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Arizona Corporation Commission

DOCKETED

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Attorneys for Applicant SolarCity Corporation

BEFORE THE ARIZONA CORPORATION COMMISSION

KRISTIN K. MAYES
CHAIRMAN

SANDRA D. KENNEDY
COMMISSIONER

PAUL NEWMAN
COMMISSIONER

GARY PIERCE
COMMISSIONER

BOB STUMP
COMMISSIONER

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

DOCKET NO. E-20690A-09-0346

**SOLARCITY'S NOTICE OF FILING
OF TESTIMONY AND EXHIBITS**

Applicant, SolarCity, by and through its undersigned counsel hereby gives notice that it is submitting this Notice of Filing of Testimony and Exhibits including additional testimony of Lyndon Rive and David Peterson.

RESPECTFULLY SUBMITTED this 13th day of October, 2009.

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1 **Original and 13 copies filed this**
2 **17th** day of October, 2009, with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington Street
6 Phoenix, Arizona 85007

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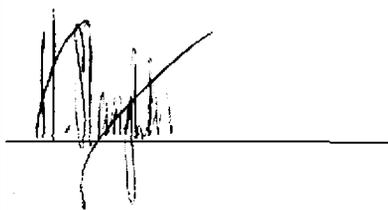
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**SOLARCITY'S NOTICE OF FILING
OF TESTIMONY AND EXHIBITS**

Additional Testimony of Lyndon Rive

Q: Explain the services that SolarCity has provided to its customers in Arizona.

A: SolarCity has traditionally provided its customers with design, installation and maintenance of rooftop solar photovoltaic systems at no up front cost to the user through our solar lease program.

1 **Q:** Does performing any of these services subject SolarCity to regulation from the Arizona
2 Corporation Commission?

3
4 **A:** No, the industry has long been providing these services in Arizona without regulation. In
5 fact, the ACC Staff has even expressly stated in the Solar Alliance Docket that the solar lease
6 program does not subject providers to ACC regulation.
7

8
9 **Q:** Please explain the services that SolarCity wishes to provide to schools, non-profits and
10 governmental entities under this docket?
11

12
13 **A:** SolarCity wishes to provide the schools, non-profits and governmental entities with the exact
14 same services it provides its existing customers in Arizona; design, installation and maintenance
15 of solar photovoltaic rooftop systems at no up front cost to the consumer.
16

17
18 **Q:** And none of these services you seek to provide would cause you to be regulated in Arizona?
19

20 **A:** That is correct.
21

22 **Q:** So why don't you just provide these services to the schools, what is holding you back?
23

24
25 **A:** As we have discussed, the provision of these services would make solar prohibitively
26 expensive to these users unless we utilize an SSA because the IRS requires that our pricing relate
27 to the amount of electricity provided. Without the federal tax incentives there is just no
28 economically viable way to provide our services to schools, non-profit or governmental entities

1 **Q:** So what is the point of the SSA?

2
3 **A:** The SSA allows us to provide our core services to schools, non-profits, and governmental
4 entities. Without the SSA we could not provide our services at a price that would make sense.
5

6
7 **Q:** And again, when you say “core services” you mean the unregulated services such as design,
8 installation and maintenance with no up front costs that several companies provide to customers
9 all over Arizona right?

10
11 **A:** Right.

12
13
14 **Q:** Are you aware that Commission Staff has said that the primary purpose of an SSA is to
15 “furnish” electricity to the customer which would result in your company being a Public Service
16 Corporation under the State Constitution?
17

18
19 **A:** Yes.
20

21 **Q:** What is your reaction to that?
22

23
24 **A:** I have two reactions; first, SolarCity does not furnish electricity at all because the customer
25 owns all electricity the moment it is produced and therefore, there is never a transfer of
26 possession. The SSA is very clear on this point; and second, even if the Commission believes
27 that somehow SolarCity furnishes energy it never legally possesses it is crystal clear that any
28 furnishing is merely incidental to our provision of wholly unregulated services. You have to

1 understand that there is simply no other economically viable way for schools, non-profits and
2 governmental entities to utilize our unregulated services that we provide all over the state unless
3 they use the SSA. All SolarCity is doing is trying to provide this class of non-profit customers
4 with its core, unregulated services. If it means we somehow end up furnishing electricity then
5 that is purely incidental. SolarCity never decided to change its business plan and start selling
6 electricity. Instead, SolarCity tried to figure out a way to bring this class of non-profit customers
7 its legal services and the SSA is the only way to do that. We have no reason to change our
8 business plan as we have been highly successful. If we are furnishing electricity, which I do not
9 agree with, it is merely incidental to us utilizing the only viable way to provide the unregulated
10 services the non-profit group can benefit from.
11
12
13

14 Further, and this is extremely important, our pricing for the SSA is simply the price we would
15 charge for a lease divided out over the number of kWh we expect the system to produce. The
16 notion that we are charging for something different or selling electricity is just absurd.
17
18

19 **Q:** As to your first reaction it appears the Staff's witness contends that the fact that the SSA says
20 the school owns and takes possession of all electricity the moment it is produced is merely a trick
21 of semantics to avoid a transfer of possession. What is your response to that?
22
23

24 **A:** I have always felt, and my lawyers have agreed, that language in contracts is important. This
25 is not semantics, this is about possession of something and when that possession occurs.
26 Possession is a right and the provision of the SSA that provides that the customer possesses all of
27 the electricity the moment it is produced transfers a right to the customer. That right is real, it is
28 tangible and is much more than semantics. We are not quibbling over the meaning of some word

1 with dual meanings. We have negotiated the exact moment of possession such that the customer
2 always owns the electricity and SolarCity never does.

3
4 **Q:** What do you think of the prospect of regulating SSAs while the other forms of solar
5 installation are allowed to flourish unregulated?
6

7
8 **A:** Frankly, I think that prospect makes little sense. From public policy standpoint the SSA is a
9 much better tool for protecting the end users of solar photovoltaic systems and should be far
10 preferable the prospect of customers purchasing their own systems or even leasing systems.
11

12
13 **Q:** Can you explain that further?
14

15 **A:** Yes, there are several attributes of the SSA that protect the customer and make the
16 arrangement preferable to a lease or straight purchase. First, the SSA customer only pays based
17 on the performance of the system. In that case the risk of loss is entirely on the provider. If the
18 system does not produce then the customer pays nothing. If the system underproduces then the
19 customer pays less. By contrast, most leases are for a fixed amount each month that the
20 customer pays regardless of performance. Obviously, with a purchase the customer becomes the
21 owner and bears all the risk that their initial investment could be wasted if the system
22 underproduces or fails to produce for periods of time. Second, the SSA gives the customer the
23 opportunity to try the product before buying it. The customer has the option to purchase
24 periodically during the term of the SSA. Unlike in a purchase situation, if the customer is
25 unhappy with the product they do not end up owning it but if they like it they have the chance to
26 buy it. Third, it incentivizes the solar provider to install a good working product. It needs to
27
28

1 perform optimally for the solar provider to profit. If the system is leased or purchased then the
2 provider does not make more money based on optimal performance. The SSA gives incentive
3 for reliable and optimal service. Fourth, with the SSA, the customer does not have to maintain
4 his own system as he would if he bought the system outright. The solar provider takes care of all
5 maintenance at no additional costs.
6

7
8 All in all the public is better protected by an SSA than a lease or a purchase of a solar
9 photovoltaic system. That is why I think it makes little sense to regulate the SSA arrangement
10 when leases and purchases are not regulated.
11

12
13 **Q:** Do you agree with Staff's assertion that SolarCity fails one of the Serv-Yu tests, because you
14 will accept substantially all requests for service? Staff notes in its testimony at page 27 that you
15 have not provided evidence that the number of potential customers is a small distinct subset of
16 potential customers – do you have any such evidence?
17

18
19 **A:** I do not agree with staff and have the evidence to prove we do not accept anywhere near
20 substantially all the service requests we receive. We keep track of all of our incoming requests
21 for service through a customer relationship management platform called SolarWorks. When
22 someone calls SolarCity seeking service, their particulars go into this system, and we generate a
23 quote for them if we can. I have reviewed the records for the past 21 months of SolarWorks
24 data and found that SolarCity has turned away 91% of those that have requested service during
25 that period. All in all SolarCity only accepts a small percentage of the requests for service that
26 we receive and clearly it cannot be said that SolarCity accepts “substantially all requests for
27 service.”
28

1 Staff discusses that our goal is to serve millions of customers and they are right about that if you
2 look at our plans to grow nationwide outside of the specific question in this Docket. But the
3 Serv-Yu test isn't "many" or "millions:" it's "substantially all." As I just mentioned we are a
4 far cry from accepting "substantially all" requests for service as we are turning away the
5 overwhelming majority of requests. I think it's a very long walk from us turning away 9 out of
6 every ten people who requested service to accepting "substantially all" requests for service.
7

8
9 **Q:** Mr. Rive, is there any reason to believe you actually cannot (as opposed to will not) accept
10 substantially all requests for service from the public?
11

12
13 **A:** Yes. Right now, as the ACC is aware, distributed generation is only made practical with the
14 utilities' rebates added into the equation. As you know, there is a limited pot of rebate money
15 each year on both the commercial and residential side. Once that rebate money has been used up
16 for the year there is no way to move forward with any additional projects in an economically
17 viable manner. This was extremely evident this year when APS came to the Commission to ask
18 for more money to serve its commercial rebate program for the year and also asked for a set
19 aside of \$20 million in rebates just for schools. Without that set aside for school projects no
20 school projects would have been able to be completed this year no matter how many requests for
21 service were made. In response to that school set aside more than 20 school districts, several
22 community colleges, and several charter schools were in contact with SolarCity to discuss the
23 potential to install solar this year in APS' service area. Even with the \$20 million set aside there
24 is no way SolarCity could accept all of these requests and the many buildings and many
25 megawatts involved because the rebate money will not support enough megawatt production this
26
27
28

1 year to cover all those who inquired. No matter what SolarCity's intentions may be you can
2 plainly see we simply cannot accept substantially all requests for service from the public.

3
4 **Q:** Mr. Rive, do you feel that your company offers a commodity comparable to energy provided
5 by an Incumbent Utility?
6

7
8 **A:** That's another point - we don't feel that solar systems are a commodity. In fact, we find that
9 solar customers can be very finicky, based on their own private preferences. By no means do
10 they just want cheaper electrons and not care where they come from. Customers will happily
11 pay more or less, or not sign on at all, because one solar system is ugly and the other attractive,
12 because one's modules are made in America and the other's are not, because one takes up more
13 roof space than another, because one system will penetrate a customers' roof and the other will
14 not, because we offer a really interesting Web interface and others do not, because one
15 competitor requires an upfront payment and another does not. Even if they produce the same
16 number of electrons, the products and offerings we finance for our customers are unique and
17 highly differentiated. Different customers look for different things.
18
19

20
21 **Q:** Have you had a chance to compare SolarCity's Articles of Incorporation with those of some
22 Public Service Corporations in Arizona?
23

24
25 **A:** Yes.
26

27 **Q:** And what have you found?
28

1 **A:** While SolarCity's Articles of Incorporation make no reference to being a utility or serving
2 electricity, each of the Articles of Incorporation for the PSCs in Arizona that I have had a chance
3 to review clearly indicates that the utility is being formed to act as a public utility. For example,
4 I have attached copies of the Article of Incorporation for Sulphur Springs Valley Electric
5 Cooperative (SSVEC), The Navopache Electric Cooperative (NEC), TEP and APS. SSVEC's
6 Articles of incorporation reference that it is being formed subject to the "Electric Cooperative
7 Act." NEC's Articles of Incorporation actually state flat out that it is going to "furnish" electric
8 energy while TEP's Articles indicate it is formed to transact business as a "public service
9 corporation within the meaning of Section 2 of Article 15 of the Arizona Constitution."
10 Similarly, APS' Articles of Incorporation include the statement that, "[t]he character of the
11 business which the Corporation intends to actually conduct in the State of Arizona on and for the
12 foreseeable period after July 1, 1976 is that of a public service corporation within the meaning of
13 Section 2 of Article 15 of the Constitution of Arizona as in effect on July 1, 1976." Each of
14 these Articles of Incorporation are attached to this testimony as SolarCity Exhibit "D" and
15 SolarCity's Articles of Incorporation are attached as SolarCity Exhibit "E."
16
17
18
19

20 **Q:** Does that conclude your testimony?
21

22 **A:** Yes.
23
24
25
26
27
28

1 **Additional Testimony of David Peterson**

2 **Q:** On page 19 of his testimony, the Staff's witness Mr. Irvine states that the "provision of
3 electricity" under the Scottsdale SSAs is the "primary purpose of the agreements." As a party to
4 the agreements in question do you agree with that assessment and if you do not please tell me
5 what you believe to be the "primary purpose of the agreements?"
6

7
8 **A:** I do not agree with Mr. Irvine at all. The fact of the matter is that the Scottsdale Unified
9 School District already has all of the electricity it needs and I have absolutely no need for
10 additional or different electricity. I have no reason to believe that either APS or SRP will ever
11 fail to meet my electrical needs so, no, I do not agree with Mr. Irvine as SUSD simply does not
12 need additional electricity for any reason. What SUSD does need however, is to save money
13 wherever we can save money so that I can hire more teachers or buy more books or improve
14 more buildings. What SolarCity is offering is a chance for SUSD to lower its overall operating
15 budget. Without the SSA arrangement SUSD would have no way of recognizing this savings.
16
17 The purpose of the SSA is clearly to provide a financing mechanism that allows SUSD to save
18 money. The fact that we are saving money in relation to electricity is completely and totally
19 irrelevant to SUSD. The important part is that SUSD is being offered an opportunity to save
20 money without putting up any upfront money. If anyone can offer SUSD the opportunity to save
21 millions of dollars without coming out of pocket one penny upfront then we are going to strongly
22 consider that opportunity whether it involves solar panels, school books or cleaning supplies. To
23 say this is about the electricity is absurd; it is about the savings and the ability to recognize those
24 savings without up front capital investment.
25
26
27
28

1 Additionally, everyone has to remember that there is no other economically viable way for us to
2 make this work. If SUSD could purchase the system or lease it while taking advantage of the
3 substantial tax incentives we would explore that but as has already been explained that does not
4 work because of our tax exempt status. All SUSD wants are the services that SolarCity provides
5 without regulation in this State right now which are the design, installation and maintenance of
6 the system with no upfront costs. Because we are a school the only way we can get these
7 services at a price that makes sense is through a SSA.
8

9
10 **Q:** You mention the word “financing” in your response yet Mr. Irvine, in his testimony indicates
11 that he believes that the SSA is not actually a form of “financing.” What do you think of that?
12

13
14 **A:** Again, I totally disagree with Mr. Irvine. If SUSD buys the panels then SUSD needs to come
15 up with approximately \$10 million dollars just to install the solar systems for the two schools.
16 The SSA allows us the opportunity to get the solar panels in place and to begin saving money
17 without spending anything up front. We are using SolarCity to raise the upfront costs for us and
18 are paying for that based on the savings we ultimately receive from their installation. That is
19 “financing” in its most basic sense. I don’t know what else to call that. Also, a simple glance at
20 the dictionary under the word “financing” shows that what we are doing is plainly “financing.”
21 The Cambridge Dictionary defines “financing” as, “to provide the money needed for something
22 to happen.” In this case, we are utilizing the SSA so that SolarCity and its third party investors
23 can provide the money needed so that the School District can save money. Mr. Irvine’s
24 definition of “financing” was self serving and inaccurate.
25
26
27
28

“SOLARCITY EXHIBIT D”

Articles of Incorporation for Sulphur Springs Valley Electric Cooperative

AMENDED AND RESTATED
ARTICLES OF INCORPORATION
OF
SULPHUR SPRINGS VALLEY ELECTRIC COOPERATIVE, INC.

Pursuant to Sections 10-2056 of the Arizona Revised Statutes, the undersigned corporation hereby adopts the following Articles of Incorporation amending and restating in their entirety the Articles of Incorporation filed with the Arizona Corporation Commission, as amended to date. The Amended and Restated Articles of Incorporation hereinafter appearing correctly set forth without change the provisions of the Articles of Incorporation as heretofore amended and amended hereby, and supersede the original Articles of Incorporation and all amendments thereto.

The following Articles of Amendment are executed pursuant to Arizona Revised Statutes 10-2051 et. seq. and were made on behalf of Sulphur Springs Valley Electric Cooperative, Inc. with its principal office in Willcox, Arizona

ARTICLES OF INCORPORATION
OF
SULPHUR SPRINGS VALLEY ELECTRIC COOPERATIVE, INC.

ARTICLE I.

The corporation as it now exists is Sulphur Springs Valley Electric Cooperative, Inc., and the present address of its principal office is Willcox, Arizona. The name of the company as a cooperative shall be Sulphur Springs Valley Electric Cooperative, Inc., and the address of its principal office as a cooperative shall be Willcox, Arizona.

ARTICLE II.

This corporation was organized under the statutes of the State of Arizona providing for the incorporation of a corporation not for profit and as set forth in Section 602, Revised Code Arizona, 1928.

ARTICLE III.

The Sulphur Springs Valley Electric Cooperative, Inc., elects to become a cooperative non-profit membership corporation subject to the Electric Cooperative Act.

ARTICLE IV.

The nature of the business of the corporation and the objects or purposes to be transacted promoted or carried on by it shall be as allowed by law. The corporation may engage in any transaction or business authorized by law and shall have all the powers authorized by law that may be necessary, convenient or appropriate to accomplish the purpose for which the corporation is organized or to carry out its business or affairs. The corporation may adopt By-Laws.

ARTICLE V.

The business and affairs of the corporation shall be vested in and managed and controlled by a board of directors and the officers of the corporation shall be a president, a vice-president, a treasurer and a secretary. The offices of Secretary and Treasurer may be held by the same person.

The directors, as such, shall not receive any compensation for their services, but the By-Laws may provide for reimbursement for reasonable expenses incurred in connection with the performance of their duties.

ARTICLE VI.

The number of directors, their election, removal, and filling of vacancies, and delineation of voting districts shall be as set forth in the By-Laws.

ARTICLE VII.

The corporate existence of the corporation shall be perpetual.

ARTICLE VIII.

Section 1. Membership in the corporation and rights, duties, and responsibilities shall be set forth in the By-Laws.

Section 2. The private property of the members of the corporation shall be exempt from execution for the debts of the corporation and no member shall be liable or responsible for any debts or liabilities of the corporation.

IN WITNESS WHEREOF, the President and Secretary of the Corporation, acting for and on behalf of the corporation, have hereunto set their hands this 23rd day of June, 1999.

Curtis Nolan
President

Harold Hinkley
Secretary

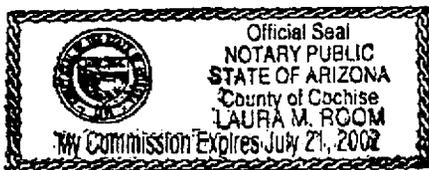
STATE OF ARIZONA)
)ss
County of Cochise)

On this, the 23rd day of June, 1999, before me, the undersigned Notary Public, personally appeared Curtis Nolan and Harold Hinkley, the President and Secretary, respectively of Sulphur Springs Valley Electric Cooperative, Inc., an Arizona Corporation (now known as SSVEC) and acknowledged to me that they, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the Corporation by themselves as such officers.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Laura M. Room
Notary Public

(Seal)



Articles of Incorporation for The Navopache Electric Cooperative

ARTICLES OF INCORPORATION
of
NAVOPACHE ELECTRIC COOPERATIVE, INC.

KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned, having this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of Arizona, hereby adopt the following articles of incorporation:

ARTICLE I.--NAME

The name of this Corporation is NAVOPACHE ELECTRIC COOPERATIVE, INC.

ARTICLE II.--PLACE OF BUSINESS

The principal place of business of the Corporation shall be Phoenix, Maricopa County, Arizona, but the Corporation may have and maintain offices and places of business in such other places in and out of the State of Arizona as its Board of Directors may from time to time deem advisable.

ARTICLE III.--INCORPORATORS

The names, residences and addresses of the incorporators are as follows:

<u>NAME</u>	<u>RESIDENCE AND ADDRESS</u>
W. H. Larson	Lakeside, Arizona
T. A. Caldwell	Lakeside, Arizona
James A. Trent	Lakeside, Arizona
S. W. Jaques	Lakeside, Arizona
C. Gilmore Jackson	Lakeside, Arizona

ARTICLE IV.--NATURE OF BUSINESS

The general nature of the business to be transacted and the object or objects and purpose or purposes for which the Corporation is formed are:

(a) To generate, manufacture, purchase, acquire and accumulate electric energy for its members and to transmit, distribute, furnish, sell and dispose of such electric energy to its members only, and to

construct, erect, purchase, lease as lessee and in any manner acquire, own, hold maintain, operate, sell, dispose of, lease as lessor, exchange and mortgage plants, buildings, works, machinery, supplies, apparatus, equipment and electric transmission and distribution lines or systems necessary, convenient or useful for carrying out and accomplishing any or all of the foregoing purposes;

(b) To acquire, own, hold, use, exercise and, to the extent permitted by law, to sell, mortgage, pledge, hypothecate and in any manner dispose of franchises, rights, privileges, licences, rights-of-way and easements necessary, useful or appropriate to accomplish any or all of the purposes of the corporation;

(c) To purchase, receive, lease as lessee, or in any other manner acquire, own, hold, maintain, use, convey, sell, lease as lessor, exchange, mortgage, pledge or otherwise dispose of any and all real and personal property or any interest therein necessary, useful or appropriate to enable the corporation to accomplish any or all of its purposes;

(d) To assist its members to wire their premises and install therein electrical and plumbing appliances, fixtures, machinery, supplies, apparatus and equipment of any and all kinds and character (including, without limiting the generality of the foregoing, such as are applicable to water supply and sewage disposal) and, in connection therewith and for such purposes, to purchase, acquire, lease, sell, distribute, install and repair electrical and plumbing appliances, fixtures, machinery, supplies, apparatus and equipment of any and all kinds and character (including, without limiting the generality of the foregoing, such as are applicable to water supply and sewage disposal) and to receive, acquire, endorse, pledge, guarantee, hypothecate, transfer or otherwise dispose of notes and other evidences of indebtedness and all security therefor;

(e) To borrow money, to make and issue bonds, notes and other evidences of indebtedness, secured or unsecured, for moneys borrowed or in payment for property acquired, or for any of the other objects or purposes of the corporation and to secure the payment of such bonds,

notes or other evidences of indebtedness by mortgage or mortgages, or deed or deeds of trust upon, or by the pledge of or other lien upon, all or any of the property, rights, privileges, or permits of the corporation, wheresoever situated, acquired or to be acquired;

(f) To do and perform any and all acts and things, and to have and exercise any and all powers which may be necessary or convenient to accomplish any or all of the foregoing purposes or which may be permitted, from time to time, by the Act under which the corporation is formed and the laws of the State of Arizona; provided, however, that all of the operations of the corporation shall be on a cooperative basis, not for profit, and for the use and benefit of its members as such. The corporation shall render no service to or for the public.

ARTICLE V.--NON-CAPITAL STOCK

The corporation is organized as a non-profit corporation without capital stock.

ARTICLE VI.--DURATION OF CORPORATE EXISTENCE

The corporate existence shall begin on the date these articles are filed and a certified copy of the same recorded in accordance with the law and a certificate of incorporation delivered by the Corporation Commission, and the termination thereof shall be twenty-five (25) years thereafter, with the privilege of renewal as provided by law.

ARTICLE VII.--CORPORATE GOVERNMENT

(a) The affairs of the Corporation shall be governed by a Board of Directors of not less than three (3) nor more than nine (9) directors and such officers as the Board of Directors may elect or appoint. The officers shall be a President, Vice-President, Secretary and Treasurer, elected by and from among the directors. Deputy officers may be provided for by the Bylaws adopted hereunder.

(b) At the annual meeting of the members to be held on the last Wednesday in November of each year, beginning with the year 1946, the directors shall be elected by and from the members of the Cooperative to hold office until the next annual meeting of the members or until

their successors shall have been elected and shall have qualified.

(c) The first directors of the Corporation who shall hold office until the annual meeting of the members in the year 1946, or until their successors shall have been elected and shall have qualified, are:

<u>NAME</u>	<u>ADDRESS</u>
W. H. Larson	Lakeside, Arizona
T. A. Caldwell	Lakeside, Arizona
James A. Treat	Lakeside, Arizona
S. F. Jaques	Lakeside, Arizona
C. Gilmore Jackson	Lakeside, Arizona

The above named persons were elected as directors at a meeting of the incorporators held at Phoenix, Maricopa County, State of Arizona, at 2:00 o'clock, P.M., on the 14th day of August, 1946.

(d) The Bylaws may provide that directors may be nominated or elected from different divisions of the entire territory to be served.

ARTICLE VIII.--INDEBTEDNESS
OR CORPORATE LIABILITY

The highest amount of indebtedness or liability, direct or contingent, to which this Corporation shall at any time subject itself is Four Million (\$4,000,000.00) Dollars.

ARTICLE IX.--EXEMPTION OF MEMBERS

The private property of the members of the corporation shall be exempt from execution for the debts of the corporation and no member shall be individually liable or responsible for any debts or liabilities of the corporation.

ARTICLE X.--MEMBERSHIP

Membership in the corporation shall be evidenced by a certificate of membership which shall be in such form and shall contain such provisions as shall be determined by the Board of Directors, not contrary to or inconsistent with these Articles of Incorporation or by the Bylaws of the Corporation. Such certificate shall be signed by the President and by the Secretary of the corporation and the corporate seal shall be affixed thereto.

ARTICLE XI.--AMENDMENT OF ARTICLES

These Articles shall be adopted at an organization meeting by a vote of not less than two-thirds of the original corporators and may be amended as now or hereafter provided by law.

ARTICLE XII.--BYLAWS

The power to adopt bylaws shall be vested in the members. The bylaws of the corporation may be altered, amended or repealed by the members at any regular or special meeting, provided that the notice of such meeting shall have contained a copy of the proposed alteration, amendment or repeal.

ARTICLE XIII.--STATUTORY AGENT

The statutory agent of this corporation shall be Virgil W. Chandler, 516 Heard Building, Phoenix, Arizona, who has been a bona fide resident of the State of Arizona for more than three (3) years last past, who is appointed its lawful agent for and in behalf of said corporation to accept and acknowledge service of and upon whom may be served all necessary process or processes in any action, suit or proceeding that may be had or brought against the said corporation in any of the Courts of said State of Arizona. His appointment may be revoked at any time by filing the appointment of another agent.

IN WITNESS WHEREOF, we, as corporators, hereunto set our hands as such corporators in the County of Maricopa, State of Arizona, the 19th day of August, in the year 1946.

W. J. Jackson
James A. Tunt
J. W. Caldwell
C. Edward Jackson

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this the 19th day of August, 1946, before me, the undersigned
officer, personally appeared W. H. LARSON,
T. A. CALDWELL, JAMES A. TREAT,
S. W. JACQUES AND C. GILMORE JACKSON,

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known to me to be the persons whose names are subscribed to the foregoing
Articles of Incorporation, as incorporators, and that they executed the
same for the purpose therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my
official seal in said Maricopa County, the day and year in this certifi-
cate last above mentioned.

Paul Steinhilber
Notary Public

My Commission Expires:
4-9-48

(Seal)

39819

Certificate of Inc.) Issued 8-20-46
Business)

Signed by

W. S. Whiddett
Wm. M. Goodwill

Chairman

Secretary

Not Secy

ARIZONA CORPORATION COMMISSION
INCORPORATING DIVISION
FILED

AUG 19 1946

Approved by _____
Notary Public for Arizona
My Comm. Expires _____
Wm. M. Goodwill
Secretary

Articles of Incorporation for Tucson Electric Power Company

1 9 7 0 1 1

RESTATED
ARTICLES OF INCORPORATION
OF
TUCSON ELECTRIC POWER COMPANY

AL. CORP. INCORPORATED
FOR THE STATE OF ARIZONA
Nov 11 1970
DATE OF INCORPORATION
1970

KNOW ALL MEN BY THESE PRESENTS: That the incorporators, having associated themselves together for the purpose of forming a corporation under and by virtue of the laws of the State of Arizona did adopt Articles of Incorporation, which are restated as follows:

FIRST: The name of the Corporation shall be Tucson Electric Power Company.

SECOND: The known and principal place of business of the Corporation within the State of Arizona shall be 220 West Sixth Street, Tucson, Arizona 85701, but the known place of business may be changed and other offices may be established and maintained in or outside of the State of Arizona at such places as the Board of Directors may designate.

THIRD: The purposes for which the Corporation is organized shall be the transaction of any or all lawful business for which corporations may be incorporated under Chapter 1 of Title 10, Arizona Revised Statutes.

The character of business which the Corporation intends actually to conduct in the State of Arizona is that of a public service corporation within the meaning of Section 2 of Article 15 of the Constitution of Arizona.

FOURTH: The total number of shares of Capital Stock of all classes which the Corporation shall have authority to issue is Two Hundred One Million (201,000,000) shares, divided into:

One Million (1,000,000) shares of Preferred Stock without par value;

and

Two Hundred Million (200,000,000) shares of Common Stock without par value.

The Capital Stock of the Corporation shall be paid in at such time and upon such conditions as the Board of Directors shall from time to time determine.

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Preferred Stock

The Board of Directors of the Corporation shall have the authority to divide the Preferred Stock into series and determine the designation, preferences, privileges and voting powers of the shares of each series so established and the restrictions and qualifications thereof, all to the extent and in the manner provided by law; provided, however, that prior to January 1, 1995 such authority shall be exercised only by the unanimous act of the entire Board of Directors.

Common Stock

Subject to the limitations, if any, specified with respect to the Preferred Stock of any series thereof, dividends may be paid on shares of the Common Stock, out of any funds legally available therefor, when and as declared by the Board of Directors.

Subject to the limitations, if any, specified with respect to the Preferred Stock of any series thereof, in the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the assets of the Corporation available for payment and distribution to shareholders shall be distributed ratably in proportion with their holdings to the holders of shares of the Common Stock.

All voting power shall vest exclusively as the holders of shares of the Common Stock, except as any statute of the State of Arizona shall expressly provide to the contrary, and except as and to the extent otherwise specified with respect to the Preferred Stock, or any series thereof, and each holder of the Common Stock shall, in the election of directors and upon each other matter coming before any meeting of shareholders, be entitled to one (1) vote for each share of such stock standing in the name of such holder on the books of the Corporation.

General Provisions

The Corporation may, subject to such limitations, if any, as may be specified with respect to the Preferred Stock, or any series thereof, amend these Articles of Incorporation from time to time, in as many respects as may be desired and authorized hereafter permitted by law. The rights conferred upon shareholders in these Articles of Incorporation are granted subject to the foregoing right to amend.

The Corporation may, subject to such limitations, if any, as may be specified with respect to the Preferred Stock, or any series thereof, acquire, hold, own, lease, transfer or otherwise dispose of any shares of its Capital Stock theretofore issued and outstanding; provided, however, that purchases, whether direct or indirect, shall be made only to the extent of unreserved and unrestricted earned surplus available therefor.

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A statutory consolidation or merger of the Corporation shall not be deemed to be a liquidation, dissolution or winding up of the Corporation within the meaning of any provision of these Articles of Incorporation.

In consideration of the issue by the Corporation of shares of the Capital Stock of the Corporation, each and every present and future holder of shares of the Capital Stock of the Corporation shall be conclusively deemed, by acquiring or holding such shares, to have expressly consented to all and singular the terms and provisions of these Articles of Incorporation and to have agreed that the voting rights of such holder and the restrictions or qualifications thereof shall be as set forth in, or determined pursuant to, this Article.

Any action required or permitted by these Articles of Incorporation to be taken by the Board of Directors of the Corporation may be taken by a duly authorized committee of the Board of Directors, except as otherwise required by law.

FIFTH: The consideration for the issuance of shares of Capital Stock of the Corporation may be paid to the Corporation, in whole or in part, in cash, in kind, property, tangible or intangible, or in labor or services actually performed for the Corporation, as may be determined by the Board of Directors; provided, however, that the consideration for shares of Capital Stock of the Corporation having a par value shall not be less than the par value thereof. Shares of Capital Stock of the Corporation shall be deemed to be fully paid and non-assessable when payment of the consideration for which such shares are to be issued has been received by the Corporation. The private property of shareholders of the Corporation shall be forever exempt from the debts and obligations of the Corporation.

SIXTH: The period of duration of the Corporation shall be perpetual.

SEVENTH: (A) The affairs of the Corporation shall be conducted by a Board of Directors consisting of a number of persons, not less than seven (7) nor more than ten (10), specified by the Board of Directors in the Bylaws of the Corporation. Directors shall receive reasonable compensation for the services which they perform. Directors shall be elected annually by the shareholders at the annual meeting of shareholders and when so elected shall serve until the next annual meeting of shareholders or until their successors have been duly elected and qualified.

(B) No director of the Corporation shall be personally liable for monetary damages for breach of fiduciary duty as a Director; provided, however, that nothing herein shall be deemed to eliminate or limit any liability which may not be so eliminated or limited under the laws of the State of Arizona, as in effect at the effective date of this paragraph (B) of Article SEVENTH or as thereafter amended. No amendment, modification or repeal of this paragraph (B) shall eliminate or limit the protection afforded by this paragraph (B) to a director with respect to any act or omission occurring before the effective date thereof.

(C) (1) The Corporation shall, to the maximum extent permitted by applicable law, as from time to time in effect, indemnify any person who is a party to or otherwise involved in (or threatened to be made a party to or otherwise involved in) any threatened, pending or completed action, suit or proceeding (hereinafter called an "Action"), whether civil, criminal, administrative or investigative (including without limitation any Action by or in the name of the Corporation to procure a judgment in its favor) by reason of the fact that he was a director or officer of the Corporation, or is or was serving at the request of the Corporation as a director or officer of another corporation, of any type or kind, domestic or foreign, or any partnership, joint venture, trust, employee benefit plan or any other entity or enterprise, against expenses, including attorneys' fees, and against judgments, fines and amounts paid in settlement incurred by him in connection with such Action or any appeal therein.

(2) The Corporation shall pay any expenses incurred by a director or officer of the Corporation in defending any such Action in advance of any final disposition thereof upon receipt of any undertaking by or on behalf of such person to repay such advances to the extent of the amount to which such person shall ultimately be determined not to be entitled.

(3) The Corporation, by resolution of the Board of Directors, may extend the benefits of this paragraph (C) of Article SEVENTH to independent agents and other representatives of the Corporation (such director, officer, employee, agent and other representative entitled to benefits under this paragraph (C) being hereinafter sometimes called an "Indemnified Person").

(4) All rights to indemnification and to the advancement of expenses granted under or pursuant to this paragraph (C) shall be deemed to have been granted by a contract between the Corporation and each person who is an Indemnified Person at any time while this paragraph (C) is in effect and may be evidenced by a separate contract between the Corporation and each Indemnified Person, and such rights shall be effective in respect of all Actions commenced after the effective date of this paragraph (C), whether arising from acts or omissions occurring before or after such date. No amendment, modification or repeal of this Article shall affect any rights or obligations theretofore existing.

(5) The Corporation may purchase and maintain insurance on behalf of, or insure or cause to be insured, any person who is an Indemnified Person against any liability asserted against him and incurred by him in such capacity in respect of which he is an Indemnified Person, or arising out of his status in such capacity, whether or not the Corporation would have the power to indemnify him against such liability under this Article. As used in this Section, "insurance" includes retrospectively rated and self-insured programs, provided, however, that no such program shall provide coverage for directors and officers.

which is prohibited by applicable law. The Corporation's indemnity of any person who is an Indemnified Person shall be reduced by any amounts such person may collect with respect to such liability (a) under any policy of insurance purchased and maintained on his behalf by the Corporation or (b) from any other entity or enterprise served by such person.

(6) The rights to indemnification and to the advancement of expenses and all other benefits provided by, or granted pursuant to, this Article shall continue as to a person who has ceased to serve in the capacity in respect of which such person was an Indemnified Person and shall inure to the benefit of the heirs, executors and administrators of such person.

(7) The Board of Directors shall have the power and authority to make, alter, amend and repeal such procedural rules and regulations relating to indemnification and the advancement of expenses as it, in its discretion, may deem necessary or expedient in order to carry out the purposes of this Article. Such rules and regulations, if any, to be set forth in the Bylaws of the Corporation or in a resolution of the Board of Directors.

EIGHTH: The Corporation shall have power to accept any law of any state of the United States, within the territorial limits of which the Corporation may from time to time be desirous of exercising its franchises or carrying on any part of its business, and to exercise within such other state all such franchises, powers, privileges, and rights and be subject to such restrictions as may by the laws of such state be permitted or imposed.

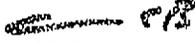
NINTH: The name, residence and post office address of each incorporator were as follows:

<u>Name</u>	<u>Residence</u>	<u>Post Office Address</u>
J. R. Snider	2717 Exeter St. Tucson, Arizona	35 West Pennington St. Tucson, Arizona
J. Luther Davis	1815 North Norton Ave. Tucson, Arizona	35 West Pennington St. Tucson, Arizona
C. L. Clawson	2840 East Seventh St. Tucson, Arizona	35 West Pennington St. Tucson, Arizona

TENTH: The directors of the Corporation shall have the power to make, alter, amend and repeal such bylaws for the management of the business and affairs of the Corporation as they may deem necessary or expedient, and to fill vacancies occurring in the Board of Directors from any cause.

IN WITNESS WHEREOF, the undersigned, Tucson Electric Power Company, an Arizona corporation, has executed the foregoing Restated Articles of Incorporation of Tucson Electric Power Company by its President, Charles E. Bayless, and by its Secretary, Dennis R. Nelson, whose signatures are acknowledged as having been set forth, and said Corporation by said officers hereby states that the foregoing Restated Articles of Incorporation set forth all of the operative provisions of the Articles of Incorporation of Tucson Electric Power Company as heretofore amended and that the Restated Articles of Incorporation correctly set forth without change the provisions of the Articles of Incorporation as heretofore amended and that the Restated Articles of Incorporation supersede the original Articles of Incorporation and all amendments thereto, and said officers further state that said Restated Articles of Incorporation were heretofore duly adopted by the Board of Directors of the Corporation.

TUCSON ELECTRIC POWER COMPANY

By: 
Charles E. Bayless
Its: President
By: 
Dennis R. Nelson
Its: Secretary

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STATE OF ARIZONA)
) ss. Tucson
COUNTY OF PIMA)

The foregoing instrument was acknowledged before me this 5th day of August, 1994, by Charles E. Bayless and Dennis R. Nelson, President and Secretary of Tucson Electric Power Company, an Arizona corporation, on behalf of the corporation.



Notary Public

My Commission Expires:
August 8, 1995

Articles of Incorporation for Arizona Public Service Company

**ARTICLES OF INCORPORATION
OF
ARIZONA PUBLIC SERVICE COMPANY
Restated As Of May 25, 1988**

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, HOWARD L. ALLER, GEORGE P. BILLARD AND JOHN H. PAGE, desiring to form a corporation under and according to the laws of the State of Arizona, do hereby adopt the following Articles of Incorporation:

FIRST: The name of the Corporation is Arizona Public Service Company.

SECOND: The purposes for which this Corporation is organized include the transaction of any or all lawful business for which corporations may be incorporated under Chapter 1 of Title 10, Arizona Revised Statutes, on or at any time after July 1, 1976.

The character of business which the Corporation intends actually to conduct in the State of Arizona on and for the foreseeable period after July 1, 1976 is that of a public service corporation within the meaning of Section 2 of Article 15 of the Constitution of Arizona as in effect on July 1, 1976.

THIRD: The authorized Capital Stock of the Corporation is 115,535,000 shares divided into 100,000,000 shares of Common Stock with a par value of \$2.50 per share, 150,000 shares of \$1.10 Cumulative Preferred Stock with a par value of \$25.00 per share (the "\$1.10 Preferred"), 105,000 shares of \$2.50 Cumulative Preferred Stock with a par value of \$50.00 per share (the "\$2.50 Preferred"), 120,000 shares of \$2.36 Cumulative Preferred Stock with a par value of \$50.00 per share (the "\$2.36 Preferred"), 150,000 shares of \$4.35 Cumulative Preferred Stock with a par value of \$100.00 per share (the "\$4.35 Preferred"), 1,000,000 shares of Serial Preferred Stock with a par value of \$50.00 per share, 4,000,000 shares of Serial Preferred Stock with a par value of \$100.00 per share and 10,000,000 shares of Serial Preferred Stock with a par value of \$25.00 per share. The \$1.10 Preferred, the \$2.50 Preferred, the \$2.36 Preferred and the \$4.35 Preferred are hereinafter sometimes collectively referred to as the "Preferred Stock"; and the 15,000,000 shares, in the aggregate, of Serial Preferred Stock, without regard to the amount of the par value thereof, are hereinafter sometimes collectively referred to as the "Serial Preferred". The Serial Preferred shall be issuable in series.

The Capital Stock of the Corporation shall be paid in at such time and upon such conditions as a majority of the Board of Directors shall from time to time fix and determine. Subject to the terms and provisions of this Article Third, the Board of Directors of the Corporation is authorized to provide from time to time for the issuance, within the limitations and restrictions herein set forth, of shares of the Serial Preferred in series and to fix from time to time before issuance the designations, preferences, privileges and voting powers of the shares of each series of the Serial Preferred and the restrictions or qualifications thereof, including, without limiting the generality of the foregoing, the following:

- (a) the serial designation and authorized number of shares,
- (b) the dividend rate, the date or dates at which such dividends shall be payable and the extent to which such dividends shall be cumulative,
- (c) the amount or amounts, not less than the par value, to be received by the holders in the event of voluntary or involuntary dissolution or liquidation of the Corporation,
- (d) the price or prices at which shares may be redeemed and any terms, conditions and limitations upon such redemptions,
- (e) any sinking fund provisions for the redemption or purchase of shares of such series, and
- (f) the terms and conditions (if any) on which shares may be converted;

provided, however, that subject to the provisions of Section 10-033 of the Arizona Revised Statutes, the shares of all series of the Serial Preferred shall not have more than one vote each.

The designations and preferences of each of said classes of stock (excluding, except as specifically otherwise set forth, the Serial Preferred) shall be as follows:

(1) The Preferred Stock, each class *pari passu* with each other class thereof and with the Serial Preferred, but in preference to the Common Stock and any stock junior to the Preferred Stock and the Serial Preferred, shall be entitled to dividends from surplus or profits at the rates of One Dollar and Ten cents (\$1.10), Two Dollars and Fifty Cents (\$2.50), Two Dollars and Thirty-Six Cents (\$2.36) and Four Dollars and Thirty-Five Cents (\$4.35), respectively, per share per annum, payable quarterly on March 1, June 1, September 1 and December 1 of each year, when and as declared by the Board of Directors. Such dividends with respect to each share shall be cumulative from the first day of the dividend period in which such share shall originally have been issued. No share of Preferred Stock shall be entitled to any dividends from surplus or profits in excess of the dividends at the respective rates per share per annum aforesaid. Each series of Serial Preferred, *pari passu* with each class of the Preferred Stock but in preference to the Common Stock and any stock junior to the Preferred Stock and the Serial Preferred, shall be entitled to dividends from surplus or profits at the rates, payable at such times and cumulative to the extent fixed by the Board of Directors of the Corporation pursuant to the authority herein conferred upon such Board of Directors.

(2) In the event of involuntary dissolution or liquidation of the Corporation, the holders of the Preferred Stock, each class *pari passu* with the other classes thereof and with the Serial Preferred, but in preference to the Common Stock and any stock junior to the Preferred Stock and the Serial Preferred, shall be entitled to receive, respectively, the par value of their shares, plus an amount equal to the accrued and unpaid dividends on such shares to the date of dissolution or liquidation. In the event of any voluntary dissolution or liquidation, the holders of the Preferred Stock, each class *pari passu* with each other class thereof and the Serial Preferred, but in preference to the Common Stock and any stock junior to the Preferred Stock and the Serial Preferred, shall be entitled to receive, respectively, the par value of their shares, plus an amount equal to the accrued dividends on such shares to the date of dissolution or liquidation plus the redemption premium. On and after July 1, 1976, the redemption premium shall be: \$2.50 per share of the \$1.10 Preferred; \$1.00 per share of either the \$2.50 Preferred or the \$2.36 Preferred; and \$2.00 per share of the \$4.35 Preferred. In the event of dissolution or liquidation of the Corporation, voluntary or involuntary, the holders of the Serial Preferred, *pari passu* with each class of the Preferred Stock, but in preference to the Common Stock and any stock junior to the Preferred Stock and the Serial Preferred, shall be entitled to receive such amount or amounts, not less than par value, as may be fixed by the Board of Directors pursuant to the authority herein conferred upon the Board of Directors.

(3-a) Upon the affirmative vote of a majority of the shares of the issued and outstanding Common Stock at any annual meeting or at any special meeting called for that purpose, any class of Preferred Stock may be redeemed in whole or in part at any time at the applicable redemption price for each share thereof redeemed, plus an amount equal to the accrued dividends to the date fixed for redemption. On and after July 1, 1976, the redemption price shall be: \$27.50 per share of the \$1.10 Preferred; \$51.00 per share of either the \$2.50 Preferred or the \$2.36 Preferred; and \$102.00 per share of the \$4.35 Preferred. If, pursuant to such vote of the Common Stock, less than all of the share of any class of Preferred Stock are to be redeemed, they shall be selected in such manner as the Board of Directors or the Executive Committee shall determine. Nothing herein contained shall limit any right of the Corporation to purchase or otherwise acquire any shares of any class of Preferred Stock.

(3-b) Each series of Serial Preferred shall be subject to redemption in whole or in part at such price or prices and on such terms, conditions and limitations as may be fixed by the Board of Directors prior to the issuance of any such series. If less than all of the shares of any series of the Serial Preferred are to be redeemed, they shall be selected in such manner as the Board of Directors or the Executive Committee shall determine. Nothing herein contained shall limit any right of the Corporation to purchase or otherwise acquire any shares of any series of the Serial Preferred. Any shares of Serial Preferred redeemed or otherwise acquired by the Company shall have the status of authorized and unissued shares, undesignated as to series, and may thereafter, in the discretion of the Board of Directors and to the extent permitted by law, be sold or reissued from time to time, as part of another series or (unless prohibited by the terms of such series as fixed by the Board of Directors) of the same series, subject to the terms and conditions herein set forth.

(3-c) Notice of the intention of the Corporation to redeem shares of Preferred Stock of any class, or any series of the Serial Preferred, shall be mailed at least thirty (30) days before the date of redemption to each holder of record of the shares to be redeemed, at his last known post office address as shown by the records of the Corporation. At any time after such notice has been mailed as aforesaid, the Corporation may deposit (separately as to each class or series) the aggregate redemption price payable with respect to shares of such class or series to be redeemed (or the portion thereof not already paid in the redemption of shares so to be redeemed) with any bank or trust company (having capital, surplus and undivided profits aggregating at least \$4,000,000) in The City of New York, a member of the Clearing House of The City of New York, or with any bank or trust company (having capital, surplus and undivided profits aggregating at least \$4,000,000) in the City of Phoenix, Arizona, a member of the Clearing House of the City of Phoenix, Arizona, named in such notice of redemption, payable in amounts aforesaid to the respective orders of the holders of record of the shares of such class or series so to be redeemed, on endorsement, if required, and surrender of their certificates. Thereupon said holders shall cease to be stockholders with respect to said shares and from and after the making of such deposit said holders shall have no interest or claim against the Corporation with respect to said shares, but shall be entitled only to receive said monies from said bank or trust company without interest.

(4-a) The term "net income available for fixed charges" whenever hereafter used in these Articles of Incorporation shall mean the sum of (a) the net income of the Corporation determined in accordance with generally accepted accounting principles and (b) an amount equal to the interest charges on long-term debt of the Corporation deducted in determining such net income including amortization of debt discount and expense if and to the extent such amortization was deducted in determining net income. The term "long-term debt" as hereinafter used in these Articles of Incorporation shall include all indebtedness of the Corporation having a fixed maturity date more than one year from the date of issue thereof or renewable or refundable at the option of the obligor pursuant to any revolving or other similar credit agreement or otherwise to a date more than one year from the date of issue thereof. The certificate of any firm of independent accountants selected by the Board of Directors shall be conclusive evidence as to the net income available for fixed charges for any period.

(4-b) So long as any shares of any class of Preferred Stock are outstanding, the Corporation shall not, without the affirmative vote or consent of the holders of at least two-thirds of the outstanding shares of said class, voting as a class: (a) authorize, by amendment of the Articles of Incorporation, any stock ranking prior in any respect to said class; or (b) make any change, by amendment of the Articles of Incorporation, or otherwise, in the terms and provisions of said class that would adversely affect the rights and preferences of the holders thereof; or (c) issue any shares of said class theretofore authorized but unissued, or shares of any stock *pari passu* with said class, other than in exchange for, or for the purpose of effecting the redemption or other retirement of, not less than an equal aggregate par value of shares of Preferred Stock, or of any stock *pari passu* therewith, at the time outstanding, unless the net income available for fixed charges of the Corporation for a period of any twelve (12) consecutive months within the fifteen (15) calendar months immediately preceding the first day of the month in which such additional stock is issued is at least one and one-half (1½) times the sum of (i) the interest requirements for one year on the long-term debt of the Corporation to be outstanding immediately after the date of issue of such additional shares and (ii) the dividend requirements for one year on all shares of Preferred Stock, and of all other classes of stock ranking on a parity with or prior to said class of Preferred Stock in respect to dividends or assets, to be outstanding immediately after such proposed issue of additional shares.

(4-c) So long as any shares of the Serial Preferred are outstanding, the Corporation shall not, without affirmative action taken as hereinafter provided by the holders of Serial Preferred: (a) authorize, by amendment of the Articles of Incorporation, any stock ranking prior in any respect to the Serial Preferred; or (b) make any change, by amendment of the Articles of Incorporation, or otherwise, in the terms and provisions of the Serial Preferred or any series of the Serial Preferred of which any shares are then outstanding, that would adversely affect the rights and preferences of the holders of the Serial Preferred; or (c) issue any shares of the Serial Preferred theretofore authorized but unissued, or shares of any stock *pari passu* with the Serial Preferred, other than in exchange for, or for the purpose of effecting the redemption or other retirement of, not less than an equal aggregate par value of shares of Serial Preferred, or of any stock *pari passu* therewith, at the time outstanding, unless the net income available for fixed charges of the Corporation for a period of any twelve (12) consecutive months within the fifteen (15) calendar months immediately preceding the first day of the month in which such additional stock is issued is at least one and one-half (1½) times the sum of (i) the interest requirements for one year on the long-term debt of the Corporation to be outstanding immediately after the date of issue of such additional shares and (ii) the dividend requirements for one year on all shares of Serial Preferred, and of all other classes of stock ranking on a parity with or prior to the Serial Preferred in respect of dividends or assets, to be outstanding immediately after such proposed issue of additional shares. In taking any affirmative action that may be required by this Section (4-c), the holders of Serial Preferred shall vote or consent according to the following two classes: Serial Preferred Stock with a par value of either \$50.00 or \$100.00 per share; and Serial Preferred Stock with a par value of \$25.00 per share; and such action shall require the affirmative vote or consent of the holders of at least two-thirds of the then outstanding shares of each such voting or consenting class; provided, however, that if a proposed amendment requiring affirmative action pursuant to clause (b) of the immediately preceding sentence will adversely affect less than all series of Serial Preferred of which shares are then outstanding, then the affirmative vote or consent of the holders of at least two-thirds of the outstanding shares of each series which will be adversely affected by the proposed amendment, each such Series (regardless of the par value of the shares thereof) voting or consenting as a class, shall constitute the required affirmative action, and in such event the affirmative vote or consent of the holders of two-thirds of the outstanding shares of all series within each class referred to in the first clause of this sentence shall not be required.

(5) So long as any of the shares of the Preferred Stock or the Serial Preferred are outstanding, the Corporation shall not, without affirmative action taken as hereinafter provided by the holders of Preferred Stock and Serial Preferred, merge or consolidate with any other corporation or corporations or sell substantially all of the property of the Corporation; provided the provisions of this Section (5) shall not apply to any mortgage of all or substantially all of the property of the Corporation, or to a purchase or other acquisition by the Corporation of the assets or franchises of another corporation, or to any other transaction which does not include such a merger, consolidation or sale of property of the Corporation. In taking any affirmative action that may be required by this Section (5), the holders of Preferred Stock and Serial Preferred shall vote or consent according to the following classes: each class of Preferred Stock; each series of Serial Preferred Stock with a par value of either \$50.00 or \$100.00 per share; and the Serial Preferred Stock with a par value of \$25.00 per share; and such action shall require the affirmative vote or consent of the holders of at least a majority of the then outstanding shares of each such voting or consenting class.

(6-a) Each holder of Preferred Stock or Serial Preferred shall be entitled to one vote for each share of stock standing in his name on the books of the Corporation.

(6-b) If at the time of any annual meeting of stockholders dividends payable on the \$1.10 Preferred or on the \$2.50 Preferred shall be accrued and unpaid in an amount equal to six (6) quarterly dividends, the holders of both such classes of stock, voting as a single class for such purpose, shall be entitled to elect two directors. Whenever the right shall vest in the holders of the \$1.10 Preferred and the \$2.50 Preferred to elect two directors, the Board of

Directors shall, at least ten (10) days prior to such annual meeting at which such dividends remain accrued and unpaid, cause to be mailed to each stockholder, at his last known post office address as shown on the stock records of the Corporation, a notice to this effect. At all meetings of stockholders where the holders of the \$1.10 Preferred and the \$2.50 Preferred shall have such right to elect two directors, the presence in person or by proxy of the holders of a majority of the aggregate number of outstanding shares of \$1.10 Preferred and \$2.50 Preferred shall be required to constitute a quorum for the election of such two directors; provided, however, that the absence of a quorum of the holders of \$1.10 Preferred and \$2.50 Preferred shall not prevent the election at any such meeting or adjournment thereof of directors in the usual manner by the holders of all classes of stock if the necessary quorum of the holders of all classes of stock is present in person or by proxy at such meeting. When all dividends accrued and unpaid on the \$1.10 Preferred and the \$2.50 Preferred shall have been paid or declared and set apart for payment, holders of \$1.10 Preferred and \$2.50 Preferred shall at the next annual meeting be divested of their rights in respect of such election of two directors, and the voting power of the holders of the \$1.10 Preferred and the \$2.50 Preferred and the holders of the Common Stock shall revert to the status existing before the first dividend payment date on which dividends on the \$1.10 Preferred or the \$2.50 Preferred were not paid in full; but always subject to the same provisions for vesting such special rights in the holders of the \$1.10 Preferred and the \$2.50 Preferred in the event dividends on the \$1.10 Preferred or the \$2.50 Preferred shall again become accrued and unpaid in an amount equal to six (6) quarterly dividends. Vacancies among directors elected by holders of the \$1.10 Preferred and \$2.50 Preferred during any period for which directors shall have been so elected shall be filled, until the next annual or special meeting for the election of directors, by the vote of the remaining directors of the Corporation. Vacancies among directors elected by holders of all classes of stock shall be filled by the vote of a majority of the remaining directors elected by the holders of all classes of stock until the next annual meeting for the election of directors or special meeting in lieu thereof.

(6-c) If at the time of any annual meeting of stockholders dividends payable on the \$2.36 Preferred shall be accrued and unpaid in an amount equal to six (6) quarterly dividends, the holders of the \$2.36 Preferred, voting as a single class for such purpose, in addition to the other rights to which they may be entitled hereunder by law, shall be entitled to elect one director. Whenever the right shall vest hereunder in such holders to elect one director, the Board of Directors shall, at least ten (10) days prior to such meeting at which such dividends remain accrued and unpaid, cause to be mailed to each stockholder, at his last known post office address as shown on the stock records of the Corporation, a notice to this effect. At all meetings of stockholders where such holders shall have such right to elect one director, the presence in person or by proxy of the holders of a majority of the aggregate number of outstanding shares of said class of stock shall be required to constitute a quorum for the election of such one director; provided, however, that the absence of a quorum of the holders of said class of stock shall not prevent the election at any such meeting or adjournment thereof of directors in the usual manner by the holders of all classes of stock if the necessary quorum of the holders of all classes of stock is present in person or by proxy at such meeting. When all dividends accrued and unpaid on the \$2.36 Preferred shall have been paid or declared and set apart for payment, the holders of the said class of stock shall at the next annual meeting be divested of their rights in respect of such election of such one director, and the voting power of the holders of the \$2.36 Preferred and the holders of the Common Stock shall revert to the status existing before the first dividend payment date on which dividends on the \$2.36 Preferred were not paid in full; but always subject to the same provisions for vesting such special rights in the holders of the \$2.36 Preferred in the event dividends on said class of stock shall again become accrued and unpaid in an amount equal to six (6) quarterly dividends. Vacancies among directors elected by holders of all classes of stock shall be filled by the vote of a majority of the remaining directors elected by the holders of all classes of stock until the next annual meeting for the election of directors or special meeting in lieu thereof.

(6-d) If at the time of any annual meeting of stockholders dividends payable on the \$4.35 Preferred shall be accrued and unpaid in an amount equal to six (6) quarterly dividends, the holders of the \$4.35 Preferred, voting as a single class for such purpose, in addition to the other rights to which they may be entitled hereunder by law, shall be entitled to elect one director. Whenever the right shall vest hereunder in such holders to elect one director, the Board of Directors shall, at least ten (10) days prior to such meeting at which such dividends remain accrued and unpaid, cause to be mailed to each stockholder, at his last known post office address as shown on the stock records of the Corporation, a notice to this effect. At all meetings of stockholders where such holders shall have such right to elect one director, the presence in person or by proxy of the holders of a majority of the aggregate number of outstanding shares of said class of stock shall be required to constitute a quorum for the election of such one director; provided, however, that the absence of a quorum of the holders of the said class of stock shall not prevent the election at any such meeting or adjournment thereof of directors in the usual manner by the holders of all classes of stock, if the necessary quorum of the holders of all classes of stock is present in person or by proxy at such meeting. When all dividends accrued and unpaid on the \$4.35 Preferred shall have been paid or declared and set apart for payment, the holders of the said class of stock shall at the next annual meeting be divested of their rights in respect of such election of such one director, and the voting power of the holders of the \$4.35 Preferred and the holders of the Common Stock shall revert to the status existing before the first dividend payment date on which

dividends on the \$4.35 Preferred were not paid in full; but always subject to the same provisions for vesting such special rights in the holders of the \$4.35 Preferred in the event dividends on said class of stock shall again become accrued and unpaid in an amount equal to six (6) quarterly dividends. Vacancies among directors elected by holders of all classes of stock shall be filled by the vote of a majority of the remaining directors elected by the holders of all classes of stock until the next annual meeting for the election of directors or special meeting in lieu thereof.

(6-e) If at the time of any annual meeting of stockholders dividends payable on any series of Serial Preferred shall be accrued and unpaid in an amount equal to six (6) quarterly dividends, the holders of the Serial Preferred, voting as a single class for such purpose, shall be entitled to elect two directors, plus one additional director for each class of Preferred Stock, if any, of which all of the shares shall have ceased to be outstanding, provided that in no event shall the aggregate number of directors which the holders of Serial Preferred are entitled hereunder to elect exceed one-fourth of the total number of members of the Board of Directors at the date the right to elect directors vests in such holders hereunder. Whenever the right shall vest in the holders of the Serial Preferred to elect the number of directors hereinabove provided, the Board of Directors shall, at least ten (10) days prior to such annual meeting at which such dividends remain accrued and unpaid, cause to be mailed to each stockholder, at his last known post office address as shown on the stock records of the Corporation, a notice to this effect. At all meetings of stockholders where the holders of the Serial Preferred shall have such right to elect directors, the presence in person or by proxy of the holders of a majority of the aggregate number of outstanding shares of Serial Preferred shall be required to constitute a quorum for the election of such directors; provided, however, that the absence of a quorum of the holders of Serial Preferred shall not prevent the election at any such meeting or adjournment thereof of directors in the usual manner by the holders of all classes of stock if the necessary quorum of the holders of all classes of stock is present in person or by proxy at such meeting. When all dividends accrued and unpaid on the Serial Preferred shall have been paid or declared and set apart for payment, holders of Serial Preferred shall at the next annual meeting be divested of their rights in respect of such election of directors, and the voting power of the holders of the Serial Preferred and the holders of the Common Stock shall revert to the status existing before the first dividend payment date on which dividends on the Serial Preferred were not paid in full; but always subject to the same provisions for vesting such special rights in the holders of the Serial Preferred in the event dividends on any series of the Serial Preferred shall again become accrued and unpaid in an amount equal to six (6) quarterly dividends. Vacancies among directors elected by holders of the Serial Preferred during any period for which directors shall have been so elected shall be filled, until the next annual or special meeting for the election of directors, by the vote of the remaining directors of the Corporation. Vacancies among directors elected by holders of all classes of stock shall be filled by the vote of a majority of the remaining directors elected by the holders of all classes of stock until the next annual meeting for the election of directors or special meeting in lieu thereof.

(7) Dividends may be paid upon the Common Stock and upon any other stock junior to the Preferred Stock and the Serial Preferred only when dividends have been paid or funds have been set apart for the payment of dividends as aforesaid on the Preferred Stock and the Serial Preferred from the date after which dividends thereon became cumulative to the beginning of the period then current with respect to which such dividends are usually declared, but whenever there shall have been paid or funds shall have been set apart for the payment of all such dividends upon the Preferred Stock and the Serial Preferred, as aforesaid, then dividends upon the Common Stock and upon any other stock junior to the Preferred Stock and the Serial Preferred may be declared payable then or thereafter out of any surplus or profits then remaining. After the payment of the limited dividends and/or shares in distribution of assets or amounts payable upon dissolution or liquidation to which the Preferred Stock and the Serial Preferred are expressly entitled in preference to the Common Stock and any other stock junior to the Preferred Stock and the Serial Preferred in accordance with the provisions hereinabove set forth, the Common Stock alone (subject to the rights of any class of stock hereafter authorized) shall receive all further dividends and shares in distribution.

(8) Each holder of Common Stock shall be entitled to one vote for each share of stock standing in his name on the books of the Corporation.

(9) Subject to the provisions of Section (4) hereof, the Corporation may issue and dispose of any of its shares, authorized but unissued, for such consideration as may be fixed by the Board of Directors.

(10) The Corporation from time to time may resell any of its own stock, purchased or otherwise acquired by it as herein provided for, at such price as may be fixed by its Board of Directors or Executive Committee.

(11) Subject to the provisions of Section (4) hereof, the Corporation, in order to acquire funds with which to redeem any Preferred Stock of any class or any series of Serial Preferred, may issue and sell stock of any class then authorized but unissued, bonds, notes, evidences of indebtedness, or other securities.

(12) Subject to the provisions of Section (4) hereof, the Board of Directors of the Corporation may at any time authorize the conversion or exchange of the whole or any particular share of the outstanding Preferred Stock of any class, or of any series of Serial Preferred, with the consent of the holder thereof, into or for stock of any other class at the time of such consent authorized but unissued and may fix the terms and conditions upon which such conversion or exchange may be made; provided that the Board of Directors may not offer Preferred Stock of any class or any series of Serial Preferred in conversion or exchange into or for Common Stock or into or for Preferred Stock of any other class or Serial Preferred of any other series if, by such conversion or exchange, the amount which the holders of the shares of stocks so converted or exchanged would be entitled to receive either as dividends or shares in distribution of assets would be increased in preference to the Common Stock, unless the Preferred Stock or Serial Preferred so offered in conversion or exchange shall have been authorized by a majority vote of the shares of stock outstanding at a meeting at which the stockholders voting for the authorization of the Preferred Stock or Serial Preferred so to be offered in conversion or exchange shall include the holders of record of not less than a majority of the shares of Common Stock then outstanding and entitled to vote.

(13) Upon any issue for money or other consideration of any stock of the Corporation that may be authorized from time to time, no holder of stock irrespective of the class of such stock shall have any preemptive or other right to subscribe for, purchase or receive any proportionate or other share of the stock so issued, but the Board of Directors may dispose of all or any portion of such stock as and when it may determine free of any such rights, whether by offering the same to stockholders or by sale or other disposition as said Board may deem advisable; provided, however, that if the Board of Directors shall determine to offer any new or additional shares of Common Stock, or any security convertible into Common Stock, for money, other than by (a) a public offering of all of such shares, (b) an offering of all of such shares to or through underwriters or investment bankers who shall have agreed promptly to make a public offering of such shares or (c) an offering of all of such shares to the stockholders (whether comprising the holders of all outstanding classes or of the Common Stock only), the employees or the customers of the Corporation, then the same shall first be offered pro rata to the holders of the then outstanding shares of Common Stock of the Corporation upon terms not less favorable to the purchaser (without deduction of such reasonable compensation, allowance or discount for the sale, underwriting or purchase as may be fixed thereafter by the Board of Directors) than those on which the Board of Directors issues and dispose of such stock or securities to other than such holders of Common Stock; and provided further, that the time within which such preemptive rights shall be exercised may be limited by the Board of Directors to such time as to said Board may seem proper, not less, however, than twenty days after mailing of notice that such stock rights are available and may be exercised.

(14) A consolidation, merger or amalgamation of the Corporation with or into any other corporation or corporations shall not be deemed a distribution of assets of the Corporation within the meaning of any provisions hereof.

(15) In addition to the Preferred Stock, the Serial Preferred and the Common Stock, subject to the provisions of Section (4) hereof, upon the vote of a majority of all the directors of the Corporation and of a majority of the total number of shares of stock then issued and outstanding and entitled to vote (or if a larger number or different proportion of shares is required by the laws of the State of Arizona, notwithstanding the above agreement of the stockholders to the contrary, then upon the vote of the larger number or different proportion of shares so required), the Corporation may from time to time create or authorize one or more other classes of stock with such designations, preferences, privileges, voting powers, conditions, restrictions and liabilities as may be determined by said vote, which may be the same or different from the designations and preferences of the classes of stock of the Corporation then authorized. Any such vote authorizing the creation of a new class of stock may provide that moneys payable by the Corporation with respect to any class of stock thereby authorized shall be paid in the money of any foreign country named therein or designated by the Board of Directors, pursuant to authority therein granted, at a fixed rate of exchange therein stated or provided for and all such payments shall be made accordingly.

(16) Subject to the provisions of Section (4), any class of the Preferred Stock or the Serial Preferred or the Common Stock, or all of said classes or series of stock, may be increased at any time upon vote of the holders of a majority of the total number of shares of the Corporation then issued and outstanding and entitled to vote thereon.

FOURTH: The name and address of the statutory agent of the Corporation on July 1, 1976 is General Investment Company (an Arizona corporation), 3100 Valley Center, Phoenix, Arizona 85073. The address of the known place of business of the Corporation on July 1, 1976 is 411 North Central Avenue, Phoenix, Arizona 85004.

FIFTH: The Board of Directors shall consist of not less than eleven nor more than thirty persons. Within such limits, the number of directors shall be fixed and may be altered from time to time as may be provided by the bylaws.

The number of directors constituting the Board of Directors of the Corporation on July 1, 1976 is seventeen. The names and addresses of the persons who are to serve as directors on and after July 1, 1976 until the first annual meeting of stockholders next succeeding that date, or until their successors are elected and qualified, are:

Ralph M. Bilby
700 North Bertrand
Flagstaff, AZ 86001

Norman W. Fain
Dewey Route
Prescott, AZ 86301

William T. Garland
Garland's Oak Creek Lodge
Sedona, AZ 86336

Marvin R. Morrison
P.O. Box 464
Gilbert, AZ 85234

James B. Rolle, Jr.
1920 Fifth Avenue
Yuma, AZ 85364

Richard Snell
4515 North Dromedary Road
Phoenix, AZ 85018

Maurice R. Tanner
5229 East Palo Verde Place
Scottsdale, AZ 85253

Morrison F. Warren
1061 East Magdalena Drive
Tempe, AZ 85283

Ben F. Williams, Jr.
2100 Ninth Street
Douglas, AZ 85607

Karl Eller
2225 East Georgia Avenue
Phoenix, AZ 85016

Del W. Fisher
107 East Boca Raton Road
Phoenix, AZ 85022

Victor H. Lytle
1130 Smoke Avenue
Prescott, AZ 86301

W. P. Reilly
722 East Winter Drive
Phoenix, AZ 85020

Henry B. Sargent, Jr.
9 West Palmyra Avenue
Phoenix, AZ 85021

Donald N. Soldwedel
503 East Palo Verde Street
Yuma, AZ 85364

Keith L. Turley
4601 East Solano Drive
Phoenix, AZ 85018

K.O. Wilbanks
800 Crestview Drive
Farmington, NM 87401

The Corporation may indemnify any and all of its directors and officers, or former directors and officers, against expenses incurred by them, including legal fees, or judgments or penalties rendered or levied against any such person in a legal action brought against any such person for actions or omissions alleged to have been committed by any such person while acting within the scope of his employment as a director or officer of the Corporation, provided that the Board of Directors shall determine in good faith that such person did not act, fail to act, or refuse to act willfully or with gross negligence or with fraudulent or criminal intent in regard to the matter involved in the action or omission.

SIXTH: A director of the Corporation shall not be personally liable to the Corporation or its shareholders for monetary damage for breach of fiduciary duty as a director, except for liability for any of the following:

- (a) any breach of the director's duty of loyalty to the Corporation or its shareholders,
- (b) acts or omissions which are not in good faith or which involve intentional misconduct or a knowing violation of law,
- (c) any authorization of an unlawful payment of a dividend or other distribution on the Corporation's capital stock or the unlawful purchase of its capital stock,
- (d) any transaction from which the director derived an improper personal benefit, or
- (e) a violation of Arizona Revised Statutes Section 10-041.

If the Arizona General Corporation Law is amended after the date of these Articles of Incorporation to authorize corporate action further eliminating or limiting the personal liability of directors, the liability of a director of the Corporation shall be eliminated or limited to the full extent permitted by the Arizona General Corporation Law, as amended.

Any repeal or modification of this Article SIXTH shall not increase the personal liability of any director of the Corporation for any act or occurrence taking place prior to such repeal or modification or otherwise adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

The provisions of this Article SIXTH shall not be deemed to limit or preclude indemnification of a director by the Corporation for any liability of a director which has not been eliminated by the provisions of this Article SIXTH.

IN WITNESS WHEREOF, we have hereunto set out hands and seals this Eleventh day of February, One Thousand Nine Hundred and Twenty.

(SIGNED) HOWARD L. ALLER (Seal)

(SIGNED) GEORGE P. BULLARD (Seal)

(SIGNED) JOHN H. PAGE (Seal)

STATE OF ARIZONA

SS

COUNTY OF MARICOPA

On this 11th day of February, in the year One Thousand Nine Hundred and Twenty, before me, Cora A. Hess, a Notary Public in and for the County and State aforesaid, personally appeared HOWARD L. ALLER, GEORGE P. BULLARD and JOHN H. PAGE, known to me to be the persons described in and whose names are subscribed to and who executed the foregoing Articles of Incorporation, and they acknowledged to me that they executed the same for the purposes and considerations therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the said County and State, the day and year last above written.

Cora H. Hess
Notary Public in and for the County
and State aforesaid.

My commission expires September 30, 1923

(Notarial Seal)



"SOLARCITY EXHIBIT E"

Delaware

PAGE 1

The First State

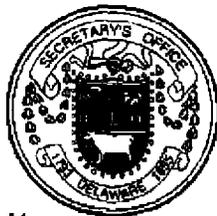
I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "SOLARCITY CORPORATION", FILED IN THIS OFFICE ON THE TWENTY-EIGHTH DAY OF OCTOBER, A.D. 2008, AT 12:23 O'CLOCK P.M.

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

4178768 8100

081071748

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



Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 6935840

DATE: 10-28-08

**FIFTH AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION**

OF

SOLARCITY CORPORATION

The undersigned, Lyndon Rive, hereby certifies that:

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

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

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

ARTICLE I

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

ARTICLE II

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

ARTICLE III

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

ARTICLE IV

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

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

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

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

2. **Liquidation.**

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

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

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

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

(d) **Certain Acquisitions.**

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

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

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

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

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

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

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

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

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

3. **Redemption.**

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

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

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

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

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

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

(ii) the Redemption Date and the Redemption Price;

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

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

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

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

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

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

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

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

(a) **Right to Convert.**

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

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

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

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

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

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

(b) **Automatic Conversion.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. **Voting Rights.**

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

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

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

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

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

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

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

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

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

(i) amend this Section 6.

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

(C) **Common Stock.**

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

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

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

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

ARTICLE V

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

ARTICLE VI

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

ARTICLE VII

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

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

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

ARTICLE VIII

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

* * *

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

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

/s/ Lyndon Rive
Lyndon Rive, Chief Executive Officer &
President