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BEFORE THE ARIZONA CORPORATION

IN THE MATTER OF THE APPLICATION OF)
SOLARCITY CORPORATION 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

RECEIVED
2009 NOV -9 A 8:31
AZ CORP COMMISSION
DOCKET CONTROL

At: Phoenix, Arizona

Date: November 2, 2009

Filed: **NOV 09 2009**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

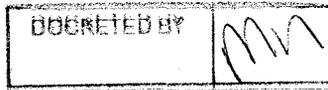
VOLUME V

(Pages 962 through 1182, inclusive.)

Arizona Corporation Commission

DOCKETED

NOV -9 2009



ARIZONA REPORTING SERVICE, INC.

Court Reporting
Suite 502

2200 North Central Avenue
Phoenix, Arizona 85004-1481

Prepared for: By: COLETTE E. ROSS
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INDEX TO EXAMINATIONS

2

WITNESSES

PAGE

3

STEVEN PATRICK IRVINE

4

	Direct Examination by Mr. Hains	973
5	Cross-Examination by Mr. Pozefsky	987
	Cross-Examination by Mr. Hogan	1016
6	Cross-Examination by Mr. Robertson	1033
	Cross-Examination by Mr. Sundlof	1095
7	Cross-Examination by Ms. Deborah Scott	1101
	Examination by Com. Newman	1111
8	Cross-Examination by Mr. Rich	1126

9

10

INDEX TO EXHIBITS

11

NO.	DESCRIPTION	IDENTIFIED	ADMITTED
12	S-1 Prefiled Direct Testimony of Steven Patrick Irvine	974	987
13	RUCO-2 Arizona Republic Editorial	988	1015
14	RUCO-3 Open Meetings Agendas June - October 2009	1007	1015

16

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1 BE IT REMEMBERED that the above-entitled and
2 numbered matter came on regularly to be heard before the
3 Arizona Corporation Commission, 1200 West Washington
4 Street, Phoenix, Arizona, commencing at 9:05 a.m., on
5 the 2nd of November, 2009.

6
7 BEFORE: KRISTIN K. MAYES, Chairman
8 PAUL NEWMAN, Commissioner, appearing via
9 teleconference

10 JANE RODDA, Administrative Law Judge

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Certified Reporter

Certificate No. 50658

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1 ALJ RODDA: Let's go back on the record in
2 Docket No. E-20690A-09-0346, which is the application of
3 SolarCity for a determination not a public service
4 corporation.

5 And I have lost track of the number of days of
6 hearing, but this is the continuation of the hearing.
7 And just for the record, I am going to take appearances
8 of the parties again. So I will start with SolarCity.

9 MR. RICH: Your Honor, Court Rich and Ryan
10 Hurley from the Rose Law Group for the applicant
11 SolarCity Corporation.

12 ALJ RODDA: And on behalf of RUCO.

13 MR. POZEFSKY: Good morning, Your Honor. Daniel
14 Pozefsky on behalf of RUCO.

15 ALJ RODDA: And on behalf of AECC.

16 MR. CROCKETT: Good morning, Your Honor. Webb
17 Crockett on behalf of Freeport McMoRan Copper & Gold,
18 Incorporated, and Arizonans for Electric Choice &
19 Competition who I refer to collectively as AECC.

20 ALJ RODDA: And on behalf of the SunPower
21 Corporation.

22 MR. ROBERTSON: Good morning, Your Honor.
23 Lawrence V. Robertson, Junior on behalf of SunPower
24 Corporation.

25 ALJ RODDA: And SRP.

1 MR. SUNDLOF: Good morning. Ken Sundlof with
2 Jennings, Strouss & Salmon representing Salt River
3 Project.

4 ALJ RODDA: And APS.

5 MS. DEBORAH SCOTT: Good morning. Deborah Scott
6 and Linda Benally representing APS.

7 ALJ RODDA: And TEP and UniSource.

8 MR. GELLMAN: Good morning, Your Honor. Jason
9 Gellman from the law firm Roshka, DeWulf & Patten on
10 behalf of TEP/UniSource.

11 ALJ RODDA: And I guess Sulphur Springs Valley.

12 MR. CARROLL: Bradley Carroll from the law firm
13 of Snell & Wilmer on behalf of Sulphur Springs Valley
14 Electric Cooperative.

15 ALJ RODDA: Great. Nice to see you again.

16 And on behalf of Western Resource Advocates.

17 MR. HOGAN: Tim Hogan representing WRA.

18 ALJ RODDA: And Commission Staff.

19 MR. HAINS: Thank you. Good morning, Your
20 Honor. Charles Hains on behalf of Staff.

21 ALJ RODDA: Okay. Okay. So I don't have
22 Mr. Wene with SunRun, but is there anyone else who I
23 missed?

24 (No response.)

25 ALJ RODDA: All right. Then I guess where we

1 left off a week ago or so, or over a week ago, we were
2 going to start with Staff's witness. And I know in the
3 interim Staff has filed a notice of an additional
4 witness.

5 Mr. Hains, do you want to talk about that?

6 MR. HAINS: Certainly, Your Honor, I can talk
7 about that now.

8 In the notice, Staff filed a notice, we have
9 noted throughout the proceedings in here that there have
10 been a number of high level policy issues that have been
11 brought up that Staff did not specifically address
12 thoroughly inside of the direct testimony of Mr. Irvine,
13 and they were addressed in passing in his testimony.

14 However, the discussion has gone significantly
15 beyond, and there have been questions raised in those
16 directions with regard to what, for example,
17 light-handed regulation might look like, things of that
18 nature, that were not the focus of Mr. Irvine's
19 testimony.

20 To that extent, Staff has made available
21 Mr. Elijah Abinah in the event that questions are raised
22 that Mr. Irvine is not prepared to address based on what
23 he is prepared to provide in this case. However, Staff
24 is not necessarily planning on calling Mr. Abinah unless
25 questions are asked that Mr. Irvine is not prepared to

1 address.

2 ALJ RODDA: Okay. So the intent this morning
3 was to start with Mr. Irvine, see if he could answer all
4 the questions that the parties and the bench might have,
5 and if any of us needed additional information, that
6 Mr. Abinah would be available.

7 MR. HAINS: Correct. And this was viewed from
8 Staff's perspective as mostly a convenience to both
9 parties. And we didn't say in the pleading, but it was
10 also to the parties, not just to the persons on the
11 bench. But it was so if Mr. Irvine encountered a policy
12 question that he was either not prepared to answer or
13 not been authorized to provide an answer, that we would
14 not have to stall the proceedings, have him go and find
15 the answer, and be put back on again, that it would
16 short-circuit that process. But if there are no
17 questions of that nature that bring about that concern,
18 we are happy not to bring Mr. Abinah.

19 (Telephone rings.)

20 ALJ RODDA: I think that's Commissioner Newman.

21 (Brief pause.)

22 ALJ RODDA: Commissioner Newman, can you hear
23 me?

24 COM. NEWMAN: Yes.

25 ALJ RODDA: Okay. I can hear you.

1 COM. NEWMAN: Good.

2 ALJ RODDA: All right. Mr. Hains.

3 MR. HAINS: That was mostly what Staff intended
4 so...

5 ALJ RODDA: Okay.

6 MR. ROBERTSON: Your Honor.

7 ALJ RODDA: Mr. Robertson.

8 MR. ROBERTSON: I don't know if you are aware or
9 not, so I did want to mention in connection with what
10 Mr. Hains has just described, that last Thursday or
11 Friday, I believe the same day we received notice of
12 Staff's notice it might be calling an additional
13 witness, SunPower Corporation filed a response to that.
14 And we indicated we had no objection, provided that all
15 of the parties were afforded the opportunity to
16 cross-examine Mr. Abinah if he was called.

17 I understand that RUCO has also filed a
18 responsive pleading which I saw for the first time just
19 a few moments ago. Ms. Scott very graciously afforded
20 me access to it. I have not discussed the RUCO pleading
21 with my clients so I don't know how SunPower feels about
22 that.

23 But I wanted to be sure you were aware of these
24 two filings before Mr. Irvine was called to the stand,
25 since we don't know at this point whether his testimony

1 will occasion an additional Staff witness being called
2 or not.

3 ALJ RODDA: Right. And I did see the RUCO
4 filing, and Mr. Robertson's SunPower filing this
5 morning, also. And so I don't know that it was -- that
6 Mr. Abinah was going to testify to anything different
7 than was in the Staff report, but more I see it just as
8 a supplement to the Staff report. And I think we will
9 start with Mr. Irvine. And it is better to have the
10 complete record, and if we need Mr. Abinah, he is
11 available.

12 MR. POZEFSKY: And Your Honor, just so you are
13 aware, and the parties are, too, we didn't intend to
14 take a hard line approach. We certainly didn't intend
15 to exclude any testimony Mr. Abinah would have, or even
16 object to him testifying. Our only concern was us
17 preparing testimony. There were some things arguably
18 probably that would have been better for Mr. Abinah, but
19 of course, I don't know if he is going to testify or
20 not; if he does, what is he going to testify to, and is
21 he going to go beyond what is in Mr. Irvine's testimony.

22 So all these kinds of ideas started to make, you
23 know, us think, well, we probably need to do some
24 preparation or have some idea exactly, even if he is
25 going to be able available, you know, what is the extent

1 of his testimony.

2 But again, it wasn't to take a hard line
3 approach or prevent it, and really, however you want to
4 proceed would be fine with us. We are not that hard
5 about, you know, 48 hours and that sort of thing, but we
6 do want to be able to adequately present some
7 testimony --

8 ALJ RODDA: Okay. All right.

9 MR. POZEFSKY: -- or examination.

10 ALJ RODDA: We will see how it goes.

11 All right. Do you want to call Mr. Irvine? Or
12 I will call Mr. Irvine.

13 MR. HAINS: Thank you, Your Honor. Staff would
14 like to call Mr. Irvine.

15

16 STEVEN PATRICK IRVINE,
17 called as a witness on behalf of ACC Staff, having been
18 first duly sworn by the Certified Reporter to speak the
19 truth and nothing but the truth, was examined and
20 testified as follows:

21

22 DIRECT EXAMINATION

23 BY MR. HAINS:

24 Q. Good morning, Mr. Irvine.

25 A. Good morning.

1 Q. Could I please have you give your full name for
2 the record.

3 A. My name is Steven Patrick Irvine. I go by
4 Steve.

5 Q. Thank you.

6 And by whom are you employed and in what
7 capacity?

8 A. I am employed by the Arizona Corporation
9 Commission as a public utility analyst.

10 Q. And in your capacity as a public utility analyst
11 were you assigned to evaluate the present application?

12 A. I was.

13 Q. Do you have up there what has been marked for
14 purposes of identification as Exhibit S-1?

15 A. I do.

16 Q. And can you identify that, please.

17 A. This is my written prefiled direct testimony in
18 this matter.

19 Q. And that was prepared by you or under your
20 direction?

21 A. It was.

22 Q. If I were to ask you the questions posed within
23 S-1, would your answers today be the same as those
24 presented in the exhibit?

25 A. Yes.

1 Q. Do you have any changes, modifications, or
2 corrections to make to S-1?

3 A. No.

4 Q. Do you adopt S-1 as your sworn testimony here
5 today?

6 A. Yes.

7 Q. Mr. Irvine, first thing I would like to ask you
8 after this is: Are you an attorney?

9 A. I am not.

10 Q. In what capacity did you review the application?

11 A. Well, I was assigned in my role as a public
12 utility analyst to review the application, and I applied
13 a plain English understanding of the application in
14 Staff's evaluation.

15 Q. I see. And so to the extent that you have used
16 words that parties have indicated possess a legal
17 significance, you are only using those terms with their
18 plain English meaning?

19 A. That's correct.

20 Q. Mr. Irvine, in your prefiled testimony you
21 discussed the facts surrounding SolarCity's description
22 of its service to the schools, correct?

23 A. I did.

24 Q. Can you briefly summarize your conclusions.

25 A. Staff's conclusions were that in the SSA

1 configuration that there is a furnishing of electricity,
2 that electricity is not incidental to the SSA, and that
3 the Serv-Yu factors weigh in favor of a public service
4 corporation.

5 Q. Mr. Irvine, have you been present for most of
6 the testimony by witnesses in this proceeding?

7 A. Most of the testimony, not all, but most of the
8 testimony.

9 Q. Do you recall there being a question posed to
10 the effect that regulation should have a purpose?

11 A. I do.

12 Q. And it was suggested that Staff has not
13 articulated a purpose for regulation in this instance.
14 Do you recall a question or a discussion to that effect?

15 A. I do.

16 Q. Can you discuss the reasons that Staff believes
17 that a purpose exists for regulation in this case?

18 A. I can. There are certain benefits to regulation
19 and a finding that SSA providers are PSCs. I would like
20 to discuss four of them.

21 One is in relation to the marketplace and there
22 being a fair and level playing field among the
23 competitors. Another subject is benefits related to
24 ratemaking considerations that relate to the incumbent
25 provider. There are safety considerations that can also

1 be addressed through a regulation. And there are also
2 consumer services considerations that provide benefits
3 in regulation. Now I will discuss each of these items
4 briefly, not comprehensively, but briefly.

5 Should the Commission determine that providers
6 of SSAs are not PSCs and consequently not regulated,
7 Staff could not see why an unregulated affiliate of an
8 incumbent provider would also not be regulated, or even
9 the incumbent utility itself might also provide the same
10 service.

11 And there is a danger that either of those
12 entities might exert some undue market influence by the
13 nature of their staying power in the market, their
14 relationships with customers, their knowledge of the
15 customer base. And we think that there is benefits to
16 SSA providers themselves in the Commission having a hand
17 in that process by virtue of regulating the SSA
18 providers, which could include the regulated affiliates
19 of the incumbent utilities.

20 Q. And that was with reference to the first subject
21 you discussed, the first reason for regulation?

22 A. That's correct. It is the Commission's ability
23 to monitor the market and ensure that there is a fair
24 environment.

25 The next area is related to ratemaking. There

1 are ratemaking considerations that arise with the
2 proliferation of SSAs. For instance, there could be
3 stranded costs associated with the incumbent utilities
4 as a provider of last resort. There is a concern
5 related to loss of market share that, as the incumbent
6 utilities lose kilowatt hour billing determinants, that
7 the price goes up for the remaining kilowatt hours and
8 the other customers.

9 There is concerns about cream skimming and
10 redlining where the SSA providers will first go after
11 the most profitable customers, which are customers with
12 the greatest ability to pay, leaving behind customers
13 with lesser ability to pay to carry the cost of stranded
14 costs and costs associated with the increased costs
15 relative to planning and maintaining capacity and
16 redundant generation for those times when the SSA
17 providers are not supplying energy to the grid.

18 The third section that I would like to talk
19 about is safety considerations. Were SSA providers
20 found to be not public service corporations and were not
21 regulated, then the Commission's regulatory authority
22 would only extend to the incumbent provider. And
23 SolarCity itself appears to be a very conscientious and
24 good organization. Were SSAs to proliferate there may
25 be other providers who may not have the same level of

1 expertise and concern and level of service that a good
2 provider like SolarCity might have.

3 And if the Commission's only recourse is to deal
4 with the incumbent utilities through the interconnection
5 agreement, then the Commission can only deal directly
6 with the SSA providers through the incumbent provider,
7 and the only stick or recourse that we may have is to
8 order disconnection, which is a very crude tool because
9 it could leave the SSA without power, whereas if the
10 Commission had the ability to regulate the SSA provider
11 directly, then we can deal with problems from their
12 origin and perhaps not have to resort to disconnection
13 to mitigate safety considerations.

14 And then the last area I would like to talk
15 about is about consumer services and the benefits
16 related to that. We have a consumer services department
17 here at the Commission that is available on call to
18 customers. They call in with questions and concerns,
19 and the consumer services department does a fine job of
20 mitigating those concerns.

21 And it is a benefit for both the customers and
22 the utilities themselves because they provide a forum
23 that is a third-party forum, and they deal with a lot of
24 questions before they rise to the level of a complaint
25 or something that's more critical. And were SSAs found

1 to be PSCs, I believe the consumer services could help
2 to the benefit of both the SSA customer and the SSA
3 provider.

4 Q. And also on that point you brought up with the
5 fourth factor, or this fourth area reason why regulating
6 with respect to customer service issues, were you
7 present for testimony that suggested that adequate
8 protections are in place, and that, in any event, we are
9 talking about sophisticated customers when we are
10 talking about just the customers who would be the focus
11 for SSAs?

12 A. I did hear some comments along those lines.

13 Q. Principally the schools and the governments,
14 that they go through processes for the evaluation of
15 entering into these agreements?

16 A. Yes.

17 Q. And do you also recall testimony suggesting that
18 the SSA format of agreement, and specifically what I
19 mean is the use of an agreement that allows for the
20 monetization of a tax benefit, that it isn't necessarily
21 strictly restricted in applicability to just entities
22 that don't pay income taxes, that it could conceivably
23 be used for entities that do pay income taxes but just
24 not enough to take advantage of the benefits?

25 A. That's correct. The SSA could be used to, with

1 other customers, but perhaps foregoing some of the tax
2 incentives.

3 Q. And by these other customers, that might
4 include, for example, some businesses or residential
5 customers?

6 A. Yes, potentially.

7 Q. Okay. And do you anticipate that customers in
8 that range, smaller businesses, residential customers,
9 have access to the analytical resources and the
10 resources generally that these larger entities like
11 school districts or government entities have with which
12 to evaluate the contracts that they would be entering
13 into?

14 A. On average, no. Schools which -- for those
15 schools which are governments, and included for
16 governments, there are rules that govern the way
17 purchasing is done. And typically there are people with
18 purchasing training who have the ability to make very
19 informed and sophisticated decisions relative to
20 acquisition, purchasing.

21 And I would say that for your average small
22 business that on average they don't have those same
23 resources or rules. They make decisions with fewer
24 resources and fewer expertise.

25 Q. Mr. Irvine, I would like to move on to another

1 significant point that has been raised in the testimony
2 of various witnesses, and that involves the discussion
3 of whether the SSA is a financing agreement and that any
4 similarity to the utility business might be incidental.
5 Do you recall testimony of that nature, or the
6 discussion?

7 A. I do.

8 Q. Does Staff believe that the SSA is a financing
9 agreement, or, just to be specific, an agreement for
10 payment of principal and interest made toward eventual
11 ownership?

12 A. We do not. We believe the agreement is more
13 akin to the sale of electricity.

14 Q. Do you think that payment of principal and
15 interest toward eventual ownership would reflect a more
16 common or ordinary understanding of what is meant by
17 financing?

18 A. I do. That's part of my prefiled written
19 testimony. I think that if you were to go out and poll
20 the world and study the incidence of the use of the word
21 financing, that it is most often used to describe the
22 acquisition of a house or a car, and in that context, it
23 usually involves the payments of principal and interest
24 with the goal of eventual ownership.

25 Q. Mr. Irvine, you also looked at the eight Serv-Yu

1 factors, is that correct?

2 A. I did.

3 Q. And when you looked at them did you consider the
4 possibility that SolarCity, their application might not
5 satisfy every factor, or that some factors may only be
6 barely satisfied?

7 A. We did. And in regard to, for instance, the
8 question of monopoly or monopolization, what comes to my
9 mind on that issue in particular is competitive local
10 exchange carriers in the telecom world. We regulate
11 CLECs and yet most -- or none of them have
12 monopolization. They all share the same common
13 territory, which is a statewide CC&N, and we clearly
14 regulate them. Yet none of them have a monopoly.

15 Q. You would agree there is no question that the
16 CLECs are public service corporations?

17 A. That's correct.

18 Q. Bearing that in mind -- well, okay. Move on.

19 Mr. Irvine, do you recall the issue being raised
20 in several issues to the effect that being a public
21 service corporation means rate regulation?

22 A. I do.

23 Q. And how does rate regulation work? You just
24 mentioned the example of competitive telecommunications.
25 Do you know how rate regulation works with those

1 entities?

2 A. I do. Most commonly CLECs are given a tariff
3 with rates that are specified by a range. They include
4 a maximum and a minimum, and there is a pretty wide
5 range that allows them to operate without coming in for
6 an adjustment to that tariff.

7 Q. And you also participated in the track one of
8 this proceeding, is that correct?

9 A. I did.

10 Q. And would it be correct that in that proceeding
11 that the two SolarCity SSAs that were provided, the
12 method that was used for setting the rates in those
13 cases would be a minimum and a maximum, is that correct?

14 A. That's correct.

15 Q. Mr. Irvine, you have suggested that a form of
16 streamlined regulation is possible for an entity like
17 SolarCity. Can you discuss what you mean or envision by
18 that?

19 A. Well, Staff hasn't yet developed a conclusive
20 plan for that. That is something that's yet to be
21 developed. It is something that we would want to
22 develop in conjunction with the affected parties and in
23 another setting so that we can hear what they want. But
24 I can offer for you what I might call some milestones
25 for what Staff is envisioning.

1 We are envisioning a range of rates like we have
2 just discussed so that SSA providers could operate
3 within a comfortable range and come to contract prices
4 within that range without having to come in for some
5 sort of a tariff adjustment or new tariff.

6 Q. By that you mean the minimum/maximum rate range?

7 A. That's correct. We would offer a minimum and
8 maximum rate, and then the SSAs could operate in any
9 rate within that range according to the tariff.

10 We also envision a very streamlined and
11 truncated CC&N application, what you might think of as a
12 registration as opposed to a CC&N, so that the providers
13 can come in and, without much discomfort, be granted a
14 CC&N.

15 We also envision the filing of a standard
16 agreement as a template so that perhaps the utilities
17 could come in and file for administrative approval a new
18 contract that reflects the agreement which has already
19 been approved and scrutinized by Staff.

20 Q. And while you suggested those are milestones or
21 landmarks, none of those necessarily has to be a part of
22 any position that Staff would propose in the end, but
23 just features that Staff thinks would make sense sitting
24 from this point right now?

25 A. That's correct. And I would like to reiterate

1 that we would like to hear from the SSA providers and
2 all the interested parties, and we are very open to
3 suggestions and hearing what works best for them and
4 perhaps new ideas that we haven't yet envisioned.

5 Q. Mr. Irvine, is there anything else that you
6 would like to add at this point?

7 A. Yes, there is. I would like to state that Staff
8 is a proponent of the REST rules and the vision of the
9 REST rules. We care about renewable energy. We are
10 concerned and we care about the displacement of other
11 energy that pollutes the air. We care about the
12 environment. We care about the schools and the school
13 children, and we would like for the schools to get solar
14 power and we would like for them to save money. And we,
15 without endorsing any particular provider, we wish
16 success to any provider of solar equipment.

17 But in this matter we are asked about whether an
18 SSA provider would be a PSC, and we answered the
19 question honestly. We hope nobody comes away with the
20 wrong conclusion that we don't support the proliferation
21 of solar equipment.

22 MR. HAINS: With that, Your Honor, Staff would
23 move for the admission of Exhibit S-1.

24 ALJ RODDA: Okay. Any objection to S-1?

25 MR. POZEFSKY: No.

1 MR. CROCKETT: No objection.

2 ALJ RODDA: Hearing none, then S-1 is admitted.

3 (Exhibit No. S-1 was admitted into evidence.)

4 MR. HAINS: Thank you, Your Honor. With that,
5 Mr. Irvine is available for cross-examination.

6 ALJ RODDA: Mr. Crockett, do you have questions?

7 MR. CROCKETT: I have no questions of this
8 witness, Your Honor.

9 ALJ RODDA: Okay. How about you, Mr. Pozefsky?

10 MR. POZEFSKY: I have questions.

11 ALJ RODDA: Good.

12

13

CROSS-EXAMINATION

14 BY MR. POZEFSKY:

15 Q. Good morning, Mr. Irvine. Let me ask you. I
16 heard in your opening comments you state, when you were
17 talking about finance agreements, you used the words,
18 well, if you polled the world and kind of got the common
19 sense impression and saw what the public view was, a
20 financing agreement is principal and interest with the
21 goal of ownership. Does that sort of summarize what you
22 were saying?

23 A. I think it does.

24 Q. So obviously, you know, the public perception or
25 the public's, how the public would view it is an

1 important consideration, correct?

2 A. I think it is helpful to think about the most
3 common use of financing and what it is most commonly
4 understood in terms of consideration of the application.

5 Q. I want to hand out an exhibit. You should have
6 before you what is marked as RUCO's Exhibit 2, is that
7 correct?

8 A. I have it now.

9 Q. Does that appear to be a copy of an editorial
10 from The Arizona Republic?

11 A. It does.

12 Q. It is dated Thursday, October 29, 2009?

13 A. It is.

14 Q. Could you do me a favor. There is a section on
15 the left-hand corner. It is called Solar Roadmap Lights
16 the Way, correct?

17 A. There is.

18 Q. And then there is a little box there called
19 Keeping the Clouds from Solar Innovation.

20 A. It says Keeping the Clouds from Solar
21 Innovation. I thought I maybe heard you say invasion,
22 but it was probably innovation.

23 Q. Maybe invasion. Depends on one's perspective.

24 Could you read -- there is a couple short
25 paragraphs. Could you read those paragraphs in the

1 record.

2 A. Again, the title is Keeping the Clouds from
3 Solar Innovation. Here is an innovative idea. A solar
4 company installs and maintains panels on a school for
5 free. The school then pays a low monthly fee for the
6 electricity. It all pencils out because the solar
7 company can collect renewable energy tax credits while
8 tax exempt organizations like schools cannot. Schools
9 benefit from lower predictable electricity bills -- I am
10 sorry, electric bills, rather. Arizona benefits from
11 expending its solar resources and industry. But the
12 Arizona Corporation Commission could strangle this
13 innovation with regulation. The Commission is deciding
14 whether these solar companies should be treated as
15 utilities. The answer is clear and logical, no.

16 Q. You would agree with me that this is a
17 perspective of what should happen in this proceeding,
18 wouldn't you?

19 A. It is a perspective.

20 Q. Do you agree with that sentence, but the Arizona
21 Corporation Commission could strangle this innovation
22 with regulation?

23 A. Well, I believe that the Corporation Commission
24 has in its power the ability to enact regulation which
25 could make the proliferation of SSAs unlikely. I

1 wouldn't characterize that has strangling, and I don't
2 think it is likely, but it is a possibility.

3 Q. You don't agree with the last sentence, or at
4 least Staff doesn't, is that correct, the answer is
5 clear and logical, no?

6 A. You are correct that I do not agree with the
7 last statement.

8 Q. You also stated in your opening summary,
9 Mr. Irvine, that Staff is given a perspective from the
10 plain language interpretation, is that correct?

11 A. That's correct. And let me say one thing for
12 the record, for the clarity of the record. There is
13 another witness who is Mr. Irvin. I am Mr. Irvine. And
14 I just wouldn't want any readers of the docket to be
15 confused with that, because he had a very different
16 perspective.

17 Q. And I understand. And I am going to ask you
18 some questions as we go through, because there is, I
19 suppose, a fine line between a plain language
20 interpretation and legal, so I am going to try and keep
21 it plain language. But if you can't answer, if you feel
22 I go outside, let me know, and I am sure your lawyers
23 will, too.

24 But let me ask you from a policy perspective --
25 and, again, you might want to defer this to

1 Mr. Abinah -- should the Commission regulate, from
2 Staff's standpoint? I know the plain language
3 interpretation perspective, but what about the policy
4 perspective?

5 A. Well, in my opening we discussed some of the
6 benefits of regulation. And I believe that, should the
7 Commission regulate SSA activity, that there would be
8 benefits to both the providers and ratemakers. And I
9 believe that argues towards a response that, yes, the
10 Commission should regulate these activities.

11 Q. Okay. Let me step back. I am looking at your
12 testimony on page 8, your direct testimony. In general
13 Staff disagrees with the company's interpretation that
14 SolarCity is not furnishing electricity in these
15 transactions, correct?

16 A. That's correct.

17 Q. Staff believes SolarCity actually is furnishing
18 electricity, correct?

19 A. Well, let me be more precise, that in an SSA
20 arrangement that it would be furnishing electricity.

21 Q. And that's because SolarCity in this SSA
22 situation would be actually generating and then
23 transferring the electricity, correct?

24 A. Staff's conclusion is based on a number of
25 considerations. That is one. There are others such as

1 the SSA agreement making reference to the sale and
2 purchase of electricity, the pricing per kilowatt basis,
3 and further reasons as well.

4 Q. Well, you have heard where the company describes
5 a difference between a lease and an SSA, and that is
6 that the lease, there is a fixed price for the
7 electricity, and the SSA, the price varies based on
8 usage. Do you recall, I believe it was SolarCity's
9 president who made that description?

10 A. I am actually a little confused by the part that
11 characterizes a fixed versus a variable price for the
12 electricity.

13 Q. Well, let me ask you this, Mr. Irvine. With
14 regard to the furnishing of electricity, isn't it the
15 same thing occurring in a lease situation?

16 A. It depends on what you mean by the same thing.
17 There is a lot of components to an SSA, so...

18 Q. Well, comparing your interpretation of what is
19 going on in the SSA as far as the actual transfer of the
20 electricity, or however you look at it from a plain
21 interpretation view, is the same thing going on in a
22 lease situation? In other words, is electricity being
23 generated and then transferred in the lease situation?

24 A. Energy is generated whether there is a lease or
25 a purchase of electricity. In terms of transfer, I

1 think I would generally agree, although there are a lot
2 of sticky and legal nuances to that question related to
3 ownership and transfer that I can't address. But I
4 believe in either case electricity is generated from the
5 SSA equipment and then moves through the SSA provider
6 property to the school property.

7 Q. But Staff isn't suggesting in this case that
8 solar leases should be regulated, correct?

9 A. Staff hasn't made a determination on the
10 question of leases. It was outside the scope of our
11 study.

12 Q. But wouldn't you agree that a determination of
13 regulation here would open that door under your view?

14 A. I actually don't know what implications it would
15 have for the question of leases.

16 Q. Has Staff considered the implication for the
17 application of leases?

18 A. We did a little bit, particularly in the first
19 Solar Alliance docket. And we haven't made a conclusive
20 determination, but we do feel that the idea of leases
21 lends towards -- lends to, and let me be clear, I am not
22 saying determines, but lends to a conclusion that a
23 lease would not be regulated activity. Each case has to
24 be studied on its own, and we don't yet have that docket
25 in front of us.

1 Q. You are familiar with the SSA, correct? There
2 has been a copy of it as Exhibit 7 of the application.
3 Let me take you there. Do you have the application
4 before you?

5 A. There is a bundle of exhibits here. I could
6 thumb through them, and I believe it is probably here.
7 I do have Exhibit A-1, entitled application and request
8 for expedited ruling. I believe that's the application.

9 Q. I am on page 4. I am really not going to get
10 too centered on the exhibit other than to bring out
11 something in your testimony. And it talks about
12 something you also testified to in your summary. And
13 that's paragraph 2, where the SSA provides that the
14 seller shall provide the buyer the financing, design,
15 development, and operation of the system. You are
16 familiar with that aspect of the agreement, correct?

17 A. I am sorry. I am not actually following you yet
18 here on the exhibit. Was it page 4 of the application?

19 Q. Yes. It is paragraph 2, it is entitled finance,
20 design, development, and operation of the solar.

21 ALJ RODDA: Are you looking at the exhibit to
22 the application or the application?

23 MR. POZEFSKY: I am sorry. It is the exhibit,
24 Exhibit 7 to the application.

25 THE WITNESS: I apologize. I was looking at the

1 application itself. Let me get there then.

2 MR. POZEFSKY: Sure. And I apologize if I was
3 unclear.

4 THE WITNESS: Mr. Pozefsky, I see that the
5 exhibits are marked alphabetically A, B, and C, and I
6 believe you said it was Exhibit 7. Perhaps you could
7 clarify that.

8 BY MR. POZEFSKY:

9 Q. Yes. What I am looking at actually is Exhibit 7
10 to the SSA.

11 A. I see.

12 Q. Which is Exhibit A, so... So I was unclear.

13 ALJ RODDA: Isn't it Exhibit B, the SSA? Oh.

14 MR. POZEFSKY: You are right, Your Honor, it is
15 Exhibit B. We are going to get there. It is Exhibit B,
16 Exhibit 7 to Exhibit B, paragraph 2 on page 4.

17 ALJ RODDA: Great.

18 THE WITNESS: Okay. Once again, let me clarify
19 so we are all on the same page. The subject of the
20 question is titled finance, design, development, and
21 operation of solar panel system.

22 BY MR. POZEFSKY:

23 Q. Right.

24 A. That is correct.

25 Q. That's correct. And my question is, you talk

1 about the financing, so I want to ask you some questions
2 about the financing. Are you familiar with that aspect
3 of the solar service agreement?

4 A. Well, I know that it is characterized as a
5 financing. I am not sure which aspect you are dealing
6 with, but I suppose you will ask me more specific
7 questions and we can get to it that way.

8 Q. Right. And it is that aspect. You state, and I
9 am just referring now flipping you to your testimony,
10 well, that paragraph talks -- let's go back to
11 Exhibit 7. This is a paragraph you will agree, wouldn't
12 you, that it provides for the seller shall provide the
13 buyer with the financing, among other things, correct?

14 A. That statement is included in that paragraph
15 marked number 2.

16 Q. Okay. And I am just summarizing your testimony
17 on page 11. You have testified to this in your
18 statement, that at least from Staff's perspective, the
19 SSA is not a financing vehicle for the schools because
20 it does not include payments for principal and interest
21 with the goal of eventual ownership, is that correct?

22 A. It is Staff's position that the SSA is not a
23 financing according to the most common understood sense
24 of what a financing is, which is what you have just
25 stated. It is typically associated with the acquisition

1 of a house or car that includes payments for principal
2 and interest with the goal of eventual ownership.

3 Now, financing is a broad word that can mean a
4 lot of things. And there is a lot of room for argument
5 about what financing is or isn't. But because of that,
6 Staff's perspective is taken from what we understand to
7 be the most common use of the word.

8 Q. Well, let me ask you, you are not limiting what
9 a financing agreement is to an agreement that must have
10 this criteria, that is, principal and interest payments
11 with the eventual goal of ownership, correct?

12 A. Could I ask you to rephrase the question.

13 Q. Sure. Well, let me ask you, you are not stating
14 that the only criteria for a financing agreement is that
15 there be principal and interest payments with the goal
16 of ownership, correct?

17 A. What Staff is stating is that it doesn't appear
18 to be financing, because it doesn't seem to comport with
19 what the common sense understanding of financing is, or
20 common usage understanding of what a financing is.

21 Q. Let me ask you from a common sense standpoint,
22 wouldn't you agree that a car lease is a form of a
23 financing?

24 A. Well --

25 Q. And isn't that one way in which someone can

1 obtain a vehicle without actually paying for it
2 outright?

3 A. It is a method by which a person can obtain a
4 vehicle. When people say I am going to finance a car,
5 typically they mean I am going to get a loan or paper,
6 bank note, and pay interest and principal with the goal
7 of ownership. There are leases, and that's one way to
8 get a car, but I think it is a different thing.

9 Q. How is that different from the financing
10 standpoint? It is a manner of financing, isn't it?
11 What is different about it?

12 A. The condition of eventual ownership.

13 Q. You would agree with me that with a car lease,
14 the condition doesn't have to be eventual ownership,
15 correct?

16 A. Usually it is not. There are leases that have
17 an option to purchase at the end of a lease period.

18 Q. So is it your testimony that if it is not the
19 goal of eventual ownership, then it is not a financing
20 agreement?

21 A. Well, Staff's testimony is that commonly when
22 people think about financing, they think of it in terms
23 of acquisition of a car or a house, and typically that
24 includes the goal of eventual ownership.

25 Q. Let's go to the house. What about a home equity

1 loan, isn't that another form of financing?

2 A. Well, Mr. Peterson's testimony included a
3 definition of financing, which I don't recall the exact
4 language, but it came from a generic desktop sort of
5 dictionary that says something very broad as
6 substantively similar to financing means providing
7 funding for a purpose.

8 Now, if you want to -- if one thinks that's the
9 definition of financing, and if they want to acquire
10 something, they could take out a home equity loan, and
11 pursuant to that sort of definition of financing, you
12 might call it a financing.

13 Q. Okay. Let's move on, Mr. Irvine. I want to ask
14 you some questions about light regulation. On page 41
15 of your testimony, you talk about the framework of light
16 regulation, light-handed regulation, correct?

17 A. Yes.

18 Q. What does the Staff envision as light
19 regulation?

20 A. Well, it is characterized by what I described
21 earlier on direct, that it would include a rate pursuant
22 to a minimum or maximum range. It would include a very
23 short and streamlined CC&N process in the case of SSAs.
24 It would include the filing and approval of a generic or
25 standard template agreement so that in the future, when

1 new SSAs were established, perhaps there could be an
2 administrative filing where Staff compared the new SSA
3 filing to the approved template agreement and then
4 administratively approved the new SSA.

5 But again, let me reiterate those are just
6 milestones for a template, bear in mind, and it is not
7 something that we have fully vetted.

8 Q. How come you haven't fully vetted it?

9 A. Well, the primary question of the application
10 was whether providers of SSAs would be public service
11 corporations, not what should regulation lite look like.
12 In a perfect world, time permitting, we would have dealt
13 with that already. But it is a matter of resources and
14 timing and the question of the application.

15 Q. You would agree, wouldn't you, Mr. Irvine, that
16 the Commission would still have to set rates, correct?
17 I mean you have likened it to the telecom industry,
18 correct?

19 A. I did liken it to the telecom industry. And to
20 the question whether the Commission would have to set
21 rates, as I have said, the Commission in the telecom
22 industry sets rate minimums and maximums, and then the
23 CLECs are allowed to operate within that range. Now,
24 whether that's setting rates or not, I guess it depends
25 on one's perspective.

1 Q. And in the telecom industry, the Commission
2 would have to make some fair value findings, correct?

3 A. It is my understanding that we make fair value
4 findings.

5 Q. Would you agree with, Mr. Irvine, that a
6 reasonable person could conclude that there is no such
7 thing really as a light-handed approach to regulation?

8 A. I agree that a reasonable person could conclude
9 that. I also believe that reasonable people can
10 disagree.

11 Q. Would you agree that regulation of any kind
12 would increase Staff's workload?

13 A. In the absolute sense, I believe yes. However,
14 I don't know that it is a prohibitive problem.

15 Q. Would you agree that it would require more of
16 Staff and the Commission's resources?

17 A. I agree.

18 Q. Would you agree that it could also delay the
19 time in which a solar business could move forward on a
20 project?

21 A. I believe that there could be requirements that
22 would require an application or some sort of effort on
23 the part of the SSA providers, and that any application
24 involves at least the time of making the application. I
25 don't necessarily believe that the Commission would need

1 to craft some kind of light regulation where timing
2 became a prohibitive problem for the SSA providers.

3 Q. What about increase in the expense of the
4 project, would you agree it would increase the expense
5 of the project?

6 A. My answer to that question is similar to my last
7 answer on the issue of timing. Anytime you do anything
8 there is obviously cost involved. But again, I don't
9 think that the Commission would necessarily need to
10 craft something that resulted in a prohibitive cost.

11 Q. What would be the purpose of regulation?

12 A. Well, I mentioned four main areas of benefits
13 that can arise from regulation.

14 Q. What would be the benefit to the customers?

15 ALJ RODDA: When you say customers, which
16 customers are you referring to?

17 MR. POZEFSKY: Of the solar industry.

18 ALJ RODDA: You mean with the installation on
19 the roof?

20 MR. POZEFSKY: Right, the schools, for instance.

21 ALJ RODDA: Okay.

22 THE WITNESS: Well, the fourth topic I mentioned
23 in discussion of the benefits was consumer services,
24 where the consumer services department here at the
25 Commission provides a third-party forum and resource for

1 responses to concerns that consumers have.

2 But I think more importantly are the ratemaking
3 considerations. The schools who are subject to SSAs
4 would remain customers of the incumbent utility
5 providers. And as I discussed earlier, there are
6 ratemaking implications that arise from the
7 proliferation of SSAs. The ratemaking implications for
8 the incumbent utility providers are cost considerations
9 that pass through to the ratepayers. Those ratepayers
10 can include the schools themselves.

11 BY MR. POZEFSKY:

12 Q. Do you believe, Mr. Irvine, that there is a
13 disparity in bargaining power between the schools and
14 not-for-profit solar installers?

15 A. I don't know that I have an opinion about that.
16 I don't believe that I was -- certainly wasn't involved
17 in that process, and I don't believe it is a topic that
18 we have studied at length.

19 I will say, though, that my understanding is
20 that the school let out an RFP, and that would seem to
21 indicate that they had a choice, and I guess I will
22 leave my answer at that.

23 Q. Do you believe that the solar power that the
24 solar installers and these SSAs would provide is
25 indispensable to the entities, the schools, and

1 nonprofits to meet their electric load requirements?

2 A. Schools, governments, and nonprofits have the
3 option of continuing to take electricity from their
4 incumbent providers. So it is not indispensable.

5 I would point out, though, that were one of
6 those entities to enter into an SSA, that were they to
7 get a better deal and have an expectation for getting a
8 certain amount of their load met at that particular
9 price, that were that relationship to change, that it
10 could be detrimental to the schools.

11 Q. Let me get back to the light regulation. You
12 talked about the range that is set in the telecom and
13 how you envision it would be in this arena. Would the
14 range be the same for all the solar providers?

15 A. Again, we, Staff, hasn't decided conclusively
16 what that should look like, and ultimately that's a
17 decision for the Commission to make.

18 Sitting here today thinking back about it
19 prospectively from a policy standpoint, I don't believe
20 they would necessarily have to be the same range for
21 every provider.

22 Q. And if they weren't the same range, wouldn't
23 that be a discriminatory form of pricing?

24 A. You know, I am not sure I know the answer to
25 that question. If there were a test case in front of us

1 with more facts, we could think about it more clearly.

2 But I will say this, that I believe in the CLEC
3 world there are different ranges, and I don't think
4 anyone claims that there is problems related to price
5 discrimination. And I believe that when it is
6 necessary, the CLECs can always come in for an
7 adjustment to those tariffs.

8 CHMN. MAYES: Mr. Pozefsky, could I jump in real
9 quick?

10 I am interested in boring down on this CLEC
11 comparison, Mr. Irvine. And I appreciate the corollary
12 that Staff is trying to draw. But is there a difference
13 between CLECs and these SSA providers in the sense that
14 if I am a small business and I sign up to take my
15 telephone service from a CLEC, I am taking all of my
16 telephone service from the CLEC, whereas if I am a
17 school and I sign up with an SSA, I am taking only a
18 portion of my electricity service from the SSA provider
19 and the dominant portion from the electric utility? Has
20 Staff thought about that difference in the two models
21 and what that may say with regard to the propriety of
22 regulation?

23 THE WITNESS: Staff has given some consideration
24 to the comparability. First, let me say that I don't
25 typically work in telecom matters. Normally I work

1 mostly with energy, water, and sewer. It is my
2 understanding that in a CLEC configuration, that there
3 also are other options available to customers, like they
4 have cellphones and perhaps VOIP, and I think it is
5 possible they can have redundant forms of service. But
6 I can't speak extensively to that issue.

7 I will say that Mr. Abinah has a lot more
8 background in the telecom world, and if that's something
9 you wanted to learn more about in terms of Staff's
10 understanding of the comparability of the models, that
11 perhaps he could provide more information.

12 CHMN. MAYES: I will ask him about that.

13 But am I correct in my understanding of what
14 happens when you sign up for service with a CLEC, I mean
15 if you are -- if I am a small business and I decide to
16 go with Level 3 for my service, I am getting all of my
17 service, at least with regard to what they provide, from
18 Level 3 and not some of it from Level 3 and some of it
19 from Qwest?

20 THE WITNESS: That's correct.

21 CHMN. MAYES: Okay, thank you.

22 Thank you, Mr. Pozefsky.

23 MR. POZEFSKY: You are welcome.

24 BY MR. POZEFSKY:

25 Q. Mr. Irvine, in your opinion would setting a

1 range of prices result in a lower price to the schools
2 and the nonprofits than if competition were allowed to
3 develop?

4 A. I don't see how those are two mutually exclusive
5 thoughts. I think that there can be a tariff with a
6 range of rates in a competitive environment. In fact, I
7 believe that's how the CLEC world is organized.

8 Q. Let me restate that. In your opinion, would
9 setting a range of prices result in lower prices to
10 schools and nonprofits than if there were no regulation?

11 A. That's a hypothetical with so many variables I
12 don't think I could even venture a guess.

13 Q. You would agree with me, though, however, that
14 all things being equal, higher prices wouldn't be in the
15 customer's best interest, the schools and the
16 nonprofits, correct?

17 A. I am sorry, did you say that -- were you asking
18 if I believe a higher price would be in the customer's
19 and school's best interest?

20 Q. No. I said all things being equal, higher
21 prices would not be in the best interest of the schools
22 or the nonprofits, correct?

23 A. That's correct.

24 Q. Let me hand you what is marked RUCO

25 Exhibit 2 -- 3, excuse me. Sir, you should have before

1 you a copy of what should be part of the open meeting
2 agendas from June through October 2009. Take a second.
3 Is that what that appears to be?

4 A. That's what it is titled, so I assume that's
5 what it is.

6 Q. Okay. And I want to give you a second to look
7 through these. I didn't take the complete agendas, I
8 just took the parts of the agendas relevant. If you
9 would, turn to that first page, the consent agendas.
10 Are you there?

11 A. I am.

12 Q. Looking at number 2 of the agenda, number 6,
13 number 8, number 10, are you -- I don't know if you are
14 familiar, but are these the examples of the CLEC cases
15 that are the abbreviated cases before the Commission
16 that you have talked about earlier?

17 A. Let me preface my answer by saying I am not
18 familiar with these cases personally, but they seem to
19 be applications from CLECs.

20 Q. Okay. And in general, applications for
21 cancellations of certificates of convenience and
22 necessity, that sort of thing is part of the abbreviated
23 process that we had talked about earlier that Staff has
24 talked about, correct?

25 A. Well, we talked earlier about there being an

1 abbreviated process potentially for the obtaining of a
2 CC&N. Some of these seem to be cancellations of CC&Ns.
3 It looks like one of them is an application for a CC&N.
4 Possibly.

5 Q. And of course, if there was no regulation, these
6 companies wouldn't have to come before the Commission
7 seeking an application to cancel their CC&N, correct?

8 A. It would seem that's correct.

9 Q. And each one of these that we have just -- that
10 is set forth here on this agenda, they are applications
11 that the Staff does have to go through, correct?

12 A. We give some consideration to every application.

13 Q. Okay. If you would, turn two more pages. You
14 will see that there is the July revised agenda, is that
15 correct?

16 A. I see a July agenda. Whether it is revised or
17 not, I don't know. So it does say revised.

18 Q. And it is the Chairman's consent agenda for
19 July?

20 A. It appears to be.

21 Q. And, again, if you look at number 1, 2, 3, 5, 7,
22 8, looks like 11 was pulled, but those are all telecom
23 matters, correct?

24 A. Well, I don't recall exactly all the numbers you
25 have mentioned, but to the best of my memory I looked at

1 them, and they all appear to be telecom filings.

2 Q. And they are all matters Staff would have to go
3 through and review, correct?

4 A. Again, we give some consideration to every
5 application.

6 Q. And they are all matters that the Commissioners
7 would also have to look at, correct?

8 A. Well, I don't know if that's entirely correct.
9 I think the Commission considers matters at their own
10 discretion. These are on the consent agenda, so
11 apparently they were meant for Commission consideration.

12 Q. And all these are matters that wouldn't be here
13 if they weren't regulated, correct?

14 A. It would seem. I don't -- again, I don't know
15 these matters particularly, but as a general principle,
16 if somebody were not subject to regulation they wouldn't
17 file an application with us.

18 Q. Okay. You stated -- well, let me ask you,
19 Mr. Irvine, wouldn't you agree that Staff also shares a
20 goal for the proliferation of the solar industry here in
21 Arizona?

22 A. Absolutely.

23 Q. And wouldn't you agree that there has been a lot
24 of evidence offered in this case which would indicate
25 that regulation of any form is likely to impede the

1 growth of the solar industry here in Arizona?

2 A. I know that a lot of parties have that position.

3 Q. Let me ask you, has there been any evidence
4 since you have been here that shows that regulation
5 would not impede the solar industry in this case?

6 A. Well, to know what happens in the future
7 requires some level of speculation. I don't know what
8 would happen in the future one way or the other. But I
9 would want to make one point on that subject.

10 When this application first came in, the
11 contract rate was at 11 cents; shortly thereafter it
12 dropped to 9. There was some discussion on that. I
13 believe there was some question about how that was
14 possible. Part of the answer included talk about
15 economies of scale, and some of the response included
16 discussion of the company just absorbing that additional
17 cost through the margin.

18 To be honest, I don't know the internal
19 financings of SSA providers. I believe it is very
20 possible that there would be added costs for regulation,
21 but that they would be nominal, and perhaps they could
22 be absorbed in such a way that the SSA providers could
23 go forth and still make a profit. It seems like if they
24 can absorb nearly a 20 percent drop in price that
25 perhaps the cost of regulation is also absorbable.

1 Q. Why would a company want to come to Arizona and
2 install and do SSAs in Arizona when it can go to any
3 other state that's not regulated?

4 A. Well, putting myself in place of an SSA
5 provider, I would want to get all the business I could.
6 I would want to come to a state that had a lot of sun.
7 And if the costs were nominal here and it were still
8 profitable, I would want to profit as much as I could.

9 Q. Do you believe that regulation even in a
10 light-hearted aspect or light-hearted form would present
11 some amount of uncertainty to investors?

12 A. It really would depend on the form that the
13 light-handed regulation took. I believe in a lot of
14 respects it would provide certainty for the investors.
15 In other words, at this moment we are not done with this
16 proceeding. We don't know what the future holds for
17 regulation. Once we have a road map, once it is
18 determined, people will get a sense of the cost of
19 regulation here and can figure it into their business
20 models and it will provide them more certainty in some
21 regards.

22 Now, could there be some sort of Commission
23 decision that created more uncertainty? Sure. But I
24 don't think the Commission would craft that sort of
25 decision.

1 Q. In Staff's analysis, Staff hasn't contacted any
2 investors to determine whether or not regulation would
3 in fact affect their decision, has it?

4 A. We did not contact anyone to explore that.

5 Q. Did Staff figure that into its analysis?

6 A. We gave consideration to the possibility because
7 a number of parties have raised that concern, and it is
8 an obvious concern when you look at the application.

9 Q. If in fact regulation would impede the industry,
10 would Staff be making its current recommendation,
11 hypothetically?

12 A. Well, impede at face value could mean a lot of
13 things. If it meant filing one single tariff and
14 somebody thought that was impeding the proliferation of
15 SSAs, well, it may not be that harmful in reality.

16 Q. How about strangle, like the term used in The
17 Arizona Republic? If in fact hypothetically it would
18 strangle the business, would Staff still be making the
19 same recommendation?

20 A. Well, strangle again is a point of perspective
21 problem. But if by that you mean make the proliferation
22 of SSAs unfeasible or not happen, again, the question
23 being would we still make the same policy determination,
24 I don't know, because we didn't explore that
25 possibility. And we never concluded that it would.

1 Again, perhaps that's something you could ask Mr. Abinah
2 as a policy maker, as one of our chief policy makers.

3 Q. Could you turn to page 36 of your direct
4 testimony.

5 A. I can and I have.

6 Q. Could you read the last line on that page.

7 A. You mean the last complete sentence?

8 Q. Yes, please.

9 A. More importantly, light-handed regulation is
10 likely to have only nominal costs that would not produce
11 negative results.

12 I am sorry, I have gone to the second to last.
13 I will now read the last sentence. Staff believes that
14 regulation could be applied in this instance to
15 encourage the development of this nascent industry.

16 Q. How could regulation be applied in this instance
17 to encourage the development of this nascent industry?

18 A. Well, if it were applied in some way where the
19 costs of regulation were only nominal, it would be a
20 signal to investors that there wouldn't be a cost
21 prohibitive regulatory environment here.

22 More importantly, though, as I mentioned earlier
23 in opening, one of the benefits of regulation is to
24 encourage a level playing field. So the Commission can
25 monitor and ensure that the incumbent providers

1 themselves don't dominate the industry and exercise
2 market power to the detriment of other SSA providers.

3 Q. So it is showing that there wouldn't be a cost
4 prohibitive barrier by regulation but actually encourage
5 the development of the industry; is that what you are
6 saying?

7 A. I believe that investors would have more
8 certainty and they would view it as a positive thing,
9 and that would contribute to the development of the
10 industry.

11 MR. POZEFSKY: Okay, Mr. Irvine. I think that's
12 all I have.

13 I would move for the admission of RUCO Exhibit 2
14 and 3 at this time.

15 ALJ RODDA: Are there any objections to 2 and 3?

16 (No response.)

17 ALJ RODDA: All right. Then RUCO-2 and 3 are
18 admitted.

19 (Exhibits Nos. RUCO-2 and RUCO-3 were admitted
20 into evidence.)

21 MR. POZEFSKY: Thank you.

22 ALJ RODDA: And I will ask Mr. Robertson.
23 Before you get started, Mr. Robertson, do you have sort
24 of an estimate of how long?

25 MR. ROBERTSON: 20, 30 minutes, possibly longer,

1 depending on the witness' responses.

2 ALJ RODDA: Okay. Before I go to you, then, let
3 me ask Mr. Hogan. I am just planning the lunch break.

4 Do you have questions for this witness?

5 MR. HOGAN: How long do you want me to ask them?

6 ALJ RODDA: I am just asking.

7 MR. HOGAN: I have a few.

8 ALJ RODDA: A few meaning more than half an
9 hour?

10 MR. HOGAN: No.

11 ALJ RODDA: Why don't we start with you then.

12 MR. HOGAN: I kind of figured I was in your
13 range, so...

14 ALJ RODDA: Yes, I was just trying to find
15 someone in my range, like a puzzle piece.

16

17 CROSS-EXAMINATION

18 BY MR. HOGAN:

19 Q. Good morning, Mr. Irvine.

20 A. Good morning.

21 Q. You mentioned at the beginning of your testimony
22 the four -- or you identified four reasons or issues for
23 regulation in this instance. Do you recall that?

24 A. I do.

25 Q. And one of them had to do with unregulated

1 affiliates of incumbent utilities. Do you recall that?

2 A. That's correct.

3 Q. Can you expand on that for me, please. I am not
4 sure I fully understood that.

5 A. Sure. Were the Commission to determine that
6 providers of SSAs were not public service corporations
7 and therefore they were not regulated, it is difficult
8 for Staff to imagine that the Commission could prevent
9 an incumbent provider from creating, or rather the
10 parent of an incumbent provider, creating an unregulated
11 affiliate who could also participate in the SSA market.
12 We believe that there is some danger that, as an
13 affiliate, that they would have a lot of advantage over
14 other SSA providers that would be detrimental to the
15 market.

16 Q. In what way? I am not quite sure I understand
17 that.

18 A. Sure. Well, I hate to pick on a particular
19 incumbent utility, but just to facilitate the
20 discussion, let's choose APS. And it could be any other
21 incumbent utility, TEP or UNSC or any others.

22 But say Pinn West were to form an unregulated
23 affiliate and call it APS Solar and they were diligent
24 in keeping a firewall in place between APS and APS
25 Solar. It is Staff's concern that simply the name alone

1 is significant to the market and provides a lot of
2 comfort, and it would be a competitive advantage that
3 the incumbent utility would have -- I am sorry, not the
4 incumbent utility but the unregulated affiliate would
5 have.

6 There are a number of other things that could
7 occur. For instance, this new unregulated affiliate
8 could hire all the employees from the incumbent utility,
9 and they would bring with them the knowledge of the
10 market and their Rolodexes and their personal
11 relationships with their largest and best customers, and
12 they would bring also a great deal of knowledge of the
13 market. They know more about Arizona because they deal
14 with us.

15 And there may be an incumbent provider that
16 doesn't give sufficient diligence in maintaining a
17 firewall. Maybe they would actually in some cases
18 share, perhaps even inadvertent, information with their
19 unregulated affiliate. And we believe all those
20 possibilities create the specter of a competitive
21 disadvantage for the SSA providers.

22 Q. It seems like that could happen anyway, though.

23 A. I am not sure, you know, I'm not sure I know
24 what you mean by anyway.

25 ALJ RODDA: I didn't understand that question.

1 BY MR. HOGAN:

2 Q. Well, if APS wants to get into this business --
3 let's assume your recommendation is adopted by the
4 Commission, and SolarCity and other providers are
5 regulated. APS could still choose to get into that
6 business and all of the factors that you have just
7 identified could occur, correct?

8 A. It would depend on the method they used to get
9 in the business. If APS were, if Pinn West rather, for
10 instance -- and perhaps this doesn't get directly to
11 your question.

12 Q. You understand my question, though, right?

13 A. I think so.

14 Q. Okay.

15 A. Let me try and answer, and then if I don't get
16 to the right response we can redirect.

17 If the Commission were to determine that SSA
18 providers are not regulated, Pinn West could form
19 potentially -- and again, I am not picking on anyone in
20 particular, just to facilitate the discussion -- Pinn
21 West, for instance, could form an unregulated affiliate
22 of APS who could operate without Commission regulation
23 or oversight.

24 Now, again, I am not sure about all the
25 possibilities, but referring to APS itself, it could

1 potentially operate either in a regulated or unregulated
2 way.

3 For instance, there is a project in Flagstaff
4 where they have sought approval to, if I understand
5 correctly, get a tariff for the provision of solar
6 energy in the Flagstaff area. In that case, the
7 Commission would regulate that because they are seeking
8 regulatory approval for that. They want to operate,
9 again, if I understand correctly, I am not actually
10 assigned to docket, but my understanding is they want to
11 carry out the function in a regulated way.

12 Now, there is a third possibility where APS
13 itself could enter into the SSA market under the APS
14 organization itself and not be regulated. There was an
15 example earlier about pizza, were APS to sell pizza
16 would we regulate that. The answer is no, because
17 that's an unregulated activity. Could APS form a
18 business within its corporate structure where it got
19 into provision of SSAs in a way that was unregulated by
20 the Commission? I don't know, but I am not sure that
21 they couldn't.

22 CHMN. MAYES: Mr. Hogan, could I jump in here?

23 MR. HOGAN: Sure.

24 CHMN. MAYES: Mr. Irvine, I was under the
25 impression they are already in that business. And maybe

1 APS can shed some light on this. But it was my
2 understanding that APS Energy Services at the very least
3 already offers energy efficiency services through that
4 affiliate to large institutions and may also be doing
5 solar projects. So if I am incorrect, maybe somebody
6 can correct me on that. But that was what I had heard.
7 In fact, I have heard some complaints from potential
8 competitors about APS being in that business.

9 Ms. Scott, am I wrong?

10 MS. DEBORAH SCOTT: Chairman Mayes, I am sorry
11 to jump in the middle of this cross-examination, but I
12 am sure that you are aware that we really do have a
13 firewall.

14 CHMN. MAYES: I know. You are already in the
15 business, aren't you?

16 MS. DEBORAH SCOTT: I would be honest with you,
17 as a lawyer from APS, I do not know what ESS' business
18 is.

19 CHMN. MAYES: Okay.

20 MS. DEBORAH SCOTT: And we purposely separate
21 our lawyers, because our code of conduct requires us to
22 do that. And it is not just an illusory type of code of
23 conduct, we do comply with that.

24 CHMN. MAYES: Okay, good enough. Maybe I don't
25 know if there is a way to get Pinnacle West to report

1 that information to us. But it is my understanding, as
2 a Commissioner who has been told this by potential
3 competitors of APS Energy Services, that they are
4 already in the business. And we are not regulating
5 them, are we?

6 THE WITNESS: To my knowledge, no.

7 And if I might add, Chairman, I do want to be
8 very clear that I don't mean to suggest that APS would
9 breach its firewall. I just use Pinn West and APS to
10 facilitate the discussion and put a name on it for the
11 sake of talking about it.

12 CHMN. MAYES: So, subject to check, if I am
13 correct, your concern is that if the Commission were to
14 not regulate SSAs, that that would encourage APS Energy
15 Services to do more of this kind of activity? I mean,
16 and if so, why hasn't Staff been concerned about this
17 before?

18 THE WITNESS: Well, to answer the first part,
19 would there be an incentive to do that, I think from a
20 business perspective there would be. There is potential
21 business and potential business in an arena where they
22 are already established, and could perhaps exert market
23 force even without breaching their firewall.

24 To the second question, why hasn't Staff looked
25 at it, I am low enough in the organization that I

1 haven't been involved with those decisions. And I don't
2 know that we aren't. Again, Mr. Abinah is available for
3 questions of a higher policy nature.

4 CHMN. MAYES: Okay. Thank you.

5 ALJ RODDA: Oh, Mr. Hogan.

6 MR. HOGAN: Thanks.

7 BY MR. HOGAN:

8 Q. So if I am understanding this correctly,
9 Mr. Irvine, it is that your present concerns about APS
10 would be heightened if there were no regulation, is that
11 correct?

12 A. Let me clarify that you have couched the
13 question in terms of APS. Our concerns extend to every
14 incumbent utility.

15 Q. And I apologize, I didn't mean to do that. But
16 you get the idea, right, that your present concerns
17 about unregulated affiliates would be heightened if
18 there were no regulation of this activity?

19 A. That's correct.

20 Q. Okay. And you also mentioned as one of the four
21 reasons for regulation the possibility of stranded
22 costs, correct?

23 A. That's correct.

24 Q. And that is simply loss of load by incumbent
25 utilities, right?

1 A. It relates to loss of load by incumbent
2 utilities. More specifically it relates to the expenses
3 for the equipment and other things that are necessary
4 that provide load that would be lost.

5 Q. Okay. And that's an issue in other areas as
6 well, correct, for example, energy efficiency?

7 A. It is something that should be considered.

8 Q. I mean is Staff evaluating those issues? Well,
9 I don't know if you -- are you aware of whether the
10 Staff is evaluating those issues in other contexts like
11 energy efficiency?

12 A. Typically when Staff analyzes demand-side
13 management programs, for instance, usually stranded cost
14 is not a concern that rises to the forefront, if you
15 will. I don't want to say categorically that we don't
16 consider it, because I am not sure that we don't, but it
17 is usually not a concern, at least in the context of DSM
18 programs.

19 Q. It just seems somewhat similar to me in this
20 context where the school, let's just say schools, are
21 taking power on a supplemental basis so they are
22 reducing their overall load from the incumbent utility
23 much like they, they and other customers, would use
24 energy efficiency and demand-side management. Correct?

25 A. There is some common concern among those two

1 issues.

2 Q. Right. The incumbent utility loses revenues as
3 a result of either technique?

4 A. That's correct.

5 CHMN. MAYES: If I could, to this point, and I
6 find it interesting that you have raised it because it
7 is an issue that was dealt with by the New Mexico PUC
8 administrative law judge in the order that was issued
9 and I think is in evidence now. And what the New Mexico
10 ALJ said was that stranded costs, to the extent that it
11 is an issue, is an issue that can be addressed in rate
12 cases.

13 Do you agree with that, or would you agree -- I
14 mean I don't know how a future Commission would handle
15 that with regard to either, you know, SSAs or energy
16 efficiency or DG solar in general. But would you agree
17 that that's, if that's a concern of Staff's, it is
18 something that could be addressed in rate cases?

19 THE WITNESS: Certainly stranded costs can be
20 addressed in rate cases. Our concern lies more with the
21 aspect that, were SSAs unregulated, then there would be
22 very little check potentially on the proliferation of
23 SSAs and very little control on the cause of stranded
24 costs. Certainly the way the Commission deals with
25 stranded cost is something that can be done in a rate

1 case, but it is Staff's concern that the input to that
2 process may be uncontrolled.

3 I would want to point one thing out while we are
4 on this topic, that in my testimony I have described
5 that the Commission will have some control of the
6 proliferation of SSAs through its approval of REST
7 tariffs. And I would point out that while that's true
8 today, given the current economics of things, it may not
9 be true in the future. And at some point when there is
10 price parity between SSA electricity and grid energy,
11 that process can be a lot more uncontrolled in the
12 future or outside.

13 CHMN. MAYES: Okay. Mr. Hogan, can I
14 continue --

15 MR. HOGAN: Absolutely.

16 CHMN. MAYES: -- with this line? Because it
17 kind of goes to one of the questions that I have.

18 If the Commission -- couldn't the Commission
19 come back at this issue when the market reaches price
20 parity and when we do see such proliferation of SSAs,
21 that there is market dominance by these providers?

22 I mean, is it Staff's position that if we let
23 this -- let go of this now, we can never grasp it again
24 in the future? I mean you let it go, you know, if you
25 let the tiger by the tail, let go of the tiger now, you

1 can't get ahold of it in the future. Is that Staff's
2 position?

3 THE WITNESS: See if I can respond, and again
4 regroup if I don't get quite to the answer.

5 From a legal perspective, does the Commission
6 have the legal authority to make that conclusion in the
7 future and not now I can't answer because I am not an
8 attorney. I suspect somebody would object on a legal
9 basis. And I don't know.

10 From just a generic knowledge I have from being
11 employed here for many years, I believe the Commission
12 could make a determination in the future to regulate
13 after having, at present, not made that determination.

14 To the matter of letting the tiger go, I think
15 there is something in that, that if we choose, if the
16 Commission were to choose not to regulate now, there is
17 some danger that things could get out of control,
18 problems could arise, and then the response would have
19 to be a determination to regulate.

20 CHMN. MAYES: So it is Staff's position, though,
21 that for at least the immediate future we know, and we
22 know -- there is an upward boundary with regard to how
23 many solar systems will be installed in Arizona likely,
24 correct? And that upward, that upward boundary is
25 basically set by the REST.

1 THE WITNESS: At present, yes, I think the
2 Commission, because of the economics involved, has a lot
3 of control over that process. I am a little concerned,
4 though, that, if over the course of this case the
5 contract price drops from 11 to 9, we may be at that
6 point of cost parity sooner than we expect.

7 CHMN. MAYES: Okay. At least with regard to --
8 well, that's a good point. That is an interesting
9 point. But that is with regard to schools and
10 institutions, correct, not other types of SSAs or
11 leases?

12 THE WITNESS: I understand that the application
13 asks for adjudication in regard to schools, nonprofits,
14 and governments. And I don't think a Commission
15 decision would extend beyond that unless the Commission
16 chooses to decide that. So should the Commission
17 maintain the scope of the decision within the realm of
18 schools, nonprofits, and governments, then I suppose the
19 answer is yes.

20 CHMN. MAYES: Okay.

21 THE WITNESS: If I understood the question
22 correctly.

23 CHMN. MAYES: And then going, just one last
24 question on this point, going back to Staff's position
25 about letting go or concern about letting go, if the

1 test -- I guess the first question is: Does Staff agree
2 with RUCO that the Commission is to apply a two-part
3 test in this instance, one, is there furnishing going
4 on, and, two, are the Serv-Yu factors met? Is that
5 Staff's understanding of the way we judge this issue?

6 MR. HAINS: Excuse me. I apologize, Your Honor.

7 Madam Chair, as other parties have done, very
8 careful about trying to interrupt when you have a
9 question like this, but it does seem this is a legal
10 question about how the case law works, and it is
11 something that Staff is prepared to address in the
12 briefs, but I don't think Mr. Irvine is here to provide
13 the legal conclusion of how the analysis works in that
14 effect.

15 CHMN. MAYES: Okay. Well, just about every
16 other witness has provided their legal conclusions in
17 this case. I have been here for the entire case,
18 Mr. Hains, but okay. If that's the case, and Mr. -- I
19 read his testimony, too, and there is a whole lot of
20 discussion of the factors and Serv-Yu. So if --

21 Let me ask the question this way: If the
22 Serv-Yu factors are not met today but they are met in
23 2014 when Wall Street believes that we are going to
24 reach price parity with solar, couldn't at that point
25 the Commission come back and determine that these are

1 public service corporations?

2 THE WITNESS: Sitting here today as a public
3 utility analyst who is not a lawyer, I think so.

4 CHMN. MAYES: Okay. Thank you, Mr. Hogan.

5 MR. HOGAN: I just have a couple more.

6 ALJ RODDA: Okay, good.

7 BY MR. HOGAN:

8 Q. Switching to your specific recommendation here,
9 Mr. Irvine, you highlighted the fact that at least a
10 contributing factor to your conclusion is that the price
11 here in the SSA is on a kWh basis, correct?

12 A. That's correct.

13 Q. Assume the SSA was entirely the same except that
14 instead of being priced on a kWh basis it was a fixed
15 price. Would your conclusion be different?

16 A. To be honest, I don't know, because that wasn't
17 the case before us. It sounds silly, but it is not
18 something that we discussed.

19 Q. Okay. So if it was the same exact -- just so I
20 am clear about this -- the same exact agreement but it
21 calls for a fixed payment instead of a kWh, you don't
22 know whether that would alter your recommendation in
23 this case?

24 A. I am not certain, because there are parts of the
25 contract that make reference to the purchase of

1 electricity. So the facts would be cloudy in that
2 circumstance. And I don't know ultimately what Staff's
3 conclusion would be, because we didn't perform that
4 analysis.

5 Q. Yes, and you understand why I am asking. I mean
6 it is my recollection of your testimony that you are the
7 one who said that part of the reason that led you to the
8 conclusion this was supplying electricity is it was
9 priced on a kWh basis.

10 A. That's correct. And let me try and respond this
11 way. If the facts of this hypothetical SSA suggested to
12 us that it is a lease, we believe that leases are more
13 appropriately not regulated.

14 Now, there is some complications there because
15 some of the incentive money that is available from tax
16 incentives is contingent on it not being a lease. So
17 again, the facts are all very cloudy there.

18 Q. Right, and I am putting aside the tax
19 implications. I am just trying to wonder from a
20 regulatory standpoint and the question that we are
21 facing in this proceeding.

22 A. Yes. Let me try again, if I might. Removing
23 ourselves from consideration from the SSA at present,
24 considering only a lease, our inclination is not to
25 regulate given a lease. And I think we discussed that

1 in the Solar Alliance docket.

2 Now, whether this SSA is a lease or not, that's
3 a whole other question.

4 Q. Okay. And putting aside the tax issues again,
5 if any part of that kWh payment in the SSA was going
6 toward an ownership interest on the part of the school
7 and the facilities provided, would that make a
8 difference in your recommendation?

9 A. If you look at my testimony, there is some
10 discussion about ownership being relevant to the
11 question of furnishing. And I don't want to speak
12 categorically and say if X then Y, ultimately no
13 regulation, but I will say that ownership contributes to
14 a determination, the goal of ownership would contribute
15 to a determination not a PSC.

16 Q. So it is possible that if some portion of the
17 kWh charge was dedicated to acquisition of an ownership
18 interest on the part of the school that your
19 recommendation might change?

20 A. At this point I think the hypothetical is
21 getting murky enough that I don't want to say, but I do
22 believe what I said previously, that were there clear
23 ownership, that that lends towards a recommendation not
24 a PSC.

25 Q. Okay. And if there was some, and, your answer

1 to this may be the same, if there was some payment by
2 the school at the inception of the agreement that
3 secured, well, secured some ownership interest in the
4 facilities, and then thereafter paid on the kWh basis
5 that is specified in the agreement, would that alter
6 your recommendation at all?

7 A. You were right earlier when you said my answer
8 would be the same. It is not -- those weren't the facts
9 in front of us so we didn't consider that or analyze
10 that possibility.

11 MR. HOGAN: Okay. Thank you very much.

12 Thank you.

13 ALJ RODDA: Thank you, Mr. Hogan.

14 And now I am going to take a lunch break, and we
15 will meet back here at 1:10.

16 (A recess ensued from 12:12 p.m. to 1:16 p.m.)

17 ALJ RODDA: All right. Mr. Irvine is back on
18 the stand and we are back on the record.

19 And I was going to ask, Mr. Robertson, if you
20 had questions for this witness.

21 MR. ROBERTSON: I do. Thank you, Your Honor.

22

23 CROSS-EXAMINATION

24 BY MR. ROBERTSON:

25 Q. Good afternoon, Mr. Irvine.

1 A. Good afternoon.

2 Q. Did you have an enjoyable lunch?

3 A. I did. Did you?

4 Q. Good, good.

5 Before I start with the cross-examination that I
6 had prepared prior to the commencement of today's
7 hearing, I wanted to go to one point that you covered
8 during your direct examination from Mr. Hains.

9 At one point early in your supplemental direct
10 examination this morning, you described what you felt
11 were four areas of benefit, four regulation factors that
12 would address the issue of need for regulation. And
13 according to my notes, those were a level playing field,
14 ratemaking considerations which included stranded costs
15 and cherry picking, safety, and consumer services. Did
16 I capture those four areas of benefit correctly?

17 A. Those were the four areas that I mentioned as
18 benefits.

19 Q. Let me ask you a question. When we talk about
20 benefits that could be achieved through regulation as
21 you perceive it, or a need for regulation as you
22 perceive it, as you look at the determination on need --
23 and this is from your perspective; I am not asking you a
24 legal question -- do you examine it in terms of what X
25 is doing as of this point in time or what X might be

1 doing at some future point in time?

2 A. Well, when we think about the activities of an
3 organization or business model, we think both in terms
4 of what it may be doing in the moment and the potential
5 for the future.

6 But I want to back up and clarify one part, one
7 aspect of your question in terms of the issue of need
8 and benefit. I have described these areas as benefits
9 that can come out of a regulatory process.

10 I think need is a different issue. If by need
11 you mean cause for regulation, the cause comes out of
12 constitutional requirements. In other words, if the
13 constitution says regulate activity X, the need or cause
14 to regulate it is because the constitution prescribed
15 that. And I want to differentiate that from the
16 benefits of regulation.

17 I have talked about four benefits to regulation,
18 but if there were a question about why should the
19 Commission regulate, there are two parts. The most
20 principal one is because if the constitution prescribed
21 it, then we do what the constitution says. But there
22 are other benefits in addition to the primary cause for
23 regulation.

24 Q. I am going to ask you some follow-up questions
25 on this point. I am going to endeavor to phrase them

1 very, very carefully so that your counsel does not feel
2 I am seeking to elicit the expression of a legal opinion
3 from you. Okay?

4 A. Okay. I appreciate that.

5 Q. Is it your understanding under the constitution
6 of Arizona that if a corporation or an entity is found
7 to satisfy the definition of public service corporation
8 as set forth in Article 15, Section 2 of the
9 constitution, that at that point the Commission has no
10 alternative but to assert jurisdiction and regulate that
11 entity?

12 A. I am not certain I know that answer to that
13 question.

14 Q. Okay. What is the purpose of applying the
15 Serv-Yu factors to a given factual situation?

16 A. My understanding of the relevance of the Serv-Yu
17 factors is that they serve to help give an indication of
18 whether a certain business practice constitutes
19 activities performed by a public service corporation or
20 not.

21 Q. You indicated earlier today you have been in
22 attendance throughout most of the hearings in this
23 proceeding, did you not?

24 A. I did.

25 Q. Can you point to any evidence in the record as

1 developed thus far that demonstrates a need for
2 regulation of solar service providers?

3 A. Based on Staff's review of the application and
4 the evidence in the record, we feel that there is a
5 furnishing of electricity in an SSA agreement. We feel
6 that electricity is not incidental to the agreement.
7 And we feel that review of the Serv-Yu factors indicates
8 that the SSAs would be a public service corporation --
9 that the providers of the SSAs would be public service
10 corporations.

11 Q. Is it your opinion and your position that if
12 SolarCity is found to furnish electricity, that
13 demonstrates a need for regulation of SolarCity?

14 A. I think it is a relevant factor in that
15 determination and it is a significant factor in that
16 determination. I believe there are other
17 considerations, but I believe that figures largely into
18 that decision.

19 Q. I am going to repeat the question very
20 specifically. If it is determined that SolarCity, under
21 the SSAs in question, is furnishing electricity, does
22 that in and of itself indicate a need for regulation?

23 A. Not being a lawyer, I can't speak to the
24 universe of legal tests for that determination. I can
25 say what I said previously, that I think it figures

1 largely into the consideration, but I can't say, not
2 having legal training or being an attorney, I can't say
3 what the universe of relevant tests is.

4 Q. I want to make very clear, Mr. Irvine, as I ask
5 you these questions I am not asking you to express a
6 legal opinion. In your opinion, does a determination
7 that SolarCity is furnishing electricity under the SSAs
8 indicate a need for the Commission to regulate
9 SolarCity?

10 MR. HAINS: Your Honor, I think the witness has
11 already said that this question leads him to a legal
12 analysis, that he has done analysis of the things that
13 he believes are relevant to indicate, you know, when
14 that need is triggered but he hasn't indicated whether
15 there is some legal requirement that one factor, one
16 question in particular necessitates a determination that
17 a need has been established for the regulation. I think
18 this question is now kind of unavoidably going into a
19 legal question at this point.

20 MR. ROBERTSON: Your Honor, if I might respond.
21 The witness has referred to three different things that
22 appear to have influenced his thinking when I asked him
23 the original question of is there a need at this time
24 for regulation. One was a determination there has been
25 a furnishing of electricity, the second was that that

1 furnishing of electricity was not incidental, and the
2 third was the application of the Serv-Yu factors.

3 What I have endeavored to do with my line of
4 questioning is isolate each of those three components to
5 find out in the witness' opinion whether one is more
6 important than the other, what is the relative
7 importance among them.

8 And the reason we have stayed with the same
9 question is the witness has gone back to asserting the
10 three, and I have tried to isolate need or isolate the
11 furnishing of electricity and just get his opinion on
12 that, not his legal opinion. We can deal with the legal
13 import in the briefs.

14 And then I would intend to do the same with
15 regard to that furnishing of electricity not being
16 incidental and then the role of the Serv-Yu factors. So
17 that's the purpose of my cross-examination.

18 ALJ RODDA: Okay. Well, I am going to let you
19 ask it one more time -- I am not sure -- I mean with
20 that understanding, but it is, it is a borderline
21 briefing issue.

22 MR. ROBERTSON: Let me approach it a different
23 way.

24 ALJ RODDA: I am interested myself in the
25 answers, but, you know...

1 MR. ROBERTSON: I am sorry, Your Honor, I didn't
2 mean to interrupt you.

3 ALJ RODDA: That's okay, go ahead.

4 MR. ROBERTSON: May I continue?

5 ALJ RODDA: Yes.

6 MR. ROBERTSON: Thank you.

7 BY MR. ROBERTSON:

8 Q. Mr. Irvine, if it were found that under the SSAs
9 in question SolarCity is not furnishing -- no -- is
10 furnishing electricity and the other two components you
11 alluded to, the incidental or not being incidental and
12 the Serv-Yu factors were not in play, in your opinion,
13 would there be a need to regulate?

14 MR. HAINS: Again, Your Honor, same objection.
15 This goes back to the, you know, whether any of these
16 factors has more significance legally or whether it is a
17 process, whether satisfaction of one leads to the other
18 questions.

19 I think this is a legal question, and this
20 witness is not provided to provide legal conclusions on
21 Staff's behalf. That's something that Staff is more
22 than happy to cover in the briefs, probably will cover
23 in the briefs, but I think this is a legal question.

24 MR. ROBERTSON: Your Honor, my phrasing of the
25 question deliberately and very carefully avoided asking

1 the witness for a legal opinion. I asked him in his
2 opinion, given the question I just asked, does he feel
3 there is a need to regulate. He has expressed opinions
4 earlier today throughout his testimony as to when and
5 where he feels a need to regulate and what should be
6 done. I am trying to find out the role that each of
7 these three components plays in his thought process and
8 his formulation of opinions.

9 ALJ RODDA: Okay. Colette, would you read back
10 the question for me.

11 (The record was read by the reporter as
12 requested.)

13 ALJ RODDA: Mr. Robertson, when you asked about
14 a need to regulate, what do you mean by that? I mean I
15 don't know what you mean by that. A constitutional
16 need, a legal requirement to regulate, or an economic
17 need to regulate?

18 MR. ROBERTSON: In my opinion, Your Honor, and I
19 believe I may have indicated this during my
20 cross-examination of RUCO witness Jodi Jerich, I believe
21 that the Southwest Transmission Cooperative case pulls
22 together for the first time what the Serv-Yu factors are
23 all about, and that is, particularly with regard to the
24 latter two or three, is there a need to regulate under
25 the legal analysis.

1 As I understand the Southwest Transmission case,
2 and you have heard this expressed by other parties as
3 well, there is a two-step analytic process. There is
4 Article 15, Section 2, does the entity or the individual
5 meet the definition of public service corporation. And
6 if so, you move on to Serv-Yu and make a determination
7 on whether or not to regulate.

8 What Southwest Transmission Cooperative tells us
9 is that in the aggregate of factual circumstances that
10 are out there, there is either an underlying need to
11 regulate or not. And if there is not, then you don't
12 regulate even if the entity fills the definition of a
13 public service corporation.

14 What I have been endeavoring to ascertain from
15 this witness is what importance does he attribute to the
16 furnishing of electricity, in his opinion as a layperson
17 who has studied this particular situation in the context
18 of this case, what importance does he attribute to
19 incidental or the Serv-Yu factors. He may have an
20 importance in his mind, he may not. I am not asking him
21 to come to the ultimate legal conclusion. I am trying
22 to get at the facts that we can all then brief as we see
23 appropriate.

24 ALJ RODDA: Okay. With that explanation, I am
25 going to let you answer the question. I mean you, you

1 followed what -- his explanation, right, your opinion,
2 not your legal conclusion, but --

3 THE WITNESS: Okay.

4 ALJ RODDA: If you can remember the question.

5 THE WITNESS: I think I can. I will try, and
6 there is always time to go back if I don't.

7 ALJ RODDA: There is always time.

8 THE WITNESS: Right?

9 With regard to the relative weight of any given
10 test, I am not certain that any test is subordinate to
11 the other or more important than the other. Sitting
12 here today as a public utility analyst who has not
13 studied the law, it seems to me that the constitution
14 figures pretty large in the equation. Whether the
15 presence of a constitutional test indicating one thing
16 in absence of the same finding from any other tests
17 causes a need to regulate or a prescription to regulate,
18 I honestly don't know.

19 BY MR. ROBERTSON:

20 Q. That's a fair enough answer.

21 Let's go back to the four points or the areas of
22 benefit that you identified in your testimony. Do you
23 make a distinction between the concept of areas of
24 benefit that might flow from regulation versus a need to
25 regulate, in your mind?

1 A. Well, I think a legal test that prescribes
2 regulation is a subtly different thing than benefits
3 that may emanate from regulation. I don't believe that
4 they are unrelated, but I think there is a difference
5 between a legal test and what I might call policy
6 benefits or benefits of regulation. Now, if there is
7 some component of the law that argues against that,
8 again, I am not a student of the law. I don't know.

9 Q. Do you have your prepared testimony in front of
10 you?

11 A. I do.

12 Q. Let me move on now to some of my previously
13 prepared cross-examination. I would like you to turn to
14 page 1 of your prepared testimony. And I am going to
15 ask you some questions to learn a little bit more about
16 your background. So let me start with the question and
17 answer which begin on line 15 and concludes on line 19
18 on page 1 of Exhibit S-1.

19 Did you work at any time in a nonacademic
20 capacity between 1994, when you graduated from Arizona
21 State University with your bachelor of science degree in
22 business marketing, and in 1997, when you received your
23 master's degree in public administration from Arizona
24 State University?

25 A. I did.

1 Q. What did you do?

2 A. I did a number of things in that period of time.
3 I worked for a period of time as an interpreter, and I
4 worked in construction at that same period of time.

5 Q. Anything else during that particular period of
6 time?

7 A. Possibly, but those are the jobs that stick out
8 in my mind.

9 Q. Okay. Now, subsequent to your graduation from
10 Arizona State in 1997 with your master's degree in
11 public administration, and prior to your commencement of
12 employment with the Commission in May of 2001, did you
13 work during that period?

14 A. I did.

15 Q. What was the nature of the work you did during
16 that period?

17 A. I worked for a period of time, I was a building
18 inspector. I also was involved in a start-up company
19 that was in the technology industry, and I did research
20 for that company. I was also involved in computer
21 sales.

22 Q. Which technology industry was the start-up
23 company?

24 A. The company was developing a modem, a compressed
25 digital packet modem that would conduct wireless

1 transactions. And the first application was meant to be
2 in a transit setting, but the architecture of the system
3 was open to transaction processing in a number of other
4 formats. So it was a core technology with an initial
5 industry in mind, but it was open to applications in
6 other industries.

7 Q. Your prepared testimony indicates that you began
8 employment with the Commission in May of 2001 and had
9 worked in the Utilities Division since September of
10 2002. In which area of the Commission did you work
11 between May of 2001 and September of 2002?

12 A. I worked in the Corporations Division.

13 Q. Okay. Now let's move up, we are still on
14 page 1, to the question and answer which begin on line 7
15 and conclude on line 13. And in this question and
16 answer you describe your responsibilities as a public
17 utility analyst, do you not?

18 A. I do.

19 Q. Now, you indicate in the first sentence in your
20 answer that your work has been involved in connection
21 with rate proceedings, and you continue to expand upon
22 that in the second sentence. In the third sentence you
23 go on to say, quote, my duties have also included
24 evaluating a variety of applications or components of
25 applications, including financings, purchase power

1 agreements, renewable energy standard and tariff
2 programs and others.

3 What percentage of your time over the years that
4 you have worked in the Utilities Division would you
5 allocate to rate proceedings to begin with, and then
6 these other five categories of matters or other four
7 categories of matters that you refer to in the last
8 sentence of the answer I have just read?

9 A. Well, answering the question is a little
10 difficult, and let me explain why. At line 12 I mention
11 renewable energy and standard tariff programs. Very
12 often those happen within rate proceedings. So to say
13 that I spend X amount of time in rate proceedings and Y
14 amount of time in these other areas is a little bit
15 misleading, because some of those areas sometimes occur
16 within rate proceedings and sometimes they do not. So I
17 am not quite sure how to answer the question. I could
18 give you a number of answers that attempt to respond to
19 those different possibilities, if you would like.

20 Q. Well, if you would like to modify my question,
21 so to speak, as you just did a moment ago to perhaps
22 lump two different activities you have identified
23 together, that's fine. I am just trying to ascertain
24 how you have spent your time over your years with the
25 Utilities Division in those different areas so I can get

1 an idea of how and where you spent your time. So please
2 feel free to reorganize my question if you would like to
3 so you can give me a responsive answer.

4 A. Thank you.

5 It is difficult for me to say with a high degree
6 of accuracy how much time I spend in one event or the
7 other. If I were pressed to provide an answer based on
8 best information possible, I would say I spend
9 45 percent of my time in rate proceedings and the rest
10 of the time in matters that aren't rate proceedings.
11 But that's just a crude guess.

12 Q. When you use the word others, as you do within
13 the context of the phrase "and others" on line 13, what
14 would be some examples of others?

15 A. There are a lot of filings that are compliance
16 tariff -- compliance items, for instance, that we
17 review. And then there is proceedings such as this one
18 which aren't a rate proceeding, per se.

19 Q. I was about to ask you whether this particular
20 proceeding was one of the others or one of your purchase
21 power agreements. And I gather it is one of the others,
22 is that correct?

23 A. Well, that's an interesting question. There has
24 been some debate about the meaning of purchase power
25 agreements. Some parties to this docket feel that SSAs

1 are equatable to purchase power agreements, and others
2 do not.

3 Q. How did you intend it in your testimony,
4 Mr. Irvine?

5 A. Well, when I wrote line 12, I was thinking that
6 an example of a purchase power agreement was, for
7 instance, the Solana application.

8 Q. Does that conclude your response? Because I am
9 about to move on, but I don't want to interrupt you or
10 cut you short.

11 A. I appreciate the consideration. It does
12 conclude my response.

13 Q. Let me start now by confirming my understanding
14 of the scope of your testimony and recommendations in
15 this proceeding. Am I correct in my understanding that
16 your testimony and the Staff's recommendations are
17 confined to the SolarCity application, which is the
18 subject of this proceeding?

19 A. That's correct.

20 Q. Am I also correct in my understanding that the
21 Commission Staff's review of documentation in connection
22 with this proceeding considered only SolarCity's SSAs
23 with the Scottsdale School District and documentation
24 relating to SolarCity's organizational status and
25 SolarCity's business marketing plans?

1 A. We did consider all that information. We also
2 looked at what we saw in the media.

3 Q. Can you be more explicit in that regard?

4 A. There were a number of articles in the news
5 about this very case, and we read them.

6 Q. Why did you deem those articles to be pertinent
7 to your analysis?

8 A. Because the subject of the articles was this
9 matter.

10 Q. Did those news articles play a role in the
11 opinions that you have formulated and the Commission
12 Staff's recommendations?

13 A. They played a role as much as we read them and
14 considered their content.

15 Q. Do you consider those news articles to be part
16 of the evidentiary record in this proceeding with the
17 exception of RUCO-2?

18 A. I was just about to lift up RUCO-2. I see that
19 RUCO-2 is in the docket. I don't believe any of the
20 other articles were submitted to the docket.

21 Q. Am I further correct in my understanding that
22 the Commission Staff's application and analysis of the
23 language of Article 15, Section 2 of the Arizona
24 Constitution and the Serv-Yu factors pertain only to
25 SolarCity in connection with this proceeding?

1 A. Well, when we thought about this application, we
2 thought about SSA providers in the larger context. In
3 other words, we considered other providers in the
4 hypothetical weren't SolarCity, per se. However, our
5 comments and recommendations are limited to
6 recommendations specific to SolarCity as a provider, as
7 that is the question before us in the application.

8 Q. In that regard, Mr. Irvine, would you turn to
9 page 43 of your prepared direct testimony. And so we
10 have it at this point in the record as a follow-up to
11 your last answer, would you read me the question and
12 answer which appear at line 2 through line 12 on
13 page 43.

14 A. Question: Please summarize Staff's
15 recommendations.

16 Answer: Staff recommends the following, listed
17 in the order of three bullet points, the first being
18 this, that should the Commission find that SolarCity is
19 acting as a public service corporation, the Commission
20 continue to require SolarCity to provide a special
21 contract or a tariff with the special contract to the
22 Commission for review and for approval until the
23 Commission approved a CC&N for SolarCity;

24 The second bullet point being that should the
25 Commission find that SolarCity is acting as a public

1 service corporation, SolarCity should be required to
2 apply for a CC&N;

3 And the final bullet point, that the
4 Commission's finding in this matter apply only to
5 SolarCity's SSA for schools, nonprofits, and
6 governmental entities. Determination on other contracts
7 or sales should be made upon separate application.

8 Q. Thank you.

9 Mr. Irvine, with reference to the first bullet
10 point -- and it may have been that I misheard you -- I
11 thought I heard you use the language special contract as
12 opposed to standard contract. If the transcript
13 reflects that you did say special contract, should that
14 be corrected to read standard contract within the
15 context of that first bullet point?

16 A. The language in the first bullet point does
17 refer to a special contract. If I inadvertently said
18 standard, I apologize.

19 Q. Now that I see it, there is a reference to both
20 special contracts and standard. And your prefiled
21 testimony speaks for itself in any regard. Thank you
22 for doing that. I appreciate that.

23 Were you in the hearing room when SunPower
24 Corporation witness Irvin testified?

25 A. I recall much of his testimony. If there was a

1 part I missed, that's possible, but I do recall being
2 here for much of his testimony.

3 Q. Do you recall him testifying that SunPower
4 Corporation was not making an issue of the question of
5 furnishing of electricity within this proceeding, that
6 it was leaving that to other parties?

7 A. My memory on that is actually not certain. It
8 is a very real possibility, but I don't recall.

9 Q. Well, let me represent to you for purposes of
10 the line of cross-examination I am about to enter that
11 to date, SunPower has not made an issue out of the
12 questioning of whether or not SolarCity is furnishing
13 electricity. It has deferred to other parties to
14 express their views in that regard. So I would like to
15 have that understanding with you. I think it will help
16 us in my cross-examination of you. Do you accept that
17 representation?

18 A. I do.

19 Q. Okay. Thank you.

20 What I would like to do, then, is move on to a
21 specific examination of your use of the Serv-Yu factors
22 in connection with your Staff analysis. Now, you do
23 that beginning on page 19 and continuing on to page 31
24 of your prepared testimony, do you not?

25 A. That's correct.

1 Q. What I am interested in ascertaining,
2 Mr. Irvine, is what you looked at and what you took into
3 account, setting aside your earlier determination in
4 your testimony that in your opinion SolarCity is
5 furnishing electricity and that that furnishing of
6 electricity is not incidental.

7 So against that background, let's start with
8 your examination of Serv-Yu factor number 1, which is
9 what the corporation really does. Did you do any
10 analysis and in-depth consideration or discussion of
11 other services offered under the SSAs such as design,
12 financing, installation, and monitoring services, and
13 the proportionate role and value of those services in
14 relation to the provision of electricity?

15 A. We gave that consideration.

16 Q. Can you point to me in your prepared direct
17 testimony where you discuss that consideration you gave
18 it?

19 A. I don't know that I could point to a part in my
20 testimony that indicates that we do, but I can tell you
21 it is something that we discussed.

22 Q. How would the Commission or Judge Rodda or the
23 parties to this proceeding determine the extent to which
24 you discussed those other services and the proportionate
25 role or value you attributed to them as a part of the

1 overall SSA arrangement?

2 A. They could ask me.

3 Q. Well, I am asking you to please describe them
4 for the record the extent to which you considered those
5 other services. We will start with that.

6 A. Well, we talked about them. I don't know that I
7 can give you an answer like seven or any way to quantify
8 it, but I can tell you that we discussed it.

9 Q. Can you tell me how you determined the
10 proportionate role and value of those other services
11 vis-à-vis the provision or furnishing of electricity?

12 A. Well, I can say that we considered all the
13 evidence that was in the record, which included a
14 description of those other aspects of the SSA. And we
15 compared -- we considered the whole of the services
16 offered under the SSA. And in that process, we
17 determined that the furnishing of electricity was
18 predominant in the SSA.

19 And I believe your question was how did we
20 evaluate or come to that determination. You know, if I
21 understood your question correctly, I believe the answer
22 is we just considered all the elements in context.

23 Q. In your last response, Mr. Irvine, you referred
24 to having considered the evidence in the record. Now,
25 the evidence in the record as of the point in time that

1 you did your analysis and you prepared and filed your
2 prepared testimony was basically the SolarCity
3 application and the two SSAs with the Scottsdale School
4 District, was it not?

5 A. Well, that was the evidence in the record. We
6 also did data requests on the company and got responses
7 to data requests.

8 Q. And did those data requests address the design,
9 financing, installation, and monitoring services and how
10 SolarCity quantified or considered the proportionate
11 role and value of those services to be vis-à-vis the
12 provision or furnishing of electricity?

13 A. It seems to me like we asked that question.

14 Q. Well, do you have a specific recollection as to
15 whether or not SolarCity responded to that question?

16 A. I believe we asked the question; I believe they
17 responded. And I don't believe I recall the answer at
18 this moment.

19 Q. In the Staff's view, did you and the Staff
20 assign more significance or a greater role to the
21 furnishing of electricity vis-à-vis the other services
22 being provided which included design, financing,
23 installation, and monitoring?

24 A. Staff felt that the furnishing of electricity
25 figured larger into the question of PSC status than the

1 other services. And ultimately we decided that the SSA
2 represented a sale of electricity, and that SSA -- that
3 the furnishing of electricity was not incidental to the
4 SSA.

5 Q. Let's move on to Serv-Yu factor number 2,
6 dedication to public use. In there, in your prepared
7 testimony, at page 23, lines 4 and 5, you observe that
8 SolarCity has chosen to serve a class of end-users which
9 constitutes a significant portion of the general public.

10 What studies did Staff undertake to support the
11 conclusion that SolarCity has chosen to serve a class of
12 end-users which constitutes a significant portion of the
13 general public?

14 A. Well, we ran into one concern earlier on in this
15 case where, I believe, there was a procedural order that
16 schools be notified of a particular matter. And in
17 trying to determine what schools were, we considered the
18 question of what schools were, and found that in the
19 broadest sense that there is hundreds and hundreds of
20 schools in Arizona, which led us to believe that the
21 potential market for schools is large.

22 I have also heard it said that government is one
23 of the largest providers -- employers, rather, in
24 Arizona. And I don't recall who, but one of our
25 staffers confirmed that, that that was statistically

1 valid, that one of the largest employers in Arizona is
2 government. And between seeing that schools potentially
3 represented hundreds of SSA customers, and knowing that
4 government is a large employer here in the state, we
5 concluded that those end-users constitute a significant
6 portion of the general public.

7 Q. Are you saying that basically you took
8 categories of types of users such as schools and
9 governments and assumed they were all potential
10 customers of SolarCity, and thus concluded that
11 SolarCity had chosen to serve a class of end-users which
12 constitutes a significant portion of the general public?

13 A. I think that's correct.

14 Q. Did you do any specific data request or analysis
15 with regard to -- of that general public that you so
16 identified -- SolarCity actually intended to try and
17 establish customer relationships with?

18 A. Are you asking if we served a data request on
19 SolarCity to see if they intended to establish
20 relationships with individuals in that market? Is that
21 the question?

22 Q. Well, let's start with that. I had a two-part
23 question. Let's start with that, which was the first
24 part.

25 A. I think we asked questions about if they were,

1 had already entered into SSA agreements and other
2 questions in that arena, if you will, similar questions.

3 MR. ROBERTSON: Your Honor, I wonder if I might
4 have the reporter read the last response back.

5 ALJ RODDA: Okay.

6 (The record was read by the reporter as
7 requested.)

8 BY MR. ROBERTSON:

9 Q. And do you recall SolarCity's responses to that
10 data request?

11 A. I am not certain. I believe they said they did
12 not have other SSAs. I believe just conversationally
13 they may have mentioned having had discussion with other
14 schools, but I am not certain about that.

15 Q. Did SolarCity in any way at any time indicate
16 they intended to seek to serve all schools and all
17 governmental institutions within the State of Arizona?

18 A. I believe that having asked for a determination
19 for those entire categories indicates the potential.
20 And I believe I recall Mr. Rive saying something to the
21 effect of we intend to get as much business as we can.
22 And they are a for-profit company, and it makes sense to
23 me that as a for-profit company they would endeavor to
24 get as much business as they can.

25 Q. Would your conclusion be different if all the

1 facts were the same but the organization in question was
2 a nonprofit company who was simply interested in
3 spreading the advantages of solar energy?

4 A. In that scenario, there could be other variables
5 that could cause Staff to draw different conclusions.
6 But if it were a nonprofit who had a benevolent goal, it
7 would seem they would want to do as much good work as
8 they could.

9 Q. You referred to Mr. Rive's testimony. Do you
10 also recall his testimony that SolarCity did not intend
11 and would not in fact accept all requests for SSA
12 arrangements within Arizona?

13 A. I recall that.

14 Q. Did you, during the course of your Staff
15 analysis, preparing your testimony, give any
16 consideration to that information which was contained in
17 both the SolarCity application and the SSAs?

18 A. We did.

19 Q. And what weighting did you give that indication
20 that the company was not intending to accept all
21 requests for service in your larger picture analysis?

22 A. Well, I don't know how to quantify the weight.
23 I can say that we considered it.

24 Q. Were you in the hearing room when APS witness
25 Barbara Lockwood testified?

1 A. I was.

2 Q. Do you recall her testimony which projected 300
3 SSAs in 2015, 550 SSAs in 2020, and 800 SSAs in 2025?

4 A. That sounds about right.

5 Q. Now, APS operates in 11 of Arizona's 15
6 counties, does it not?

7 A. I am not certain of the actual count.

8 Q. Do you also recall Ms. Lockwood indicating that
9 on the commercial side or on the nonprofit side, there
10 were on the order of 117,000 industrial and commercial
11 customers in APS' electric service areas at present?

12 A. I don't recall that, but I don't dispute it
13 either.

14 Q. Okay. Did Staff in any way endeavor to quantify
15 the projected number of SSA arrangements within the
16 State of Arizona that it might be anticipated SolarCity
17 could achieve in executing?

18 A. I don't believe so. Again, we looked at the
19 schools issue and found that there were hundreds of
20 schools. But I don't recall an effort to exactly
21 quantify the number of potential SSA customers.

22 Q. Would it be fair to say, then, to wrap up this
23 line of inquiry, that essentially you identified certain
24 categories of customers, schools, governmental and
25 nonprofit, and determined that to be the general public

1 of which SolarCity sought to serve a significant
2 portion?

3 A. I think that's implicit in the nature of the
4 application. They have asked for an adjudication
5 relative to those market shares, to those market
6 segments.

7 Q. Is the answer to my question yes?

8 A. To be honest, I will have to ask you to repeat
9 it to be certain.

10 MR. ROBERTSON: If I might have the court
11 reporter read it back, please.

12 (The record was read by the reporter as
13 requested.)

14 THE WITNESS: In part, yes, because of the
15 nature of the application. However, I would add that it
16 is possible that SolarCity will serve other customers.
17 For instance, we know that they serve, I believe they
18 have indicated that they serve residential customers in
19 other formats.

20 So if your question is within the confines of
21 this application, then the answer is yes. However, I
22 would point out that their business isn't necessarily
23 confined to those markets.

24 CHMN. MAYES: Mr. Robertson, could I jump in?

25 MR. ROBERTSON: Certainly, Chairman Mayes.

1 CHMN. MAYES: Thank you.

2 Mr. Irvine, on page 22 of your testimony, under
3 your discussion of dedication to public use, you note
4 that a devotion to public use also means that the public
5 generally, insofar as it is practicable, has the right
6 to enjoy service from the facilities. And in both, in
7 your discussion of dedication of public use, am I
8 correct that you, that Staff, is using as its universe
9 for public the universe of schools rather than the
10 universe of electricity users in a given service
11 territory or in the State of Arizona?

12 Your definition of public is based on a class of
13 end-users or is a class of end-users rather than what I
14 was sort of thinking of public. And, you know, tell me
15 if you think I am wrong but, and maybe there is a
16 different definition of this, but public is the public,
17 isn't it? Or maybe not.

18 THE WITNESS: Well, actually, that's correct.
19 And I think it sort of illustrates how complex this
20 whole matter is. For instance, in the net metering
21 scenario, if there is excess generation, that goes to
22 the grid, which is public, which includes every market
23 beyond schools, nonprofits, and governments. So in that
24 context, public means everyone on the grid.

25 CHMN. MAYES: And that's my next question. So

1 are you saying that because excess energy from these
2 arrangements finds its way onto the grid, that makes
3 them dedicated public use? And if so, because we have
4 net metering in Arizona, wouldn't every single solar
5 system constructed and installed in Arizona then become
6 a public service corporation under Staff's definition,
7 because it gets net metered and put onto the grid? I
8 didn't really quite understand your logic here.

9 THE WITNESS: Right. Sorry about that. I would
10 say the answer is not necessarily. If a person has a
11 solar panel that they own on their home, the act of
12 having net production doesn't make them a public service
13 corporation. There are other legal tests involved. And
14 that single issue Serv-Yu wouldn't make that homeowner a
15 public service corporation.

16 In this case, in the context of the SSA, I think
17 it lends to the consideration, but in and of itself
18 doesn't.

19 CHMN. MAYES: Okay. And I understand that
20 distinction. But it would also lend -- Staff would have
21 to apply to -- you would also say, then, that a solar
22 system put on my condo means that I am dedicating my
23 condo to public use, at least that one prong would be
24 met if I decided to put solar up?

25 THE WITNESS: You know, I have to say that's not

1 something we thought about, so I can't answer. I can
2 say this much, that I think it makes your facility of
3 public interest. How it relates to Serv-Yu in the
4 context of your condo, that's another question that we
5 didn't, we didn't take up.

6 CHMN. MAYES: Okay. And then, and you say on
7 line 17 of page 22, again, you say a devotion of public
8 use also means that the public generally, insofar as it
9 is practicable, has the right to enjoy service from the
10 facilities.

11 One of the distinctions that the ALJ in New
12 Mexico made in her decision was that, at least in her
13 view in New Mexico, people don't have the right to
14 demand service from SSA providers. Do you disagree? Is
15 Staff disagreeing with that? Do I have the right to
16 demand service of SolarCity?

17 THE WITNESS: I don't think the public can
18 compel any provider to serve them.

19 CHMN. MAYES: Okay. So, but you say devotion to
20 public use also means that the public generally has the
21 right to enjoy service from the facilities. If you just
22 acknowledged that I don't have the right to demand
23 service from SolarCity, haven't you also acknowledged
24 that that prong of the test is not met, the Serv-Yu
25 test, understanding that there are multiple prongs to

1 that test, to Serv-Yu?

2 THE WITNESS: Right. You know, I am not sure if
3 I should say I am not sure or ask you to rephrase.

4 CHMN. MAYES: It is okay. I was trying to -- I
5 mean, again, in New Mexico, the ALJ found that the
6 public did not have the right to demand service of the
7 SSAs in making her decision that these are not public
8 service corporations, or shouldn't be regulated in New
9 Mexico, obviously. They have a different test, and I
10 will ask you some questions about this later because
11 they have similar language in their statute as Arizona's
12 constitutional language. But she found that they don't,
13 the public doesn't have the right to enjoy service from
14 facilities.

15 I am just trying to understand if Staff believes
16 that the public in Arizona does have the right to demand
17 service from SSA providers.

18 THE WITNESS: I don't think that the public can
19 compel a provider to serve.

20 CHMN. MAYES: Okay. Thank you.

21 BY MR. ROBERTSON:

22 Q. Let's move to Serv-Yu factor number 3, which
23 pertains to articles of incorporation, authorization,
24 and purposes. In your prepared testimony, as I read it,
25 Commission Staff acknowledges that none of SolarCity's

1 incorporating documents explicitly indicate an intent or
2 purpose to conduct business as a public service
3 corporation in Arizona. Have I correctly read that
4 portion of your testimony?

5 A. That's correct.

6 Q. Now, you go on in your testimony to indicate
7 that you examined the documentation by means of which
8 SolarCity qualified to do business as a foreign
9 corporation in Arizona, since it is a Delaware
10 corporation. Do you recall that part of your testimony?

11 A. Yes.

12 Q. And in there you noted that it had the language
13 which authorized it in its articles of incorporation to
14 engage in, words to the effect, of any lawful type of
15 business activity. Do you recall that?

16 A. That seems correct. If you could point me to
17 the part of my testimony, I can be more exact.

18 Q. Page 24, lines 11 through 14.

19 A. That's correct. None of the incorporating
20 documents reviewed by Staff explicitly state that
21 SolarCity's purpose is to conduct the business of a
22 public service corporation.

23 Q. Now, read the second sentence of that portion of
24 the answer which begins on line 12 of page 24.

25 A. However, Staff would note that at this time the

1 purpose language in the articles of incorporation does
2 not preclude SolarCity from conducting the business of a
3 public service -- I am sorry -- public service
4 corporation either.

5 Q. Now, that portion of your prepared testimony
6 concludes your analysis of Serv-Yu factor number 3, does
7 it not?

8 A. In my prefiled written direct testimony, yes.

9 Q. In your testimony, based against the background
10 of the language you have just read from it, is the
11 Commission Staff inferring that at some future date
12 SolarCity might endeavor to act as a public service
13 corporation?

14 A. Well, it really depends on whether you mean that
15 they might intentionally endeavor to do so or they might
16 endeavor to conduct the business of SSAs and implicitly
17 conduct the service of a public service corporation.

18 So I don't mean to suggest that they might come
19 to the Commission asking to do the business of a PSC
20 unless the Commission were, in this proceeding, to
21 adjudicate that this, the SSA activity, is a public
22 service corporation activity. But they might go out and
23 conduct that business and unintentionally function as a
24 PSC.

25 Q. In your view, in order for a corporation to

1 avoid this Serv-Yu factor being applied in such a manner
2 as to suggest regulation, would its articles of
3 incorporation expressly have to state it is not
4 authorized to act as a public service corporation in
5 Arizona?

6 A. No. They would avoid being a public service
7 corporation by the nature of the activities they
8 conduct. But it wouldn't necessarily be a requirement
9 that their articles of incorporation or authority to
10 transact business in Arizona, it would not be required
11 that those documents would need to include a statement
12 precluding them from those activities.

13 Q. As a layperson, what does this portion of your
14 testimony, specifically your discussion of Serv-Yu
15 factor 3, tell you about how this relates to the inquiry
16 of whether or not SolarCity should be regulated?

17 A. Well, the articles don't indicate an intention
18 to function as a PSC; at the same time, they don't
19 preclude the company from working as a PSC. So I don't
20 think that a conclusion can be drawn one way or the
21 other based on that test alone.

22 Q. Would you say that with regard to factor 3 then
23 it is inconclusive?

24 A. I do agree to that.

25 Q. Okay. Let's move to Serv-Yu factor number 4.

1 This one pertains to dealing with service of a commodity
2 in which the public generally has been held to have an
3 interest. In your analysis and your testimony, do you
4 make a distinction between electricity generated from
5 conventional resources as contrasted with electricity
6 generated through solar technology?

7 A. In certain regards we make the distinction and
8 certain regards we don't. For instance, we recognize
9 some energy as being a renewable energy pursuant to the
10 REST rules and some not. But from another perspective,
11 if you consider it in terms of the electricity used by
12 the school, we think those electrons are comparable.

13 Q. With --

14 CHMN. MAYES: Go ahead.

15 BY MR. ROBERTSON:

16 Q. Within the context specifically of Serv-Yu
17 factor number 4, are you making a distinction between
18 electricity as generated from a conventional resource
19 versus electricity generated through solar technology?

20 A. No.

21 Q. In your analysis, did you give any consideration
22 to whether or not members of the public might have a
23 specific desire to obtain electricity for their use that
24 has been generated through solar technology?

25 A. Yes. In fact, in my direct I believe I ended my

1 direct by saying Staff is a proponent of renewables and
2 solar. And that's something we considered in the
3 context of our study.

4 Q. I am not sure that last response is responsive
5 to my question. So let me try and reframe the question.

6 A. Please.

7 Q. The word commodity as it appears within the
8 context of Serv-Yu factor number 4, do you view
9 electricity generated through solar technology as being
10 a commodity different from electricity generated through
11 conventional resources?

12 A. I think within the context of Serv-Yu factor 4,
13 given my layman's understanding and layman's reading of
14 Serv-Yu, that for purposes of application of Serv-Yu 4
15 there is not a distinction. However, Staff recognizes
16 that distinctions exist in the generation of
17 conventional grid power versus renewable energy.

18 Q. Are you saying in that regard that solar energy
19 is recognized as being a unique form of commodity within
20 the context of the Commission's REST regulations, but
21 within the context of Serv-Yu factor 4, it is not?

22 A. I believe that's true. And let me qualify it by
23 saying this: Again, I am only applying the layman's
24 reading of Serv-Yu, but I don't believe Serv-Yu made any
25 distinction between the source of the generation,

1 whether it be renewable energy or not renewable energy.

2 Q. Serv-Yu may or may not have, but for purposes of
3 your testimony and the Commission Staff's position in
4 this proceeding, my understanding from your testimony is
5 you do not make such a distinction, is that correct?

6 A. Well, I have tried to explain that within the
7 context of Serv-Yu factor number 4, we don't think that
8 SSA generation, let me say energy generated through an
9 SSA, is distinct in terms of it being a commodity.
10 However, we recognize in the larger context that there
11 is a difference between renewable energy and
12 nonrenewable energy.

13 CHMN. MAYES: Could I, on this point?

14 MR. ROBERTSON: Certainly.

15 CHMN. MAYES: Because I am curious about this as
16 well, Mr. Irvine. So, and I don't want to keep going
17 back to the New Mexico case, but I think it is, it has
18 got some interesting parallels.

19 When the Judge in New Mexico was dealing with
20 whether SSAs were, quote-unquote, affected with the
21 public interest, she distinguished them and said that
22 they weren't in the sense that -- and I am reading from
23 page 16 of her order -- developer-owned systems operate
24 in parallel with a public utility's electric grid,
25 offsetting rather than replacing the customer's use of

1 grid electricity. And then she also states that,
2 quote-unquote, developers provide hosts to a green
3 alternative.

4 So Staff didn't -- Staff doesn't make a
5 distinction with regard to, A, how much electricity, how
6 much of the commodity is being provided or how it is
7 being provided in the way that New Mexico did?

8 In other words, let me put it to you this way:
9 If SolarCity were producing 1 percent of the school's
10 electricity or if they were producing 75 percent of the
11 school's electricity, it wouldn't matter to Staff under
12 this prong, because it is being -- because there is some
13 of that commodity being produced?

14 THE WITNESS: I think that's right. But I would
15 like to talk about some of the context, if I could.

16 First of all, we talked to the school and found
17 that they did a cost/benefit analysis of the SSA cost of
18 energy versus grid energy and made a cost determination.
19 They told us if it gets any more expensive than 11 we
20 can't buy it, which indicates that their primary
21 consideration was cost.

22 Now, I appreciate that there is a lot of other
23 good that comes out of the SSA. I recognize that it
24 provides good things for the school. It is a learning
25 tool for the school. It cleans the air. It helps with

1 the REST rules. Those are all good things. But
2 fundamentally their decision was based on a cost basis,
3 which indicates that they viewed it as interchangeable
4 to me.

5 CHMN. MAYES: Okay, and I appreciate that point.
6 But isn't it still a fact that -- and I am hearkening
7 back to an exhibit I saw earlier in the proceeding that
8 the total amount of electricity being used by the
9 schools was listed, Coronado and Desert Mountain, and it
10 never, if I recall correctly, it never exceeded, you
11 know, I think a third or so of the total energy needs of
12 the schools.

13 So Staff doesn't think that that's relevant or
14 decisive in looking at whether the commodity is one
15 which the public has generally been held to have an
16 interest?

17 THE WITNESS: Yes. But I would add that there
18 probably exists a threshold in which there is no point
19 in talking about it. If it were a panel that were one
20 square foot of PV that powered a clock, you know, we
21 wouldn't be having this discussion today. But whether
22 it is 1 percent versus 80 percent, I don't think that
23 changed our analysis.

24 CHMN. MAYES: Okay. So there is some percent
25 that I mean, Staff would be more concerned about

1 50 percent than 10 percent?

2 THE WITNESS: Yes, because of the greater
3 ratemaking consequence it has on the incumbent. The
4 more the SSA generates as a percentage of the user's
5 load, the more significant the ratemaking implications
6 to the incumbent. So we are concerned about size. I am
7 sure there is a threshold somewhere, but I don't know
8 what it is.

9 CHMN. MAYES: Okay. Thank you.

10 BY MR. ROBERTSON:

11 Q. Mr. Irvine, let's move to Serv-Yu factor 5. And
12 I think we will be able to move through this one fairly
13 quickly. This pertains to monopolizing or intending to
14 monopolize the territory with a public service
15 commodity. And if I read your testimony correctly at
16 page 25, lines 20 and 21, the Commission Staff concedes
17 that SolarCity does not possess an intent to monopolize
18 the territory with the public service commodity, is that
19 correct?

20 A. That's correct. But again, I would like to
21 provide just a little more context. After having
22 written that, Mr. Rive confirmed that he plans to get as
23 much business as he can. So certainly as a business
24 that's a for-profit business, they would like to get as
25 much business as they can. I don't think a monopoly

1 will happen anytime soon.

2 Q. Well, Mr. Irvine, since you are now on the stand
3 and you are under oath, let's get your testimony and
4 your opinion as of this afternoon which is pertinent to
5 this analysis. Do you now believe that SolarCity has
6 the intent to monopolize the territory with a public
7 service commodity?

8 A. I agree with my written testimony, that they do
9 not likely intend to monopolize the territory. I
10 haven't been a fly on the wall in their boardroom. I
11 doubt that they sat down and planned to become a
12 monopoly. That's why I have used the word likely. But
13 I do think it is their business goal to get as much
14 business as they can.

15 Q. Earlier when we were discussing Serv-Yu factor 3
16 you ultimately stated that it was inconclusive, all
17 things being considered, in terms of its role in the
18 analysis in this proceeding.

19 Would you say in light of your testimony of
20 today that number 5 is inconclusive, or would you
21 characterize it differently?

22 A. Well, I have used the word likely in line 20. I
23 haven't spoken in absolutes. I don't believe they
24 envision becoming a monopoly. I believe they do intend
25 to get as much business as possible.

1 Q. Well, since you referred to line 20, let's refer
2 to the first line -- the first word in line 20 which is
3 the first part of your answer to the question, quote,
4 does Staff believe that SolarCity intends to monopolize
5 the territories in which it operates with a public
6 service commodity. And the first word in your answer is
7 no. Are you changing that answer this afternoon?

8 A. No.

9 Q. Let's move on to Serv-Yu factor number 6. And
10 this pertains to the acceptance of substantially all
11 requests for service. In your analysis under this part
12 of the Serv-Yu criteria, you refer to SolarCity's
13 marketing literature for apparent support for the
14 conclusion that SolarCity's goal is to, quote, service a
15 substantial part of the public, close quote. And you
16 appear to criticize SolarCity for not providing evidence
17 that it seeks to serve only a, quote, small, distinct
18 subset of potential customers, close quote. And my two
19 reference points here are page 27, lines 18 through 22,
20 and page 28, lines 10 through 13. Have I misread your
21 testimony?

22 A. While you were speaking I was searching for the
23 reference. And I found the first reference but not the
24 second. Can I ask you to repeat the reference?

25 Q. Certainly. No, the first reference was page 27,

1 lines 18 to 22, and the second reference was page 28,
2 lines 10 through 13.

3 A. And can we deal with those individually so that
4 I can respond accurately?

5 Q. Certainly. In your testimony in addressing this
6 facet of the Serv-Yu test or criterion, you on the one
7 hand refer to SolarCity's marketing literature with what
8 appears to be an intent to have it support the
9 conclusion that SolarCity's goal is to service a
10 substantial part of the public, and yet in the second
11 reference I gave you, on page 28, you appear to
12 criticize SolarCity for not having provided evidence it
13 seeks to serve only a small distinct subset of potential
14 customers. And my question to you was: Have I read
15 your testimony correctly?

16 A. I believe that you have read my testimony
17 correctly. However, I wouldn't characterize the second
18 quote as a criticism, rather just a statement as a
19 matter of fact.

20 Q. Why did you mention it at all?

21 A. To make it clear for the record that Staff had
22 no basis to believe that their goal was necessarily to
23 serve a small, distinct subset of potential customers.

24 Q. The marketing literature you looked at, was that
25 marketing literature that SolarCity uses on a national

1 scale or was that specifically tailored to the Arizona
2 market?

3 A. We looked at their website and something they
4 provided us in response to a data request. The website
5 is clearly at least national, if not worldwide. You
6 know, whoever gets on the web can view that. I don't
7 recall the scope of the second piece of literature they
8 gave us. I am not sure they said exactly where they use
9 it. I do believe they said they don't use that
10 particular document in Arizona, though.

11 Q. Do you recall any indication as to what they do
12 use in Arizona by way of marketing literature?

13 A. I think they said at this point, at this point
14 they haven't developed anything specific to Arizona.

15 Q. So basically the literature that you were able
16 to look at was intended for a national market, is that
17 correct?

18 A. I presume, since it is on the web, it is
19 available for anyone to view.

20 Q. Do you recall whether that literature makes a
21 distinction as between government, nonprofit, and school
22 customers on the one hand and for profit and industrial
23 and commercial and residential customers on the other
24 hand?

25 A. I recall on their website they show different

1 services for different customers. I don't recall
2 exactly the categories inclusive in each customer
3 section.

4 Q. Do you recall anything of their national
5 literature that tended to break down those different
6 categories percentage-wise or proportionately as a part
7 of the company's marketing objectives?

8 A. I don't recall that.

9 Q. Okay. Let's move on to Serv-Yu factor number 7.
10 This pertains to service under contracts and reserving
11 the right to discriminate is not always controlling.
12 Did you do any analysis of SolarCity's actual
13 contracting practices in Arizona to date?

14 A. We looked at the two SSAs that are the subject
15 of the application.

16 Q. Did you look at any other documentation
17 pertaining to actual contracting practices in Arizona?

18 (Telephone rings.)

19 (Brief pause.)

20 ALJ RODDA: Commissioner Newman, are you there?

21 COM. NEWMAN: Yes.

22 ALJ RODDA: Okay.

23 THE WITNESS: We looked at the SSA template
24 provided in the Solar Alliance docket, but no other
25 contracts specific to Arizona.

1 BY MR. ROBERTSON:

2 Q. Okay. And I believe in your prepared testimony
3 at page 12, lines 10 to 15, you indicate that SolarCity
4 does not have literature describing its specific Arizona
5 activities, is that correct?

6 A. I am sorry, could you repeat the reference
7 again.

8 Q. That reference is page 12, lines 10 to 15.

9 A. And, I am sorry, again the question?

10 Q. It was more a statement, but I will ask you a
11 question. In that portion of your testimony, do you
12 acknowledge that SolarCity does not have literature
13 describing its specific Arizona activities?

14 A. Well, at the time our best information was that
15 they had communicated to us that they had not prepared
16 any literature to promote SSAs in the Arizona market.

17 Q. Do you have any reason to alter that portion of
18 your testimony at this time?

19 A. No.

20 Q. Let's move now to Serv-Yu factor number 8, which
21 pertains to actual or potential competition with other
22 corporations whose business is clothed with the public
23 interest. Were you in the hearing room when APS witness
24 Barbara Lockwood testified?

25 A. I was.

1 Q. Did you understand her testimony to indicate or
2 suggest that APS feels that SolarCity and other solar
3 service providers are competing with APS to its
4 detriment?

5 A. I don't believe she said that, but I don't
6 recall her testimony specifically enough to provide a
7 definitive comment on that matter. But I don't recall
8 her having said that, if that helps.

9 Q. And to be sure the record is clear, with
10 reference to your use of the word that, you don't recall
11 her having testified to the effect that APS believes
12 SolarCity and other solar providers are competing with
13 APS to APS' detriment. Is that what you meant?

14 A. That's correct.

15 Q. Let's move to another area now, and that's the
16 subject of light regulation.

17 ALJ RODDA: Mr. Robertson, is this a good time
18 for a short break?

19 MR. ROBERTSON: That would be fine.

20 ALJ RODDA: Okay.

21 MR. ROBERTSON: And this is one of my last
22 areas, so it would be a good time to break.

23 ALJ RODDA: Let's just do it now and come back
24 in ten minutes.

25 (A recess ensued from 2:44 p.m. to 2:59 p.m.)

1 ALJ RODDA: All right. Let's go back on the
2 record.

3 Mr. Irvine is back on the stand. And,
4 Mr. Robertson, I think you were entering a new area.

5 MR. ROBERTSON: I was, Your Honor. I was about
6 to move to the area of light regulation.

7 BY MR. ROBERTSON:

8 Q. But before I do that, before we leave your
9 earlier testimony, Mr. Irvine, I would like to go back
10 to one of the four areas of benefit that you described
11 initially when Mr. Hains was conducting his direct
12 examination of you this afternoon.

13 And one of those four areas, if I recall it
14 correctly, related to ratemaking concerns that the Staff
15 has and the subsets of the prospect of possible stranded
16 costs or cherry picking. Do you recall that part of
17 your testimony?

18 A. I do.

19 Q. Now, as I understand, that is a concern that you
20 have with regard to SSAs becoming commonplace within the
21 State of Arizona, is that correct?

22 A. That's correct. We are concerned about, well, a
23 number of things in the category of ratemaking. One
24 that I didn't mention earlier was that of obtaining
25 information should SSAs be determined to be the subject

1 of regulation. The Commission will have the ability to
2 get information about load being served and planned load
3 being served to provide to the incumbent utilities so
4 they can best plan for resource allocation in the
5 future, to have the best information available and
6 provide the lowest cost grid power that they can.

7 Q. Would you agree that regulating SSAs is not the
8 only way that that sort of information could be
9 provided?

10 A. I believe there are other avenues that the
11 information could be provided, but I believe that with
12 the SSAs provided -- providers, rather, were they
13 regulated, the Commission would be best positioned to
14 serve data requests and get responses.

15 Absent regulation, it seems like the only other
16 tool is to disconnect, which is a crude tool that's
17 harmful to the customers.

18 Q. Now, what were the other concerns that you had
19 with regard to this, one of your four areas of benefit
20 as they related to the incumbent electric utility? The
21 two that I jotted down in my notes were you referred to
22 the prospect of stranded costs and cherry picking. Did
23 I get those correctly?

24 A. Those are two of the concerns within that
25 category.

1 Q. That your concern might result or occur with
2 SSAs, correct?

3 A. Those are two of several concerns that might.

4 Q. Why wouldn't those same concerns and that same
5 potential impact for a utility, if there is one, exist
6 where you have a lease of solar facilities or where the
7 host site purchases the solar equipment from the outset?
8 Wouldn't you have the same impact on the local electric
9 utility?

10 A. There would still be many of the same ratemaking
11 concerns. But I don't believe that that's a cause to
12 decide not to regulate the SSA providers. If they are
13 in the business of selling electricity, they should be
14 regulated. And by regulating them, the Commission will
15 have the power to get information that will help the
16 incumbent providers best plan and best mitigate their
17 own costs.

18 Q. But you would agree those other impacts such as
19 stranded costs and cherry picking, should they occur,
20 could also occur in the lease or the outright purchase
21 situation, could they not?

22 A. I agree.

23 Q. Okay. Now, let's move to light regulation. And
24 I want to declare at the outset, Mr. Irvine, with the
25 questions I am about to ask you, my intent is not to put

1 Mr. Abinah on the stand, but if you are not the
2 appropriate witness, you should also so indicate. Okay?

3 A. Fair enough.

4 Q. Would you describe again briefly your concept
5 and the Staff's concept of light regulation for the
6 solar service provider industry and for SSAs.

7 A. Well, again, I hate to be repetitive, but you do
8 need to be clear for the docket, we don't have as yet a
9 final vision of what that includes. We have a vision of
10 some possible hallmarks, if you will, of what that looks
11 like, one of them being a tariff which included a
12 minimum and maximum rate that allowed SSAs to occur at
13 rates anywhere within a range set forth in the tariff.

14 Another feature that we are considering is a
15 very quick and efficient CC&N process that you might
16 think of as akin to a registration rather than a
17 traditional CC&N. We are also envisioning the filing of
18 a template agreement so that companies could, with each
19 new SSA, file for administrative approval another
20 contract based on an existing template for
21 administrative approval by Staff.

22 Q. Throughout the hearing reference has been made
23 to the light regulation approach that the Commission has
24 taken with regard to the regulation of the telephone
25 industry. Do you recall that testimony?

1 A. Yes.

2 Q. In my examination of the Arizona Administrative
3 Code, I found three different articles that related to
4 the regulation of the telephone industry and the
5 competitive environment. And these are all in R-14-2.
6 Article 9 relates to customer owned pay telephones,
7 Article 10 relates to alternative operator services, and
8 Article 11 relates to competitive telecommunication
9 services.

10 Do you know to which of those articles and the
11 associated regulations reference has been made by Staff
12 previously in these hearings when they refer to light
13 regulation similar to the telephone industry?

14 A. I am not sure exactly what you meant by that
15 question. It sounds as though you are asking me which
16 is the controlling piece of the articles that regulate
17 CLECs. Is that your question?

18 Q. I thought my question was straightforward, but I
19 will endeavor to restate it. When Staff previously in
20 this proceeding has referred to a form of light
21 regulation for the solar industry that could be similar
22 to that light regulation adopted for telephones, do you
23 know whether they have been referring to Article 9,
24 Article 10, Article 11?

25 A. I don't know. My knowledge of CLEC regulation

1 comes not from review of the articles but from
2 discussion with Staff members who have knowledge of the
3 subject.

4 Q. Do you know as between Article 9, Article 10,
5 and Article 11, which of those articles, or if it is a
6 combination which combination of those articles,
7 reference was made to during these discussions involving
8 CLEC that you just referenced?

9 A. Again, I don't know. When I spoke with those
10 staffers, they didn't describe which articles that the
11 regulatory authority came from or controls that process.

12 Q. Would the short, succinct answer to my question
13 be that you don't know?

14 A. That's correct.

15 Q. With regard to the light regulation you
16 described just a moment ago, as you envision it, does
17 the Staff contemplate that the implementation of that
18 regulation would be accompanied by the promulgation of
19 regulations by the Commission?

20 A. I am not sure what you mean by the promulgation
21 of regulations by the Commission.

22 Q. Have you had, during your tenure with the
23 Commission Staff, any exposure to rulemaking
24 proceedings?

25 A. Not directly.

1 Q. Do you have any knowledge of what rulemaking
2 proceedings entail?

3 A. Very limited knowledge.

4 Q. Do you have any knowledge of the procedure by
5 which the Commission initially proposes and ultimately
6 adopts regulations which become a part of the Arizona
7 Administrative Code?

8 A. I have only limited knowledge of that.

9 Q. What is your understanding of how the Commission
10 would arrive at the template and the streamlined CC&N
11 process and the range of rates that you described a few
12 moments ago would comprise light regulation for the
13 solar service industry?

14 A. Well, in terms of minimum features of the
15 process, I am sure it would include, I believe it would
16 include a Commission decision. I imagine they would
17 also do something like a workshop or engage in some
18 process to hear the concerns and input from relevant
19 parties. But I can't name a step -- I am sorry, I
20 cannot name a list of requisite steps.

21 Q. During your discussions with your fellow Staff
22 colleagues in connection with the preparation of your
23 testimony and the preparation for your appearing as a
24 witness today, as you discussed the light regulation
25 approach you have described, was there any discussion as

1 to whether or not rulemaking proceedings would be
2 necessary?

3 A. There was some discussion about the possibility
4 of rulemaking.

5 Q. Did those discussions reach a conclusion as to
6 whether or not rulemaking would be necessary?

7 A. To my knowledge, no.

8 Q. Okay. With regard to the streamlined CC&N
9 proceeding, did those discussions address whether or not
10 an evidentiary hearing would be necessary in order for a
11 solar service provider to obtain a CC&N?

12 A. There was some discussion about that, and I
13 honestly can't recall any definitive conclusions on that
14 matter.

15 Q. With regard to the range of rates that you
16 prescribed as a part of light regulation, did the
17 discussions pertaining to that subject address whether
18 or not the Commission would be required to make a fair
19 value rate base determination with respect to each solar
20 service provider who obtained a CC&N and approved the
21 rates?

22 A. I believe we did discuss that matter, and I
23 believe the determination was that there would be a need
24 for fair value finding in each case.

25 Q. Did the discussions address whether or not the

1 fair value determination would be made within the
2 context of an evidentiary hearing?

3 A. I don't recall any discussion about the venue
4 that a fair value finding would need to take place in.

5 Q. With reference to the template which you
6 described as a further feature of the light regulation
7 you have described, how would that be arrived at?

8 (Telephone rings.)

9 (Brief pause.)

10 ALJ RODDA: You can go ahead.

11 THE WITNESS: Well, I think initially the
12 provider would make a filing, and at minimum there would
13 be a Commission decision approving the template. I
14 don't know about any additional steps, whether a
15 hearing, for instance, would be necessary.

16 BY MR. ROBERTSON:

17 Q. Did your discussions include a consideration of
18 the timelines that would be involved in connection with
19 an applicant both obtaining a CC&N and approval for its
20 rates?

21 A. We discussed the time involved, and agreed
22 universally that we would want it to be a very short
23 timeline as a convenience for the SSA providers. We
24 didn't come up with exact proposed requirements.

25 Q. When you say as short as possible, would that be

1 consistent with allowing for an evidentiary hearing and
2 a Commission decision in the matter?

3 A. If it were necessary, yes.

4 Q. Did your discussions address what would be the
5 nature of an applicant's burden of proof?

6 A. I don't believe so.

7 Q. Finally, did your discussions regarding light
8 regulation address the question of whether or not that
9 regulatory scheme would be applicable to distributed
10 generation solar project entities and/or third parties
11 who provided financing for those entities where you had
12 an entity such as an LLC created for a specific project?

13 A. There was some talk about who the appropriate
14 applicant would be. We discussed the possibility about
15 whether an LLC as a third party would be the appropriate
16 applicant. But we couldn't come -- we didn't come to
17 anything conclusive because we know very little about
18 the LLC format that SolarCity is considering. It was
19 news to us when we heard it at oral testimony, so we are
20 not quite sure, but it is a matter that we gave some
21 thought to.

22 Q. Would it be correct, then, to conclude that you
23 also know very little about LLC or third-party financing
24 arrangements that other solar service providers might
25 contemplate?

1 A. That's correct. SolarCity has been the only
2 applicant here, and we know very little bit about the
3 LLC process that they plan to use.

4 Q. Does that conclude your response? I didn't want
5 to interrupt you. That's why I asked.

6 A. I appreciate that. Since we are at this point
7 maybe I will add that we asked some questions about --
8 at least Legal did -- and I believe that SolarCity
9 declined to provide information about some of the
10 contractual features of the LLC arrangement. So we
11 asked and haven't had a response yet. And with that, I
12 conclude my comment on that matter.

13 Q. Let me circle back to my original question on
14 that last point. Would it be accurate to say that the
15 Commission Staff did not reach any conclusions at this
16 point in time as to whether or not the light regulation
17 scheme would be applicable to third-party financing or
18 to entities created for a specific solar project?

19 A. I may have misunderstood your questions earlier.
20 I thought you were getting to the question of whether an
21 LLC involved with the SSA would be the appropriate
22 applicant in the matter of a CC&N proceeding, and I
23 answered based on that assumption.

24 It sounds to me now like you are asking whether
25 the formation of an LLC or whether a third-party

1 financier would be included in the regulatory umbrella
2 of a limited, light-handed regulation model. If that's
3 your question, I don't know the answer to that question.

4 Q. Do you recall the testimony of SunPower
5 Corporation witness Irvin where he described that quite
6 often an LLC will be formed for a specific distributed
7 generation project by the solar service provider in
8 question, and at some point that LLC will be acquired
9 from the solar service provider by a party providing
10 third-party financing?

11 A. I don't recall the exact language, but that all
12 sounds familiar from his testimony.

13 Q. Against that background, would the light
14 regulation scheme that the Staff has been discussing be
15 applicable to that third-party financing provider when
16 it acquires the LLC?

17 A. I can't say, for a number of reasons. First, we
18 haven't established yet a definitive model for
19 light-handed regulation, and second, it would be for the
20 Commission to determine what the pieces of that model
21 were and what the requirements would be.

22 MR. ROBERTSON: Mr. Irvine, I believe that's all
23 I have. Thank you.

24 ALJ RODDA: All right. Thank you,
25 Mr. Robertson.

1 Mr. Sundlof, are you awake? Do you have any
2 questions? I see you moved forward.

3 MR. SUNDLOF: Thank you, Your Honor.

4

5

CROSS-EXAMINATION

6 BY MR. SUNDLOF:

7 Q. Good afternoon, Mr. Irvine.

8 A. Good afternoon.

9 Q. Kenneth Sundlof representing Salt River Project.

10 I think I identified a couple of concerns in
11 your testimony, in your summary. And the first is that
12 you are concerned that the principle that might be
13 established here, which would be to exempt SSAs from
14 regulation or the determination of being a public
15 service company, could be extended to other
16 circumstances with unfavorable results. Is that fair to
17 say?

18 A. That's correct. Staff has a concern that,
19 should there be a determination not a PSC in this
20 matter, that that could extend to provision to other
21 markets beyond schools, nonprofits, and governments.

22 Q. So, for example, you said in your testimony that
23 an incumbent utility, for example, could form an
24 unregulated subsidiary and move some of its electric
25 business to the subsidiary and avoid some regulation.

1 A. Staff is concerned that that's a possibility. I
2 don't want to say anything definitive about that, and it
3 is all subject to the Commission's ultimate decision,
4 but that's a real concern that Staff has and we don't
5 see why that couldn't happen.

6 Q. Is another concern the possibility that electric
7 service providers, ESPs, could construct their contracts
8 to fall within this not furnishing electricity argument
9 that's being posed here?

10 A. That's weighed heavy on our minds.

11 Q. Is it possible that this same argument could be
12 extended to generation with other fuels, for example,
13 the diesel was talked about or coal, and the same
14 principle would apply to those not so environmentally
15 friendly types of generation?

16 A. That's correct, that is also a concern.

17 Q. And were you here when Mr. Crockett talked about
18 wind farms in northern Arizona?

19 A. I believe so.

20 Q. And so it is possible that this principle could
21 be extrapolated to a wind farm in northern Arizona
22 serving multiple customers?

23 A. Well, it remains to be seen, but we are
24 concerned about possibilities of that nature.

25 Q. And what about neighborhood solar, what if my

1 whole neighborhood got together and built a big solar
2 plant and we all had a share of it, only we used an SSA
3 type model, would that potentially exempt us from
4 regulation?

5 A. That seems to be a little bit different animal,
6 so I don't know what to say about that.

7 Q. Well, does that possibility concern you, that
8 sort of centralized distributed generation could become
9 exempted from the definition of public service
10 corporation?

11 A. If it happened, it would raise some concerns for
12 Staff.

13 Q. You also seem to be concerned about public
14 interest issues or consumer issues, and I want to
15 explore those a little bit. The first is, you are a
16 utility analyst and you are really good at this, can you
17 tell me as you sit here right now how many hours of a
18 solar PV unit are on-peak and off-peak, let's say on
19 Tucson Electric Power's rate schedules?

20 A. I haven't actually worked on a TEP rate case, so
21 I am not concerned -- I am not conscious of what hours
22 are on-peak or off-peak at TEP.

23 Q. So then that would take some analysis to figure
24 that out?

25 A. Yes.

1 Q. And I assume -- and I don't want to pick on
2 TEP -- I assume you haven't done the same analysis for
3 Salt River Project's pricing structures?

4 A. We did look, because one of the SSAs was with
5 SRP, we looked at comparative costs. But as to a
6 broader analysis of on-peak versus off-peak hours, we
7 didn't do that.

8 Q. Is it true that the majority of solar hours of a
9 solar PV unit are off-peak, or do you know?

10 A. Usually solar production is on-peak.

11 Q. Even in the winter?

12 A. It depends on the location. It really varies
13 from one to another. Usually in the winter on-peaks are
14 more shoulder hours, evening and morning.

15 Q. So it is fair to say that you haven't done an
16 analysis on how much of solar production is on-peak and
17 off-peak in the winter, summer, year round, utility by
18 utility?

19 A. That's correct, I haven't personally.

20 Q. And that wouldn't be a difficult analysis for
21 you, but it would take some time?

22 A. I think that's a fair characterization.

23 Q. And the average customer might not have the
24 tools to be able to make that kind of analysis?

25 A. I think the average customer would not have the

1 tools available at hand for that analysis.

2 Q. And what about comparing the price of solar PV
3 to the alternative of simply taking electricity from the
4 incumbent utility? That would require some analysis of
5 off-peak and on-peak and different rate schedules, and
6 it would not be difficult for you, but might be
7 difficult for the average consumer?

8 A. It would certainly be difficult for the average
9 consumer, and to be honest, I found it a little more
10 complex than expected when I conducted that analysis in
11 this matter.

12 Q. The solar analysis also depends upon an
13 assumption on what future incumbent utility prices will
14 do, right?

15 A. That's correct. In fact, there were some
16 assumptions involved in the modeling that the school
17 used.

18 Q. That was Mr. Peterson's model?

19 A. His, and he also engaged a consultant to conduct
20 a similar analysis and they used similar assumptions as
21 well.

22 Q. And what were their assumptions?

23 A. I don't recall exactly. I believe one model
24 assumed a certain percentage increase in incumbent
25 provider rates, another one did not. But I don't recall

1 the numbers.

2 Q. So I mean, I guess sort of a silly question, but
3 it is not possible for any of us to predict with any
4 accuracy what incumbent utility prices will do on
5 average over the next 15 years?

6 A. You might predict it on accident, but I don't
7 think there is any way of being certain of future
8 prices.

9 Q. So a comparison over 15 years would involve a
10 lot of guesstimating?

11 A. Especially when you get out at the point of 15
12 years, or any number of years in the future becomes very
13 difficult to predict.

14 Q. And would that be particularly difficult for the
15 average customer to be able to make that kind of
16 prediction?

17 A. Absolutely. In fact, it is sometimes even
18 difficult for the utilities themselves to predict.

19 Q. Have you ever seen SSA contracts with escalation
20 provisions? Have you heard about that?

21 A. I am not sure about the term escalation
22 provision and its meaning.

23 Q. What I mean is that over time the price that the
24 customer would pay per kilowatt hour increases.

25 A. I believe I have seen PPAs with that provision.

1 Whether or not an SSA or PPA is a contended issue here.

2 Q. Have you seen it where it is tied to the prices
3 of the incumbent utility?

4 A. I don't recall specifically. It seems
5 plausible, but I don't recall specifically a PPA, for
6 instance.

7 Q. Would it be difficult for the average customer
8 to analyze escalation provisions that may be tied to
9 rates of inflation or may be tied to incumbent utility
10 prices?

11 A. Absolutely. No one knows what the incumbent
12 prices are until the Commission decides. And there is a
13 lot of other factors, for instance, the price of fuel
14 and purchase power that goes into adjusters. And there
15 are so many variables it would be very, very difficult
16 for a customer to know.

17 MR. SUNDLOF: Thank you, I have no further
18 questions.

19 ALJ RODDA: All right. Thank you.

20 Ms. Scott, do you have any questions?

21 MS. DEBORAH SCOTT: I do have a few.

22

23 CROSS-EXAMINATION

24 BY MS. DEBORAH SCOTT:

25 Q. Good afternoon, Mr. Irvine.

1 A. Good afternoon.

2 Q. I have a few questions, a few areas, so it may
3 sound like I am jumping around, but a lot of the
4 questions were already answered.

5 Were you in the hearing room when Mr. Rive was
6 testifying about the business model SolarCity has? And
7 I am thinking in particular of leases for residential,
8 for residential applications.

9 A. I believe so.

10 Q. If the Commission adopts your recommendation and
11 finds that SolarCity is a public service corporation,
12 would they be regulated only in the instances where they
13 use SSAs, or would they be then regulated for all of
14 their business models?

15 A. Well, the application seeks an answer to the
16 question relative to SSAs for schools, nonprofits, and
17 governments. Staff hasn't asked the Commission for a
18 determination outside that scope. So under your
19 hypothetical, were the Commission were to adopt Staff's
20 recommendation, the regulation would only extend to SSAs
21 within the scope of schools, governments, and
22 nonprofits.

23 Q. In your testimony, both your prefiled testimony
24 and then on the stand today, you have stated that
25 SolarCity would compete with the incumbent utilities or

1 that the incumbent utilities may have a loss of market
2 share, is that correct?

3 A. That's correct. We believe there would be
4 competition and potentially loss of market share.

5 Q. So does Staff think that SolarCity is in essence
6 a retail competitive service provider?

7 A. Well, I know that term has some meaning, and I
8 hesitate to answer conclusively knowing that has a
9 meaning that I am not entirely familiar with. I can't
10 picture the definition. But I do believe that SolarCity
11 or any other provider using an SSA model would be
12 competing on a retail basis.

13 Q. So if they were to be competing on a retail
14 basis, then is it Staff's position that those providers
15 would have to comply with the provision of the retail
16 competition rules that are still in effect?

17 A. I am not certain about that. I am not familiar
18 enough with it.

19 Q. Is it your testimony that Staff hasn't yet made
20 a decision on that particular approach?

21 A. No, that's not my testimony precisely. I am
22 here representing Staff to the best of my abilities. I
23 have no knowledge of Staff having drawn that conclusion.
24 Perhaps somebody else did and I have no knowledge of it.

25 Q. Okay. Thank you.

1 I have a couple other questions, whether you
2 considered these issues. And that's all I need; I was
3 curious if you have considered them.

4 If SolarCity is found to be a public service
5 corporation and were to install solar facilities in APS'
6 service territory for homeowners, would those
7 installations be considered residential distributed
8 generation for the purposes of APS' requirement? Have
9 you considered that?

10 A. We did consider it. In fact, I believe it was
11 the subject of a data request from APS to Staff. And we
12 find some merit in that. We haven't drawn a conclusion.
13 And I believe if you would care to pose a question to
14 Mr. Abinah, he may be in a better position to provide an
15 answer to that. But to my knowledge we don't have a
16 conclusive determination on that.

17 Q. Okay. And then same question related to
18 commercial installations. If SolarCity was to be a PSC
19 and installed facilities on a commercial business in
20 APS' service territory, would it count as APS'
21 nonresidential distributed energy requirement or would
22 it be a wholesale distributed energy requirement?

23 A. I don't recall Staff's position on that matter.

24 Q. Earlier today in your discussions with the
25 Chairman you stated that with the cost of solar dropping

1 from 11 cents to 9 cents we may be closer to price
2 parity and it may be sooner than you think. Do you
3 recall a discussion along those lines? I may have had
4 the quote wrong.

5 A. No, actually, it was pretty accurate in
6 substance.

7 Q. When you are talking about price parity, is what
8 you mean there that the cost of solar would be similar
9 to the cost of conventional generation?

10 A. Yes, more specifically the cost from the
11 incumbent provider.

12 Q. Okay. And would you agree with me that the drop
13 in cost to 9 cents includes the subsidies from the
14 federal government as far as tax credits?

15 A. I presume it does.

16 Q. And would you agree that that 9 cent price also
17 includes the utility rebates as well?

18 A. I presume it does.

19 Q. So would you agree with me that price parity
20 really won't occur until there is no subsidies involved?

21 A. It seems like there could be price parity both
22 with or without subsidies.

23 Q. Could you explain that.

24 A. Well, if incumbent utility's price were, say,
25 10 cents per kilowatt hour, and the SSA provider's price

1 was also 10 cents per kilowatt hour, it is possible that
2 the SSA provider could offer that 10 cent price in one
3 instance having included incentives, and in another
4 instance not having included incentives. In other
5 words, it could be 10 cents in either case, and on one
6 hand possibly being subsidized on one hand, on one hand
7 not.

8 Q. Would you agree that if a solar provider offered
9 a price of 10 cents and it included subsidies, tax
10 credits, and utility rebates as compared to the
11 utility's 10 cent price for conventional generation that
12 in fact you are really comparing apples and oranges at
13 that point in time?

14 A. Well, the rates would have different components.
15 To the end-user the price would be similar regardless of
16 the inclusion of incentives or rebates or not.

17 Q. I guess I am talking about from an economic
18 outlook when we talk about price parity. There has been
19 a lot of discussion when this is going to come. And my
20 questions go to whether you are talking about price
21 parity with the advantage of the rebates from the
22 utilities and the federal tax credits as opposed to
23 stand-alone solar energy is now the same cost as
24 conventional generation. Can you give me your opinion
25 on that?

1 A. Well, from a consumer perspective -- I would
2 just like to offer this as background so we can get
3 through the question. From a consumer perspective, if
4 the SSA price is the same as the incumbent price, it
5 wouldn't seem to matter to them whether that price
6 included rebates or incentives or not.

7 I will say, though, that ultimately from an
8 economic consideration, incentives are important, and
9 they do make a difference in the economics. And the
10 reason I say that is this: Should there be -- should
11 the SSA provider provide a rate equivalent to the
12 incumbent utility that was based on inclusion of an
13 incentive from the REST plan, in that instance the
14 Commission maintains some influence on the proliferation
15 of SSAs. If the SSA provider can offer the same price
16 as the incumbent absent that, then the Commission has a
17 reduced ability to influence the proliferation of SSAs.

18 So there is a difference between a scenario
19 where the parity price includes incentives and one that
20 does not include the incentives.

21 Q. So just to make sure that the record is
22 straight, in your discussion with the Chairman earlier
23 when you stated that dropping from 11 cents to 9 cents
24 was closer to -- was making price parity sooner than you
25 think, you were talking about price parity with

1 subsidies versus conventional generation, is that
2 correct?

3 A. Well, in either case, whether the SSA provider's
4 price relies on incentives or not, once those prices are
5 equal to the incumbent provider, in either case there
6 will be an accelerated proliferation of SSAs.

7 Q. And I understand your point about the
8 acceleration of the SSA providers. I am just trying to
9 understand, in your statement that price parity is
10 sooner rather than later, that you were referring to the
11 contracts here at hand, which include those subsidies,
12 correct?

13 A. Well, to be honest, I am a little cloudy on the
14 discussion in the context with the Chairman. If I
15 recall correctly, it was in the context of trying to
16 express some concern about the Commission maintaining
17 the ability to extract information and to participate in
18 the management of SSAs, which I believe is correct.
19 Then yes, the context of my comment about concerns of
20 the price dropping so rapidly and perhaps parity
21 occurring more quickly than expected did envision a
22 period of time when the SSA offered price was no longer
23 dependent on subsidies.

24 Q. So you think that's coming sooner than we think?

25 A. Well, I don't know about when, but when I see a

1 nearly 20 percent drop in price, it lends to the belief
2 that it is sooner rather than later.

3 Q. Okay. But you agree that that 20 percent drop
4 in price was for contracts where there are federal tax
5 credits and utility rebates, right?

6 A. I believe that's the case. But in spite of the
7 presence of subsidies involved in that price, I think it
8 demonstrates an ability of the company to absorb a
9 nearly 20 percent drop in price, which is the subject of
10 Staff's concern.

11 Q. I don't disagree with you. Thank you,
12 Mr. Irvine.

13 And just one last area, which goes back to the
14 hypothetical situation you were talking to Mr. Hogan
15 about. Do you recall that?

16 A. I do.

17 Q. Okay. Are you aware that the electric
18 competition rules include a code of conduct?

19 A. I believe they do.

20 Q. And are you aware that the code of conduct
21 applies to APS and its competitive electric affiliates?

22 A. My understanding is that was the intention. I
23 also understand that some of the competition rules are
24 no longer in effect, and I don't personally know which
25 are in effect or not. But I have a summary knowledge of

1 the code of conduct and that's my understanding.

2 Q. Subject to check, I believe that the code of
3 conduct provisions in the rules still stand after the
4 courts have been done with them.

5 So did you know that under the code of conduct
6 that APS is prohibited from providing confidential
7 information to its affiliates, and that there are
8 separation requirements? Are you aware of that?

9 A. I don't have a really good working knowledge of
10 the code of conduct. But I believe those provisions
11 probably figure largely into the whole point of the code
12 of conduct, and I would be surprised if those provisions
13 were not contained.

14 Q. Okay. And, Mr. Irvine, and I know it was a
15 hypothetical, but since it was so close to home I just
16 want to clarify for the record, when you were referring
17 to the fact that an affiliate could hire an incumbent
18 utility's employees and they could bring a Rolodex and
19 their personal relationships, were you referring in any
20 way that APS and its affiliates have not acted properly?

21 A. No. And I appreciate the question, because I
22 want to be very clear about that. I have no belief or
23 knowledge of APS ever having done that or reason to
24 believe that they would. I simply wanted to raise it as
25 a possibility for any incumbent provider no matter who

1 they may be. I could just as easily have used the
2 variable company X, and in retrospect I wish I had.

3 But I wouldn't want anyone to think I had --
4 that Staff has an immediate concern about any misconduct
5 by APS or any factual potential breaches of their
6 firewall. We are just concerned about it conceptually
7 from any provider.

8 MS. DEBORAH SCOTT: Thank you, Mr. Irvine. I
9 have no further questions.

10 COM. NEWMAN: Judge.

11 ALJ RODDA: Yes, Commissioner Newman.

12 COM. NEWMAN: I have a couple questions.

13 ALJ RODDA: Okay. Do you want to ask them now?
14 We still have SolarCity.

15 CHMN. MAYES: Your Honor.

16 COM. NEWMAN: I want to ask them now, just a
17 couple questions. It is really along the lines of what
18 you were asking and maybe the Chair was asking. May I?

19 ALJ RODDA: All right.

20 COM. NEWMAN: Just a couple.

21

22 EXAMINATION

23 BY COM. NEWMAN:

24 Q. First of all, good afternoon. How are you?

25 A. I'm fine. How are you?

1 Q. I am fine.

2 I was going to ask you really about this subject
3 which is a new subject, or at least a new argument that
4 I heard you state today. You might have stated it
5 before, but I hadn't been here for every minute of the
6 hearing.

7 But with regard to this issue of somehow the SSA
8 providers would be in competition with the APSS and the
9 TEPs of the world because they see this as a potential
10 lucrative market and want to set up under their
11 corporate pinnacles, if you will, perhaps services that
12 would be in competition with these SSAs, you see that as
13 a potential problem, don't you?

14 A. Definitely.

15 Q. Okay. And that's -- and I wanted to work
16 through that with you, if I can. The way the rule, and
17 it could be, you know, a problem with our rules, but the
18 way that the rules work now with regard to distributed
19 generation is that it provides for distributed
20 generation. Distributed generation is one way that the
21 investor-owned utilities and rural co-ops, for that
22 matter, are going to meet their RPS goals.

23 So when I heard about SSAs before, I have heard
24 that the representatives from the big companies say that
25 they see these kinds of companies as helping us achieve

1 a niche in this nascent solar market, and that they
2 could act not as competitors but as facilitators of
3 achieving this goal. I have heard that from APS. So I
4 was never really thinking along the lines that they
5 would be in competition as opposed to being -- they be
6 in concert of helping them achieve their distributed
7 generation and RPS goals. What do you have to say to
8 that?

9 A. Well, there is a number of possible future
10 scenarios. It could be that there is a very cooperative
11 relationship between the incumbent providers and SSA
12 providers who are not affiliated with the incumbent
13 utility.

14 However, Staff is concerned about the
15 possibility of the unregulated affiliates of incumbent
16 providers who do exercise market power. In fact, early
17 on in Staff's consideration of this matter I made a
18 number of calls to other states to find out if this
19 matter has arisen there and to learn the facts about
20 other jurisdictions. And that seemed to be one of the
21 concerns between -- amongst the states where SSAs were
22 authorized. They were concerned about an adversarial
23 relationship between the SSA providers and the incumbent
24 utility indirectly through their unregulated affiliates.

25 Q. Right, because -- and they are in actual market

1 competition without a system of decoupling. I could
2 understand that, because the whole philosophy behind
3 distributed generation is that, you know, that they
4 wouldn't have -- it affects -- it is hard to separate
5 out, but it fits into the IPOs' decisions whether they
6 have to build a new power plant or what kind of, the
7 alternative energy it can be promoting, solar versus,
8 solar voltaic versus concentrators.

9 But what states in particular were concerned?

10 A. I recall speaking with a staffer from Colorado
11 PUC being particularly concerned. I recall a few of the
12 staffers from other states having mentioned similar
13 concerns. I don't recall off the top of my head who
14 those were.

15 Q. Okay. I am just so curious about this because,
16 I mean, the Commission's interactions with regard to
17 regulation in this area implicitly, anything to do
18 implicitly could affect market share of the incumbents.
19 And in fact, in a state of economic slow growth, if you
20 will, they have even a slowdown now, so their markets
21 are being affected just by the fact that there is being
22 no growth.

23 But to reach these renewable energy standards,
24 they -- and I am not -- I don't mean this to be negative
25 in any way, they are having some trouble achieving their

1 goals. Even APS had a recent declaration of a very huge
2 commercial deal that fell under. And, you know, there
3 is a state interest here of trying to proceed as
4 prudently and expeditiously as possible in not only
5 creating a solar industry in Arizona, but, you know,
6 because it is in the state's best interest.

7 So what is at stake here is the ability of a
8 third party to just enter the market, not necessarily to
9 be an antagonist to the IPOs. That's a statement. What
10 do you say to my comment, they just want to be able to
11 do business, not necessarily take out the IPOs?

12 A. Well, I do agree that SSAs want to be in
13 business, and Staff supports that and wants to find a
14 way for the SSAs to operate and for the SSA providers to
15 help the incumbent utilities meet their distributed
16 generation requirements. And it is our hope that we can
17 craft a form of light-handed regulation that will
18 facilitate that.

19 Q. But your statements with regard -- you know, I
20 consider very serious your statements earlier this
21 morning with regard to competition, and the point that
22 the Judge just brought up. I mean I am always
23 concerned, you know, what the left arm and right arm of
24 the IPOs are doing. And that's one of the jobs at the
25 Commission. And I think that there is a duty of good

1 faith for the, for the large providers to be telling us
2 about this, if they would want to go into competition.

3 But to raise that as sort of the specter of a
4 new argument that somehow if we gave them control, this
5 nascent niche, that somehow that would be a threat to
6 the IPOs, first, that's just part of going into a new
7 phase of trying to figure out how distributed generation
8 would work, and then to this model that we are trying to
9 present to the Arizona public and which you need -- we
10 may even tweak a little bit to, you know, in the future,
11 to get more solar installations in that the Commission
12 could in the future say we want to incentivize these
13 prospects because we are dealing with the greater public
14 health -- issue of public health.

15 So whether it is light regulation or no
16 regulation, I just don't see this argument about it
17 being a potential threat to the IPOs' turf as something
18 that the case should rely, this case, the decision
19 should rely upon.

20 I am getting comments. But I am thinking about
21 this out loud. And I wanted to have a conversation with
22 you about it.

23 So I guess my last question, wouldn't you agree
24 that anything that the Commission does with regard to
25 the renewable energy market if we are trying to grow

1 distributed generation market, that potentially net
2 metering, you know, is successful, is a threat to their
3 existence without decoupling?

4 A. I am considering your answer, Commissioner. I
5 am not sure exactly what you mean by decoupling in that
6 example.

7 Q. Well, decoupling is, of course, a policy,
8 decoupling, meaning to -- we don't have it in Arizona.
9 They have it in California.

10 Decoupling, as you know, is a system where the
11 profit motive of the companies and the need to grow is
12 sort of artificially limited through decoupling policy
13 that some commissions have adopted. And if they have
14 that in place, then technically their competition for
15 this lost distributed generation component, they may
16 want to be compensated for it in some ways.

17 But up until we have that decoupling, you could
18 always make a statement that any policy that the
19 Commission does could potentially threaten the turf or
20 profit or the ability for the IPO to grow as it is used
21 to growing.

22 A. Right. Commissioner, I believe when you say
23 decoupling you mean a price decoupling, the rates
24 rather, of the incumbent utility are more removed from
25 the usual kWh and demand billing determinant than they

1 are at present so they are more insulated, if you will,
2 from the loss of market share that results, for
3 instance, from a DSM program.

4 Q. Right. And we haven't made any conclusions. I
5 think we are going to have a workshop that will go into
6 decoupling. I am not 100 percent sure of that. But I'm
7 just trying to describe what I think is a new parity
8 that we should see IPOs through. And your statements
9 this morning and I don't mean -- just seek -- are sort
10 of old parity thoughts about that. Do you hear what I
11 am saying?

12 A. I believe I do. And understanding that -- I
13 agree, to the extent that I understand your question and
14 comments before, that any decision the Commission makes
15 in regard to, for instance, promoting DSM or distributed
16 generation of whatever sort of potentially affects the
17 market share and turf of the incumbent utility, and I
18 agree that that's true.

19 What I would want to add to that line of
20 thinking, though, is consider, for instance, scenario A,
21 if you will, where SSA providers are not regulated, and
22 scenario B, where SSA providers are regulated. In
23 scenario B where the SSA providers were regulated, the
24 Commission would have the ability to learn from those
25 SSA providers about their load and their plans for

1 future expansion and to be able to provide to the
2 incumbent provider the best possible information for use
3 and resource planning so that they can mitigate the
4 costs of that lost load.

5 Q. But they know -- okay. But just keep on going
6 with me. We are in a good conversation here. But don't
7 they know through their internal documents that since
8 they are the only, they are the monopoly players in
9 town, and we have, the jury set them up as sort of the
10 clearinghouses for distributed generation, they know
11 every SSA that will have been signed? And in some ways
12 because, you know, they are, as well as the Commission,
13 sort of charged with knowing how many SSAs are signed
14 up, if not signed up, because they have to keep tabs to
15 make our renewable energy standards.

16 So isn't there -- so I mean why have government
17 bureaucrats, in an ACC that's already overloaded with
18 not enough Staff, why have us double count that? This
19 is an efficiency question.

20 A. Well, there are a lot of parts to those
21 comments.

22 Q. Yes.

23 A. I think in the context of the present operation
24 of the REST tariffs that the incumbent utilities have
25 the ability to gain a lot of information about potential

1 load simply by the process of administering the REST
2 programs and the REST incentives. That ability may
3 diminish in the future as REST incentives become less
4 critical to the economics of the SSA providers.

5 Q. But they aren't yet and they won't be. I mean,
6 they won't be until 2020 or 2025. We are sitting here
7 in 2009. So the argument, if we -- I am just going to
8 make a comment. I am just having a conversation with
9 you. It is an interesting kind of
10 examination/conversation, which I do, which is,
11 basically why don't we in the spirit of not -- of
12 incentivizing the solar market, why don't we look at
13 that problem when RPS rules are being closer to being
14 achieved?

15 As a matter of fact, we are even going to have a
16 workshop in the next couple months potentially talking
17 about raising the standards, which means that the -- it
18 is a possibility -- you know, that, you know, at a
19 certain point provide a certain point into this policy
20 that we are considering now that says, you know, by some
21 date in the future if we see these companies having, you
22 know, some defined market share, that then we look at it
23 then. In the sense that's a rightness argument. Do you
24 hear what I am saying?

25 A. I think so. And again, there is a lot of

1 interesting features to that line of thinking. And I
2 have a several responses to all of that. Hopefully it
3 is on topic.

4 Q. I think it is on topic. I am trying to dig in.

5 A. Right. From the most broadest perspective we
6 don't know what light-handed regulation looks like, what
7 the future may hold when price parity absent incentive
8 comes.

9 Absent all that, we don't know exactly what the
10 problems or costs for incumbent will be in the future.
11 And as is a safety net to all that, it is Staff's
12 position that it is a good idea to preserve for the
13 Commission the ability to get information from SSA
14 providers at any time through a PSC finding in this
15 case.

16 Now, in terms of at what point does any SSA
17 provider reach a critical mass and have enough market
18 share to warrant Commission regulation were it not to
19 decide at this moment in time to regulate, I am not sure
20 how we would know that information from the beginning if
21 we don't have the ability to get that information from
22 them through data responses as a regulated entity.
23 Maybe there is another way or not, I just can't envision
24 how we would know.

25 Q. Well, what I thought about is, since we are,

1 again, we are in a new phase of regulation, if we even
2 resource planning and integrate a resource planning,
3 which we are trying to implement at the Commission, so
4 basically through integrated resource planning and APS
5 keeping the records of how much is being distributed for
6 the foreseeable future for the next five years through
7 just informal meetings instead of ACC having to hire a
8 whole staff to look after all these paperwork, this
9 paperwork is already being looked at by the IPOs.

10 Anyway, we have gone around in a circle. But I
11 appreciate the dialogue very much. And that last
12 question, it is related, have you considered, for
13 example, what I just mentioned at the end, any, any
14 other ways besides light regulation to monitor what this
15 sector will be doing? Could there be a voluntary saying
16 that says, you know, SolarCity or something, yes, this
17 quarter we did, you know, ten school districts and six
18 commercial activities and where they are, not them
19 having to report the price of that because I think that
20 would be a bit intrusive, but could they just do a
21 report like that?

22 A. Staff did consider the possibility of voluntary
23 reporting of information. And our --

24 Q. And what is wrong with that?

25 A. Well, our concern is that the company that we

1 see today is SolarCity. And they seem like good people.
2 They seem like the sort of people who would provide
3 information. I am not sure in the future every solar
4 SSA provider would be as cooperative. And if the
5 enforcement tool we use is the interconnection agreement
6 through the incumbent utilities, and were somebody not
7 to cooperate and play nice, then it seems like the
8 Commission's only recourse in that instance is to order
9 a disconnection, which is harmful to the customer.

10 And we see that as a crude tool rather than a
11 more direct and efficient tool, which would be the
12 ability to issue and require responses to data requests
13 directly to the SSA provider.

14 Q. Okay. And now my last question just has to do
15 with the telecom example, because I am just -- I am -- I
16 heard you say before that you are not a telecom expert,
17 but we have heard a number of times Staff's position is
18 perhaps a model of the light regulation should be what
19 they do in certain sectors in the telecom industry. Are
20 you aware of that?

21 A. Well, it is correct that I am not an expert in
22 the telecom industry, but we have used that as an
23 example of having some of the features of light
24 regulation that we feel would be beneficial for a
25 light-handed regulation of the SSA providers.

1 COM. NEWMAN: And forgive me if this question
2 has been asked before in the hearing, Judge.

3 BY COM. NEWMAN:

4 Q. But I just want to know in four sentences what
5 is the description of that regulation. What is a
6 general description of that kind of regulation, if you
7 know?

8 ALJ RODDA: No, I don't think he was asking me.
9 He was asking you. He was apologizing.

10 COM. NEWMAN: I was sort of --

11 THE WITNESS: I'm sorry. I thought the Judge
12 part meant that you were posing the question to the
13 Judge.

14 BY COM. NEWMAN:

15 Q. No, I was apologizing, I was apologizing to the
16 Judge if the question had been asked before.

17 A. I see. And given that, I suppose I will respond
18 now. You are asking me to provide a characterization of
19 the Commission's regulation of the CLECs and the telecom
20 industry.

21 Q. Yes, in four sentences or less.

22 ALJ RODDA: Can't be done, it takes five.

23 THE WITNESS: Well, I think arguably it is a
24 form of light-handed regulation. The CLECs operate
25 without having to come in to the Commission a lot for

1 new contracts or changes to rates. And I think it
2 hasn't hindered the CLEC market at all. In fact, there
3 is a very, very competitive CLEC market in existence,
4 and I think that it provides a good example of the
5 possibility of a form of regulation that is not cost
6 prohibitive or overly burdensome for the providers.

7 BY COM. NEWMAN:

8 Q. And the second paragraph of that would be just a
9 few facts of what is done, what kind of reports are
10 mandated in a CLEC situation.

11 A. Well, I think that they make -- if I recall,
12 there are two filings. One is an annual report filing,
13 which they file on a confidential basis. And I think
14 they make an affiliated interest report, an annual
15 affiliated interest report. And I believe those are the
16 only two regular filings made by the CLECs.

17 Q. And are they quarterly or are they daily?

18 A. I believe they are both annual.

19 COM. NEWMAN: Annual reports. Okay. And
20 that's -- I guess that's the only question I have for
21 you.

22 And I didn't know whether that question was
23 asked, Judge, so that's why I was asking your pardon.

24 ALJ RODDA: That's okay.

25 COM. NEWMAN: Thank you so much.

1 ALJ RODDA: All right. Thank you. All right.

2 Mr. Rich, do you have questions?

3 MR. RICH: Yes, Your Honor, I do.

4 ALJ RODDA: Sorry you had to wait so long.

5 MR. RICH: No, I appreciate the opportunity.

6

7

CROSS-EXAMINATION

8 BY MR. RICH:

9 Q. And I want to start off by thanking the witness
10 for all his hard work on this. I certainly
11 appreciate -- I know we don't necessarily agree. I said
12 in my opening statement maybe at the end of this we do
13 agree, but let's see how it goes.

14 I want to ask you first a few questions about
15 what you said today. You led off your testimony, you
16 recall a discussion about how you applied a, quote,
17 plain English meaning to, I guess, terms such as
18 furnishing and the Serv-Yu analysis. Do you recall
19 that?

20 A. I do.

21 Q. So I guess I am trying to figure out what your
22 testimony means when you say you have concluded that
23 SolarCity is furnishing electricity. You don't mean
24 that in the legal sense, is that right?

25 A. That's correct. I have tried to be very careful

1 to convey that Staff did not through my testimony arrive
2 at a legal conclusion. The legal conclusions will be
3 the subject of legal briefs, and for the moment, the
4 purpose of my testimony is simply to develop the facts
5 as a basis for the legal conclusions that occur in the
6 legal briefs. And for the moment, the responses are
7 simply based on plain English understanding of the
8 aspects of the case.

9 Q. Okay. So just yes or no, the conclusions that
10 you reach in your testimony with regard to whether or
11 not SolarCity is furnishing electricity do not intend to
12 arrive at a legal conclusion?

13 A. Yes.

14 Q. They -- yes, they do not, sorry, yes, they do
15 not intend to arrive at a legal conclusion, is that
16 correct?

17 A. Within the context of Staff's testimony
18 ultimately it will be the basis of briefs which will
19 arrive at a conclusion.

20 Q. You made a distinction I think when we came back
21 from lunch between need and benefit. And I hadn't heard
22 that before, and I have got some questions on that.

23 Is it your testimony that you found a need for
24 regulation here based solely on constitutional analysis?

25 A. No. And let me clarify that. I am a little

1 uncomfortable with the phrase constitutional analysis,
2 because one might expect that means that a legal
3 analysis were performed. I performed, as I said, a
4 plain English -- Staff performed a plain English review
5 of the factors of this case, which included a plain
6 English reading of the constitution.

7 And then actually I have forgotten your original
8 question.

9 Q. It was your testimony earlier today, was it not,
10 that there is a need because the constitution says it
11 needs to be regulated?

12 A. What I would like to say in terms of my
13 testimony is that to the question of whether regulation
14 should occur, more important than the benefits that
15 might come as a result of a decision to regulate, more
16 important than those benefits, is the ultimate question
17 of what the constitution prescribed. If the
18 constitution prescribed regulation, then there is a
19 strong suggestion that regulation should occur.

20 Q. And it is Staff's position in this case that the
21 constitution does prescribe regulation?

22 A. Well, the constitution describes furnishing of
23 electricity as being a factor in determining a PSC
24 status. And because we believe that there is a
25 furnishing of electricity, that those facts lend towards

1 a decision to regulate providers of SSAs.

2 Q. And I don't mean to be flip here, but when you
3 say there is a furnishing, you mean the common sense
4 version or in the constitutional version of the word
5 furnishing?

6 A. In the common sense reading of what the
7 constitution says about furnishing.

8 Q. So is it accurate to say that once Staff decided
9 that there was this need or a constitutional reason for
10 regulation, then you went ahead and looked what the
11 benefits of regulation were?

12 A. Our first considerations were the language of
13 the constitution, whether the electricity was incidental
14 to the SSAs, and also the Serv-Yu tests. The bulk of
15 our discussion and consideration of the benefits of
16 regulation occurred after that analysis, but not
17 exclusively after that analysis.

18 This is a very complicated subject, and we have
19 gone round and round in a lot of different discussions,
20 syntax, and ways of thinking about it. So I don't think
21 it is as clean as saying we did step A of constitutional
22 analysis, step B, benefits. But the bulk of the
23 discussion did occur after the other considerations.

24 Q. And am I right that the first time that Staff
25 has articulated the four benefits that you articulated

1 today was here today, is that correct?

2 A. Articulate for the record, I believe that's
3 correct.

4 Q. Is there any sense in which you are bummed out
5 that the constitution required you to regulate in this
6 instance? Are you disappointed that the constitution
7 required regulation when you looked at it?

8 A. I don't have a personal interest in the outcome,
9 but when I said earlier that Staff is supportive of the
10 REST rules and their vision and SolarCity, I am sorry,
11 solar applications and that we wish well to any solar
12 provider, I meant that. And I do hope that we can come
13 up with a process that allows the proliferation of solar
14 panels, and SSAs for that matter.

15 Q. So after you determined that regulation was
16 necessary under the constitution, what if you had looked
17 and you could not find a benefit?

18 A. Well, I have to say that I don't know, because
19 we considered the benefits and found them. And we were
20 very concerned about the benefits, particularly the
21 ratemaking consideration. In fact, that's one that we
22 really had thought about from the beginning even before
23 coming to a conclusion about the Serv-Yu and
24 constitutional matters. We have been very, very
25 concerned about the effect on incumbent utilities, and

1 also the ability for unregulated affiliates of the
2 incumbents to exert undue influence in the market.

3 Q. Well, let's talk about that a little bit more.
4 So of your four things that you introduced today, your
5 four rationales, number one was, I believe, leveling the
6 playing field, correct, marketplace?

7 A. That's correct.

8 Q. Okay. And in discussing that, you talked about
9 the unregulated derivatives of incumbents. And of
10 course, you remember that discussion, correct?

11 A. I do.

12 Q. Wouldn't those derivatives of incumbent
13 utilities be subject to the Serv-Yu analysis?

14 A. I suppose in considering whether they were
15 regulated or not they would be subject to the Serv-Yu
16 analysis.

17 Q. So wouldn't the constitution still decide
18 whether or not those are regulated utilities,
19 independent of your concern about whether or not they
20 are regulated utilities?

21 A. Well, I find the question a little confusing,
22 but I believe the answer is yes, that every provider's
23 status stands on its own. And whether I was concerned
24 or not about the ability for that unregulated incumbent
25 to exert undue market force, regardless of my concerns

1 in that regard, they would still be subject to a test
2 whether they were PSCs or not.

3 Q. So it is really a separate issue from what we
4 are talking about in this case, you are talking about if
5 a separate company under separate circumstances is or is
6 not a regulated utility?

7 A. Well, this application deals only with the
8 status of SolarCity. So were there to be an unregulated
9 affiliate working in the SSA business, the determination
10 about their status would occur in another venue.

11 Q. Is this what you just talked to Commissioner
12 Newman, that you called other states to ask about their
13 concerns, is this the issue?

14 A. It depends on, when you said this issue, what
15 you are referring to.

16 Q. The impact of potentially unregulated arms of
17 incumbent utilities or of parent companies to incumbent
18 utilities.

19 A. No. Actually at the very beginning of this
20 matter, I called a number of states just to find out if
21 they had dealt with this. And what evolved from those
22 discussions was my -- them telling me and communicating
23 to me that they had concerns about the future of the
24 marketplace.

25 Q. And when you say they had concerns, you

1 certainly don't mean the PUCs of those states or some
2 official body formally expressed concerns, correct?

3 A. That's correct, that it wasn't formal. These
4 were casual conversations between myself and other
5 staffers who were just talking to me about the matter.
6 They weren't official or --

7 Q. In fact in any --

8 A. -- sanctioned --

9 Q. I am sorry to talk over you. Are you completed?
10 Sorry.

11 A. I am now.

12 Q. And, in fact, in any of those states do they
13 actually regulate SSAs? Just yes or no is fine.

14 A. I don't believe that any of the states that I
15 spoke to mentioned regulating SSAs.

16 Q. So it is safe to say that none of those concerns
17 that were expressed rose to the level such that it
18 encouraged them or moved them to regulate SSAs, correct?

19 A. Well, I think that those staffers who I talked
20 to who had concerns would have hoped that the measures
21 that went to legislatures would have gone the other way.
22 But when you say rose to the level of causing them to be
23 regulated, nothing was done at the PUCs level to change
24 that.

25 Q. So staffers at those institutions expressed

1 concerns, but yet the decision makers did not choose to
2 regulate, correct?

3 A. Correct.

4 Q. Thank you.

5 Your second provision was, or your second reason
6 was talking about ratemaking considerations. Now, isn't
7 it the goal, I think it goes without saying, but the
8 goal of the REST program is to encourage distributed
9 generation, correct?

10 A. It certainly seems to be.

11 Q. And, in fact, there is a surcharge or some
12 amount that goes on customers' bills to that end,
13 correct?

14 A. That's correct.

15 Q. Is it your testimony that you believe that if
16 the REST is successful by encouraging and ultimately
17 having the implementation of distributed generation,
18 that is a bad thing?

19 A. No, I don't think it is a bad thing. All things
20 do come at a cost, but I wouldn't characterize it as a
21 bad thing.

22 Q. Having the decision makers in Arizona,
23 previously the Arizona Corporation Commission, already
24 made that decision that that cost is appropriate?

25 A. Apparently they have.

1 Q. You talked a little bit about stranded costs.
2 What would be the remedy if you were regulating SSA
3 providers and you determined that there would be
4 stranded costs created, what remedy would there be?

5 A. Well, I don't know. That's really up to the
6 Commission to determine how they would deal with
7 stranded costs. Sometimes in a rate case they disallow
8 stranded costs. Sometimes in a rate case they pass
9 stranded costs on to ratepayers. I don't think it would
10 be impossible that the Commission could make some sort
11 of assessment to stranded costs to someone else. I
12 haven't really thought that through.

13 But more importantly to this issue, were the
14 Commission to regulate the SSA providers, they will have
15 the ability to require information of them so that they
16 can learn about how much load they are serving and how
17 much load they plan to serve, and what is the next big
18 contract they can provide so that they can pass that
19 information on to the incumbent utility providers so
20 that they can do good resource planning and mitigate
21 stranded costs from the beginning.

22 Q. Who would potentially be responsible for paying
23 for those stranded costs? Are you talking about the SSA
24 provider or the incumbent utility's ratepayers?

25 A. That's really ultimately up to the discretion of

1 the Commission how they manage stranded costs. That's
2 the sort of thing they decide in a rate case.

3 Q. And, again, under the REST standards, presumably
4 they anticipated that there would be some stranded
5 costs?

6 A. It is possible. Certainly when the Commission
7 developed the REST standards, and as they approve the
8 annual REST plans, they consider the costs associated
9 with them.

10 Q. And backing up to your answer to the question
11 before, so it is possible that one remedy to an SSA that
12 would create stranded costs would be to raise the rates
13 of that SSA or to discourage it in some way?

14 A. I really don't know. That's not something Staff
15 really developed in our consideration of this matter.

16 Q. Is it possible?

17 A. Is what impossible -- possible precisely?

18 Q. Is it possible that an SSA rate would be
19 lowered -- I am sorry -- raised in an effort to avoid
20 stranded costs or to discourage an SSA?

21 A. I am sorry, could you rephrase that? What would
22 be raised to discourage an SSA?

23 Q. And your answer a few questions ago about, we
24 talked about what would happen to -- what are the
25 remedies in dealing with potentially stranded costs.

1 And I believe your testimony -- and tell me if it is or
2 is not -- was that possibly rates can be raised or the
3 incumbent utility's customers could be impacted, and I
4 asked you about SSA providers and their customers being
5 impacted.

6 So my question is: Could an SSA provider be
7 forced to raise his rates in order to deal with stranded
8 costs on a given SSA that's proposed?

9 A. Were the Commission to determine that SSA
10 providers are PSCs and consequently were they to be
11 regulated, I believe that it is possible that some of
12 the stranded costs associated with the incumbent
13 provider could be passed on to the SSA provider. How
14 would that work operationally, I don't know, because we
15 really didn't think that through.

16 At one point you mentioned could that increased
17 cost for the customers, the stranded costs, potentially
18 are passed on to ratepayers and consequently affect all
19 ratepayers. And the customers, the SSA providers being
20 ratepayers, could potentially be affected by the cost of
21 stranded costs in the rates that they pay to their
22 incumbent utilities.

23 Q. And moving on to your third consideration, you
24 talked about safety considerations. And you have been
25 here through most of the hearings. You have testified

1 earlier today. There already are numerous regulations
2 in place including the interconnection regulations and
3 the registrar of contractors that would be involved for
4 the installers, is that correct?

5 A. There are some provisions that relate to safety.
6 Staff's concern is, however, that those are crude tools,
7 particularly, for instance, with the interconnection
8 agreements. Were some SSA provider to act irresponsibly
9 and create some safety concern and/or the Commission not
10 to regulate those SSAs, it is possible that the
11 Commission's only recourse to address those safety
12 issues would be to order a disconnect, which could be a
13 real inconvenience for the customer.

14 And it is much better for the Commission to have
15 the ability to set safety standards directly for the SSA
16 providers themselves and have the ability to take
17 whatever mitigation, mitigating action as necessary
18 directly with the SSA providers itself rather than
19 indirectly through the incumbent provider.

20 Q. Earlier you testified that disconnection could
21 leave the SSA customer without power. But that's not
22 true, correct?

23 A. Well, were the incumbent utility to disconnect
24 the customer, the customer would no longer get
25 electricity from the grid.

1 Now, if you are going to there being some
2 provision of energy through the solar panel itself, I am
3 not an engineer and I can't speak to that possibility.
4 I did hear some testimony earlier about islanding that
5 said that, if I recall correctly, should the connection
6 to the grid be lost, that there were automatic features
7 that shut off the panels themselves. If my recollection
8 on that matter is not correct, I, you know, I can't say,
9 but we do have available to the Commissioners, should
10 they choose, a staff engineer who can address the
11 physical elements of that relationship.

12 Q. And as for the consumer services issue that you
13 raised, which was number four, no customers have been in
14 here asking for regulation, have they? And just yes or
15 no is a fine answer. Are you aware of any customers
16 that have come to you in this docket asking for
17 regulation?

18 A. I am not relative to this whole SSA matter.

19 Q. And, in fact, doesn't RUCO in a sense represent
20 numerous electric customers in the State of Arizona?

21 A. That's their mission.

22 Q. And they are here asking you not to regulate,
23 isn't that correct?

24 A. They appear to be.

25 Q. That concludes the questions on stuff that came

1 up today, hopefully. Let me move into some other areas.

2 Certainly there has been a lot of discussion
3 about furnishing. And let me start by asking you if you
4 agree that the specific terms and words of the SSAs in
5 this matter are important when analyzing the case.

6 A. I am sorry, were you asking if the specific
7 words and terms are important in analyzing this case?

8 Q. In the SSA, correct.

9 A. They are.

10 Q. Okay. And is it your testimony that even though
11 the SSA says that SolarCity never possesses the
12 electricity that its panels produce, that it actually
13 does possess that electricity?

14 A. It seems to Staff that should the SSA provider
15 own the generating facility, own the conduit that
16 carries the energy away from the panel, and own the
17 inverter and the meter and all the equipment from which
18 the electricity is generated and passes through, that at
19 some point they have custody of the energy.

20 Q. And I assume you mean custody in some plain
21 English way?

22 A. That's correct.

23 Q. Okay.

24 A. Thank you.

25 Q. Doesn't ownership come with rights? Would you

1 agree with that?

2 A. In a very general sense of things, yes.

3 Q. To your knowledge does SolarCity have any
4 ownership rights in the electricity after it is
5 produced?

6 A. The SSA itself describes that the customer has
7 exclusive ownership the moment the energy is produced.
8 But again, it is difficult to envision for Staff that
9 the energy can be generated by the SolarCity owned
10 equipment, travel through all the SolarCity owned
11 equipment, and at no point be owned by the SSA provider.

12 Q. I am sorry, you said it was difficult to
13 imagine, is that --

14 A. That's correct.

15 Q. Okay.

16 A. I may have said envisioned.

17 Q. Envisioned?

18 A. They are probably close enough that it doesn't
19 matter.

20 Q. But you would agree that ownership is a legal
21 right -- I think I asked you that -- correct?

22 A. Well --

23 Q. In fact, you don't even need to answer that.
24 Would you agree with me that you either own
25 something or you don't?

1 A. I am not sure that it is always that conclusive.
2 I think it is possible that sometimes ownership is not
3 conclusive. In fact, I ran into that very same problem
4 when I purchased my last home. My Realtors and the
5 other Realtor had a dispute over when ownership
6 transferred, and ultimately they told me that it was not
7 something that was clear. So I think in the whole
8 universe of potentialities, sometimes ownership cannot
9 be clear.

10 Q. I suspect they looked at your purchase agreement
11 to try and figure that out, is that right?

12 A. At the time it appeared they really weren't
13 looking at the purchase agreements, but I suppose they
14 did some sort of review of it.

15 Q. Are you aware of anything that SolarCity can do
16 with that electricity after it is produced other than
17 let it go to the school?

18 A. Given the description of the equipment and its
19 arrangements, I don't think that SolarCity could make
20 use of the energy.

21 Q. And were you here when Mr. Rive testified that
22 they retain no UCC interest in the electricity after it
23 is produced?

24 A. I am sorry, did you say UCC interest?

25 Q. Yes, Uniform Commercial Code. They have no lien

1 in the electricity.

2 A. And let's go back to your original question now
3 that I understand that, if you would, please, or
4 perhaps --

5 Q. Sure. Were you here when Mr. Rive testified
6 that his company, SolarCity, has no UCC or Uniform
7 Commercial Code interest in the electricity after it is
8 produced?

9 A. I don't recall him discussing it in terms of a
10 Uniform Commercial Code interest.

11 Q. Do you recall him saying they have no lien
12 rights as to the electricity that's produced?

13 A. Not specifically, but it wouldn't surprise me;
14 that seems to comport with SolarCity's assertions.

15 Q. Okay. So are you asking -- strike that.

16 In order for your theory of this case to be
17 true, don't you really have to ask the Judge and the
18 Commission to reinterpret the plain language of the SSA?

19 A. I am really not sure what you mean by that.

20 Q. Sure. Let me try that again. In order for your
21 theory of this case to be true, isn't it true that you
22 are asking the Judge and the Commission to reinterpret
23 the plain language of the SSA such that they are saying
24 SolarCity really does own the electricity after it is
25 produced?

1 A. I see what you mean. I don't think I would
2 characterize it as reinterpret, but I do believe that we
3 are suggesting that the Judge and Commissioners consider
4 the possibility that there is some ownership and custody
5 of the electricity by SolarCity.

6 Q. Even though the contract says that there is not?

7 A. That's correct.

8 Q. Did you read the recommended order from the New
9 Mexico case that I think Chairman Mayes referenced
10 earlier?

11 A. Unfortunately, I have not.

12 Q. I don't think you have to answer this one. It
13 is true that the electricity at issue under the SSA
14 arrangement is not being brought to this site, to the
15 site of any given customer, from any other location; it
16 is only brought to them from their site?

17 A. In the examples we have seen with the Desert
18 Mountain and Coronado contracts, it appears that that's
19 correct.

20 Q. Now, that would be different -- we have heard
21 SRP give an example of what if the customer owned the
22 electricity at the, I think the terminology was the
23 well of the generating facility. And I don't know if
24 that's the proper term. That electricity would still
25 have to be transported to the customers, isn't that

1 correct?

2 A. You know, I don't recall that discussion enough
3 to comment on that. Perhaps you could rephrase it with
4 another hypothetical.

5 Q. Sure. I will try to restate the hypothetical.
6 You can tell me if you understand it. There was a
7 hypothetical raised that stated perhaps if we found that
8 SolarCity were not to be regulated in this instance,
9 then an incumbent utility could redo their arrangement
10 with their customers and say, customer, you own all the
11 electricity at the moment it is produced at the power
12 plant.

13 And my question to you, isn't that a different
14 situation, because that electricity would need to be
15 transported from the power plant which is off site to a
16 user?

17 A. In that hypothetical, yes. If I am
18 understanding that hypothetical correctly, you are
19 describing generation by some utility or other generator
20 who would have off-site generation, and then through
21 some combination of transmission or distribution, carry
22 the energy to the receiver. That's different in the
23 sense that it makes use of the grid and branch wiring as
24 opposed to the SSA example with Desert Mountain and
25 Coronado.

1 Q. Okay. I will ask you this now. The Solar
2 Alliance Staff report, did you -- you prepared that, is
3 that correct?

4 A. Yes.

5 Q. So are you familiar with it, obviously?

6 A. It has been some time, and it was large, but I
7 have some knowledge of it.

8 Q. So if for some reason -- strike that.

9 I want to read you a quote from the Solar
10 Alliance docket. This is, for the record, Docket
11 E-020633A-08-0513. And this is from page 9 of the Staff
12 report. You stated Staff does not quibble with the
13 notion that an entity could provide electricity in a way
14 that is incidental to its primary purpose and not be a
15 public service corporation. Do you recall that?

16 A. Just for the sake of caution, can I have you
17 read the statement again?

18 Q. Absolutely. Quote, Staff does not quibble with
19 the notion that an entity could provide electricity in a
20 way that is incidental to its primary business and not
21 be a public service corporation, period.

22 MR. HAINS: Your Honor, if I could just ask
23 briefly, if we can get him a copy of the testimony
24 that's being referred to so he can see the context of
25 the statement that is being made and to see what he is

1 being referred to.

2 ALJ RODDA: Can you just approach or show him?

3 It is probably the only copy.

4 MR. RICH: Sure.

5 THE WITNESS: Okay. I believe the exact
6 question was do I recall it. I didn't recall it. I see
7 here it is in the Staff report, and I support the
8 statement.

9 BY MR. RICH:

10 Q. And you are aware that SolarCity describes the
11 SSA as predominantly a financing arrangement and a way
12 to provide the school its four primary services, which
13 are installation, I am sorry, design, installation,
14 maintenance and financing of solar equipment, correct?

15 A. Correct.

16 Q. So on page 13 of your testimony in this case you
17 include the statement, you conclude that if the SSA were
18 in fact a financing mechanism -- sorry, let me read from
19 it.

20 A. Can I ask you to set the line number before you
21 read it.

22 Q. Yes, I will. I am sorry. Yes, lines 1 and 2 on
23 page 13. Would you agree with the statement -- I will
24 first give you a statement, then I will read part of
25 your quote here.

1 Would you agree that if in fact the SSA were to
2 be financing a mechanism, then as you said in line 1 and
3 2, quote, one might reasonably conclude that the sale of
4 electricity is merely incidental to the SSA?

5 A. Okay. I must apologize. Lines 1 and 2, the
6 sentence contained in line 1 actually began on the
7 page that preceded it, and I have taken a moment to read
8 the whole Q and A so that I can respond accurately to
9 your question. So I apologize for the delay. But
10 having done that and for the sake of responding
11 correctly, can you repeat your question.

12 Q. Sure. Let's do it without reference to the
13 testimony. If you concluded that financing were the
14 primary purpose of this agreement, then would you also
15 agree then that it was not -- it would not be subject to
16 regulation by the Commission?

17 A. Well, I think the word financing has been used
18 very loosely and with some liberty and lack of clarity.
19 So rather than say that, I would defer to the testimony
20 I have written here at page 12, lines 25 and 26, and
21 then following on page 13, lines 1, 2, 3.

22 Q. And at this point I apologize for having pointed
23 to the testimony. Let me ask it a different way.
24 Ignore the testimony for a minute.

25 If you had come to the conclusion that financing

1 were the primary purpose of this agreement, of the SSAs
2 at question in this docket, then would you have also
3 come to the conclusion that the SSA should not be
4 regulated?

5 A. Well, I can't say definitively because those
6 facts weren't present, and Staff didn't have that
7 discussion. We based our analysis on facts that were
8 present. But I will say that were the arrangements such
9 that the intent of the contract were for the customer to
10 necessarily eventually own the equipment, that would be
11 an aspect of the contract that would lend towards a
12 determination not a PSC. But I can't say conclusively
13 given the change in that one element what Staff would
14 have done.

15 Q. So if the primary purpose were something other
16 than the provision of electricity, would you -- some
17 other unregulatable purpose, would you agree that it
18 would not be subject to regulation by the ACC?

19 A. Again, I can't say conclusively. But were the
20 purpose not the sale of electricity, then that would be
21 another factor that would argue against a determination
22 for finding of a PSC regulation.

23 Q. Let me ask it another way then. If you had
24 found the furnishing of electricity was merely
25 incidental to some other unregulatable purpose, would

1 you then have stopped your analysis and figured that
2 this was not subject to regulation?

3 A. No. We would have continued our analysis and
4 considered all the relevant facts.

5 Q. So would you disagree with the Nicholson court
6 when they said it was not the purpose of regulation to
7 regulate?

8 MR. HAINS: Your Honor, calls for a legal
9 conclusion there when he is asking him what he thinks
10 about the Nicholson -- on a case. There has been no
11 explanation here as to whether or not this witness has
12 testified about what the case means or what the case
13 stands for or whether he has even read the case.

14 MR. RICH: Your Honor, I haven't even finished
15 my question.

16 ALJ RODDA: I was going to say he hadn't even
17 finished his question, although he did mention the court
18 case.

19 Perhaps you should ask it without mentioning the
20 court or just ask a different, move on.

21 MR. RICH: Sure. I can move on.

22 BY MR. RICH:

23 Q. Let me just ask you if you are aware of this, a
24 case called Nicholson. I want to know if you are aware
25 of this quote. That case -- that court said, quote:

1 The fact that an entity may incidentally provide
2 a public commodity is not sufficient to subject it to
3 regulation. It must be in the business of providing a
4 public service. End quote.

5 Are you aware of that?

6 A. I have a general knowledge of that case, a very
7 brief general knowledge of that case. And I certainly
8 don't have a legal knowledge of the matter.

9 Q. Just using a plain English interpretation of it
10 as you have throughout your testimony with other legal
11 issues, does that quote -- and if you would like I can
12 read it again -- indicate to you that if the provision
13 of electricity is merely incidental that such contracts
14 should not be regulated by the Corporation Commission?

15 A. Not being an attorney, I don't pretend to
16 understand the legal implications of a decision like
17 that. So I really can't say about the effects of that.

18 In terms of the simple plain language reading of
19 that statement, it seems like incidental is relevant to
20 the matter, but from my layman's understanding of the
21 matter, there are a number of considerations that weigh
22 in and that no single issue necessarily prevails.

23 Q. That's fair.

24 Would you characterize the SSA as a pretty
25 unique financial arrangement?

1 A. I think so. I never had seen it before.

2 Q. And you heard Mr. Peterson testify, did you not,
3 that he could not do this arrangement without companies
4 like SolarCity, because he has neither the time nor the
5 expertise to do this kind of financial arrangement?

6 A. I don't recall exactly him saying that, but it
7 makes sense it would be true.

8 Q. Would you agree that you have learned a lot
9 about how financing, how an SSA works during this
10 proceeding?

11 A. I have learned a little bit about the financing
12 of SSAs in this proceeding. I don't know what the
13 threshold of a lot is.

14 Q. Enough to say that it is far more complicated
15 than a car or a home loan or lease?

16 A. Well, in thinking about purchasing of homes, I
17 think the agreement involved with purchasing a home is
18 many pages longer than an SSA in this docket. So I
19 don't really want to offer an opinion about that.

20 Q. Okay. Is there -- so you are not willing to
21 admit that this is more complicated than buying a home?

22 A. I think in a lot of respects it is probably more
23 complicated and in some it is not.

24 Q. Is there any -- to your knowledge do you have to
25 monetize any federal tax credits when you are buying a

1 house?

2 A. To my knowledge, no.

3 Q. And that's a pretty complicated process, would
4 you agree?

5 A. I believe it is.

6 Q. And lining up tax equity investors is probably a
7 complicated process as well?

8 A. There is probably a lot of discussion and
9 complex negotiation involved in that.

10 Q. Okay. I will read you another quote from the
11 Solar Alliance Staff report, then I will hand it to you
12 so you can take a look. This is also from page 9 of the
13 Solar Alliance Staff report.

14 You wrote, quote, however, it is unclear to
15 Staff at this point to what degree the contemplated
16 financing arrangements which may potentially involve
17 complex tax credit considerations are in themselves a
18 specialized and unique service that might dwarf any
19 provision of electricity.

20 And I will give this to you if you want to take
21 a look at it.

22 A. I do actually recall those statements.

23 Q. Now, your testimony earlier today talked about
24 how this is -- you don't believe that this is financing
25 because it is not a car or a home loan with the notion

1 of paying principal and interest with ultimate
2 ownership, is that right?

3 A. What my testimony says is that the SSA is not a
4 financing in the conventional sense, in the most
5 commonly understood sense of financing, which is an
6 agreement that includes payment of principal and
7 interest with the goal of eventual ownership.

8 Q. Based in your own words in the Solar Alliance
9 case, doesn't that go to my point, if it had been just
10 common financing, it wouldn't have been, quote,
11 potentially involving complex tax credit considerations,
12 to paraphrase, I guess, that are in and of themselves a
13 specialized and unique service, that may dwarf any
14 provision of electricity?

15 A. Can I ask you to rephrase the question.

16 Q. Sure.

17 ALJ RODDA: Can we -- let's go off the record
18 for a minute.

19 (A recess ensued from 4:58 p.m. to 5:10 p.m.)

20 ALJ RODDA: All right. Let's go back on the
21 record, since the parties present are the ones we need.

22 And, Mr. Rich, go ahead.

23 MR. RICH: Thank you, Your Honor.

24 BY MR. RICH:

25 Q. Let me start by, we were talking about a quote

1 that you had on page 9 of the Solar Alliance Staff
2 report. And let me just read that again to get our
3 bearings back. In that Staff report you wrote, quote,
4 however, it is unclear to Staff at this point to what
5 degree the contemplated financing arrangements which may
6 potentially involve complex tax credit considerations
7 are in themselves a specialized and unique service that
8 might dwarf any provision of electricity.

9 Let me ask you with regard to that statement, so
10 you admit there is a situation wherein the financing
11 could, as you say, dwarf any provision of electricity?

12 A. It all depends on the particular agreement in
13 question. In this case, what we have been provided in
14 the application is the SSA. We haven't seen the
15 documents relevant to the financing, the investment
16 activities, or the agreements between the investors and
17 SolarCity. And we don't intend to include any
18 regulation of that aspect of the SSA, but the SSA
19 agreement itself, which is a different animal.

20 Q. I guess my question still remains. Do you agree
21 that if the financing could be contemplated, and let me
22 use your words -- let me strike that.

23 Do you agree that there could be complex tax
24 credit considerations that would be specialized and
25 unique that may dwarf any provision of electricity?

1 A. In that docket we weren't addressing the
2 SolarCity application. I think there could be some
3 other arrangement where there was a financial element
4 that was relevant to the consideration of adjudication
5 PSC or not.

6 In this case, we think the investment
7 activities, the monetization of the tax credits,
8 certainly those might be very complex transactions. I
9 expect they probably are. But those activities relate
10 to the investments used in the SSA agreement. The SSA
11 agreement itself we don't view as a financing; instead,
12 it is a contract for the sale of electricity. And we
13 don't suggest that the investment aspects of the
14 agreement be regulated but, instead, the SSA, the
15 provision of the SSA itself, which we view as the sale
16 of electricity.

17 Q. Okay. Let me ask it again and ask for a yes or
18 no answer. I guess that would be helpful, maybe. Do
19 you agree today, as you did during the time of the Solar
20 Alliance Staff report, that an SSA could involve complex
21 tax credit considerations that are in and of themselves
22 a specialized and unique service that might dwarf any
23 provision of electricity?

24 A. Yes, it is possible.

25 Q. Thank you.

1 Now, in your testimony earlier today you talked
2 about the word financing, and your understanding that
3 the public would generally understand it to mean payment
4 of principal and interest with eventual ownership, is
5 that correct?

6 A. There was some discussion of that, that's
7 correct.

8 Q. And I assume you didn't do any polling of the
9 public or anything to figure out what the common
10 definition of financing is, did you?

11 A. I actually asked around amongst Staff and with
12 some friends, but I didn't do anything that you would
13 describe as academic.

14 Q. Did you open the dictionary when you were coming
15 up with your definition of what your financing is?

16 A. Well, I actually opened the dictionary, several
17 dictionaries, in fact, early on in this case. You have
18 characterized it as did I open the dictionary.

19 Q. I apologize for the way that sounded, but did
20 you utilize any dictionary definitions when coming up
21 with your definition of financing?

22 A. I referred to a number of definitions that
23 included several common desktop English dictionaries.

24 Q. Okay. And you already referred to
25 Mr. Peterson's testimony where he quoted the Cambridge

1 Dictionary that said to provide the money needed for
2 something to happen, that that was the definition of
3 financing. Do you recall that?

4 A. I recall referring to Mr. Peterson's testimony
5 that made reference to that definition. Now, I don't
6 agree that that's the definition. I believe there are a
7 number of definitions. But probably you didn't mean to
8 actually say that; that's probably just a casualty of
9 the way you formed the question.

10 Q. Do you believe that your definition is the
11 definition of financing?

12 A. Well, as I have just said, I believe there are a
13 number of different definitions of the word finding, and
14 I believe that the definition that Staff has relied on
15 is probably what is most commonplace when people discuss
16 financings.

17 Q. If we refer back then to the Solar Alliance
18 Staff report at page 9, that quote that I read, you
19 discussed how it is possible, and you stated today that
20 it is possible that a complex financing arrangement
21 could dwarf any sale of electricity. Are you saying
22 that complex financing arrangements don't meet your
23 definition of financing here today?

24 A. Have you asked me if I believe that complex
25 financings don't meet my definition of financings here

1 today? Is that what you asked?

2 Q. It sounds like what you said today is financing
3 is only payment of principal and interest with the goal
4 of ownership. Yet in the Solar Alliance case you
5 indicated that it is possible that there is some complex
6 financing out there that would dwarf the provision of
7 electricity, and I am trying to figure out if that
8 complex financing even fits in with your definition of
9 what financing is.

10 A. Well, there is a lot of parts to that question,
11 slash, statement. I don't think that definition as used
12 here is the only definition of financing. In fact, I
13 believe I said that it is what we believe is the most
14 common definition of financing. And I have recognized
15 that the definition that Mr. Peterson used was also a
16 valid definition of the word financing, and that there
17 are many definitions of the word financing.

18 Now, with respect to what was said in the
19 SolarCity docket, I don't have a clear recollection of
20 the context of that statement, so it is difficult for me
21 to relate that statement to the present matter.

22 MR. HAINS: Your Honor, if I could, I could
23 provide him a copy with the Staff report so he can refer
24 to it when Mr. Rich is questioning him.

25 ALJ RODDA: Oh, thank you.

1 BY MR. RICH:

2 Q. When you stated -- I will wait.

3 When you said that you used the most common
4 definition, was that found in the dictionary, and which
5 dictionary definition did you use for financing?

6 A. Let me clarify that I don't believe Staff has
7 reported that to be the most common definition, but we
8 believe it to be the definition that describes what most
9 commonly enters people's minds when they think about
10 financing.

11 Q. Are you saying that what SolarCity does through
12 the SSA is not financing?

13 A. Well, I think that financing is a loose term and
14 a lot of people can call a lot of things financing. I
15 believe that the SSA is a contract for the solar power
16 rather than some sort of financing that involves payment
17 of principal and interest with the goal of eventual
18 ownership.

19 Q. So when you wrote this statement in the Solar
20 Alliance Staff report on page 9, what were you thinking
21 of when you talked about contemplated -- I am sorry --
22 to what degree the financing arrangements potentially
23 involve complex tax credit considerations? What type of
24 financing arrangement would that be?

25 A. In that context I was thinking that -- let me

1 restate that.

2 In the context of the Solar Alliance Staff
3 report, it thinks about complex tax considerations and
4 financings and such in that hypothetical, and I don't
5 know that I can sit here today and describe for you an
6 example of that.

7 (Cellphone rings.)

8 (An off-the-record discussion ensued.)

9 BY MR. RICH:

10 Q. Could a reasonable person conclude that
11 financing -- that the SSA is a financing arrangement?

12 A. As I have said before, a reasonable person could
13 conclude that, but I would add that reasonable people
14 can disagree.

15 Q. What is your background in dealing with federal
16 tax issues?

17 A. No more than the average person. I pay federal
18 taxes, and it has come up here in this matter, but
19 beyond that I have very little training in federal tax
20 issues.

21 Q. So are the implications and interpretation of
22 the federal tax code part of your area of expertise?

23 A. They are not.

24 Q. Safe to say you are not an expert in the federal
25 tax code? And hopefully that's probably a good thing, I

1 guess.

2 A. That's safe to say.

3 Q. Thank you.

4 Now, on page 15 of your testimony, I will give
5 you a line number, line 23 and 24, you make the
6 statement that, quote, the SSAs could not be structured
7 as, quote, mere financing arrangements, end quote, or
8 SolarCity would not be eligible for the various tax
9 incentives, end quote. As a nonexpert in tax, are you
10 sure of this statement?

11 A. That's the conclusion that Staff drew from
12 review of the SSA and the SEIA document that was
13 provided. I believe at some point there was some actual
14 review of tax codes themselves. I am comfortable with
15 the statement, but I cannot say that I am a tax expert.

16 Q. So could you be wrong about that statement?

17 A. There is a lot of things I could potentially be
18 wrong about, but I don't retract the statement.

19 Q. Were you here when Mr. Rive testified that in
20 fact he believes these to be financing arrangements, and
21 that his attorneys have advised him that he does not
22 need to sell electricity in order to qualify for the tax
23 credit?

24 A. I recall him talking about the first aspect of
25 what you have just said. The second aspect referring to

1 his attorneys having advised him he doesn't need to sell
2 electricity, I don't recall that statement precisely. I
3 don't dispute it either.

4 Q. Okay. Subject to check, assuming that he said
5 that, would you think his motivation to get that
6 question right is a lot higher motivation than your
7 motivation to get the answer to that question right?

8 MR. HAINS: Sorry, Your Honor, could I have that
9 question read back?

10 ALJ RODDA: I don't think it is an
11 appropriate --

12 MR. RICH: Okay.

13 ALJ RODDA: -- question, because I am sure
14 Mr. Irvine has great incentive to be as right as
15 possible.

16 MR. RICH: Sure. Let me rephrase the question
17 or ask a different question that's similar but
18 different.

19 BY MR. RICH:

20 Q. Mr. Irvine, I appreciate that. Would you say
21 that Mr. Rive has a great deal of financial incentive to
22 get the answer to the question correct, the question
23 being whether or not he needs to sell electricity in an
24 SSA in order to qualify for a federal tax credit?

25 A. I believe he does have a financial incentive in

1 getting that matter right.

2 Q. And he has come to a different conclusion than
3 you have, is that correct?

4 A. It appears so.

5 Q. And there has also been other members of the
6 industry that have also come to a different conclusion,
7 is that correct?

8 A. There are other members of that SSA industry
9 that have come to a conclusion different than Staff's.

10 Q. I want to ask you one question. On page 16 of
11 your testimony, at line 6, you state that, quote, the
12 schools may never own the solar panels, end quote. In
13 that you didn't mean to say that the schools do not have
14 an option to purchase the solar panels under an SSA, did
15 you?

16 A. What I meant is that there is a possibility that
17 the school would never take ownership of the panels.

18 Q. But they do have the option to purchase,
19 correct?

20 A. That is correct.

21 Q. In that same paragraph below you say, quote,
22 what is clear is that the primary benefit or commodity
23 the schools attain through the SSA is electricity, end
24 quote.

25 Didn't Mr. Peterson say that the primary benefit

1 was to avoid the \$10 million in upfront installation
2 costs, the monetizing of the tax credit, and the design,
3 installation, and maintenance of the solar facilities?

4 A. I don't recall precisely that he said that. He
5 may very well have. But I also recognize that he
6 performed a cost/benefit analysis, and compared the cost
7 of incumbent provider electricity against the cost of
8 SSA provider electricity, and stated that when the cost
9 rises above the contract rates, that he would not
10 proceed with the agreement.

11 Q. You agree with the testimony that has been
12 previously made that the school district already
13 receives all the electricity that it needs from existing
14 utilities? Yes or no.

15 A. I am sorry, it is just so late in the day I am
16 having trouble recalling. I believe you asked me if I
17 recall testimony to that effect.

18 Q. Sure. I believe Mr. Peterson testified that to
19 his knowledge the school district receives all the
20 electricity that it needs from the incumbent utilities.
21 Do you agree with that statement?

22 A. I do believe he said that. And I do believe
23 that the incumbent provider provides him all the
24 electricity that he needs.

25 Q. And to your knowledge does the school need to

1 provide additional electricity to any of its schools to
2 make up for current or expected shortfalls in
3 electricity from APS or SRP?

4 A. I am sorry, I hate to do this so much. Perhaps
5 rather than asking you to repeat it, could we ask it be
6 read from the record, Your Honor?

7 Q. I am happy to repeat it.

8 A. Okay.

9 Q. To your knowledge does the school need to
10 provide additional electricity to any of the schools in
11 its district to make up for current or expected
12 shortfalls in electricity from APS or SRP?

13 A. To my knowledge, no.

14 Q. So yes or no, are the schools in the market for
15 solar panels to provide for some real or perceived
16 shortfall in electricity?

17 A. I presume the answer is no.

18 Q. And would you agree that the school really
19 wanted solar panels because solar provides it an
20 opportunity to save money? Yes or no.

21 A. Well, with all due respect, I would like to
22 answer the question without saying yes or no, because I
23 don't believe it would provide an accurate
24 representation of Staff's position.

25 I believe there is a lot of reasons why the

1 school might want to obtain solar panels. I believe
2 that a primary interest is in obtaining low cost
3 electricity.

4 Q. To save money, correct?

5 A. Primarily to save money. I do believe there are
6 other considerations. I think Mr. Peterson genuinely
7 meant what he said when he talked about the benefits of
8 including the panels and the SSA as part of their
9 curriculum. But as you said, I do primarily believe it
10 was a cost issue for the schools.

11 Q. Is it true that if a school contracted with a
12 solar company to design a solar facility for them, that
13 that company would not be subject to regulation by the
14 ACC for merely designing a solar facility?

15 A. It would seem so.

16 Q. All right. Is it also true that if a school
17 contracted with a solar company to install a solar
18 facility for them, that company would not be subject to
19 regulation by the ACC for merely installing a solar
20 facility?

21 A. It would seem so.

22 Q. And is it true that if a school contracted with
23 a solar company to maintain a solar facility for them,
24 that that company would not be subject to regulation by
25 the ACC for merely maintaining a solar facility?

1 A. Taken in isolation, the simple maintenance of a
2 facility would not seem to prescribe a cause for
3 regulation, although I believe maintenance typically is
4 associated with other services.

5 And I would point out that, remind the readers
6 to the docket that Staff does not view the SSA as a
7 composite of these different measures; rather, the Staff
8 views it primarily as a contract for the sale of
9 electricity.

10 Q. I am not sure I know the answer or that I got
11 the answer. A school could hire a solar company to
12 merely maintain a solar facility on its premises without
13 being subject to regulation by the ACC, correct?

14 A. Potentially, correct.

15 Q. And could they do any one or all of those things
16 that we just mentioned, the design, installation, and
17 maintenance, could they do that at no upfront cost to a
18 customer without becoming subject to regulation?

19 A. That's a hypothetical that could include a lot
20 of variables. So I hate to say conclusively that just
21 given that, that there wouldn't be cause for regulation.
22 It would seem that those elements on their own
23 individually don't prescribe regulation.

24 Q. But we could combine those three elements,
25 design, installation, maintenance, and do those with no

1 upfront cost. You can imagine a hypothetical where that
2 would not subject the company to regulation by the ACC,
3 can you not?

4 A. I think, yes, I can, that is a possibility.

5 Q. I guess let's move on here slightly, the same
6 area, but a little bit different. So is it your
7 understanding that Scottsdale Unified School District
8 didn't buy the solar panels in question because they
9 were too expensive to purchase?

10 A. I think they mentioned that they couldn't afford
11 to buy it outright.

12 Q. And why didn't they lease the solar panels in
13 question?

14 A. I am not certain that a lease/option was
15 presented to them.

16 Q. Wasn't it true they couldn't consider a
17 lease/option because it wouldn't allow them to monetize
18 the federal tax credit?

19 A. Well, that may be true, but I don't know that
20 that was the cause of them not having a lease/option
21 available to them.

22 Q. You agree, though, that if they had leased it
23 they would not be able to monetize the federal tax
24 credit?

25 A. That's correct. I believe there is a federal

1 tax credit contingent on an agreement not being a lease,
2 a similar agreement not being a lease.

3 Q. Is there anything in the testimony that you have
4 heard so far that gives you any reason to believe that
5 the school was looking for anything more than
6 SolarCity's four core services, the design,
7 installation, maintenance, with no upfront costs of a
8 solar facility?

9 A. I am sorry, have you asked me is there anything
10 in the agreement that makes me think of that?

11 Q. In the record that you can point to that gives
12 evidence that the school is looking for anything more
13 than just those four things.

14 A. Well, the school performed a cost/benefit
15 analysis where they compared the SSA electricity's cost
16 to that of the incumbent provider, and it appears to
17 have made a cost based determination; the SSA agreement
18 itself makes several references to the purchase of
19 electricity that I have included in my testimony; the
20 SEIA document included in, I forget whether company's
21 testimony or application, I believe it was testimony,
22 prescribed that SSAs should be organized as the sale of
23 electricity in order to make use of certain tax
24 incentives; and basically the whole of the evidence that
25 we have considered.

1 Q. Now, the school -- excuse me for one second.

2 The cost/benefit analysis that you refer to, is
3 there any reason to believe the school wouldn't perform
4 that if they were going to purchase a solar panel
5 arrangement?

6 A. They would probably also perform a cost/benefit
7 analysis, but I think the comparison would be a little
8 bit different.

9 Q. I am not seeing the connection here. You are
10 saying because they perform the cost/benefit analysis
11 where one side was the price they pay for electricity,
12 that somehow means that they are not interested in those
13 four things that SolarCity provides, the design,
14 installation, and maintenance, with no upfront costs of
15 solar facilities?

16 A. Well, I think they are interested in all those
17 features, but I think the primary consideration to the
18 school was the purchase of electricity at a given cost.

19 Q. Even though they said that wasn't the primary
20 purpose?

21 A. Again, I don't recall Mr. Peterson saying that
22 precisely. It is possible that he did, and I don't
23 dispute that he did say that.

24 But I think that the schools, having performed a
25 cost/benefit analysis, comparing one per kWh price to

1 the other, more specifically the SSA price to the
2 incumbent utility price, coupled with this statement
3 that if the price went beyond 11 cents they could no
4 longer afford it and would not proceed with the
5 agreement, is an indication that their first and primary
6 consideration is the cost of electricity and the
7 purchase of electricity, and that those other benefits
8 exist, and they had an interest in the design and
9 installation, but those were not the primary purposes of
10 the SSA.

11 Q. Isn't the only reason we are here because the
12 SSA is the only financial viable way that the schools
13 can get those four services?

14 A. I guess I am not sure of that. I know we are
15 here because SolarCity made the application.

16 Q. And we already established that it wouldn't --
17 they would be forfeiting the tax credit if they either
18 purchased or leased, wouldn't they? Strike that. Let
19 me rephrase.

20 Have we not already established that the school
21 would be forfeiting the federal tax credit if they
22 either purchased or leased a solar facility?

23 A. Those are both true statements and they are in
24 the record somewhere. I believe you can read them into
25 the SEIA document itself. I couldn't point exactly

1 where that was entered into the testimony.

2 Q. And this is the only -- would you agree that
3 this is the only way the schools can get those four
4 services and monetize the federal tax credit?

5 A. This whole process is new to me, and I don't
6 want to speak categorically and say it is the only way
7 to get the tax credit. But from the evidence presented
8 before me, it appears like the SSA is an attempt to
9 monetize the tax credits, all of the tax credits
10 available to it.

11 Q. So would you agree that a reasonable person
12 could conclude that SolarCity is actually in the
13 business of providing those four services, the design,
14 installation, maintenance of solar facilities, with no
15 upfront costs, and that they only incidentally provide
16 electricity when they provide these four things to
17 schools, nonprofits, and governments?

18 A. Again, I would agree with that. And I would
19 point out that reasonable people can disagree, and Staff
20 disagrees with that characterization.

21 Q. Let me ask you this. I am trying to get to the
22 core of what makes this subject to regulation but the
23 other arrangements and some other hypothetical financing
24 arrangements not subject to regulation. I have got a
25 hunch I know what it is, but I am not sure.

1 So what if the school found someone who was
2 willing to install a solar panel system but said you
3 don't need to pay me up front, why don't you just keep
4 track of how much electricity it creates and you just
5 pay me back based on the amount of electricity it
6 creates on a per kilowatt hour basis over the next ten
7 years, we will call it even, whatever that amount is, is
8 that subject to regulation by the ACC?

9 A. Again, every case stands on its own. It seems
10 from the very brief information that you have described
11 that, given that, my first inclination would be that is
12 potentially the sale of electricity, and it is something
13 we would need to consider further.

14 Q. And why is that potentially the sale of
15 electricity?

16 A. Well, it is potentially the sale of electricity
17 because of the price being based on a per kWh basis.

18 Q. So we are really talking about because the price
19 is a kWh basis -- strike that.

20 Now, if they provided that same service but it
21 was just a flat monthly fee for ten years, would that
22 same entity be subject to regulation by the ACC
23 potentially?

24 A. Well, potentially, yes. The Commission can
25 arrive at whatever determination they choose to make.

1 If I recall correctly, you have described that
2 instead of being a per kWh price it was based on a
3 monthly price, is that correct.

4 Q. Correct.

5 A. In that scenario, the price being based on a
6 fixed monthly price does not directly indicate the sale
7 of electricity and argues for a conclusion not a PSC in
8 that event. But, again, that's just a hypothetical and
9 it is difficult to say anything conclusively about a
10 hypothetical.

11 Q. So hypothetically speaking, if the tax code
12 hadn't required the SSA to be priced based on the amount
13 of electricity produced, your opinion on this matter and
14 Staff's position may be that SolarCity is not subject to
15 regulation under these circumstances?

16 A. If the tax code had not prescribed that the sale
17 of electricity be modeled, that the SSA be modeled --

18 Q. Actually I would appreciate it if you use my
19 hypothetical instead of rephrasing. I think for the
20 record what I am asking is if the tax code had not said
21 that pricing needs to be in relationship to the amount
22 of kilowatt hours produced, if it had not said that,
23 would Staff's position be different today? Would Staff
24 believe that SolarCity is not subject to regulation?

25 A. Well, were that true, and were the SSA

1 different, and were the SSA to appear more like a lease,
2 as I have said before, our inclination about leases is
3 that it can be equated to an individual serving
4 themselves, like in the situation of a person having
5 their own well. And so those circumstances, again, were
6 it to appear like a lease, our inclination would be to
7 make a recommendation against a finding of a PSC.

8 But, again, that's not the set of facts we had
9 before us. And you are talking about a hypothetical
10 that could include a lot of other variables. So I
11 don't, again, I don't want to answer conclusively on
12 that matter, but I will say that were Staff to find that
13 the SSA were a lease or like a lease, we would be more
14 inclined to find that the provider was not a PSC.

15 Q. So I know people love to blame the IRS for
16 everything and anything, but is it possible what you are
17 saying is we are really only here today because the IRS
18 requires a certain prioritizing scheme in order to take
19 advantage of a tax credit?

20 A. I believe it is very possible that were the IRS
21 rules very different, different rather, that SolarCity
22 might have written a different SSA that might have
23 different fundamental qualities that would cause
24 another, another finding by Staff.

25 Q. In your mind, since we talked about it, what are

1 the major differences between a lease such that it
2 shouldn't be regulated and an SSA such that it should
3 be? What is it, what makes the difference?

4 A. Well, the most obvious difference is that sale
5 of electricity is typically priced with the inclusion of
6 a use based feature or, more specifically, a per kWh
7 component. Sometimes there are other things like demand
8 costs and such, but the obvious aspect is a pricing per
9 kWh.

10 In a lease arrangement, pricing is typically
11 done with fixed incremental payments, like most often it
12 takes the form of monthly payments, and that's the most
13 obvious difference. I don't believe that there is an
14 analyst guide to identifying a lease versus a purchase,
15 but those are some of the obvious signs.

16 Q. And those are significant differences, in your
17 mind, as to the question of regulation?

18 A. Yes. I think those are significant differences
19 as to the question of regulation.

20 Q. But generally the non -- all other
21 thing -- strike that.

22 I am just having a hard time with the idea that
23 just because we charge a price at a different rate you
24 believe we should be regulated. Because they are really
25 doing the same thing, aren't they?

1 A. When you say they are doing the same thing --

2 Q. A lease and an SSA.

3 A. -- I believe there is a difference. And here is
4 why Staff is inclined --

5 ALJ RODDA: Is there a cricket in the room?

6 MR. RICH: That will be a sign of something.

7 ALJ RODDA: Okay.

8 THE WITNESS: One of the reasons why Staff is
9 generally inclined to think of a lease as not the
10 subject of a regulation is because we start initially
11 thinking about a person with a well in their backyard
12 who serves themselves. From there, Staff can make a
13 jump to a person who has leased a piece of equipment.

14 Say they have leased solar panels. In that
15 example of a leased panel, the user has temporary
16 custody and control over the equipment and pays on a
17 typically, assuming it were a fixed monthly charge, on
18 some known fixed rate that wasn't directly related to
19 the output of the leased equipment. And in that example
20 Staff is comfortable generically speaking. Again, this
21 is not conclusively but we tend to think of that as
22 equatable to a well and therefore not subject to
23 regulation.

24 Alternatively, in the sale of electricity, there
25 is a furnishing of electricity and the equipment, for

1 instance in the SSA example, remains in the custody and
2 control of the SSA provider, as opposed to a lease
3 arrangement where the customer actually has control and
4 custody and is serving themselves with the equipment.

5 Q. But the solar services provider, SolarCity, is
6 doing the same thing, aren't they? In each situation,
7 whether it be a lease or an SSA, they are doing the same
8 thing?

9 A. Well, we don't know about the lease possibility
10 given what we have before us is the SSA and we don't
11 believe that's a lease. And so we haven't seen that
12 example to make a comparison.

13 Q. Now, in a lease, wouldn't it be true that
14 SolarCity or the solar services provider would be
15 designing, installing, maintaining, a solar facility
16 with no upfront costs?

17 A. We don't have that example before us. I suppose
18 they could create a lease like that. I haven't seen
19 that animal yet to think about.

20 Q. So the difference really is the pricing, is that
21 a fair -- boil it down, the difference between a lease
22 and SSA is the pricing?

23 A. Well --

24 MR. HAINS: Your Honor, I think that
25 mischaracterizes Mr. Irvine's testimony. I believe he

1 did say the distinction is that in a lease the customer
2 has custody over the equipment and is providing
3 themselves, where in an SSA, the power is being provided
4 by the owner of the equipment.

5 ALJ RODDA: I thought you were going to say
6 asked and answered. I mean haven't we gone over this a
7 lot?

8 MR. RICH: Sorry, Your Honor. I will move on.

9 MR. POZEFSKY: Your Honor, before he does, is
10 there any possibility that I could be excused?

11 ALJ RODDA: You may be excused.

12 MR. POZEFSKY: Thank you.

13 ALJ RODDA: Anyone who needs to go may be
14 excused, and just call your friends to find out about
15 briefing schedule.

16 MR. RICH: And, Your Honor, I certainly -- I
17 have more, and I am not going -- to the extent you want
18 to finish it tonight, I am happy to keep going. But,
19 I --

20 ALJ RODDA: You have a significant --

21 MR. RICH: I am not necessarily asking to go,
22 but it is late.

23 ALJ RODDA: I thought it stopped.

24 MS. WAGNER: Could we just have an estimate how
25 much longer for those of us who have to deal with child

1 care?

2 MR. RICH: It is probably a good amount.

3 ALJ RODDA: Okay. Let's stop then. We can come
4 back tomorrow. Can you come back tomorrow?

5 MR. ROBERTSON: No.

6 MR. CROCKETT: No. Maybe we can have a
7 discussion about what we are going to do by way of
8 briefing.

9 ALJ RODDA: Yes. Let's go off the record.

10 (An off-the-record discussion ensued.)

11 ALJ RODDA: Let's just go back on the record.

12 Okay. During the off-the-record discussion, the
13 parties have agreed that we will recess for the day and
14 meet back here on Monday, November 9th, at 10:00 a.m.,
15 unless I tell them otherwise.

16 All right. Thank you all. It is nice to see
17 you again. I get to see you some more.

18 (The hearing recessed at 5:59 p.m.)

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

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I, COLETTE E. ROSS, Certified Reporter
 No. 50658 for the State of Arizona, do hereby certify
 that the foregoing printed pages constitute a full, true
 and accurate transcript of the proceedings had in the
 foregoing matter, all done to the best of my skill and
 ability.

WITNESS my hand this 6th day of November,
 2009.

Colette E. Ross

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 Certified Reporter
 Certificate No. 50658