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BEFORE THE ARIZONA CORPORATION COMMISSION

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

Docket No. E-20690A-09-0346

**POST-HEARING OPENING BRIEF OF
FREEPORT-MCMORAN COPPER &
GOLD INC. AND ARIZONANS FOR
ELECTRIC CHOICE AND
COMPETITION**

Freeport-McMoRan Copper & Gold Inc. and Arizonans for Electric Choice and
Competition (hereinafter collectively "AECC") hereby submit their Post-Hearing Opening
Brief in connection with the above referenced matter.

I. INTRODUCTION

On July 2, 2009, SolarCity Corporation ("SolarCity") filed an Application with the
Arizona Corporation Commission ("Commission") for a Determination that when
SolarCity enters into a Solar Service Agreement ("SSA") with schools, non-profit
organizations, and non-governmental entities, it is not acting as a Public-Service
Corporation ("PSC") as defined in Article 15, Section 2 of the Arizona Constitution.

On page 2, at lines 27 and 28, of SolarCity Exhibit A-1, SolarCity describes its

1 company as ". . . a national leader in solar power system design, financing, installation,
2 monitoring and related services." Further, "SolarCity provides all services related to the
3 installation and operation of the system, including permitting, maintenance of the system
4 for the term of the agreement (if under an SSA or lease), billing, accounting, and any
5 reporting requirements." (TEP Exhibit No. 1, SolarCity Response to Staff's Data Request
6 STF 4.9).

7 AECC's Brief will first discuss the applicable law that is involved in the SolarCity
8 Application and then discuss the application of the law to the facts. As stated in
9 *Southwest Transmission Cooperative, Inc. v. Arizona Corporation Commission*:

10 Determining whether an entity is a public service corporation
11 requires a two-step analysis. First, we consider whether the
12 entity satisfies the literal and textual definition of a public
13 service corporation under Article 15, Section 2, of the
14 Arizona Constitution.

15 . . . Second, we evaluate whether the entity's business and
16 activity are such 'as to make its rates, charges, and methods of
17 operations a matter of public concern,' by considering the
18 eight factors articulated in *Natural Gas Serv. Co. v. Serv-Yu
19 Coop.*, 70 Ariz. at 237-38, 219 P.2d at 325-26.

20 *SWTC v. Arizona Corp. Com'n*, 213 Ariz. 427 at 430, 142 P.3rd 1230.

21 AECC will not re-state all of the Testimony on the issues included in the
22 Testimony of the witnesses for SolarCity, RUCO, Staff of the Commission ("Staff"), or
23 other intervenors who participated in the proceeding. Staff presented Testimony in
24 opposition to the position asserted by SolarCity that it is not a PSC and, therefore, not
25 subject to regulation by the Commission.

26 It is important for Members of AECC to understand how entities who offer
customers alternative forms of energy, such as distributed generation, fit into the larger
regulatory framework of electric restructuring and how the Commission intends to
implement its Renewable Energy Standard ("RES") with respect to these entities. As
energy costs rise, mechanisms such as distributed generation and energy efficiency

1 become increasingly useful in managing energy costs and in developing cost control
2 programs that include a variety of options. Therefore, regulatory certainty is important for
3 consumers and electric providers, including solar providers, in order to foster the type of
4 electric industry that will best serve the public interest.

5 II. DISCUSSION

6 A. Applicable Law

7 1. Is SolarCity "furnishing" electricity through the employment of SSA's?

8 Article 15, Section 2 of the Arizona Constitution provides in relevant part:

9 All corporations other than municipal engaged in furnishing
10 . . . electricity for light, fuel or power . . . shall be deemed
public service corporations.

11 The first question to be addressed in connection with the relief requested by
12 SolarCity's Application is whether ownership and maintenance of the equipment as
13 described in SolarCity Exhibit A-1 that creates the electricity results in SolarCity
14 "furnishing" electricity? SolarCity argues that it does not "furnish" electricity because it
15 never takes possession or title to the electricity as it is created. The SSA provides that, as
16 the electricity is created, the electricity is in the possession of the SolarCity customer,
17 who also has legal title to the electricity.

18 As demonstrated by the witnesses providing Testimony on this issue, a reasonable
19 argument can be made on either side of the issue as to whether SolarCity is "furnishing"
20 electricity and, therefore, a PSC subject to regulation by the Commission. It depends on
21 how one views ownership and maintenance of the equipment that creates the electricity
22 and on who has possession and title to the electricity as soon as it is created. However,
23 such determination should not be based on implication or a strained construction.

24 *Arizona Corporation Commission v. Nicholson*, 108 Ariz. 317, at 321, 497 P.2d 815
25 (1972).

26

1 2. If the SSA is construed in a manner that SolarCity is not deemed to be
2 "furnishing" electricity, then SolarCity should not be deemed a PSC or be subject to
3 regulation by the Commission.

4 The Commission should then grant the relief requested in the SolarCity
5 Application (SolarCity Exhibit A-1).

6 **B. Serve-Yu factors**

7 1. If, however, it is determined that SolarCity is "furnishing" electricity, does
8 that necessarily mean that SolarCity is a PSC and, therefore subject to regulation by the
9 Commission pursuant to the provisions of Article 15, Section 3, of the Arizona
10 Constitution?

11 In order to answer the question, it is necessary to consider the eight factors set
12 forth by the Arizona Supreme Court in *Natural Gas Service Co. v. Serv-Yu Coop.* 70
13 Ariz. 235, at 237-238, 219 P.2d 324 (1950). Those factors are:

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

27 Witnesses for the parties have discussed each of these factors in considerable
28 detail in support of the argument that SolarCity is not a PSC when SolarCity enters into
29 SSAs and, therefore, not subject to regulation by the Commission. It is contended by
30 SolarCity that its use of SSAs does not meet the factors set forth in *Serv-Yu*, and
31 SolarCity should, therefore, not be subject to regulation by the Commission. SolarCity

1 has support for its position by the witnesses for RUCO and other intervenors.

2 Staff, however, disagrees with SolarCity's and other intervenors' analysis of the
3 factors set forth in *Serv-Yu* and concluded that:

4 Incumbent electric utilities and SolarCity SSAs have many of
5 the same characteristics. Therefore, Staff believes that these
6 facts support the conclusion that SolarCity would be a public
service corporation in its provision of service through SSAs.
(Staff Exhibit S-1, p. 32, at ll. 2-4)

7 AECC believes that it is reasonable to conclude on the basis of an analysis of the
8 factors set forth in *Serv-Yu* that SolarCity's provision of SSAs should not be subjected to
9 regulation by the Commission.

10 **2. Consequences of regulation by the Commission.**

11 If, however, enough of the *Serv-Yu* factors apply to SolarCity so as to make its
12 business a matter of public concern and interest, the inquiry then becomes what, if any,
13 regulation by the Commission should be required?

14 Staff suggested that the regulation could be "stream-lined." (Staff Exhibit S-1 at p.
15 38, ll. 18 and 19.) However, other than by making a brief reference to other utility
16 industries regulated by the Commission with different levels of Commission regulation,
17 Staff does not address the issues raised by SolarCity and other intervenors concerning the
18 "chilling effect" and detrimental impact of Commission regulation.

19 SolarCity and other intervenors have outlined the consequences of a determination
20 that the provision of SSAs by SolarCity should be subject to regulation by the
21 Commission.

22 Intervenor SunPower Witness Kevin T. Fox discussed in his Testimony the
23 "streamlined form of regulation" approach suggested by Staff as follows:

24 . . . I have a number of concerns with that sort of approach.
25 First, I believe Solar City makes a compelling case that
26 regulation is inappropriate when policy considerations
underlying the *Serv-Yu* decision are applied to circumstances
surrounding SSAs. Sun Power witness Irvin has also
addressed several of these in his testimony. Second, any

1 decision to regulate is likely to create a number of
2 uncertainties that may take a considerable amount of time to
3 clarify through a rulemaking. Third, what is considered
4 "regulation light" by the current Commission may be
5 considered too light by a subsequent Commission, meaning
6 ongoing uncertainty is created regardless of the level of
7 regulation that would be put in place today. Finally, any form
8 of regulation would be likely to introduce compliance costs
9 that would serve to make solar options more expensive. I
10 also do not think this sort of approach is necessary given that
11 the Commission already exercises considerable control over
12 SSA providers, and the manner in which they do business
13 through its REST rules, net metering rules and
14 interconnection standards. (SunPower Exhibit No. 2, p. 7, l.
15 23 – p. 8, l. 2-1/2.)

16 SolarCity responded to a data request from Staff as to whether regulation would
17 impose a prohibitive impediment, and, if so, to describe the impediment. SolarCity
18 responded as follows:

19 Any regulations (e.g. factfinding, reports, briefings, filings,
20 etc.) lead to increased costs and business risk that ultimately
21 will be born [sic] by the end user in the form of higher prices.
22 The financial viability of solar in many instances is currently
23 very tenuous. This is demonstrated by the fact that these
24 installations rely heavily on tax incentives and utility rebates.
25 Therefore, small increases in costs can easily make the
26 difference between a project being financially feasible or not
27 for the end user. This means few solar systems installed
28 which directly translates to a loss of economies of scale for
29 SolarCity which in turn translates to additional costs and
30 higher prices for the customer. At some point these extra
31 costs and lower sales volumes may cause SolarCity and other
32 companies to invest their resources in growing in other states
33 with lower regulatory burdens. (TEP Exhibit No. 1,
34 SolarCity Response to Staff's Data Request STF 2.42.)

35 Intervenor SunPower Witness H. M. Irvin, III, testified concerning whether
36 requiring third-party financing arrangements and/or entities to be subjected to regulation
37 by the Commission would discourage, if not preclude, the use of third-party financing in
38 Arizona. He testified as follows:

39 A regulatory situation where such contracts for services
40 (electricity, maintenance, output monitoring, warranty of
41 system components) either (i) would be subject to the
42 requirement of prior review and approval by the Commission

1 or (ii) could subsequently be 'reopened' by the Commission
2 and subject to repricing and/or restructuring would have a
3 chilling effect on the willingness of financial investors to
participate in the arrangement. (SunPower Exhibit No. 1,
p. 6, l. 25-1/2 – p. 7, l. 2.)

4 Further, Intervenor SunPower Witness Fox testified in response to a question of
5 whether SSAs would be offered in Arizona if the Commission decides to regulate SSA
6 providers, that he did " . . . not believe SSAs would be offered in Arizona" (SunPower
7 Exhibit No. 2, p. 6, l. 2-1/2). He then stated the concerns that were likely to unnerve
8 investors to be:

9 Two key concerns are with regard to initial contract approval
10 by the Commission (for example the Commission's approval
11 of the Solar City contracts in Phase 1 of this proceeding) and
12 the Commission's ability to adjust rates of jurisdictional
13 utilities. From the investor perspective, the former raises the
14 risk that an expected revenue stream may never materialize
15 and the latter raises the risk that revenue streams may be
16 altered such that an investment becomes uneconomic.
17 (SunPower Exhibit No. 2, p. 6, ll. 14 – 16-1/2.)

18 SunPower Witness Fox also was of the opinion that regulation would have a
19 detrimental impact on solar development in Arizona. He stated:

20 A decision that SSA providers are public service corporations
21 would create an enormous amount of uncertainty regarding:
22 (1) if threshold for initial contract approval, (2) the
23 requirements for obtaining a CC&N, (3) the basis for
24 determining which rates will be determined just and
25 reasonable, (4) the possibility that contract rates or terms may
26 be unsettled during the term of an SSA, and (5) the sort of
regulatory compliance costs and obligations that may be
applied to an SSA provider. Quite frankly, I cannot imagine
any investor being interested in making SSA financing
available with any, let alone all, of these open questions.
(SunPower Exhibit No. 2, p. 7, ll. 8-12.)

27 **C. Application of any SolarCity decision to other solar providers**

28 Whether the decision issued by the Commission in connection with the SolarCity
29 Application should be applied to other solar providers will depend on how the
30 Commission addresses the various issues raised by SolarCity in its Application.

1 **III. CONCLUSION**

2 In making a determination on the issues raised in the SolarCity Application, the
3 Commission will have to consider the impact on the development of the solar market in
4 Arizona if providers are determined to be public service corporations. Will such a
5 determination have a "chilling effect" and a "detrimental impact" on the development of
6 the solar market?

7 From a review of the Testimony and exhibits presented by the witnesses in this
8 proceeding, AECC has concluded that it would be premature for the Commission to
9 impose regulation on SSA providers at this time. Although it could be argued that by use
10 of the SSAs SolarCity is "furnishing" electricity and, therefore, is a PSC subject to
11 regulation by the Commission. However, AECC does not believe the factors set forth in
12 *Serv-Yu* have been met to the extent that SolarCity should be subjected to regulation by
13 the Commission. Regulation will have a negative impact on the emerging solar industry
14 in Arizona.

15 To assist in developing solar energy and in furthering the Commission's RES, the
16 solar industry should be permitted to evolve without Commission regulation so as to
17 encourage companies to develop the market. The Commission can monitor the industry
18 and evaluate any given solar provider to see if such company meets the *Serv-Yu* factors.
19 Such monitoring could involve workshops to consider issues raised in this proceeding,
20 such as financial, safety, and reliability, as well as other issues that may warrant attention.

21 The Commission has an example of the impact of deregulation by its deregulation
22 of the telecommunications terminal equipment market a number of years ago. Many
23 companies entered the market bringing forward new and innovative products and
24 services, all of which have greatly expanded the market to the benefit of the public. The
25 same phenomenon could very well occur in the solar industry if it is allowed to develop
26 without regulation.

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