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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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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

**INITIAL POST-HEARING
BRIEF OF
TUCSON ELECTRIC POWER
COMPANY
AND UNS ELECTRIC, INC.**

Tucson Electric Power Company and UNS Electric, Inc., collectively referred to as "the Companies", submits their Initial Post-hearing Brief as follows:

I. Introduction.

The application of SolarCity Corporation ("SolarCity") presents a straightforward legal question of whether SolarCity is a public service corporation and, therefore subject to regulation by the Arizona Corporation Commission ("Commission"). The outcome is dictated by the Arizona Constitution and legal precedent in Arizona as applied to the facts.

There appears to be little material factual dispute about the physical nature of the distributed photovoltaic solar generation systems that SolarCity owns and operates, how those systems are operated, how the electricity from the systems is measured, how the end-user customers are billed, what the terms of service between SolarCity and its customers are and how the SolarCity system is connected to the public grid. There also seems to be minimal dispute about the incentives that SolarCity and its third party investors receive as part of SolarCity's ownership and operation of the systems.

The legal precedent and guidance in Arizona sets forth a relatively clear analytical path for determination of the legal status of SolarCity. That law dictates that SolarCity be deemed a public

1 service corporation subject to Commission jurisdiction and regulatory oversight. In the near
2 future and in the long run, as providers such a SolarCity expand in Arizona, an appropriate level of
3 Commission oversight is in the public interest and the interests of the distributed solar generation
4 industry because it ensures proper levels of service quality, consumer protection, dispute
5 resolution and coordination of important Commission policies.

6 **II. Impact of the Decision.**

7 The impact of the ruling in this docket is an important consideration in the Commission's
8 analysis of this case. This adjudication will impact more than the determination of whether
9 SolarCity is a public service corporation as a result of its provision of electricity to schools,
10 governments or non-profits pursuant to the specific Solar Service Agreements ("SSA") submitted
11 in this docket. First, the evidence is clear that SolarCity provides distributed solar electricity to a
12 myriad of customers, including residential customers, through an SSA relationship similar to the
13 SSAs submitted in this docket. Second, two of the intervenors specifically have requested that the
14 ruling be broad enough to cover all entities that provide distributed electricity in a manner similar
15 to SolarCity. Third, letters submitted in this docket indicate that the distributed solar generation
16 industry is interested in this matter.

17 As a result, this is much more than a narrow, single-company adjudication. As
18 demonstrated herein, the facts and the law lead to only one conclusion: SolarCity is a public
19 service corporation. By making this determination now, the Commission will provide clear
20 certainty to SolarCity and the distributed solar generation industry that they will be subject to
21 Commission jurisdiction. This will allow all interested parties the opportunity to work on
22 appropriate rules and standards that will protect Arizona electric customers. Indeed, the customers
23 deserve the same protections extended to them by the Commission for other utilities (including
24 electric) services.

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1 **III. Factual Background.**

2 SolarCity owns and operates distributed solar generation facilities that are located on their
3 customers' premises.¹ The customer does not pay any upfront costs for the acquisition, installation
4 and maintenance of the solar facilities.² The solar facilities are connected into the electrical panel
5 of the customer.³ Between the solar panels and the electrical panel, SolarCity installs (i) an
6 inverter to convert the electricity from the panels form DC to AC power and (ii) a meter to read
7 the amount of AC electricity being provided to the customer from the solar panels.⁴ SolarCity
8 owns all facilities up to the customer's electrical panel. SolarCity operates the solar facility and is
9 responsible for reading the meter.⁵ The electricity from the solar panel system reduces the
10 electricity that the customer needs to purchase from its incumbent utility. However, the customer
11 must remain connected to the utility's electric grid.⁶

12 SolarCity bills its customers for the electricity that is produced by the solar facility.⁷ Under
13 its SSA arrangement, the bill is based on the actual production of the facility and the customer is
14 billed on a per kWh basis.⁸ That is the only charge to the customer. SolarCity covers all operation
15 and maintenance costs.⁹

16 SolarCity offers SSA-type arrangements and solar lease arrangements to both residential
17 and commercial customers.¹⁰ The only difference between these arrangements is the payment
18 structure.¹¹ The SSA is a variable fee and the lease is a fixed monthly fee.¹² The customer has no
19 additional responsibilities with respect to the solar facilities under the solar lease arrangement than
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22 ¹ Ex. A-4 (Rive) at para. 9.

23 ² Id.

24 ³ Ex. A-4 (Tarbell), Ex. A; Tr. (Tarbell) at 358-60.

25 ⁴ Id.

26 ⁵ Tr. (Tarbell) at 359-62.

27 ⁶ Ex. A-4 (Rive) at para. 9.

⁷ Ex. TEP-2; Tr.(Rive) at 198-99.

⁸ Id.; See Ex. A-1.

⁹ Tr. (Tarbell) at 360.

¹⁰ Tr. (Rive) at 196; Exs. TEP-2, TEP-3.

¹¹ Tr. (Rive) at 196-97.

¹² Id.

1 it does with the SSA arrangement.¹³

2 **IV. Legal Framework.**

3 Whether or not a company is a public service corporation is a legal issue. The Arizona
4 courts have recently addressed the appropriate approach for determining whether a company is a
5 public service corporation subject to ACC regulation. In *Southwest Transmission Cooperative,*
6 *Inc. v. Arizona Corporation Commission*, 213 Ariz. 427, 430, 142 P.3d. 1240, 1243 (2006)
7 (“*SWTC*”), the Arizona Court of Appeals summarized the case law on the issue and confirmed the
8 use of a two step approach for the analysis: First, the courts consider whether the company meets
9 definition of a public service corporation under Article 15, Section 2, of the Arizona Constitution.
10 *Id.* Second, the courts evaluate whether the company’s business and activity are a matter of public
11 concern under the *Serv-Yu* factors. *Id.*; see *National Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235,
12 219 P.2d 324 (1950) (“*Serv-Yu*”).

13 If a company is a public service corporation subject to Arizona Corporation Commission
14 jurisdiction and regulation, the Commission has constitutional and statutory obligations regarding
15 oversight. It cannot ignore those obligations. See, e.g., *Phelps Dodge Corp. v. Arizona Electric*
16 *Power Coop. Inc.*, 207 Ariz. 95, 83 P.2d 573 (Ct. App. 2004) (the Commission cannot abdicate its
17 responsibility to ensure a public service corporation is charging just and reasonable rates wholly to
18 the market).

19 **V. Constitutional Definition of Public Service Corporation.**

20 Article 15, Section 2 of the Arizona Constitution defines a “public service corporation” as
21 “[a]ll corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel,
22 or power.” Although SolarCity has argued that it is not “furnishing” electricity because it never
23 really “owns” the electricity produced by its solar facilities, such a metaphysical distinction is
24 without merit. This Commission has previously rejected that argument. For example, in *SWTC*,
25 the transmission cooperative was found to be a public service corporation even though it argued
26 that it was simply transmitting electricity that it did not own. See *SWTC*, 142 P.3d at 1244. This

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¹³ *Id.*; Exs. TEP-2, TEP-3.

1 argument is counter to the Commission's regulatory obligation because if a retail generator of
2 electricity could avoid Commission jurisdiction by manipulating temporal ownership of
3 electricity, then the Commission would be sanctioning unregulated generation service and retail
4 electric competition in Arizona.

5 **VI. Analysis of *Serv-Yu* Factors.**

6 In *Serv-Yu*, the Arizona Supreme Court set forth eight factors to be considered in
7 identifying public service corporations that are in the business of providing a public service that
8 should be subject to Commission regulation. See *SWTC*, 142 P.3d at 1245. These factors act only
9 as guidelines for analysis and all eight factors need not be met to conclude that a company is a
10 public service corporation. *Id.* Indeed, the Arizona Court of Appeals found that SWTC was a
11 public service corporation even though it determined that several of the factors were absent. See
12 *SWTC*, 142 P.3d at 1246.

13 Moreover, the factors should not be narrowly construed; rather, broader, indirect aspects of
14 the factors should be considered. See *SWTC*, 142 P.3d at 1245. For example, in *SWTC*, the court
15 considered that fact that SWTC's transmission service to its contractual wholesale customers (i.e.
16 the distribution cooperatives) implicated the many retail customers of those cooperatives. *Id.*
17 Avoiding a narrow construction of the factors is particularly important given the potential scope
18 and impact of the ruling in this docket. And the consideration of the factors should recognize that
19 more than a single entity is likely affected by the outcome

20 **A. Factor 1: What the corporation actual does.**

21 The primary elements of what SolarCity does revolve around providing electricity directly
22 to end-user customers.

23 SolarCity owns, operates and maintains facilities used to produce electricity and it provides
24 that electricity to end-user customers. SolarCity measures the amount of electricity produced by
25 its facilities and charges the end-user customer based on the amount of electricity provided to that
26 customer. SolarCity provides electricity to a myriad of customers including residential,
27 commercial and governmental customers. SolarCity does not intend to limit its ownership and

1 operation to a small number of facilities. It broadly markets its ability to provide distributed solar
2 generation and is expanding its presence across several states, including Arizona.

3 SolarCity provides electricity that reduces the amount of electricity that needs to be
4 provided by the incumbent electric utility. SolarCity's facilities also interconnect with the public
5 grid, i.e. the incumbent utility's facilities.

6 SolarCity's ability to own and operate the solar facilities and its ability to charge the
7 competitive kWh rate are dependent on the incentive it receives from the underlying electric
8 utility. For utilities regulated by the Commission, the utility funds those incentives through the
9 Renewable Energy Standard Tariff ("REST") that is collected from all customers of that utility.

10 **B. Factor 2: A dedication to public use.**

11 SolarCity is using its facilities to provide electricity directly to the public. This nexus of
12 public benefit is even closer than the relationship between SWTC and the public that the Arizona
13 courts found to be a dedication of property for public use. *See SWTC*, 142 P.3d at 1245-46.
14 Moreover, the facilities owned and operated by SolarCity would not be possible without
15 incentives funded by the public. SolarCity receives such incentives as a result of the public
16 policies that favor increased distributed solar generation and the related benefits to the public.
17 SolarCity is accepting the incentives and providing these public benefits through its ownership and
18 operation of its distributed facilities.

19 **C. Factor 3: Articles of incorporation, authorization and purposes.**

20 SolarCity's articles of incorporation simply state that the company's purpose is "to engage
21 in any lawful act or activity for which corporations may be organized."¹⁴ These articles permit and
22 do not preclude SolarCity's activities as a public service corporation. Indeed, it is pursuant to
23 those articles of incorporation that SolarCity is furnishing electric service to the public in Arizona.

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¹⁴ Ex. A-5 at Ex. E.

1 **D. Factor 4: Dealing with the service of a commodity in which the public has an**
2 **interest.**

3 SolarCity owns and operates solar photovoltaic systems and sells the electricity produced
4 by the systems to end-user customers. There is no doubt that electric power is a commodity in
5 which the public has an interest. Moreover, SolarCity's facilities are interconnected with the
6 public electrical grid, which only enhances the public's interest. Indeed, the interconnected nature
7 of the facilities creates potential issues and disputes for those incumbent providers that connect
8 with SolarCity. The Commission would be the most appropriate forum to establish policies,
9 procedures and standards that address such disputes. Without Commission jurisdiction over
10 providers such as SolarCity customers and incumbent providers would have no regulatory agency
11 to govern SolarCity's actions and would have redress only in the courts.

12 **E. Factor 5: Monopolizing or intending to monopolize the territory with a public**
13 **service commodity.**

14 This factor is important in the context of the unique nature of the service being provided by
15 SolarCity. A concern raised by this factor arguably is whether the customer has an alternative if it
16 is not receiving satisfactory service from the provider. That is a particularly key concern under
17 SolarCity's model. Here, once the solar facilities are installed, the customer has no other realistic
18 option for solar electricity for an extended period of time, if ever. It is expensive and impractical
19 to remove SolarCity's facilities so that another provider can step in to provide solar electricity. A
20 customer cannot easily switch to competitive alternative if SolarCity (or similar provider) provides
21 unacceptable service (such as maintenance of the facility), has repeated billing issues over the
22 amount of electricity being actually provided or other customer service issues.

23 Thus, SolarCity is and will be the sole provider of solar electricity to its customer once
24 facilities are installed on the customer's premises. As a result, increased consumer protection and
25 a forum for dispute resolution – as can be provided through Commission oversight – will be
26 important as this industry grows and involves more and varied end-user customers.

1 **F. Factor 6: Acceptance of substantially all requests for service.**

2 SolarCity broadly markets its distributed solar electricity arrangements. Its website is
3 publicly directed at all potential customers, including residential customers. It is not limiting its
4 service to any particular segment of the market and it appears that SolarCity is attempting to
5 service as many customers as it can. SolarCity may choose not to serve a particular customer if
6 there are credit issues, facility constraints or other factors. However, such limitations are not
7 dissimilar from an incumbent utility requiring deposits from customers with past credit issues or
8 being unable to provide service to a potential customer due to a remote location.

9 **G. Factor 7: Service under contracts and reserving the right to discriminate.**

10 SolarCity does provide service under an agreement with the end user customer. The
11 agreement does set forth some terms that could be included in a tariff, such as the rate on a kWh
12 basis. It should also be noted that there are public service corporations that provide service under
13 tariffs that allow an Individual Contract Basis (“ICB”) that reflect the specific circumstances of the
14 customer. This is particularly common in the telecommunications sector. As noted above,
15 SolarCity may decide that it cannot or will not provide service to a specific customer depending
16 on the specific circumstances of that customer.

17 **H. Factor 8: Actual or potential competition with other public service**
18 **corporations.**

19 SolarCity competes directly with similarly situated solar energy companies and the
20 incumbent utilities for the provision of electricity. The electricity provided by the SolarCity
21 facilities is intended to offset the electricity provided by the incumbent utility.

22 **I. Result of *Serv-Yu* Analysis.**

23 The overarching purpose of the *Serv-Yu* analysis is to determine whether the business and
24 activities of the company are such as to make their methods of operations “a matter of public
25 concern clothed with the public interest” which should subject it to some level of governmental
26 control. *See SWTC*, 142 P.3d at 1245. It is clear that there are several important elements of the
27 SolarCity model that create public concern and affect the public interest. As set forth above, the

1 *Serv-Yu* factors support a determination that SolarCity is a public service corporation subject to
2 Commission jurisdiction.

3 **VII. The Nature of Appropriate Regulation.**

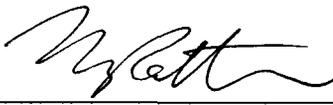
4 The Commission need not decide in this docket the details of the appropriate level of
5 regulation for distributed solar generation providers such as SolarCity, as that would be
6 determined through either the Certification of Convenience and Necessity process or a rulemaking
7 proceeding.

8 **VIII. Conclusion.**

9 Based on the evidence, the facts and applicable law are clear that SolarCity is a public
10 service corporation subject the Commission's jurisdiction and regulatory oversight. The
11 Commission's clear determination of this legal matter will provide certainty and protection for
12 both SolarCity and Arizona customers.

13 RESPECTFULLY SUBMITTED this 15th day of December 2009.

14 **TUCSON ELECTRIC POWER COMPANY AND**
15 **UNS ELECTRIC, INC.**

16 By  _____

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