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BEFORE THE ARIZONA CORPORATION COMMISSION

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2009 JUL -6 P 3: 05

ARIZONA CORPORATION COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

JUL -6 2009

DOCKETED BY

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

DOCKET NO. E-20633A-08-0513

PROCEDURAL ORDER

BY THE COMMISSION:

On October 3, 2008, The Solar Alliance ("Solar Alliance") filed with the Arizona Corporation Commission ("Commission") an application for a declaratory order that providers of certain solar service agreements ("SSAs") would not be public service corporations pursuant to Article 15, Section 2 of the Arizona Constitution ("Application").

On January 12, 2009, a procedural order was issued ordering publication and mailing of notice of the Application, setting a deadline for intervention, and setting a deadline for the filing of a Staff Report on the Application, and for parties to file Responses thereto.

On January 30, 2009, and February 4, 2009, Solar Alliance filed Notices of Filing Affidavits of Publication and Public Notice.

Intervention in this matter has been granted to Arizona Public Service Company ("APS"), Western Resource Advocates ("WRA"), Salt River Project Agricultural Improvement and Power District ("SRP"), Trico Electric Cooperative, Inc. ("Trico"), Tucson Electric Power Company ("TEP"), UNS Electric, Inc. ("UNS"), Freeport-McMoRan Copper & Gold, Inc. ("Freeport-McMoRan"), Arizonans for Electric Choice and Competition ("AECC"), Arizona Electric Power Cooperative, Inc. ("AEPCO"), the Residential Utility Consumer Office ("RUCO"), Mohave Electric Cooperative, Inc. ("MEC"), Navopache Electric Cooperative, Inc. ("Navopache"), Sulphur Springs Valley Electric Cooperative, Inc. ("SSVEC"), Sempra Energy Solutions, LLC ("SES"), and the

1 Interstate Renewable Energy Council (“IREC”).

2 Letters in support of the Application have been filed by the Tucson-Pima County  
3 Metropolitan Energy Commission, Embry-Riddle Aeronautical University, the Prescott Chamber of  
4 Commerce, Scottsdale Unified School District, Laveen Elementary School District No. 59, Tolleson  
5 Union High School District, Madison Elementary School District 38, Mesa Public Schools,  
6 Honeywell, CarbonFree Technology Corp., Ironco Enterprises, LLC, Conergy, the University of  
7 Arizona, Safeway Inc., and Arizona Solar Industries Association.

8 On March 11, 2009, Staff filed its Staff Report on the Application. Staff recommended that a  
9 hearing be held in this matter.

10 Responses to the Staff Report were filed by RUCO, APS, IREC, AEPCO, SRP, Freeport-  
11 McMoRan and AECC (jointly), TEP and UNS (jointly), SSVEC, and SES. In their filings, the  
12 parties stated a variety of differing positions on procedural matters related to processing the  
13 Application, and identify a variety of substantive issues. RUCO and AEPCO raised the issue of  
14 whether Solar Alliance has standing to bring the Application. Staff, RUCO, TEP and UNS, SRP,  
15 Freeport-McMoRan and AECC, and SES stated that it is either necessary or would be helpful to have  
16 a hearing on the Application. TEP and UNS, AEPCO, SRP and IREC took positions on the question  
17 of whether providers of SSAs are public service corporations under Arizona law. AEPCO, TEP and  
18 UNS, and SRP asserted that under the facts stated in the Application, SSA providers would be public  
19 service corporations, while IREC asserts that they would not be public service corporations. Several  
20 parties identified substantive issues they believe are related to the Application.

21 On April 24, 2009, Solar Alliance filed a Motion for Procedural Conference. The Motion set  
22 forth Solar Alliance’s position on the procedural issues of standing, the scope of the proceeding, and  
23 whether a hearing is necessary. By its Motion, Solar Alliance requested that a procedural conference  
24 be scheduled for the purpose of addressing the following three procedural issues: (1) Whether the  
25 Commission believes the Alliance has standing to bring the Application; (2) What issues the  
26 Commission desires be addressed in this proceeding; and (3) Whether the Commission desires a  
27 hearing on the issues that it determines are within the scope of this proceeding.

28 No responses to the Motion were filed.

1 On May 13, 2009, a procedural order was issued setting a procedural conference for June 22,  
2 2009, for the purpose of allowing the parties to address the following procedural issues:

- 3 1. Whether the Alliance has standing to bring the Application;
- 4 2. What issues should be addressed in this proceeding; and
- 5 3. Whether a hearing should be held, and if so, the issues that should be considered  
6 during the hearing.

7 The May 13, 2009 procedural order also directed those parties who believe that a hearing  
8 should be held in this proceeding to file, by June 15, 2009, a list including all the issues the party  
9 believes should be considered at the hearing.

10 On May 18, 2009, SES filed a motion requesting leave to be excused from attendance at the  
11 June 22, 2009 procedural conference.

12 On June 15, 2009, filings were made by AEPCO, SSVEC, SRP, TEP and UNS (jointly), APS,  
13 Freeport-McMoRan and AECC (jointly), SES, RUCO, and Staff.

14 On June 16, 2009, Trico filed a Motion for Telephonic Appearance.

15 On June 22, 2009, the procedural conference convened as scheduled. Appearances were  
16 entered by Solar Alliance, AEPCO, MEC, Navopache, SSVEC, Trico, SRP, TEP, UNS, APS,  
17 Freeport-McMoRan, AECC, IREC, RUCO, and Staff. SES's request for leave to be excused from  
18 attendance was granted, and Trico appeared telephonically, as requested.

## 19 ISSUES

### 20 Whether Solar Alliance Has Standing

21 Solar Alliance stated that because the issue of standing is not often raised before the  
22 Commission, it is not clear whether the Commission holds parties to the same requirements Arizona  
23 courts do. Solar Alliance believes that it has standing to pursue the Application on behalf of its  
24 members, but stated that even if the Commission were to determine that Solar Alliance lacks  
25 standing, the Commission could waive a standing requirement. Solar Alliance cited case law  
26 referring to the Arizona constitution's lack of a case or controversy provision, and to Arizona courts'  
27 waiver of a standing requirement in cases involving issues of great public importance that are likely  
28

1 to recur.<sup>1</sup>

2 AEPCO believes that a lack of an actual controversy and a lack of an actual and reliable set of  
3 facts upon which to render judgment require the Application to be dismissed with leave to re-file.  
4 AEPCO argues that *Natural Gas Serv. Co. v. Serv-Yu Cooperative*, 70 Ariz. 235, 219 P.2d 324  
5 (1950), requires a detailed factual inquiry of the real parties in interest to determine whether none,  
6 some or all of the members of Solar Alliance are a public service corporation. AEPCO states that  
7 Solar Alliance can only offer generic, purely hypothetical facts on the issues that the Commission  
8 must examine in its determination.

9 Parties in agreement with AEPCO on the issue of standing include MEC, Navopache,  
10 SSVEC, Trico, SRP, and RUCO. TEP and UNS, and SSVEC stated that standing is a threshold  
11 issue.

12 AECC and Freeport-McMoran believe the Commission should find that Solar Alliance has  
13 standing.

14 APS did not take a position on standing.

15 Staff stated that adjudications are very fact-specific and that Solar Alliance does not have  
16 standing in this case for an actual adjudication that SSA providers are not public service corporations.  
17 Staff stated that it is important to keep in mind that in past adjudications not a public service  
18 corporation before the Commission, different conclusions have been reached based on very small  
19 gradations of fact. Staff stated, however, that the lack of standing would not bar the Commission  
20 from moving forward in this docket in a generic way, with either generic hearings or workshops and  
21 briefings culminating in a Commission policy statement.

22 Issues to be Addressed in this Proceeding

23 Solar Alliance stated that its Application raises the narrow, factually specific question of  
24 whether a provider of an SSA that has the 12 characteristics set forth in the Application is or is not a  
25 public service corporation. Solar Alliance believes that the substantive issues raised by the other  
26 parties go beyond the Application. Solar Alliance stated that it is not necessary for the Commission  
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28 <sup>1</sup> Solar Alliance cited to *Sears v. Hull*, 192 Ariz. 65, 71, 961 P.2d 1013, 1019 (1998).

1 to consider the broader issues in order to reach a decision on the Application, and is concerned that  
2 expanding the proceeding to encompass a broader scope of issues would delay a Decision and  
3 continue the current uncertainty as to the legal status of SSA providers. Citing to public comment  
4 letters filed in this docket in favor of quickly granting the Application, Solar Alliance stated that such  
5 uncertainty currently hampers potential customers' access to renewable generation sources. Solar  
6 Alliance believes that any additional matters that should be addressed in light of a Commission  
7 determination on the Application can be handled in other proceedings.

8 IREC stated that although parties have raised a number of important issues in suggesting a  
9 need for a hearing, IREC believes that the issues are either irrelevant to reaching a decision, are  
10 outside the scope of this proceeding, or require second-guessing at policy decisions already made by  
11 the Commission. IREC stated that many of the issues are worthy of discussion depending upon the  
12 outcome of this proceeding, but at this time represent a needless expansion of the issues. IREC  
13 believes that other issues raised are not unique to SSA arrangements, and would best be addressed in  
14 a forum that encompasses all forms of solar distributed generation ownership. IREC believes that  
15 many of the issues raised by the parties would require rehashing policies established in the REST  
16 rules.

17 TEP and UNS stated that the 12 characteristics of an SSA provider set forth in the Application  
18 may be an appropriate starting point for the analysis, but as they are currently presented do not  
19 resolve the issues as they are vague and ambiguous, and without investigation, clarification and  
20 refinement, do not provide the Commission with an adequate and legally sufficient basis upon which  
21 to determine whether SSA providers are PSCs.

22 AECC and Freeport-McMoran filed a list of issues they believe should be addressed at a  
23 hearing, and stated that any additional issues identified by other parties that will assist the  
24 Commission in resolving the Application should also be addressed at the hearing.

25 RUCO filed a list of issues it believes should be considered at hearing if the Commission  
26 determines that Solar Alliance has standing.

27 Staff filed a list of 29 issues, some with sub-parts. Staff stated it may not be wise to narrowly  
28 circumscribe the issues at this time, and that without the benefit of any filed testimony in this case, it

1 may not be possible at this stage to accurately identify a full and complete list of pertinent issues.

2 Whether a Hearing Should be Held

3 Solar Alliance stated that if the Commission adopts a narrow scope for this proceeding, a  
4 hearing is not necessary. Solar Alliance believes there is no need for the Commission to examine  
5 facts other than the 12 SSA characteristics in order to apply the relevant legal standard and make a  
6 determination regarding the legal status of the SSA providers. Solar Alliance recommended that the  
7 Commission permit other parties to file legal briefs responsive to the legal analysis Solar Alliance  
8 included in the Application, allow Solar Alliance to file a reply brief, and that the Commission  
9 subsequently make a ruling based on the briefs, without a hearing.

10 IREC stated that of the two options for SSA providers to obtain the relief they seek, either  
11 addressing the issues in one proceeding, or addressing each SSA by means of serial applications, one  
12 proceeding is preferable. IREC believes that no hearings are necessary, and requests that the  
13 Commission allow parties to submit briefs on the legal issue and make a determination without a  
14 hearing.

15 AECC and Freeport-McMoran believe that all the issues raised by the parties should be  
16 addressed at a hearing.

17 APS does not object to a hearing.

18 RUCO believes that if Solar Alliance is found to have standing, the issues it provided should  
19 be addressed at a hearing.

20 Conclusion

21 Solar Alliance stated that as an outcome of this proceeding, it desires to have an unambiguous  
22 Order regarding whether its members who provide SSAs meeting the 12 criteria set forth in the  
23 Application are public service corporations. However, processing the Application in the manner  
24 proposed by the parties is highly unlikely to yield a record supporting such an Order, because no  
25 individual SSA provider is involved as a party in this proceeding.

26 The declaratory order that Solar Alliance is requesting by way of the Application would  
27 amount to an advisory opinion which would be subject to questions related to the 12 characteristics  
28

1 set forth in the Application. While the Application was carefully crafted to be limited to 12  
2 characteristics of an SSA, the constitutional issue of whether an individual SSA provider is a public  
3 service corporation necessarily depends on individual cases and specific facts.<sup>2</sup>

4 For the reasons outlined by IREC, it is apparent that the members of Solar Alliance who  
5 provide SSAs would rather have one single proceeding, without a hearing, to resolve the issue of  
6 whether SSA providers are public service corporations. However, the interested parties have  
7 expressed a need for an opportunity to fully investigate an SSA in order to provide a record upon  
8 which the Commission can determine whether the SSA provider is a public service corporation. It  
9 appears that a hearing would be the best and most expeditious means to develop such a record. In the  
10 course of a hearing, an actual SSA which is representative of SSAs used by Solar Alliance members  
11 could be fully examined, and a determination made on whether the provider of the SSA is or is not a  
12 public service corporation. It is possible that more than one SSA provider would choose to be  
13 involved in such a hearing, or that other SSA providers might choose to model their SSAs upon the  
14 one examined during the course of a Commission hearing. Solar Alliance and public comments have  
15 indicated a need for an expeditious determination on the issue of whether providers of SSAs are  
16 public service corporations. In order to provide the greatest flexibility to potential applicants and the  
17 Commission, the application could request not only adjudication not a public service corporation, but  
18 also include the alternative request for a grant of a Certificate of Convenience and Necessity, in the  
19 event the Commission determines that adjudication is not warranted. Such an application would  
20 serve to streamline the application process in the event the Commission ultimately determines that an  
21 applicant is a public service corporation.

22 Various parties' arguments regarding Solar Alliance's alleged lack of standing are not  
23 sufficiently persuasive to warrant dismissal of the Application at this time. However, Solar  
24 Alliance's goal of obtaining an unambiguous order as an outcome of this proceeding cannot be met  
25 without the participation of a real party in interest, and holding a hearing on the Application as filed  
26 is therefore not appropriate at this time. Whether in this docket or in a separate docket, the  
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28 <sup>2</sup> See *Natural Gas Serv. Co. v. Serv-Yu Cooperative*, 70 Ariz. 235, 219 P.2d 324 (1950).

1 participation of an SSA provider requesting relief would avail interested parties the requisite  
2 opportunity to examine the details of the SSA in question, and provide a complete record upon which  
3 the Commission can determine whether the particular SSA provider is a public service corporation.  
4 Although Solar Alliance explained that individual providers do not wish to participate due to the  
5 competitive nature of their businesses and the fact that SSAs may be diverse, examination of an  
6 actual SSA is necessary in order to make a determination regarding the constitutional public service  
7 corporation status of a particular SSA provider.

8         The relief requested by Solar Alliance may be best and most expeditiously accomplished by  
9 the filing of an application by one or more SSA providers. While it cannot be determined at this time  
10 with specificity which of the numerous substantive issues raised in the pleadings filed to date are  
11 relevant to a determination of a particular SSA provider's public service corporation status, the  
12 parties' filings in this docket may serve to inform potential applicants of issues that interested parties  
13 and the Commission may raise.

14         IT IS THEREFORE ORDERED that a hearing on the Application as filed is not appropriate  
15 at this time.

16         IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113 - Unauthorized  
17 Communications) continues to apply to this proceeding.

18         IT IS FURTHER ORDERED that all parties must comply with Rule 38(a) of the Rules of the  
19 Arizona Supreme Court with respect to practice of law and admission *pro hac vice*.

20         IT IS FURTHER ORDERED that withdrawal of representation must be made in compliance  
21 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the  
22 Rules of the Arizona Supreme Court). Representation before the Commission includes the obligation  
23 to appear at all hearings and procedural conferences, as well as all Open Meetings for which the  
24 matter is scheduled for discussion, unless counsel has previously been granted permission to  
25 withdraw by the Administrative Law Judge.

26 ...  
27 ...  
28 ...

1 IT IS FURTHER ORDERED that the Administrative Law Judge may rescind, alter, amend,  
2 or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at  
3 hearing.

4 DATED this 11<sup>th</sup> day of July, 2009.

5  
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7   
8 TEENA WOLFE  
ADMINISTRATIVE LAW JUDGE

9 Copies of the foregoing mailed/delivered  
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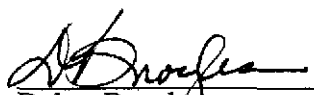
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