. I
22 never come into a proceeding with the intent to sue the
23 Commission.

24 CHMN. MAYES: Okay.

25 Well, Mr. Pozefsky, do you want chime in on that

1 issue?

2 MR. POZEFSKY: Yeah, I think I would echo
3 Mr. Grant's position on that. I don't --

4 CHMN. MAYES: Why, are you intending to sue the
5 Commission?

6 MR. POZEFSKY: Again, we don't really come in
7 with the intent to sue the Commission either.

8 I definitely would be in favor of an expeditious
9 proceeding. I don't know if we could get it all done in
10 just a policy statement either. That is about all I would
11 add on that.

12 CHMN. MAYES: Well, you would agree, though, that
13 irregardless of whether there is some case that is brought
14 with an actual SSA provider in the future, the Commission
15 could issue a policy statement on this question, couldn't
16 it?

17 MR. POZEFSKY: Yes.

18 CHMN. MAYES: And, in fact, we have done that in
19 the past without a hearing. I'm thinking of the policy
20 statement that the Commission issued on natural gas
21 infrastructure; correct?

22 MR. POZEFSKY: That's correct.

23 CHMN. MAYES: You recall that policy statement.

24 MR. POZEFSKY: And quite frankly I haven't
25 thought about it hard enough, but I don't know if you were

1 to issue a policy statement whether a standing
2 determination would even be necessary for the purpose of
3 issuing a policy statement.

4 CHMN. MAYES: I mean, obviously then it becomes a
5 question of whether that is adequate to resolve this issue
6 for all parties involved, but certainly it's something to
7 think about.

8 Mr. Fox, do you want to chime in on this?

9 MR. FOX: Thank you, Chairman Mayes. I would
10 just simply say that, you know, our concern is primarily
11 that we reach a decision in an expeditious manner that
12 allows parties to participate at a reasonable cost. So
13 the suggestion that has been made by The Solar Alliance is
14 one that would be acceptable to us.

15 CHMN. MAYES: Okay. Mr. Crockett?

16 MR. CROCKETT: Your Honor -- Judge Wolfe and
17 Chairman Mayes, I think that you have pulled us all, and I
18 think that that is probably a good process to resolve some
19 of the issues so there is some certainty on those entities
20 that want to provide financing to these solar providers.

21 I do believe that it would be appropriate for the
22 Commission to move forward and then to have some sort of a
23 hearing in order to enable it to make a determination with
24 reference to the issues that have been raised. And then
25 to issue a policy decision in that regard, that would give

1 some guidance to those entities who are interested in
2 providing business in this area.

3 And I will answer your question, my clients do
4 not intend to sue the Commission.

5 CHMN. MAYES: Thank goodness --

6 MR. CROCKETT: Thank you.

7 CHMN. MAYES: -- I got an answer on that
8 question.

9 And could I have Mr. Wakefield and the utilities
10 answer this question? Would it be preferable to have a
11 hearing in which we had a specific concrete example
12 examined that would then be followed by a policy
13 statement? In other words, some sort of hybrid approach.

14 I mean, it seems like we are talking about two
15 different situations, one in which somebody brings a case
16 and we have a hearing and address the issue, possibly just
17 through a case or a policy statement or you have a hearing
18 in which there is a specific situation that is analyzed.
19 I'm trying to understand.

20 I want the Commission to be able to get it right
21 and get it right the first time. And it seems to me that
22 we have one party that is strongly intimating that not
23 having an actual entity in front of us could lead them --
24 could potentially lead them to sue the Commission,
25 although they are not saying that today. That is what I

1 read between the lines.

2 MR. WAKEFIELD: Judge Wolfe, Chairman Mayes, let
3 me start by asking a different question than the one you
4 asked, and then I will get to yours.

5 What I hear your ultimate concern is is, you
6 know, do we need to engage in some different process to
7 address what you perceive as AEPCO's potential concerns
8 about standing? And maybe a better way to address that is
9 for the Commission to either indicate that it finds
10 standing or indicate that it found that standing is
11 unnecessary because of the important public policy
12 question presented to it. And that may cut off any
13 potential appeal on a standing question. That is just a
14 thought off the top of my head.

15 But then let me get to the question you did ask.

16 The presentation of a specific SSA contract, I
17 think it's a little problematic from our perspective.
18 First of all, these agreements are really competitively
19 confidential, and so what is -- whose specific contract do
20 we put forward? And then that entity ends up with sort of
21 a better position than other entities.

22 Now, maybe there are some contracts that are out
23 there in the public arena, maybe as the issues have been
24 considered in other states, perhaps, you know, maybe there
25 can be some background that can enlighten the Commission

1 in the process without using a specific contract from one
2 of the specific Alliance members. But there is some
3 competitive issues there that may be raised by that.

4 And I'm also not sure how that first enlightens
5 the questions that the Commission is being asked to
6 address in a policy statement. I mean, I think if you can
7 look at the Surv-Yu factors and look at the application
8 that we presented with the 12 factors and then hear from
9 other parties of other factors that can be relevant, let
10 them come forward and propose what they think may be other
11 ways to craft a policy statement, then I think that can
12 flush out issues fairly well for the Commission.

13 CHMN. MAYES: You know, I am having -- I am
14 having some difficulty understanding why it wouldn't help
15 the Commission to have an entity before us, a witness
16 before us that could say, look, here is how -- here is why
17 it is not in the public interest to define this
18 arrangement as a public service corporation. You know,
19 I'm University X and I want to do this deal with this
20 third party provider, and here are the specific
21 circumstances surrounding this deal. And then, you know,
22 allowing commissioners and a judge to ask questions about
23 that specific situation rather than the hypotheticals that
24 you have offered in your application.

25 MR. WAKEFIELD: Chairman Mayes, I can see where

1 you would find that to be useful in your exploration. How
2 you transition from then that examination to a generic
3 policy statement, I think is a little bit more difficult
4 to see. I mean, it seems to me when you have a specific
5 single SSA before you, that you are ruling that that
6 specific SSA provider, who provides under those complete
7 set of terms -- I mean, there would be additional terms
8 beyond just the 12 that we are proposing in our
9 application, that you would be saying that all of those
10 terms together might lead one not to be a public service
11 company. And then the industry is still left with, well,
12 what about if we vary this term or that term?

13 That is why we have asked you for the core 12
14 terms that we think are really the essential ones that you
15 need to make your determination, regardless of what other
16 terms in addition to those 12 might be there.

17 ALJ WOLFE: Mr. Wakefield, it seems problematic
18 to me that you are asking for an unambiguous order
19 whenever the application contains some ambiguity. That is
20 the problem that we are facing and grappling with here.

21 And also, if one provider were to perhaps file an
22 application to be adjudicated not a public service
23 corporation, that would be a public hearing, and other
24 providers who might feel that they would be affected by
25 the outcome of that hearing would be free to intervene in

1 the process and participate. And I think that that would
2 be -- that would lend itself more to having an unambiguous
3 order than a hypothetical, more of the 12 factors that I
4 don't see really how you could pin down all the 12
5 factors.

6 I'm really at a loss to understand how you could
7 have an unambiguous order come out of that.

8 MR. WAKEFIELD: Well, I think the Alliance felt
9 that if the Commission were to have granted the
10 application that it filed and said that if you possess
11 those 12 factors, that was a definite enough order for
12 financing to moved ahead.

13 ALJ WOLFE: And if we hadn't had intervenors,
14 maybe it could have. But we have had intervenors who have
15 raised -- whether there is ambiguity or not -- I'm sorry
16 if I stated that I thought it was ambiguous. But there
17 are been many parties who have raised issues of ambiguity
18 in the application. So I'm just going on the fact that
19 those issues have been raised. I'm not deciding whether
20 it's ambiguous or not.

21 But given the fact that there are people who are
22 very much opposing granting the application as such, it
23 seems to me that due process concerns would require us to
24 look at all of those issues.

25 MR. WAKEFIELD: If I might have one moment?

1 ALJ WOLFE: Sure.

2 MR. WAKEFIELD: Your Honor, just one additional
3 factor to consider is that if an individual applicant were
4 to come forward, that the other providers of SSAs might --
5 well, with the understanding or the expectation of what
6 would come out of that would be a Commission decision that
7 that one deal is or isn't a public service company,
8 doesn't makes it a public service company, then other
9 providers would likely feel the need to file their own
10 applications, and we would be right back here on a
11 case-by-case determination, which I think is what we are
12 trying to add some clarity to the industry so that that is
13 not necessary, so that the parties and the Commission
14 don't have to spend the resources of having one after
15 another after another of these SSA providers coming in and
16 asking for the Commission to give them guidance.

17 So to the extent that we can get guidance from
18 the Commission that is narrow and -- as narrow as
19 possible, that it's just whatever criteria. We proposed
20 12 criteria that we felt was necessary. If the Commission
21 says, well, we need to clean this criteria up somewhat and
22 make it more specific, however we can get to a resolution
23 that is as narrow as possible, rather than just the
24 Commission saying this entire, you know, many, many, many
25 page SSA contract is not a public service company, that

1 doesn't leave other providers with sufficient guidance to
2 have the clarity that they need to move ahead with their
3 deals so then they have come ahead with their own
4 application.

5 ALJ WOLFE: I understand. I see two possible
6 procedural paths. One is issuing a policy statement, as
7 you request, and possibly having it appealed -- and that
8 certainly doesn't provide any clarity to your members --
9 or having each member coming in and file their own
10 application. I don't know which one would take more time.

11 I'm just trying to reach the result that you are
12 looking for, if it's even possible. But those are the two
13 alternatives that I see. That is what I'm looking at.

14 So that is what I'm going to be considering
15 whenever I consider all the arguments I have heard
16 today -- or all the opinions and positions I have heard
17 today.

18 Commissioner Mayes.

19 CHMN. MAYES: Thank you, Your Honor.

20 For Staff, Ms. Wagner, can we talk a little bit
21 about the 1987 HOA policy statement? I think that
22 predates -- does that predate your time here a little bit?

23 MS. WAGNER: It does, Chairman Mayes. It does,
24 and I will be candid; I haven't read that since the Staff
25 report was filed, so I'm -- I apologize; I'm not going to

1 be very helpful if you have specific questions.

2 I will tell you that my general recollection of
3 it, of when I used to be familiar with it during the time
4 that the Staff report in this matter was prepared, is that
5 there are provisions in it that seek some assurance that
6 the entity that is seeking to be unregulated is going to
7 be somewhat circumscribed in its operations, in other
8 words, a precise area that is not growing and no
9 implications or competition with other public service
10 corporations, such that the operation of it in an
11 unregulated way has a -- well, just simply has a narrower
12 impact on the public.

13 I think that you could contrast that with this
14 case where it's unclear exactly what the business plan is,
15 as to how many customers they seek to serve, but it
16 doesn't sound like we are talking about some sort of very
17 limited and circumscribed area. There is the potential
18 for SSA providers to provide service on a very broad
19 scale. So that is one distinction that could be drawn.

20 On the other hand, I think there is also an
21 argument to be made that you could look at an SSA in some
22 respects as similar to an individual who owns a well and
23 provides his own service with that well. Certainly the
24 SSAs -- there were some samples provided to us. We saw
25 some that referred to leasing possibilities or even

1 provided an option to buy. I think those factors could
2 tend arguably to lead the other way.

3 So I'm not certain that the policy statement for
4 the small water providers is necessarily a good fit here
5 simply because the industries are somewhat different. I
6 think it does however show an example of a policy
7 statement that has been very useful to the Commission and
8 to Staff and to applicants over the years to try get some
9 bearings on where individual entities may fail.

10 CHMN. MAYES: Okay. And after hearing the
11 discussion that then ensued when I asked the parties about
12 your statement about possibly doing a hearing and then the
13 Commission issuing an order or policy statement after the
14 hearing, can you -- is there anything that you would like
15 to add to the discussion or can you elaborate any more on
16 how you would envision such a proceeding occurring?

17 And then can you contrast that with -- and then
18 you can discuss whether you think that the Commission
19 would need an actual case to look at in the course of that
20 hearing? Or are those two separate things?

21 MS. WAGNER: Your Honor, Chairman Mayes, you
22 phrased your question in terms of need, in other words,
23 some sort of legal requirement.

24 I think if the Commission were to choose to do
25 so, I think there would be a way to go forward in a more

1 generic way. I don't think -- if you go forward in some
2 sort of generic proceeding, from Staff's perspective at
3 least, I think it's important to be clear that the result
4 of that is not an adjudication. There is no actual entity
5 being adjudicated. What you can do, however, is set forth
6 factors that would be relevant in any evaluation of that
7 question. I think it would be -- that is in terms of what
8 you need, some sort of legal requirement.

9 Let me move from there and say that I think this
10 case has been very much harder because of the lack of an
11 actual applicant that provides service with a set of facts
12 that then be can identified.

13 I know The Solar Alliance has attempted to rely
14 on their 12 factors that they, of course, believe are
15 appropriate. I'll just say Staff just doesn't think those
16 12 factors are helpful in any way in this proceeding, in
17 distinguishing an entity -- in distinguishing a public
18 service corporation from a nonpublic service corporation.

19 So had this been a case where we had an actual
20 provider, there would have been a possibility for Staff
21 through discovery to exhaust the universe of facts about
22 that provider and what it's doing and the circumstances
23 under which it's doing and then to try to come up with
24 other factors or to try to make some other judgment about
25 the circumstances as a whole.

1 That it seems to me -- that is the opportunity
2 here that is missing when there is not an actual
3 applicant -- an actual provider, whether that provider be
4 the applicant or whether that provider be sort of a
5 representative of a typical SSA provider that the Alliance
6 would put forth.

7 So I think it could be very helpful to the
8 parties as well as the Commission to have that. I
9 recognize in many respects that that is up to the Alliance
10 or the individual applicant to determine if they wish to
11 come forth with that kind of evidence. That is not
12 something -- I don't think that is something that Staff
13 can require of them.

14 I would just say, you know, I think Staff is one
15 of the parties who have alleged that there is some
16 ambiguity here, and I just have to say that I recognize
17 that the presiding officer hasn't made up her mind. I
18 will just say, Staff thinks what they are asking for is an
19 unambiguous order when the application contains some
20 ambiguity. And I think providing an applicant would allow
21 us to eliminate that ambiguity and then increase the
22 chances that the Commission is going to be able to come
23 forward with an unambiguous order.

24 If it continues to be just sort of based on these
25 hypothetical facts, I think the entire case is much harder

1 to process and likely it will be much harder for the
2 Commission to fashion an order, let alone one that it is
3 going to be as satisfactory to The Solar Alliance as they
4 could like.

5 CHMN. MAYES: What about the Solar Alliance's
6 apparent concern that if we were to adjudicate the case
7 and it didn't match up with other models out there that it
8 wouldn't be particularly helpful to this issue, to
9 resolving this issue once and for all, and that we would
10 be -- the Commission's resources would be strained?

11 I mean, obviously from my standpoint that is a
12 concern, too. We are facing ever greater pressures on our
13 budget, no end in sight, cases being filed here at the
14 Commission. We have 1,000 pending cases right now,
15 54 rate cases. You know, and then to be faced with
16 potentially hundreds of applications for adjudication is
17 somewhat daunting.

18 MS. WAGNER: Your Honor, Madam Chairman, it's not
19 an appealing -- it's not an appealing process; I agree
20 with that. But to answer your question directly, I think
21 the answer is it depends. It's a question that Staff
22 really can't know the answer to at that point; perhaps no
23 one can.

24 And this is why, if solar service agreements in
25 general follow some sort of typical pattern, then I think

1 a generic case that addresses such a typical provider is
2 likely to be very helpful to other providers that are also
3 typical.

4 At this point I don't think we have a feel for
5 what the diversity is or may be along that universe of
6 solar service providers and/or solar service agreements
7 under which they operate. If it's a diverse kind of
8 group, then I think unfortunately it may be -- it may well
9 be possible that a generic proceeding may not get you out
10 of all that many individual adjudications. If, on the
11 other group, it's a more homogenous group, it very well
12 may.

13 CHMN. MAYES: Are there analyses to be drawn
14 between this situation and, as has been suggested by a
15 couple of the parties today, the light regulation that we
16 conduct over pay telephone providers?

17 MS. WAGNER: Your Honor, Chairman Mayes, I don't
18 know if there are analyses, per se. I would just say that
19 I think there are examples in Commission regulation where
20 certain kind of entities are regulated in a more
21 light-handed manner than others. And it may well be that
22 these entities may be a candidate for that.

23 CHMN. MAYES: Mr. Wakefield, did you want to --

24 MR. WAKEFIELD: Just briefly. I would just
25 recommend to the Judge and to Chairman Mayes that you go

1 back to the application and take a look at the 12 factors
2 and see if you think that they are ambiguous. Because
3 I'll tell you, myself and the Alliance worked long and
4 hard to provide a very precise and narrow application. I
5 fully understood what this Commission's concerns would be
6 about issuing a broad order and tried to put forward the
7 narrowest and most specific application that could embrace
8 the various SSA models that are used by the various
9 members. And we do believe it's a sufficiently-specific
10 list of 12 criteria for the Commission to issue its
11 declaratory order.

12 Thank you.

13 CHMN. MAYES: Mr. Wakefield, one last question
14 for you: You had stated in your brief and today that you
15 thought that this issue of light regulation was putting
16 the cart before the horse and you thought that the
17 Commission should issue this decision on whether these
18 entities are public service corporations before we address
19 that.

20 But that being said, can I ask you what the
21 industry or what The Solar Alliance -- how The Solar
22 Alliance views that model regulation with regard to your
23 entities? Is it impractical? Is it something that would
24 be acceptable to the financial backers of these entities?

25 MR. WAKEFIELD: My understanding is that these

1 are very thin margin -- it's a very thin margin industry.
2 So the cost of regulation can have dramatic effect on
3 financing at times.

4 That being said, it's the uncertainty of the
5 issue of how this business can move ahead that is a larger
6 impediment to this issue -- to this industry moving ahead
7 than the idea that there might be some light level of
8 regulation.

9 CHMN. MAYES: And you understand very well,
10 having practiced here in front of the Commission for many
11 years for RUCO, how the pay telephone operators are
12 regulated and how very lightly they are regulated.

13 So are you saying that you don't -- that the
14 industry doesn't object to that, per se, but rather the
15 lack of certainty over the issue or -- maybe this is too
16 factual and maybe I'm getting too far down the road here,
17 but I'm trying to understand whether the banks and the
18 financial entities that back these projects would find
19 that so objectionable that they wouldn't want to operate
20 in the state of Arizona, vis-a-vis some other state.

21 MR. WAKEFIELD: My understanding, Chairman Mayes,
22 is that to the extent that the level of regulation impacts
23 the rate of return that is available, that it might push
24 money into other states and away from Arizona.

25 It's not that regulation, per se, makes these

1 financiers unwilling to come to Arizona. It's just that
2 the cost of that regulation can change the balance of how
3 Arizona deals -- compares to deals in other states.

4 CHMN. MAYES: And have you analyzed the cost of
5 that type of regulation on your --

6 MR. WAKEFIELD: I don't know that any member has
7 specifically done that. These are just comments based on
8 my very general conversations with my client.

9 CHMN. MAYES: Okay.

10 ALJ WOLFE: Are there any other procedural
11 matters that any of the parties would wish to raise at
12 this time?

13 (No response.)

14 ALJ WOLFE: Thank you very much for your
15 attendance and participation today. I will take all the
16 discussion into consideration, and I will be issuing
17 something very soon. Thanks.

18 (The hearing concluded at 12:35 p.m.)

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1 STATE OF ARIZONA)
) ss.
 2 COUNTY OF MARICOPA)

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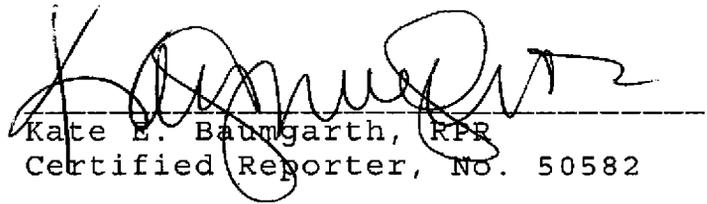
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