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OPEN MEETING AGENDA ITEM



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ARIZONA, COLORADO, MONTANA,
NEVADA, TEXAS, WYOMING,
DISTRICT OF COLUMBIA

OF COUNSEL TO
MUNGER CHADWICK, P.L.C.

December 14, 2009

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Re: SunPower Corporation
Docket No. E-20690A-09-0346

To Whom It May Concern:

Enclosed for filing in the above-referenced proceeding are the original and thirteen (13) copies of an Initial Post-Hearing Brief ("Initial Brief") on behalf of SunPower Corporation.

Copies of the enclosed Initial Brief will be electronically transmitted to all parties of record concurrently with the filing of the enclosed original and thirteen (13) copies by Mr. Robertson in Phoenix tomorrow, December 15, 2009.

Thank you for your assistance. Please advise me if you have any questions.

Sincerely,

Angela R. Trujillo
Secretary
Lawrence V. Robertson, Jr.

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CORP COMMISSION

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OPEN MEETING AGENDA ITEM

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

SUNPOWER CORPORATION
INITIAL POST-HEARING BRIEF

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December 14, 2009
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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 **KRISTIN K. MAYES, Chairman**
4 **GARY PIERCE**
5 **PAUL NEWMAN**
6 **SANDRA D. KENNEDY**
7 **BOB STUMP**

8 IN THE MATTER OF THE APPLICATION OF)
9 SOLARCITY FOR A DETERMINATION THAT) DOCKET NO. E-20690A-09-0346
10 WHEN IT PROVIDES SOLAR SERVICE TO)
11 ARIZONA SCHOOLS, GOVERNMENTS, AND) INTERVENOR SUNPOWER
12 NON-PROFIT ENTITIES IT IS NOT ACTING AS A) CORPORATION'S INITIAL POST-
13 PUBLIC SERVICE CORPORATION PURSUANT) HEARING BRIEF
14 TO ART. 15, SECTION 2 OF THE ARIZONA)
15 CONSTITUTION)

16 Pursuant to the November 9, 2009 oral directive of the Administrative Law Judge
17 assigned to the above-captioned and above-docketed proceeding, SunPower Corporation
18 ("SunPower") hereby submits its Initial Post-Hearing Brief therein.

19 **I.**

20 **INTRODUCTION**

21 **A. Statement of SunPower's Position**

22 It is SunPower's position that the evidentiary record in the instant proceeding warrants a
23 determination by the Commission that there is no need to regulate SolarCity Corporation
24 ("SolarCity") as a public service corporation under Arizona law. In addition, it is SunPower's
25 belief that subjecting SolarCity to regulation as a public service corporation could have a
26 substantial negative impact and chilling effect upon the willingness of other distributed
27 generation service providers and third-party financing entities to commit their personnel and
28 financial resources to the conduct of business in Arizona. There are many other states in which
they can productively offer their solar financing services and products without the prospect and
burden of regulation.

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satisfies the literal and textual definition of a public service corporation under Article 15, Section 2 of the Arizona Constitution. Second, we evaluate whether the entity's business and activity are such 'as to make its rates, charges, and methods of operations a matter of public concern,' by considering the eight factors articulated in Natural Gas Serv. Co. v. Serv-Yu Coop., 70 Ariz. At 237-38, 219 P.2d at 325-26 (1950)" [at page 430, 1243]

The public policy purpose behind why the analysis in question proceeds to the second level of inquiry was best articulated by the Arizona Court of Appeals in the case of Southwest Gas Corporation v. Arizona Corporation Commission, 169 Ariz. 279, 818 P.2d 714 (1991). Therein, after confirming that the jurisdictional analysis begins with the Article 15, Section 2 inquiry, the Southwest Gas court commented at length as follows:

"Although Trico Electric Cooperative v. Corporation Commission, 86 Ariz. 27, 339 P.2d 1046 (1959), applied this definition literally, our supreme court has held more recently that meeting the literal textual definition is insufficient. In Arizona Corporation Commission v. Nicholson, the supreme court stated:

*"To be a public service corporation, its business and activity must be such as to make its rates, charges, and methods of operations a matter of public concern. It must be, as the courts express it, clothed with a public interest to the extent clearly contemplated by the law which subjects it to governmental control. Free enterprise and competition is the general rule. Governmental control and legalized monopolies are the exception and are authorized under our constitution only for that class of business that might be characterized as a public service enterprise. The theory is that the right to public regulation and protection outweighs the customary right of competition. If the public contact with a business is such that its necessities and convenience can be better served through governmental supervision and controlled monopoly, thereby eliminating customary competition, the state may exercise its police power to that end. Such invasion of private right cannot be allowed by implication or strained construction. It was never contemplated that the definition of public service corporations as defined by our constitution be so elastic as to fan out and include businesses in which the public might be incidentally interested * * *."*
[emphasis in original]

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108 Ariz. 317, 321, 497 P.2d [***21] 815, 819 (1972) (quoting
General Alarm v. Underdown, 76 Ariz. 235, 238, 262 P.2d 671,
672-73 (1953)).

“In *Petrolane-Arizona Gas Service v. Arizona Corporation
Commission*, the supreme court discussed the purposes of
exercising governmental regulatory power over public service
corporations:

‘The statement of the court in *Re Geldbach
Petroleum Co.*, 56 P.U.R.3d 207 (Mo.1964),
accurately conveys the benign objectives of the
Constitution, Art. 15, § 2, and why its language
should not be reduced by judicial constructions to
insignificance:

“* * * the purposes of regulation are
to preserve and promote those
services which are indispensable to
large segments of our population,
and to prevent excessive and
discriminatory rates and inferior
service where the nature of the
facilities used in providing the
service and the disparity in the
relative bargaining power of a utility
ratepayer are such as to prevent the
ratepayer from demanding a high
level of service at a fair price
without the assistance of
governmental intervention in his
behalf.” *Id.* at 213.’ [emphasis in
original]

119 Ariz. 257, 259, 580 P.2d 718, 720 (1978) (emphasis added).
“In identifying those corporations ‘clothed with a public interest’
and subject to regulation because they are ‘indispensable to large
segments of our population,’ Arizona courts have often focused on
the following factors set forth in *Natural Gas Service Co. v. Serv-
Yu Cooperative*:

- (1) What the corporation actually does.
- (2) A dedication to public use.
- (3) Articles of incorporation, authorization, and
purposes.

1 (4) Dealing with the service of a commodity in which
2 the public has been generally held to have an interest.

3 (5) Monopolizing or intending to monopolize the
4 territory with a public service commodity.

5 (6) Acceptance of substantially all requests for service.

6 (7) Service under contracts and reserving the right to
7 discriminate is not always controlling.

8 (8) Actual or potential competition with other corporations
9 whose business is clothed with public interest.

10 *70 Ariz. 235, 237-38, 219 P.2d 324, 325-36 (1956)* (citations
11 omitted). These eight factors are merely guides for analysis and
12 they need not all be found to exist before the company in question
13 may be deemed a public service corporation. *See Petrolane-*
14 *Arizona Gas Serv. v. Arizona Corp. Comm'n, 119 Ariz. at 259, 580*
15 *P.2d at 720.*" [emphasis added]

16 **B. Meaningful Use of The Serv-Yu "Guides For Analysis"**

17 As the Arizona Supreme Court observed in the above-cited Petrolane case, the eight (8)
18 Serv-Yu factors serve as "guides for analysis" in the determination of whether a given entity
19 should be subjected to regulation as a public service corporation. The underlying purpose of that
20 analysis is to ascertain whether the nature and surrounding circumstances of the entity in
21 question are such as to (i) except it from the general public policy favoring competition, and (ii)
22 require that it be subject to regulation because that is what the broad public interest requires. As
23 the above-cited Southwest Gas and Nicholson decisions make clear, it is not enough that the
24 entity in question simply meet the "literal textual definition" of a public service corporation set
25 forth in Article 15, Section 2 of the Arizona Constitution.

26 To date, no Arizona court of record appears to have assigned an express order of
27 importance or hierarchy to the Serv-Yu factors.¹ For example, in the Southwest Gas case, the
28 court's analysis focused on how El Paso Natural Gas Company's activities did or did not match
the Serv-Yu factors, but the court did not identify certain factors as being more important than
others. Similarly, in the Southwest Transmission case, the court discussed each of the eight (8)

¹ During the course of her direct testimony in the instant proceeding, RUCO Director Jodi Jerich made a similar
observation. [Tr. 845, l. 7-15]

1 Serv-Yu factors, and concluded as follows: (i) factors 5, 6 and 7 weighed in favor of finding the
2 cooperative was not a public service corporation; factors 1, 2, 3 and 4 suggested an opposite
3 conclusion; and the cooperative had failed to address the Commission Staff's argument with
4 regard to factor 8. Finally, the Serv-Yu court was equally unenlightening in its opinion
5 originally articulating the eight (8) factors, which was intended to "clarify" its earlier decision
6 holding that Serv-Yu was a public service corporation on the basis of the underlying evidentiary
7 record.

8 Although the Arizona courts have not provided clear guidance regarding the importance
9 or hierarchy of the eight (8) Serv-Yu factors, SunPower notes that in applying these factors there
10 appear to have been three (3) recurring themes or concerns which have characterized Arizona
11 judicial decisions addressing the question of whether or not a given entity should be subject to
12 regulation as a public service corporation. The first of these themes is the desire to prevent
13 wasteful competition between companies when the equivalent service could be offered by a
14 single regulated provider, as reflected in the above-cited Trico case. The second theme is the
15 desire to assure that a provider with effective monopoly power cannot extract unjust and
16 unreasonable profits, or allocate recovery of costs in a discriminatory manner, as evidenced by
17 the above-cited Southwest Gas case. The third concern is a desire to facilitate the provision of
18 essential services to a large segment of the public, as evidenced by the above-cited Serv-Yu and
19 Southwest Transmission cases. In turn, in its own way, each of these themes would appear to be
20 directly related to the ultimate underlying question of WHETHER THERE IS A NEED FOR
21 REGULATION of the entity in question.² The following table classifies each of the Serv-Yu
22 factors on the basis of these three (3) themes or functional classification categories:
23

24 ² Supportive of this conclusion are the following additional statements from the Arizona Supreme Court:

25 "Free enterprise and competition is the general rule. Government control and
26 legalized monopolies are the exception. . ." General Alarm, Inc. v. Underdawn,
et al. 76 Ariz. 235, 238; 262 P.2d 671, 672 (1953) [emphasis added]

27 * * *

28 "We expressed in Arizona Corporation Commission v. Continental [Security
Guards], supra, 103 Ariz. At 415, 443 P.2d at 411 the 'underlying aversion of
this Court to any extension of the power and scope of the corporation

Serv-Yu Factor	Prevention of Wasteful Competition	Prevention of Uncontrolled Monopoly Power, Extraction of Unjust and Unreasonable Rates, and Recovery of Costs in Discriminatory Manner	Provision of Essential Services to Large Segment of Public
#1			X
#2			X
#3			X
#4			X
#5		X	
#6	X		
#7		X	
#8	X		

Because the public policy considerations encompassed within these themes or functional classification categories have been paramount in guiding Arizona judicial determinations regarding the appropriateness of regulation, SunPower will use this functional classification approach in connection with its discussion in Section III(B) below. In that regard, SunPower believes that such discussion will support a determination by the Commission that (i) there has been no demonstration of a need for regulation of SolarCity as a public service corporation under Arizona law; (ii) the “benefits” of regulation asserted by the Commission’s Staff are illusory, and are not a lawful substitute for that demonstration of need which is required under Arizona law; and, (iii) regulation of SolarCity as a public service corporation is neither required nor warranted.

III.

**ALLOCATION OF PROBATIVE BURDEN; AND, CONCLUSIONS
 WHICH MAY BE REACHED BASED UPON EVIDENTIARY RECORD
 IN THE INSTANT PROCEEDING**

commission to businesses not patently in need of the Commission’s control.”
Arizona Corporation Commission v. Nicholson, 108 Ariz. 317, 321, 497 P.2d
 815, 819 (1972) [emphasis added]

Similarly, in “Principles of Public Utility Rates,” the authors (James C. Bonbright, Albert L. Danielson and David R. Kamerschen) have observed that

“What must justify public utility regulation, then, is the necessity of the regulation [itself] and not merely the necessity of the product.” [emphasis added]. Principles of Public Utility Rates, Second Edition (1988) Public Utilities Reports, Inc. Arlington, Virginia.

1 **A. Allocation of Probative Burden**

2 As noted in Section II(A) above, in Arizona

3 “Free enterprise and competition is the general rule. Governmental
4 control and legalized monopolies are the exceptions . . . [and] Such
5 invasion of private right cannot be allowed by implication or
6 strained construction . . .” Arizona Corporation Commission v.
7 Nicholson, supra, at 317, 819; and,

8 the Arizona Supreme Court has an

9 ““underlying aversion . . . to any extension of the power and scope
10 of the corporation commission to businesses not patently in need of
11 the Commission’s control.”” Arizona Corporation Commission v.
12 Nicholson, supra, quoting Arizona Corporation Commission v.
13 Continental, supra, at 103 Ariz. at 415, 443 P.2d at 411

14 Succinctly stated, Arizona public policy favors free enterprise and competition in the absence of
15 a demonstrated need for regulation.

16 In the context of the instant proceeding, and against the aforesaid public policy backdrop,
17 the burden of demonstrating the existence of a need for regulation of SolarCity falls upon those
18 who (i) advocate for an exception to the general rule favoring free enterprise and competition,
19 and (ii) seek an extension of the power and scope of the Commission’s jurisdiction to which the
20 Arizona Supreme Court in generally averse. More specifically, that probative burden rests
21 squarely upon the Commission’s Staff, because that is the only party to the instant proceeding
22 who has asserted that SolarCity should be subject to regulation as a public service corporation
23 under Arizona law.

24 As discussed in Section III(B) below, SunPower believes that the Commission’s Staff has
25 failed to satisfy that burden of proof required of it by the public policy and factual circumstances
26 surrounding the instant proceeding. Simply stated, the Commission Staff has not demonstrated
27 the existence of a need at this time to regulate SolarCity in connection with the array of services
28 it provides in Arizona.

29 **B. Conclusions Which May Be Reached Based Upon A Functional Classification and**
30 **Application of the Serv-Yu Factors to the Evidentiary Record in The Instant**
31 **Proceeding:**

1 1. Functional Classification No. 1:

2 Prevention of Wasteful Competition

3 **A. Acceptance of Substantially All Requests For Service. [Serv-Yu**
4 **Factor #6]**

5 Succinctly stated, there is no evidence in the record of the instant proceeding to support a
6 finding that SolarCity accepts substantially all requests for service that it receives. In that regard,
7 the record indicates (i) that the array of services offered by SolarCity are very customized as to a
8 given customer; and, (ii) that a prospective customer and the related host site must satisfy a
9 number of screening criteria before a determination can be made as to whether a given request
10 for service is feasible. Only then can the contractual negotiations begin; and, it is only executed
11 contracts which can be said to constitute an "acceptance" of a request for service, as that term is
12 intended within the context of Serv-Yu Factor #6.

13 In that regard, the approach adopted by the Commission's Staff was one of inference, in
14 an effort to establish the requisite acceptance of substantially all requests for service. However,
15 that inference as to Arizona was not supported by probative evidence.

16 More specifically, the Commission's Staff looked to SolarCity's national (if not
17 worldwide) marketing literature in an effort to "establish" that the company intended to serve a
18 substantial part of the Arizona public.³ However, Mr. Irvine also acknowledged during cross-
19 examination that the Commission's Staff did not have any information with regard to SolarCity's
20 specific marketing plans for the State of Arizona as a whole;⁴ and, he had no data as to the
21 company's marketing objectives by customer category at either the national or state level.⁵

22 Against this background, it is readily apparent that neither the evidentiary record in the
23 instant proceeding nor the Commission Staff's inference would support a determination by the
24 Commission that SolarCity accepts substantially all requests for the services it offers in Arizona.

25 **B. Actual or Potential Competition With Other Corporations Whose**
26 **Business Is Clothed With A Public Interest. [Serv-Yu Factor #8]**

27 ³ Tr. 1078, l. 24-Tr. 1079, l. 5.

28 ⁴ Tr. 1078, L. 24-Tr. 1079, l. 19.

⁵ Tr. 1079, l. 20-Tr. 1080, l. 8.

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1 Arizona Public Service Company (“APS”), Salt River Project (“SRP”), Sulphur Springs
2 Valley Electric Cooperative (“SSVEC”) and Tucson Electric Power Company (“TEP”)
3 intervened and participated in varying degrees in the instant proceeding. Presumably, the
4 electric utility business activities of each may be said to be “clothed with a public interest.”

5 APS was the only such entity to present any evidence, which it did through the testimony
6 of Barbara Lockwood. In her testimony, Ms. Lockwood indicated that APS did not perceive the
7 services currently offered by SolarCity as being in actual or potential competition with APS to its
8 detriment. To the contrary, as the following excerpts from APS pre-filed witness summary of
9 Ms. Lockwood’s prepared Direct Testimony indicate, APS believes that solar services providers
10 such as SolarCity can perform an important role in the development and deployment of
11 renewable distributed energy systems in Arizona:

12 “APS believes that solar service providers, such as SolarCity, play
13 a role in the development and deployment of renewable distributed
14 energy systems, and in advancing consumer acceptance and
15 awareness of these systems. Accordingly, providers like SolarCity
16 are important players in advancing the Arizona Corporation
17 Commission’s (“Commission”) overall goals for renewable
18 generation, as well as APS’s specific distributed energy goals and
19 requirements. Therefore, APS does not object to SolarCity’s SSA
20 with the Scottsdale Unified School District that has been filed in
21 this Docket because the SSA applies to a single customer’s
22 premises and complies with the Commission’s Interconnection
23 Rules. Under the SSA’s contractual terms, the distributed energy
24 system is serving one customer – a school.

25 APS believes that SolarCity and other solar providers will need to
26 follow the Commission’s Interconnection Rules approved in
27 Decision No. 69674 so as to not adversely impact the reliability of
28 the APS distribution system and the safety of the Company’s
employees and customers.

Finally, APS recommends that the Commission require periodic
reporting requirements to facilitate resource planning. Solar
providers should inform APS of their expansion plans so the
Company may plan, design and build a cost-effective reliable
system to serve its customers.”

Conversely, the Commission’s Staff offered no probative evidence that SolarCity was
actually or potentially competing with any of the electric utilities in the State of Arizona to their

1 detriment. At one juncture, Mr. Irvine endeavored to suggest that a “parity” between the price of
2 electricity generated by electric utilities and electricity produced from distributed renewable
3 generation might be in the near future, based upon SolarCity’s recent downward adjustment in
4 price to the Scottsdale Unified School District (“SUSD”).⁶ However, cross-examination by
5 counsel for APS disclosed that Mr. Irvine was “really comparing apples to oranges,” because the
6 distributed renewable generation price he was using included reliance among federal tax credits
7 and utility rebates, whereas the utility’s price did not.⁷ Moreover, while Mr. Irvine opined that
8 comparable price parity might occur “sooner rather than later,” he also acknowledged that “I
9 don’t know about when”;⁸ and, he provided no probative evidence to demonstrate that such
10 parity, if in fact it should occur, would be to the actual or potential detriment of any of Arizona’s
11 electric utilities.

12 **C. Summary of Serv-Yu Factors Functional Classifications No. 1**
13 **Analysis**

14 It is readily apparent from the preceding discussion that the evidentiary record in the
15 instant proceeding cannot lawfully support a determination that the activities of SolarCity would
16 lead to wasteful competition vis-à-vis Arizona’s electric utilities. More specifically, there is no
17 credible evidence that SolarCity does or will hereafter accept and effectuate substantially all of
18 the requests for its services that it receives in Arizona. In addition, there is no probative
19 evidence that those requests that it does accept will result in actual or potential competition with
20 Arizona’s electric utilities. To the contrary, the one (1) electric utility intervenor who offered
21 testimony expressed the belief that the services offered by SolarCity and other solar services
22 providers could be beneficial in the development and deployment of distributed renewable
23 generation as a part of Arizona’s energy future.

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28 ⁶ Tr. 1104, l. 24-Tr. 1105, l. 6.

⁷ Tr. 1104, l. 24-Tr. 1106, l. 23.

⁸ Tr. 1108, l. 24-Tr. 1109, l. 2.

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2. Functional Classification No. 2:

**Prevention of Uncontrolled Monopoly Power, Extraction
of Unjust and Unreasonable Rates, and Recovery of Costs**

In A Discriminatory Manner

**A. Monopolizing or Intending to Monopolize The Territory With A
Public Service Commodity. [Serv-Yu Factor #5]**

In both his prepared Direct Testimony⁹, and during cross-examination¹⁰, Commission Staff witness Irvine acknowledged that he had found no evidence of an intent by SolarCity to monopolize the territory in which it seeks to do business in Arizona. In addition, there is no evidence in the record in the instant proceeding which suggests that SolarCity is in fact monopolizing any service territory in Arizona in connection with the provision of a public service commodity.¹¹

**B. Service Under Contracts and Reserving The Right to Discriminate Is
Not Always Controlling. [Serv-Yu Factor #7]**

As a practical matter, this Serv-Yu factor acquires meaning only when examined in relation to the results received from analysis utilizing certain other Serv-Yu factors. In that regard, the results of analysis utilizing Serv-Yu Factor(s) #4, #5 and #8 would appear to be most important, given that the functional classification category in which this Serv-Yu factor appears relates to “prevention of uncontrolled monopoly power, extraction of unjust and unreasonable rates, and recovery of costs in a discriminatory manner.” In that regard, and in the interest of brevity, the discussion of Serv-Yu Factor(s) #4, #5 and #8 which appears elsewhere in Section III of this Initial Post-Hearing Brief is incorporated herein by this reference in connection with this consideration of Serv-Yu Factor #7.

Against that discussion background, and based upon the evidentiary record in the instant proceeding, the following conclusions may be reached. First, SolarCity’s services do not

⁹ Exhibit S-1, page 25, l. 18-21.

¹⁰ Tr. 1075, l. 11-Tr. 1077, l. 8; and, in particular Tr. 1075, l. 15-20, Tr. 1076, l. 2-9, and Tr. 1077, l. 1-8.

¹¹ In that regard, as discussed in Section III(B)(3)(D) below, it is SunPower’s position that the array of services offered by SolarCity do not constitute that type of “commodity” contemplated by the Arizona courts as a “public service commodity” within the context of Serv-Yu Factor No. 5.

1 represent the service of a "commodity" in which the general public has been determined to have
2 an interest. Second, SolarCity neither currently monopolizes nor currently intends to monopolize
3 any service territory with the services it offers in Arizona. Third, at present, SolarCity is not
4 engaged in actual or potential competition with other corporations whose business is clothed
5 with a public interest, and who would be adversely affected. Accordingly, when examined
6 within the context of the instant proceeding, Serv-Yu Factor #7 would not appear to perform a
7 dispositive role.

8 **C. Summary of Serv-Yu Factors Functional Classification No. 2**
9 **Analysis.**

10 The preceding discussion (inclusive of the referenced discussion relating to Serv-Yu
11 Factor(s) #4, #5 and #8) manifests the following as they pertain to the functional classification
12 category now under examination. First, SolarCity does not possess or intend a monopoly power
13 in Arizona which requires control through regulation as a public service corporation. Second,
14 SolarCity is not in a market position to extract unjust and unreasonable rates for the services it
15 offers.¹² To the contrary, it must compete with a number of other providers of solar services for
16 the market niche in question. Third, and because of the aforementioned competition, SolarCity
17 is not in a position to recover its costs in a discriminatory manner.

18 **3. Functional Classification No. 3:**

19 **Provision of Essential Services to Large**

20 **Segment of The Public**

21 **A. What the Corporation Actually Does. [Serv-Yu Factor #1]**

22 The evidentiary record in the instant proceeding indicates that SolarCity provides an
23 array of services under the Solar Services Agreements ("SSAs") which were analyzed by the
24 Commission's Staff.¹³ These services include the design, construction, ownership, operation and
25

26 ¹² Illustrative of such competition is the number of proposals from solar services providers that the SUSD received
27 in response to its Distributed Solar Generation Request(s) For Proposals, and how such responses ultimately led to a
28 reduction in price under the SSAs which are the subject of the instant proceeding.

¹³ In that regard, Commission Staff witness Irvine testified that the Commission Staff's testimony and
recommendations were confined to SolarCity and the Application which is the subject of the instant proceeding.
[See Tr. 1049, l. 13-19; and, Tr. 1051, l. 4-7]

1 maintenance of the customer-specific solar panel system in question for the benefit of the
2 customer in question; and, these services are provided without any upfront costs to the customer
3 for the acquisition, installation or maintenance of the solar panel system. [See, e.g. Exhibit A-4
4 at page 2, lines 5-25.5] SolarCity is compensated for these services on the basis of electricity
5 which is produced by the solar panels.

6 Against this factual background, the Commission's Staff has concluded that SolarCity is
7 "furnishing" electricity within the meaning of Article XV, Section 2 of the Arizona
8 Constitution.¹⁴ However, the Commission Staff's conclusion in that regard has been challenged
9 by the testimony of SolarCity witness Lyndon Rive, RUCO witness Jodi Jerich and Western
10 Resource Advocates ("WRA") witness Dr. David Berry. As noted during the hearing, SunPower
11 did not take a position on this issue.¹⁵ Nor is it necessary for SunPower to do so, because within
12 the context of an overall examination of the Serv-Yu factors, the satisfaction of a given
13 customer's desire for electricity generated from roof-top solar panel technology is not dispositive
14 of the question of whether there is a demonstrated need to regulate the solar services provider in
15 question.

16 In turn, the Commission Staff's conclusion that SolarCity is "furnishing" electricity
17 within the meaning of Article XV, Section 2 of the Arizona Constitution appears to have strongly
18 influenced and biased its analytical approach to application of the Serv-Yu factors. The first
19 example of this appears in connection with Serv-Yu Factor #1, in relation to which the
20 Commission Staff concluded as follows:

21 "Staff felt that the furnishing of electricity figured larger into the
22 question of PSC [public service corporation] status than the other
23 services. And ultimately we decided that the SSA represented a
24 sale of electricity, and that SSA- that the furnishing of electricity
25 was not incidental to the SSA." [Tr. 1056, l. 24-Tr. 1057, l. 4]
[emphasis added]

26 However, when called upon to do so during cross-examination, Commission Staff witness Irvine
27 was unable to describe or point to any specific data that the Commission Staff analyzed or relied
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¹⁴ See, e.g., Exhibit S-1, page 8, l. 16-26; page 13, l. 5-page 19, l. 15; and Tr. 991, l. 17-20]

¹⁵ See e.g. Exhibit A-4, page 2; and, Tr. 394, l. 21-Tr. 395, l. 9; and, Tr. 1052, l. 23-Tr. 1053, l. 18.

1 upon to support its conclusion “that the furnishing of electricity was predominant in the SSA.”
2 [Tr. 1055, l. 17-18] [emphasis added] To the contrary, when specifically asked whether the
3 Commission Staff had inquired of SolarCity as to

4
5 “... how SolarCity quantified or considered the proportionate role
6 and value of those [other SSA] services to be vis-à-vis the
7 furnishing of electricity.” [Tr. 1056, l. 9-12]

8 Mr. Irvine responded as follows:

9 “A. It seems to be like we asked that question.

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

12 A. I believe we asked the question. I believe they responded.
13 And I don't believe I recall the answer at this moment. [Tr. 1056,
14 l. 13-18] [emphasis added]

15 Based upon the evidentiary record in the instant proceeding, and within the analytical
16 context of Serv-Yu Factor #1, what SolarCity actually does under its SSA is to provide design,
17 construction, ownership, operation and maintenance services related to customer-specific roof-
18 top solar panel equipment which produces electricity used by the host customer. Despite the
19 desire of the Commission Staff to ascribe to SolarCity the furnishing of electricity as its
20 “predominant” role and activity under the SSAs, the Commission’s Staff has failed to provide
21 any probative evidence to support that assertion; and, thus its effort at such attribution must be
22 rejected.

23 **B. A Dedication to Public Use [Serv-Yu Factor #2]**

24 Two (2) questions arise in connection with the application of this analytical factor. First,
25 what is the “public” to which reference is made? Second, what constitutes a “dedication”?
26 During the course of the evidentiary hearings, Mr. Irvine provided responses to inquiries from
27 Chairman Mayes which disclose the thinking of the Commission’s Staff.

28 With reference to the meaning of “public,” the exchange was as follows:

“CHMN.MAYES . . . am I correct that you, that Staff, is using as
its universe for [the definition of] public the universe of schools
rather than the universe of electricity users in a given service
territory or in the state of Arizona?”

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Your definition of public is based upon a class of end-users rather than what I was sort of thinking of [as the] public.”

THE WITNESS: Well, actually, that’s correct.” [Tr. 1063, l. 7-14, and l. 17, respectively]

With reference to the meaning of “dedication,” Mr. Irvine testified as follows:

“CHMN.MAYES. And that’s my next question. So are you saying that because excess energy from these [SSA] arrangements finds its way into the grid, that makes them dedicated to public use? . . .

THE WITNESS: In this case, in the context of the SSA, I think it lends to consideration [of a dedication], but in and of itself doesn’t [constitute dedication].” [Tr. 1063, l. 25-Tr. 1064, l. 3, and Tr. 1064, l. 16-18, respectively]

However, the Commission’s Staff provided no constitutional, statutory or judicial authority to support its narrow concept and definition of what constitutes the “public” for purposes of an application of Serv-Yu Factor #2 within the context of the electric utility industry in Arizona. To the contrary, the Arizona judicial decisions discussed above in Section II(A) of this Initial Post-Hearing Brief, which have articulated and applied the Serv-Yu analytical factors, do not support the operative term “public” as being limited to a class of end-users of electricity.

Similarly, the Commission’s Staff has failed to demonstrate the requisite “dedication” to public use of the solar panel facilities provided by SolarCity under the SSAs. During the course of cross-examination, Mr. Irvine acknowledged that SolarCity did not intend to accept all requests for service that it might receive in Arizona¹⁶; and, in response to a line of questioning from Chairman Mayes, he also acknowledged that the public in Arizona does not have a right to demand service from SSA providers, and cannot compel an SSA provider to serve.¹⁷ In addition, when pressed by Chairman Mayes, he conceded that the fact that excess energy resulting from an SSA arrangement finds its way onto the grid does not in of itself constitute the requisite dedication of the electricity-producing facility to the public.¹⁸

In summary, the Commission’s Staff has failed to substantiate with credible evidence that “dedication to public use” of the solar generating facilities in question which is required by the Arizona judicial decisions articulating and applying the Serv-Yu factors; and, the nuanced

¹⁶ See Tr. 1060, l. 9-13.
¹⁷ Tr. 1066, l. 15-19.
¹⁸ Tr. 1063, l. 25-Tr. 1064, l. 18.

1 attempt by the Commission's Staff to fill this evidentiary void by repetition of its conclusion that
2 SolarCity is "furnishing" electricity should be recognized for the "make-weight" argument that it
3 represents, and as nothing more.

4 **C. Articles of Incorporation, Authorization and Purposes. [Serv-Yu**
5 **Factor #3]**

6 In his pre-filed Direct Testimony, Mr. Irvine noted that (i) SolarCity's Delaware Articles
7 of Incorporation authorized it to engage in any lawful act or activity that may be engaged in
8 under the General Corporations Law of Delaware; and, (ii) its Application for Authority to
9 Transact Business in Arizona stated that the character of business it initially intended to conduct
10 was the "Sales and Installation of PV Solar Systems." In addition, he acknowledged that none of
11 the incorporating documents reviewed by the Commission's Staff indicated an express intent to
12 conduct business as a public service corporation.¹⁹

13 However, in his pre-filed Direct Testimony, Mr. Irvine further stated that

14 " . . . the purpose language in the Articles of Incorporation does not
15 preclude SolarCity from conducting the business of a public
16 service corporation either." [Exhibit S-1, at page 24, l. 12-14]

17 When questioned during cross-examination as to the significance of this additional observation,
18 Mr. Irvine clarified that he did not mean to infer that at some future date SolarCity might
19 endeavor to act as a public service corporation. Rather, whether it did or not would depend upon
20 the nature of the activities it then conducted.

21 For purposes of the Serv-Yu Factor #3 analysis within the context of the instant
22 proceeding, the following excerpt from cross-examination of Mr. Irvine perhaps best summarizes
23 the Commission Staff's ultimate position on this aspect of that analysis:

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

28 A. Well, the articles don't indicate an intention to function as a
PSC; at the same time, they don't preclude the company from

¹⁹ Exhibit S-1, page 23, l.22-page 24, l. 12. Also, see Tr. 1066, l. 24-1067, l. 22.

1 working as a PSC. So I don't think that a conclusion can be drawn
2 one way or the other based on that test alone.

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

5 A. I do agree to that." [Tr. 1069, l. 13-24] [emphasis added]

6 **D. Dealing With the Service of a Commodity In Which the Public Has**
7 **Generally Been Held To Have An Interest. [Serv-Yu Factor #4]**

8 Two (2) questions also arise in connection with the application of this analytical factor.
9 First, what is the "commodity" which is the subject of the service being examined? Second, to
10 what extent has an interest upon the part of the general public in the provision of that commodity
11 been evidenced?

12 For purposes of its "commodity" analysis under this Serv-Yu factor, the Commission's
13 Staff equated electricity generated under an SSA from roof-top solar panels with electricity
14 generated from non-renewable sources, because the physical properties of each are the same.²⁰
15 Stated differently, from the Commission Staff's perspective, the "commodity" in question was
16 simply electricity, regardless of the nature of the generation resource and technology.

17 However, the evidentiary record discloses that some electric consumers do perceive
18 electricity generated from renewable energy resources as a particular or special type of
19 commodity that is sometimes referred to as "green power" or a "green alternative"; and, they
20 perceive it as being different from electricity generated from non-renewable resources. In fact,
21 this "green power" or "green alternative" is perceived by such customers as a desirable special
22 commodity, with a concomitant social value, because there are less adverse environmental
23 impacts associated with its generation; and, where cost is not a precluding factor, they desire to
24 have "green power" facilities installed on their roof-tops or premises.²¹ Thus, it cannot be said
25 that the Commission Staff's perception of what constitutes a "commodity" in this Serv-Yu
26 Factor #4 context is universal.

27 ²⁰ Exhibit S-1, page 24, l. 19-page 25, l. 2. Also, see Tr. 1070, l. 16-Tr. 1071, l. 15.

28 ²¹ Commission Staff witness Irvine endeavored to side-step this fact by suggesting that the cost was the "primary consideration" for the SUSD in connection with the SSAs in question. [Tr. 1073, l. 16-Tr. 1074, l. 4] However, that opinion on his part does not dismiss the fact that electricity generated from renewable energy is perceived by others as a particular or special type of "commodity" unto itself, and one that is separate and distinct from electricity generated from non-renewable sources.

1 Furthermore, Mr. Irvine did recognize that distinctions exist with regard to electricity
2 outside the context of a Serv-Yu Factor #4 analysis, as the following cross-examination of him
3 discloses:

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

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

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

17 A. I believe that's true. And let me qualify it by saying this: Again,
18 I am only applying the layman's reading of Serv-Yu, but I don't
19 believe Serv-Yu made any distinction between the source of the
20 generation, whether it be renewable energy or not renewable
21 energy.

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

26 A. Well, I have tried to explain that within the context of Serv-Yu
27 factor number 4, we don't think that SSA generation, let me say
28 energy generated through an SSA, is distinct in terms of it being a
commodity. However, we recognize in the larger context that there
is a difference between renewable energy and nonrenewable
energy." [Tr. 1071, l. 7-Tr. 1072, l. 12] [emphasis added]

In connection with the extent to which the general public has shown an interest in having
roof-top solar panels installed, the evidentiary record is devoid of any specific information. The
Commission Staff's approach has implicitly assumed such a general interest. However, such an
assumption should not be accepted as a substitute for probative evidence where the issue is
whether or not SolarCity should be subject to regulation as a public service corporation. A
proper and meaningful application of this Serv-Yu factor requires more.

**E. Summary of Serv-Yu Factors Functional Classification No. 3
Analysis.**

1 The preceding analysis readily discloses that at present SolarCity is not engaged in the
2 provision of essential services to a large segment of the general public. The array of services it
3 offers under the SSAs are intended for prospective customers who have a specific desire for
4 roof-top solar panel facilities. In some situations, the prospective customer cannot afford the
5 upfront costs of design, construction and ownership of the necessary facilities; and, it is in those
6 instances that the financing aspects of SolarCity's SSAs can prove to be of assistance.

7 However, the services that SolarCity offers cannot be said to be "essential" to a large
8 segment of the general public. Nor, for that matter, can such services be said to be "essential" to
9 those persons and entities among the general public who might desire "green power" or a "green
10 alternative" in the form of a roof-top solar generation facility on their premises. The difference
11 between what is desirable and what is essential to one's day-to-day existence is substantial; and,
12 that difference must be recognized and maintained for purposes of the Serv-Yu analysis which is
13 the subject of the instant proceeding.

14 Finally, it is neither appropriate nor constructive to speculate as to the nature of business
15 activities that SolarCity may or may not intend or actually undertake at some future date. The
16 jurisdictional question before the Commission pertains to the nature of SolarCity's activities as
17 of this point in time. Jurisdictional determinations must be based upon facts, not conjecture.
18 Moreover, as Chairman Mayes observed during the evidentiary hearings in the instant
19 proceeding, the Commission has ongoing authority under A.R.S. § 40-252 to reconsider the
20 jurisdictional question at a later date if future events suggest that SolarCity's activities are such
21 as to require regulation of it as a public service corporation.²²

22 **C. The "Benefits" of Regulation Asserted By The Commission's Staff Are Illusory, and**
23 **Are Not A Lawful Substitute For That Demonstration of A Need For Regulation**
24 **Which Is Required.**

25 At the time he testified in the instant proceeding, Commission Staff witness Irvine orally
26 supplemented his pre-filed prepared Direct Testimony by describing what he perceived would be
27 "benefits" resulting from regulation. In doing so, he made a conscious effort to distinguish these
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²² Tr. 1029, l. 21-Tr. 1030, l. 3.

1 asserted “benefits” from that “need” which is required to be demonstrated, in order to warrant
2 regulation of a person or entity as a public service corporation under Arizona law.²³ In that
3 regard, it must be noted from the outset that such “benefits” do not and cannot represent a lawful
4 substitute for that demonstration of a “need” for regulation required by Arizona case law.

5 The first asserted “benefit” pertained to assuring “a fair and level playing field among the
6 competitors” in the solar services marketplace.²⁴ Ironically, that is not the purpose of the
7 “regulated monopoly” public policy, as employed in Arizona. To the contrary, the “regulated
8 monopoly” model presupposes the existence of a monopoly to the exclusion of any active or
9 meaningful competition. The evidentiary record in the instant proceeding indicates that that
10 concept does not accurately reflect the actual market position of SolarCity in Arizona, nor the
11 vigorous solar services market in which it competes.

12 The second alleged benefit of regulation was predicated upon “ratemaking considerations
13 that relate to the incumbent provider.”²⁵ Specifically, the concerns of the Commission’s Staff in
14 question were the prospects of possible “stranded costs” and “cherry picking.” However, as Mr.
15 Irvine conceded during cross-examination by counsel for WRA, the prospect of possible
16 “stranded costs” is also associated with the Demand Side Management and Energy Efficiency
17 policies that the Commission has adopted for electric utilities.²⁶ In addition, Mr. Irvine
18 acknowledged elsewhere during his cross-examination that the prospect of possible “stranded
19 costs” and “cherry picking” exists any time a customer of an incumbent electric utility either
20 purchases or leases distributed solar generation facilities.²⁷ Moreover, as Chairman Mayes
21 observed during Mr. Irvine’s cross-examination, the Commission Staff’s concerns in this regard
22 with respect to at least “stranded costs” can be addressed by the Commission in a future rate
23 case; and, Mr. Irvine agreed.²⁸

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25 ²³ Tr. 976, l. 9-20; and, Tr. 1043, l. 21-Tr. 1044, l. 8.

26 ²⁴ Tr. 976, l. 21-23. [emphasis added]

27 ²⁵ Tr. 976, l. 23-25.

28 ²⁶ Tr. 1023, l. 20-Tr. 1025, l. 4.

²⁷ Tr. 1084, l. 18-Tr. 1085, l. 22.

²⁸ Tr. 1025, l. 5-20. In that regard, the Recommended Decision of a New Mexico Public Regulation Commission Hearing Examiner to which Chairman Mayes made reference during her questioning of Mr. Irvine (on this subject) is the same one as the Recommended Decision discussed below in Section IV(A) of this Initial Post-Hearing Brief.

1 The third “benefit” of regulation which Mr. Irvine postulated pertained to “safety
2 considerations” related to the provision of distributed generation services. However, several
3 parties demonstrated through cross-examination that most, if not all, of such “safety
4 considerations” could be adequately addressed through a combination of (i) the Commission’s
5 Interconnection and Net Metering regulations; and, (ii) regulations of the Arizona Registrar of
6 Contractors (“ROC”) governing the activities of installers of distributed generation solar
7 facilities.

8 The fourth alleged “benefit” pertained to asserted “consumer services” benefits.²⁹ In that
9 regard, Mr. Irvine expressed the opinion that regulation would provide a “third-party forum” for
10 improving the flow of information between a customer and a solar service provider, and possibly
11 assisting in the resolution of a customer complaint. However, he provided no probative evidence
12 as to the existence of any such customer complaints or information exchange problems. Nor did
13 he demonstrate that the Commission and its Staff were uniquely qualified to evaluate and resolve
14 such complaints. In that regard, it is quite conceivable that the Arizona ROC is best suited for
15 that purpose under a regulatory scheme which already exists.

16 Thus, for the reasons discussed above, SunPower submits that the “benefits” of regulation
17 alleged by the Commission’s Staff in this instance are (i) illusory and (ii) not a lawful substitute
18 for that demonstration of “need” which is required under Arizona law in order to warrant
19 regulating a person or entity as a public service corporation.

20 IV.

21 A REVIEW OF OTHER REGULATORY 22 JURISDICTIONAL DETERMINATIONS

23 Late-filed Exhibit SunPower-3 contains copies of decisions from several other regulatory
24 jurisdictions which have addressed regulatory status questions similar to the one pending before
25 the Commission in the instant proceeding. These decisions were referred to by SunPower
26 witness Kevin T. Fox during his testimony on October 15, 2009, as examples of where other
27 state utility regulatory commissions have declined to assert jurisdiction over an entity or entities
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²⁹ Tr. 979, l. 14-Tr. 980, l. 3.

1 similar to SolarCity and its activities; and, Late-filed Exhibit SunPower-3 was compiled and
2 submitted by SunPower in response to a specific request from Chairman Mayes during the
3 evidentiary hearings.

4 In the following subsections of this Section IV, SunPower will provide a discussion of
5 each of these decisions, with appropriate reference to the regulatory jurisdiction involved.³⁰ As
6 will be noted in the discussion, several of these decisions included consideration of public policy
7 considerations similar to the Serv-Yu decision-making factors; and, in varying degrees, such
8 consideration resulted in determinations that the solar services provider entity or entities in
9 question should not be subject to regulation.

10 **A. New Mexico Public Regulation Commission (“NMPRC”)**

11 On October 23, 2009 the Hearing Examiner in a proceeding before the NMPRC (In The
12 Matter of a Declaratory Order Regarding Third-Party Arrangements For Renewable Energy
13 Generation) issued a Recommended Decision (“Decision”) for consideration by the NMPRC. It
14 is SunPower’s understanding that the NMPRC has not as yet acted upon the Decision. As noted
15 in the Statement of the Case section of the Decision, the NMPRC

16 “. . .initiated this case to determine the legality of arrangements in
17 which a developer installs, owns and operates a renewable energy
18 system on a customer’s premises and the customer or multiple
19 customers pay the developer a per kilowatt hour (‘kwh’) charge for
the energy generated by the system they use.”

20 For the purpose of brevity, the Decision characterizes these arrangements as “third-party
21 ownership purchased power agreements” or “PPAs.” In that regard, the PPAs were described in
22 the Decision as having the following characteristics:

23 “[D]evelopers own and usually also operate distributed generation
24 (“DG”) systems at their host’s premises. Both parties enter the
25 agreement completely voluntarily. The host, who in a typical
26 scenario is also a customer of a public utility, uses the energy
27 produced by the renewable energy system and pays the developer
for the energy produced by the system, shifting the technical and
financial risk to a willing investor-developer. The developer is
able to use the tax benefits associated with system ownership and

28 ³⁰ In that regard, excerpted text from a given decision will include an appropriate page reference; and, the entire text
of the decisions contained in Late-filed Exhibit SunPower-3 is incorporated herein by reference.

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1 is also paid by the host for electricity produced by the system at a
2 rate that takes into account the remaining incentives and is less
3 than or equal to what that host is paying for energy from the utility.
4 In some cases, after a certain number of years, (the amount of time
5 it takes the investor to receive its required return on its
6 investment), system ownership is transferred at fair market value to
7 the customer/energy user.”

8 The New Mexico proceeding was of a declaratory order nature, and there was no
9 evidentiary hearing. Rather, the “record” consisted of briefs and comments filed by the parties,
10 which included all New Mexico electric public utilities and rural electric cooperatives, as well as
11 representatives of the renewable energy industry and environmental interest groups. The central
12 legal issue involved was whether a Developer under a PPA is a public utility under New Mexico
13 law.

14 As the Decision notes, under the New Mexico Public Utility Act (“PUA”), a public utility
15 is

16 “. . . every person who owns, operates, leases or controls any plant,
17 property or facility ‘for the generation, transmission or distribution,
18 sale or furnishing to or for the public of electricity for light, heat or
19 power or other uses’”;

20 and, against this statutory background,

21 “The contested issue is whether a developer provides these
22 services ‘to or for the public.’”

23 In addressing and resolving this issue, the Decision considered eight (8) different
24 scenarios, and arrived at the following findings of fact and conclusions of law as to the following
25 scenarios which are analogous to scenarios addressed during the evidentiary hearings in the
26 instant proceeding:

27 “3. A developer who owns a distributed generation system at a
28 host’s premises and who sells electricity generated by the
distributed generation system to the host for only the host’s use is
not a public utility.

“4. A developer who owns multiple distributed generation systems,
serving multiple hosts, but in each instance selling electricity from
a given system to only one host, is not a public utility.

“5. A developer who (i) owns multiple distributed generation
systems on a single host’s property; (ii) does not transport
electricity generated from the systems from one location to
another; and (iii) sells all of the electricity generated from the

1 system to the single host, is not a public utility.” [Decision at page
2 27] [emphasis added]

3 In addition, during the course of its analysis, the Decision considered and discussed certain
4 public policy considerations under New Mexico law which are analogous to several of the Serv-
5 Yu factors. These included the following:

- 6 • Whether Developers provide essential public services themselves, as contrasted with
7 providing services related to essential public services [Serv-Yu Factor #4]
- 8 • Whether hosts of necessity depend on Developers for electric service [Serv-Yu Factor #4]
- 9 • Whether exclusion of Developers from the definition of a “public utility” would result in
10 unnecessary duplication of facilities, and economic waste [Serv-Yu Factor #8]
- 11 • Whether Developers are obligated to accept requests for service from any member of the
12 public, or whether they may be selective [Serv-Yu Factor #s 6 and 7]
- 13 • Whether Developers seek to replace the incumbent electric utility [Serv-Yu Factor #8]
- 14 • Whether Developers can be financially viable without enjoying a monopoly status [Serv-
15 Yu Factor #5]

16 Finally, the Decision rejects several other “policy” arguments advanced by parties advocating the
17 imposition of regulation on Developers, which are similar to those discussed above in Section
18 III(B)(2) of this Initial Post-Hearing Brief.

19 **B. Public Utilities Commission of Nevada (“PUC”)**

20 On November 20, 2008, a majority of the PUC adopted a Report On Third Party
21 Ownership of Net Metering Systems in Nevada (“Report”)³¹ in which the Presiding Officer
22 assigned to the matter had recommended; inter alia, that

23 “a. The Commission find that third-party renewable energy
24 systems are not public utilities;”

25 ³¹ Footnote 2 in the Report defines “third party ownership” as follows:

26 “The term ‘third party ownership’ refers to a financing mechanism whereby a
27 developer installs, owns and operates a renewable energy system on a customer-
28 generator’s premises. The developer lowers the cost of the system by taking
advantage of federal tax credits and state incentives. In turn the customer-
generator benefits by avoiding the high up-front system installation costs.
Regardless of the financing mechanism, the customer-generator remains
interconnected with the utility.”

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“d. The Commission find that the contractual relationship between a third party owner and a customer-generator is beyond the jurisdiction of the Commission.”

In that regard, the Commissioner who dissented from the majority vote expressly indicated in her dissenting opinion that she did not disagree with either of these recommendations, which were adopted by the majority of the Commissioners. Rather, her dissent was occasioned by the failure of the Report to address other issues which had been assigned to the Presiding Officer who prepared the Report.

The legal analysis set forth in the Report was heavily influenced by Nevada’s statutes which pertain to public utilities and net metering arrangements, respectively. In addition, the Presiding Officer relied upon an opinion of the Nevada Attorney General in which

“The Attorney General noted that the customers of a public utility are always described as plural in the statute, and stated that the nature of a public utility is to regularly supply the public with a commodity or service which is of public consequence or need,” [Report at page 4] [emphasis added]

as contrasted with a net metering system where service provided by the on-site generation is intermittent. In that regard, the Report further notes that

“A public utility exists to serve the public, a public utility upon whom every customer-generator continues to depend. Indeed, the provider of a net metering system is prevented from serving the public by the current net metering cumulative capacity cap of 1 percent of the public utility’s peak capacity in NRS 704.733. [Report at page 4]

The Report also discussed at length the incongruous public policy results which would occur if the developer participant in third-party ownership arrangements was regulated as a public utility, given the underlying purposes of the net metering statutes and the intended growth of renewable energy utilization.³²

³² In that regard, SunPower believes that many of these public policy objectives are similar to those accompanying the Commission’s adoption of the distributed generation Interconnection Document in Decision No. 69674, which was issued on June 28, 2007 in Docket No. E-00000A-99-0431.

1 As a part of its analysis, the Report also considered the regulatory status of third-party
2 financing in other jurisdictions; and, it noted that “third party owners are not treated as public
3 utilities” in California, New Jersey, Colorado, New York, Hawaii, Connecticut, Massachusetts
4 and Oregon. [Report at page 9]

5 **C. Colorado Public Utilities Commission (“CPUC”)**

6 In 2007, the CPUC had occasion to determine whether third-party providers of solar
7 services are electric utilities under Colorado law. The inquiry arose in connection with the
8 CPUC’s consideration of an Application by Public Service Company of Colorado (“Public
9 Service”) for approval of Public Service’s 2007 Renewable Energy Standard Compliance Plan.
10 In its Application, Public Service had proposed use of a Third-Party Developer Model
11 (“Developer Model”) in connection with satisfaction of certain of its Renewable Energy
12 Standard (“RES”) obligation under Colorado law. In that regard, the Developer Model was
13 described as follows:

14 “Under the Developer Model, the third-party developer owns and
15 maintains the installations on customer sites, the developer enters into
16 the SO-REC [solar on-site renewable energy credit] contract with
17 Public Service to receive the monthly REC [renewable energy credit]
18 payment directly, the developer then contracts with the end-use
19 customer for the receipt of the generation, the developer enters into
20 the interconnection agreement with Public Service, the end-use
21 customer receives the rebate, and the end-use customer is eligible for
22 net metering and receives the financial benefit of excess generation
23 being returned to the grid. As part of the contract with the developer,
24 Public Service requires the developer to acknowledge that Public
25 Service is a regulated utility and has the exclusive right to sell electric
26 energy within its Commission certified service territory and that
27 Public Service is waiving this certificated right only to the extent
28 necessary to facilitate the installation of On-Site Solar Systems to
comply with the RES.” [Order at pages 26-27]

24 After determining that the Developer Model “best effectuates” the intent of the Colorado
25 Legislature to develop and utilize renewable energy resources to the maximum extent
26 practicable, the CPUC proceeded to then address whether

27 “. . . such a contract structure is permissible under state utility
28 laws.” [Order at page 28]

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1 In the course of doing so, the CPUC noted the “tension” between those Colorado statutes which
2 reflected the “regulated monopoly” concept, and those which favored widespread utilization of
3 the states renewable energy resources. In its final analysis, the CPUC concluded as follows:
4

5 “We find the tension between the competing statutes is further
6 relieved through the role of the third party developer. We agree with
7 the OCC [Office of Consumer Counsel] that the developers are not
8 public utilities as contemplated under applicable statutes. The energy
9 generated by the solar facility will be used only by the customer or
10 exported into Public Service’s system should the customer’s
11 generated energy exceed usage. The third party developer will not sell
12 any excess generation from the solar facility to any other entity. There
13 is no opportunity for a developer to ‘cherry pick’ customers or impose
14 additional burdens on residential and commercial customers of Public
15 Service. Consequently, we find that third party developers do not
16 meet the statutory definition of a public utility. They are not required
17 to hold themselves out to serve all who request service within a
18 geographic area. The third party developer merely provides a service
19 to those with whom it contracts. As such, the formalities required
20 pursuant to § 40-5-105(1), C.R.S., for the assignment of a CPCN are
21 not necessary in these Developer Model contracts.” [Order at page
22 32] [emphasis added]³³

23 * * *

24 “While we find that third party developers are not utilities under the
25 statutory definition, and therefore no application by Public Service is
26 necessary to assign portions of its CPCN [certificate of public
27 convenience], we do find it prudent to generally monitor those
28 contracts. Therefore, we require Public Service to file annually, a list
of all contracts entered into through its Developer Model. The filing
shall include the name, address, telephone number, and e-mail address
of the third party developer, along with the name and address of the
underlying customers. The Company [i.e. Public Service] need not
file the actual contracts.” [Order at page 33]

Subsequently, on September 2, 2009, the CPUC adopted a number of amendments to its
RES rules to reflect the results of legislative enactments which had occurred during 2008 and
2009 in connection with the subject of renewable energy. However, none of the RES rules
revisions adopted by the CPUC, nor the legislative enactments which preceded them, altered the

³³ As may be noted from this excerpt, several of the factors considered by the CPUC in arriving at this conclusion are analogous to several of the Serv-Yu decision-making factors, when examined from a policy perspective.

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CPUC's 2007 determination that third-party developers are not public utilities under Colorado law subject to regulations by the CPUC.

D. Massachusetts Department of Public Utilities ("Department")

On June 26, 2009, the Department entered an order adopting rules and regulations designed to implement the net metering provision of An Act Relative To Green Communities, which was enacted in Massachusetts in 2008. As indicated in the Order, the purpose of the same was

“. . .to provide clarity and guidance to [electric] Distribution companies, [host] Customers, renewable energy developers, and other stakeholders regarding the scope of Net Metering available to § 78 of the Green Communities Act.” [Order at page 2]

The Order does not appear to expressly address the question of whether or not host customers, renewable energy developers and third-party financing or ownership entities are subject to regulation. However, the following excerpts from the Order suggest that, if expressly posed, that question would be answered in the negative.

“. . .the Department recognizes that third-party arrangements have become increasingly important to the deployment of renewable energy resources. . .” [Order at page 10]

* * *

“There is universal agreement among the commenters that addressed this topic that the regulations should unambiguously allow third-party ownership or financing of Net Metering facilities.” [Order at page 11]

* * *

“To ensure that our final regulations do not impede the development of third-party ownership or financing arrangements, the Department adopts a new section in the regulations clarifying that third-party ownership or financing of Net Metering facilities is permissible. . .” [Order at page 12]

* * *

“. . .we recognize and share the concerns voiced by the commenters that it would be inconsistent with the goals of the Green Communities Act to subject those who receive Net Metering

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1 services to regulation as an electric company, generation company,
2 aggregator, supplier, energy marketer or energy broker solely
because of their eligibility to receive Net Metering services.”

3 **E. Hawaii Public Utilities Commission (“HPUC”)**

4 On July 17, 2002, Powerlight Corporation (“Petitioner”) filed a Petition with the HPUC
5 requesting a declaratory ruling that Petitioner would not be a public utility under Hawaii’s
6 statutory law if Petitioner (i) constructed a photovoltaic renewable energy facility on a
7 customer’s site, and (ii) sold all electricity generated from that facility to the host customer.
8 Hawaii Electric Company, Inc., Hawaii Electric Light Company, Inc. and Maui Electric
9 Company, Limited requested leave to intervene. However, the HPUC ultimately dismissed their
10 joint request as being “mooted” by reason of certain conditions contained in the Decision and
11 Order (“D&O”) which the HPUC issued on November 13, 2009.

12 The following excerpts from the D&O provide a statutory and case law context for the
13 analysis undertaken by the HPUC incident to reaching a decision on Petitioner’s request:

14 “HRS § 269-1 defines ‘public utility’ in relevant part as follows:

15 ‘Public Utility’ includes every person who may
16 own, control, operate, or manage as owner, . . . any
17 plant or equipment, or any part thereof, directly or
indirectly for public use, . . . for the production,
18 conveyance, transmission, delivery, or furnishing of
light, power, heat, cold, water, gas, or oil[.]

19 HRS § 269-1 (emphasis added).”

20 * * *

21
22 “In In re Wind Power Pacific Investors-III (‘Wind Power’), 67
23 Haw. 432, 345 (1984), the Hawaii Supreme Court (‘Court’) notes
24 that ‘[t]he term “public utility” implies a public use.’ The Court
then applied the following test to determine whether an entity is a
public utility:

25 [W]hether the operator of a given business or
26 enterprise is a public utility depends on whether or
27 not the service rendered by it is of a public character
and of public consequence and concern, which is a
28 question necessarily dependent on the facts of the
particular case, and the owner or person in control

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1 of property becomes a public utility only when and
2 to the extent that his business and property are
3 devoted to a public use. The test is, therefore,
4 whether or not such person holds himself out,
5 expressly or impliedly, as engaged in the business
6 of supplying his product or service to the public, as
7 a class, or to any limited portion of it, as
8 contradistinguished from holding himself out as
9 serving or ready to serve only particular individuals.

10 Wind Power, 67 Haw. At 345 (quoting 73 B Corpus Juris
11 Secundum, Public Utilities § 3) (emphasis added)."

12 Significant facts which distinguish the Powerlight situation from the SolarCity situation
13 which is the subject of the instant proceeding are as follows:

- 14 1) Petitioner's request contemplated the provision of on-site electric service to a single
15 customer; and,
- 16 2) Petitioner's contemplated service arrangement with that customer did not include a net
17 metering arrangement nor an interconnection arrangement with the local electric utility,
18 which served that customer.

19 Thus, the determination of the HPUC that Petitioner was not a "public utility" under Hawaiian
20 law is of limited applicability to the circumstances of the instant proceeding; and, as the HPUC
21 stated in the D&O, its declaratory ruling would be in effect

22 ". . . as long as the facts presented and representations made to the
23 Commission in this docket remain true and accurate." [D&O at
24 page 8]

25 In that regard, the HPUC was implicitly reserving for itself the jurisdictional right to
26 revisit the situation at some future date, in the event that the passage of time and changed
27 circumstances indicated a need to do so. As Chairman Mayes observed during the evidentiary
28 hearings in the instant proceeding, the Commission has a similar power to do so under A.R.S. §
40-252, in the event that the Commission should conclude within the context of the instant
proceeding that regulation of SolarCity as a public service corporation under Arizona law is
neither required nor appropriate.

1 **F. Oregon Public Utility Commission ("OPUC")**

2 An exception to the preceding trend of state regulatory jurisdictions concluding that third
3 party developers or solar services providers are not public utilities, and thus not subject to
4 regulation by the commission in question, is a 2008 order issued by the OPUC in a declaratory
5 ruling proceeding. The proceeding was occasioned by a Petition filed by Honeywell
6 International, Inc., Honeywell Global Finance, LLC and Pacific Corp, dba Pacific Power. A
7 number of questions were posed for resolution by the OPUC, based upon an assumed set of facts
8 developed by the several parties to the proceeding, with the assistance of the OPUC's Chief
9 Administrative Law Judge.

10 As summarized by the OPUC, a third-party financing structure used by Honeywell was
11 described as follows:

12 "Under this structure, described in more detail in the Assumed
13 Facts, an investor pays the up-front cost of solar generating
14 facilities, retains ownership of the facilities, and benefits from
15 multiple subsidies available under state and federal law. The
16 investor sells electricity generated from the facilities to its
17 customer, who is the owner or occupant of the premises on which
18 the facilities are located. The customer, in turn, enters into a net-
19 metering agreement with an electric utility, using the electricity
20 from the solar facilities to offset some of the load it would
21 otherwise purchase from the electric utility. This arrangement
22 makes the development of solar power affordable for both the
23 investor and the customer. The structure also makes solar power
24 more affordable for certain entities that cannot themselves take
25 advantage of tax credits, such as governmental and non-profit
26 entities." [Order at page 2]

27 Against this background, one of the key issues presented to the OPUC for resolution was

28 ". . . whether the third-party investors sale of electricity to the
customer subjects the investor to regulation by the Commission."
[Order at page 2]

In addressing and resolving this particular issue, the OPUC concentrated its analysis on
the following statutory provisions:

"ORS 757.005(1) states, in relevant part, as follows:

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(1)(a) As used in this chapter, except as provided in paragraph (b) of this subsection, “public utility” means:

(A) Any corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly to or for the public, whether or not such plant or equipment or part thereof is wholly within any town or city.

[. . .]

(b) As used in this chapter, “*public utility*” does not include:

[. . .]

(C) Any corporation, company, individual or association of individuals providing heat, light or power:

[. . .]

(iii) *From solar or wind resources* to any number of customers. (Emphasis added.) [Order at pages 14-15]

Under the Assumed Facts, and within the context of this statutory language, the OPUC concluded that Honeywell’s ownership and operation of a solar photovoltaic electric generating facility did not subject it to regulation as a “public utility” under Oregon law. [Order at pages 14-15] Conversely, at a later part of the Order, the OPUC opined (by way of dicta) as follows:

“ . . . if Honeywell sells electricity from a facility that uses a net-metering eligible fuel other than solar or wind, it would presumably be a “public utility” subject to the Commission’s regulation.

ORS 757.005(1)(b)(C)(iii) explicitly exempts from the definition of “public utility” any company providing “power . . . [f]rom solar or wind resources,” but provides this exemption for no other fuel sources.” [Order at page 21]

However, as noted above, this opinion is based solely upon consideration of statutory language.³⁴ Whereas, as discussed above in Section II(A) of this Initial Post-Hearing Brief, for

³⁴ In addition, and by way of distinction on this point, it should be noted that in the Oregon declaratory order proceeding, the parties who addressed the issue agreed with the above-quoted dictum of the OPUC. Whereas, in the instant proceeding, there is strong disagreement among those parties who addressed the issue of whether SolarCity is “furnishing” electricity within the literal textual definition of a public service corporation, as set forth in Article XV,

1 purposes of analysis and resolution of a similar inquiry under Arizona law, consideration of more
2 than the constitutional or statutory definition is required in order to achieve a dispositive
3 analysis. As the Arizona Court of Appeals stated in the Southwest Gas decision,

4 “ . . . meeting the literal textual definition is insufficient”;

5 and, as the Arizona Supreme Court observed in the Petrolane case, the Serv-Yu factors are
6 available as “guides for analysis” in connection with that second level of inquiry which is
7 required. In this regard, it should be noted that the OPUC Order is based upon the Assumed
8 Facts and an interpretation of Oregon statutes, and it does not employ a Serv-Yu type of
9 supplemental analysis.

10 **G. Summary Observation**

11 Each of the regulatory commission decisions discussed above was issued within the
12 statutory and case law circumstances of the jurisdiction in question. However, what may be
13 discerned from an overview perspective is an apparent general inclination to not regulate solar
14 services providers and third-party financing entities when the surrounding circumstances allow
15 for a determination of that nature.

16 **V.**

17 **POTENTIAL NEGATIVE RAMIFICATIONS RESULTING FROM**
18 **REGULATION OF A SOLAR SERVICES PROVIDER**

19 While not directly related to nor dispositive of whether or not a demonstrated “need”
20 exists to regulate SolarCity as a public service corporation under Arizona law, SunPower
21 believed that potential negative ramifications which could result from such a decision should be
22 brought to the attention of the Commission. Accordingly, SunPower provided testimony from
23 H.M. Irvin III and Kevin Fox during the evidentiary hearings with regard to the essential role
24 that third-party financing entities play in the development and deployment of distributed solar
25 generation systems.

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Section 2 of the Arizona Constitution. More specifically, SolarCity, RUCO and WRA believe that SolarCity is not
“furnishing” electricity to the host sites; whereas, the Commission’s Staff has reached an opposite conclusion.

1 The following excerpts of counsel for RUCO's cross-examination of Mr. Irvin identify
2 the risk of loss of access to such third-party financing in Arizona, in the event that the
3 Commission should decide in this proceeding to regulate SolarCity as a public service
4 corporation:
5

6 "Q. Well, you are very familiar or have an intricate knowledge of
7 what goes on with the financiers of these solar projects. Would that
8 be fair to say?

9 A. My corner of the financial world has to do with those entities
10 that are willing to extend project capital to solar projects, correct.

11 Q. So you probably would be the perfect person to answer this
12 question, Mr. Irvin. And that is: Are these financiers really that
13 worried about regulation in Arizona?

14 A. Yes.

15 Q. Can you elaborate on that? I mean I am talking about even a
16 light form of regulation. Why would they be so concerned?

17 A. Two answers to that. I don't understand light regulation, nor
18 would the investors. It is an undefined term at this point. And I
19 have a very healthy respect for the difference between actual risk,
20 whatever that is, and perceived risk. And it is the case that capital
21 flows freely in this country and it flows relatively freely for terms
22 of investment in the tax credit world and in the solar geography. If
23 Arizona proves to be a contentious or unwieldy regulatory
24 environment for investment of projects of this type, it just won't
25 happen. They will take that capacity, take that investment money
26 and go elsewhere.

27 Q. So you really believe that any form of regulation would actually
28 hinder development of the solar industry in this state?

A. I have a very healthy distrust of absolutes. So when your
question includes any, I can't make a meaningful response to that.

Q. Okay. Well, I don't --

A. It is possible.

Q. -- want to put it in terms of any. I think we are all trying to find
out the same thing here.

A. Yes.

Q. That is, it is likely to hinder, is there a chance that it will
actually hinder? What we want to do is really facilitate solar
development here, not hinder it. So...

A. It is my view it would hinder development in this state.

Q. And is it just because of the -- is the basis for your opinion just
what you had testified earlier to about the financiers or is there
other reasons?

A. We are still an industry for a couple reasons that depends on
investment from third parties. One, they have the tax capacity, and
I explained that. The second is that a lot of participants in this

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business, SunPower included, have a different business model. We don't intend to own, have alternate uses for our capital. We want to build plants that produce cells and panels. And so we are reliant on third parties [to provide financing]. And third parties will go to those situations with their [financial] capacity where it is most fruitful, least onerous." [Tr. 399, l. 15-Tr. 401, l. 20] [emphasis added]

Similarly, during oral supplemental Direct Testimony, Mr. Fox testified upon the potential impact of regulation upon access to third-party distributed solar generation financing in Arizona as follows:

"Q. Would you now move to discuss how regulation of third-party financing entities and PPAs or SSAs would adversely affect the use of those types of documents in Arizona and why.
A. I agree with witness Irvin who just testified that this really is about risk and uncertainty. And to the extent, you know, a cloud now hangs over this issue in this state, as Mr. Irvin testified, he has not been able to procure financing for projects because of the current uncertainty. If the Commission were to decide that it was going to regulate even in a light capacity, I think there would still be a lot of uncertainty as to just exactly what that means and what the requirements would be for a provider of solar services in this state in complying with Commission regulation.
I also think that it is very important, and again this goes back to a point that Mr. Irvin just testified to, that one of the primary concerns of a financing entity is the robustness of the stream of revenue that they can expect to realize from a project in order to meet the rate of return that they expect to get in return for making that investment. To the extent they perceive that there is uncertainty or risk associated with their ability to realize that income stream, it, I believe it would turn away many potential investors, as Mr. Irvin testified to in the case with the financing for the [City of] Tucson project. For those who may have an appetite for that risk, I believe that it would be priced into the financing. There is a report that was produced by the Lawrence Berkeley National Laboratory. I quoted from it and cited to it in my testimony. And it had a very interesting statistic. It talked about what the impact would be of a 2 percent increase in the expected return on investment of a tax equity investor and, in other words, what is the cost of capital that the investor is going to need to get in order to make an investment in something that's perceived as perhaps slightly more risky. And this statistic in the Lawrence Berkeley Lab report suggested that a 2 percent increase, or 200 basis point increase, in that lending rate, in that financing rate, would require the SSA to generate 7 cents per kilowatt hour in revenue in order to be able to finance that project.

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So I think that's a direct example of the relationship between uncertainty and risk and what financial impact that's going to have on providers of this service.

Q. And it sounds as though you are saying that, at best, regulation lite would be a lessening of that risk of uncertainty slightly, but a matter of degree, and that risk would clearly still be there in the mind of the prospective investor, is that correct?

A. I agree with that. I believe that -- I do agree with Mr. Irvin. I am not sure I really understand what regulation lite means. In my mind, to an extent, it was like the clean coal initiative or the blue skies initiative. It is wording that might make someone feel better, but when you start to look more deeply into the issue, people are going to want to assess what the risk is. And as long as there is uncertainty, I believe there is going to be perceived risk. And I do agree with Mr. Irvin, that that would likely cause those who have tax equity to invest to look to markets where there is lower risk."

[Tr. 448, l. 21-Tr. 451, l. 10] [emphasis added]

SunPower believes the foregoing observations of Messrs. Irvin and Fox clearly set forth the risk of loss of access to third-party financing for distributed solar generation projects in Arizona which SolarCity could face, in the event of a decision by the Commission in the instant proceeding that SolarCity should be regulated as a public service corporation.³⁵

VI. CONCLUSION

Based upon the discussion set forth in Sections II through V above in this Initial Post-Hearing Brief, SunPower believes that the Commission can and should conclude the following:

1. Arizona case law interpreting and applying Article XV, Section 2 of the Arizona Constitution, together with Arizona's public policy generally favoring competition, require that there must be a demonstrated "need" in order to warrant regulation of a person or entity as a public service corporation;

³⁵ In that regard, in connection with counsel for RUCO's cross-examination of Commission Staff witness Irvine's concept of "light regulation" and its potential impact on the willingness of third-party financing entities to invest in distributed solar generation in Arizona prospectively, the following exchange between Mr. Pozefsky and Mr. Irvine occurred:

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

A. We did not contact anyone to explore that." [Tr. 1013, l. 1-4]

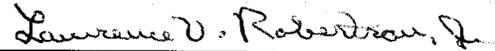
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2. The evidentiary record in the instant proceeding does not contain a demonstration of the requisite “need” to regulate SolarCity as a public service corporation under Arizona law; and,
3. As a consequence, that declaratory relief requested in SolarCity’s July 2, 2009 Application as to its jurisdictional status should be granted.

Dated this 14th day of December 2009.

Respectfully submitted,



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The original and thirteen (13) copies of the foregoing Initial Post-Hearing Brief will be filed on the 15th day of December 2009 with:

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A copy of the foregoing Initial Post-Hearing Brief will be emailed or mailed that same date to:

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