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Jordan R. Rose AZ Bar No.: 017452
Court S. Rich AZ Bar No. 021290
M. Ryan Hurley AZ Bar No. 024620
Rose Law Group pc
6613 N. Scottsdale Road, Suite 200
Scottsdale, Arizona 85250
Direct: (480) 240-5585
Fax: (480) 505-3925

Attorneys for Applicant SolarCity Corporation

BEFORE THE ARIZONA CORPORATION COMMISSION

KRISTIN K. MAYES
CHAIRMAN

SANDRA D. KENNEDY
COMMISSIONER

PAUL NEWMAN
COMMISSIONER

GARY PIERCE
COMMISSIONER

BOB STUMP
COMMISSIONER

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

DOCKET NO. E-20690A-09-0346

SOLARCITY'S INITIAL POST-
HEARING BRIEF

Applicant, SolarCity, by and through its undersigned counsel hereby gives notice that it is submitting this Initial Post-Hearing Brief.

RESPECTFULLY SUBMITTED this 15th day of December, 2009.

Rose Law Group pc

Jordan R. Rose
Court S. Rich
M. Ryan Hurley
Attorneys for Applicant SolarCity Corp.

Arizona Corporation Commission
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1 **Original and 13 copies filed this**
2 **15th day of December, 2009, with:**

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

7 **Copies sent via electronic mail to:**

8 Mr. Bradley S. Carroll
9 Snell & Wilmer L.L.P.
10 One Arizona Center
11 400 E. Van Buren
12 Phoenix, Arizona 85004-2202
13 bcarroll@swlaw.com

8 Mr. Timothy M. Hogan
9 Arizona Center for Law in the Public
10 Interest
11 202 E. McDowell Rd; Ste 153
12 Phoenix, Arizona 85004
13 thogan@aclpi.org

8 Ms. Janice M. Alward
9 Legal Division Arizona Corporation
10 Commission
11 1200 W. Washington St.
12 Phoenix, Arizona 85007
13 jalward@azcc.gov

11 Mr. Michael W. Patten, Esq.
12 Roshka DeWulf & Patten, PLC
13 400 E. Van Buren St.; Ste 800
14 Phoenix, Arizona 85004
15 mpatten@rdp-law.com

11 Ms. Deborah R. Scott
12 Pinnacle West Capital Corporation
13 400 N. Fifth St., MS 8695
14 Phoenix, Arizona 85004
15 Deb.scott@pinnaclewest.com

11 Mr. Steven M. Olea
12 Utilities Division Arizona
13 Corporation Commission
14 1200 W. Washington St.
15 Phoenix, Arizona 85007
16 solea@azcc.gov
17 Mr. Jeffrey T. Murray
18 Moyes Sellers & Sims
19 1850 N. Central Ave.; Ste 1100
20 Phoenix, Arizona 85004
21 jtmurray@lawms.com

14 Mr. Steve Wene
15 Mayes Sellers & Sims Ltd.
16 1850 N. Central Ave; Ste 1100
17 Phoenix, Arizona 85004
18 Swene@lawms.com

14 Mr. David Berry
15 Western Resource Advocates
16 Post Office Box 1064
17 Scottsdale, Arizona 85252-1064
18 abzbluhill@aol.com

16 Mr. Kenneth C. Sundlof, Jr.
17 Jennings, Strouss & Salmon, P.L.C.
18 201 E. Washington St.; 11th Fl
19 Phoenix, Arizona 85004-2385
20 Sundlof@jsslaw.com

16 Mr. Daniel W. Pozefsky
17 1110 W. Washington St; Ste 220
18 Phoenix, Arizona 85007
19 dpozefsky@azuco.com

16 Mr. Philip J. Dion, Jr., Esq.
17 Tucson Electric Power Co.
18 One S. Church St; Ste 200
19 Tucson, Arizona 85702
20 Philip.dion@azbar.org

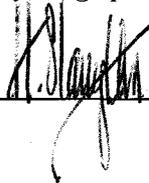
19 Mr. Lawrence V. Robertson, Jr.
20 Attorney at Law
21 Post Office Box 1448
22 Tubac, Arizona 85646
23 tubaclawyer@aol.com

19 Mr. C. Webb Crockett
20 Fennemore Craig, P.C.
21 3003 N. Central Ave; Ste 2600
22 Phoenix, Arizona 85012-2913
23 wcrocket@fclaw.com

19 Mr. Kenneth R. Saline
20 K. R. Saline & Associates, PLC
21 160 N. Pasadena; Ste 101
22 Mesa, Arizona 85201-6764
23 krs@krsaline.com

22 Ms. Kelly J. Barr
23 Salt River Project
24 Post Office Box 52025
25 Phoenix, Arizona 85072-2025
26 Kelly.barr@srpnet.com

22 Mr. Michael A. Curtis
23 Curtis, Goodwin, Sullivan,
24 Udall & Schwab, PLC
25 501 E. Thomas Rd.
26 Phoenix, Arizona 85012-3205
27 Mcurtis401@aol.com

26 
27 _____

**INITIAL POST-HEARING BRIEF
OF APPLICANT SOLARCITY CORPORATON
(DECEMBER 15, 2009)**

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1 **I. Introduction**

2 Will schools, non-profits and governmental entities be able to utilize clean green solar
3 energy to lower their operating expenses and save money during this difficult economic time?
4 This is the simple question that this case will answer. Regulating the providers of Solar Service
5 Agreements (“SSAs”) as public service corporations (“PSCs”), as Salt River Project (“SRP”)
6 and Commission Staff suggest, will drive tax equity investors away from Arizona and into the
7 numerous other unregulated markets around the Country. See Exhibit A-4 Pre-field Testimony
8 of Lyndon Rive at question 25. Without tax equity investors, schools, non-profits and
9 governmental entities are left with no way to monetize the all important federal tax credits, and
10 solar, its environmental benefits and the savings that go along with it become too expensive and
11 therefore, unattainable for those entities in Arizona. See Exhibit A-4, Pre-filed Testimony of
12 David Peterson at questions 8, 11; see also, Exhibit A-4, Pre-filed Testimony of Lyndon Rive at
13 questions 11, 13, 14. Decide not to regulate – like every other State that has faced this question
14 and watch the tax equity investment money pour into Arizona, driving the installation of solar
15 facilities and saving millions for our most cash-strapped institutions, including schools, non-
16 profits and governmental facilities. Certainly, the right thing to do is to promote solar energy; to
17 save our schools and other distressed institutions millions of dollars in this critical time; to
18 promote a cleaner environment; and harness private investment money to make all this happen.
19 Fortunately, as explained in great detail herein, Arizona law supports and directs a finding that
20 the Corporation Commission does not have jurisdiction to regulate SolarCity when it provides
21 solar services through an SSA. It is the right answer at the right time.
22

23 **II. Background of Request and Procedural History**

24 On July 2, 2009, SolarCity Corporation (“SolarCity” or “Company”, or “Applicant”)
25 filed with the Arizona Corporation Commission (“Commission”) an application to determine
26 that when SolarCity provides solar services to Arizona schools, governments, and non-profit
27 entities it is not acting as a public service corporation pursuant to Article 15, Section 2 of the
28 Arizona Constitution (“Application”). The Application requested expedited consideration so

1 that two specific SSAs with the Scottsdale Unified School District could be finalized and the
2 solar facilities installed before the end of the year to take advantage of expiring tax incentives.
3 On July 16, 2009, a procedural conference was convened and the Applicant and several
4 Intervenors attended. There was general agreement among those present at the procedural
5 conference that a Commission determination on the issue of whether an entity is a public service
6 corporation requires an application of the factors set forth in *Natural Gas Serv. Co. v. Serv-Yu*
7 *Coop*, 70 Ariz. 235, 237-238, 219 P.2d 324, 325-326 (1950) to the particular facts of the
8 Application. There was also general agreement that such an adjudication process would require
9 an evidentiary hearing in order for the Commission to have an adequate record upon which to
10 base its decision. Commission Staff therefore proposed a two-track procedural process that
11 would allow the Company to move forward quickly with the two Scottsdale SSAs through Track
12 One of the case and to perform the required legal analysis with the evidentiary record required to
13 make a determination of PSC status in Track Two.

14 On October 14, 2009, the Commission began the evidentiary hearing for Track Two of
15 the Application which concluded on November 9, 2009. SolarCity and a number of other
16 Intervenors presented evidence at the hearings that supports the following conclusions: 1) when
17 SolarCity provides solar services to schools, governmental entities and non-profits via the SSA
18 financing mechanism it is not acting as a PSC under the strict textual reading of the Constitution
19 or in the alternative according to the Constitution as interpreted under the *Serv-Yu* analysis; 2)
20 the ability to utilize SSAs without regulation as a PSC is vital to the growth and success of the
21 solar industry and solar investment in Arizona; and 3) that existing laws and regulations
22 adequately account for any public policy concerns and good public policy dictates the
23 Commission not regulate SSA providers as PSCs.

24 Only Staff and Intervenors SRP and TEP have taken positions opposing SolarCity's
25 Application. However, as this brief and the transcript of the hearing show no party presented
26 compelling evidence or arguments which would support their stance.
27
28

1 **III. Analysis**

2
3 **A. SolarCity's request is limited to schools, non-profits and governmental entities**
4 **because that class of solar users has no economically viable way to implement solar**
5 **without SSAs.**

6 Several questions were raised regarding why this request is limited to schools, non-profits
7 and governmental entities throughout the hearing on this matter. SolarCity believes that this
8 class of user is unique because as a result of their inability to utilize the Federal income tax
9 credits, the SSA is the only economically viable option for schools, non-profits and
10 governmental entities to implement solar. *See* Exhibit A-4, pre-filed testimony of David
11 Peterson at questions 8, 11; *see also*, Exhibit A-4, pre-filed testimony of Lyndon Rive at
12 questions 11, 13, 14. SolarCity believes this important fact makes it even clearer that the
13 primary purpose of the SSA is to provide much needed financing when it is used in conjunction
14 with schools, non-profits and governmental entities. Other "for profit" entities have choices
15 when implementing solar and may choose an SSA for different reasons but could also choose to
16 buy or lease a system as an alternative. Schools, non-profits and governmental entities however,
17 choose the SSA precisely because it is the only way to make the system affordable. *See Id.* This
18 lends credence to the argument that SSAs primarily are financing tools for these entities and
19 explains why SolarCity's request is directed at this class of users.

20
21 **B. The Commission could apply this ruling to all potential solar hosts if it believes**
22 **the identity of the host is not meaningful.**

23 While SolarCity believes the identity of the host as a school, non-profit or governmental
24 entity adds strength to the argument that SSAs are primarily financing tools, SolarCity is
25 supportive of a Commission Order that would expand its ruling to cover all users of solar.
26 SolarCity believes that if the Commission is inclined to apply this decision to SSAs with "for
27 profit" users it could include a statement in the Order's Conclusions of Law section indicating
28 that it does not view the identity of the host as having any impact on this analysis. This would

1 send a signal to the industry that it would be appropriate to offer SSA financing to other for
2 profit entities without running afoul of the law.

3
4 **C. Arizona law sets out a two step process for evaluating if a company is a Public**
5 **Service Corporation.**

6 Determining whether an entity is a PSC under Arizona law requires a two-step analysis.
7 First, the Commission must consider whether the company satisfies the literal and textual
8 definition of a PSC under Article 15, Section 2 of the Arizona Constitution. *See Sw.*
9 *Transmission Coop. v. Ariz. Corp. Comm'n*, 213 Ariz. 427, 430, 142 P.3d 1240, 1243 (App.
10 2007) (*citing Sw. Gas Corp. v. Ariz. Corp. Comm'n*, 169 Ariz. 279, 285, 818 P.2d 714, 720
11 (App. 1991)). The Arizona Constitution defines a “public service corporation” as a corporation,
12 other than municipal, “engaged in furnishing . . . electricity for light, fuel, or power . . .” Ariz.
13 Const. Art. 15, § 2. If the Commission determines that the entity is not furnishing “electricity for
14 light, fuel or power,” then the analysis stops and the company is declared not to be a PSC.
15 However, Arizona Courts have held that “meeting the literal textual definition is insufficient” for
16 finding that a company is a PSC. *Sw. Gas Corp.*, 169 Ariz. at 286, 818 P.2d at 721. Therefore,
17 if the Commission determines that the company in question is “furnishing” electricity, the
18 Commission must engage in a second step to evaluate whether the company’s business and
19 activities are such “as to make its rates, charges, and methods of operations a matter of public
20 concern,” through general consideration of the eight (8) factors the Arizona Supreme Court
21 articulated in *Serv-Yu. Id.* As the evidence in this case shows, SolarCity is not a PSC under both
22 analyses.

23
24 **D. SolarCity is not a PSC under the AZ Constitution because it does not furnish**
25 **electricity under the SSA arrangement.**

26 SolarCity argued throughout the matter that it provides services in the form of design,
27 installation, maintenance and financing to its customers and that it does not furnish electricity to
28 anyone. *See Trans. 102*, line 3-6. This argument is based on the Supreme Court of Arizona’s

1 holding in *Williams v. Pipe Trades Industr. Program of Ariz.*, 100 Ariz. 14, 20, 409 P.2d 720,
2 724 (1966), wherein the Court stated that the Constitution's concept of furnishing "connotes a
3 transfer of possession." In the present case, SolarCity's SSA clearly states that the "...Purchaser
4 [the school] will take title to all electric energy that the System generates from the moment the
5 System produces such energy..." Applicant's Exhibit A-1 at Exhibit B at Exhibit 7, p. 4(4)(a).

6 From the moment of its creation, the electricity is the sole legal possession of the School
7 District. Further, as the testimony shows, SolarCity cannot prevent the electricity from flowing
8 to the School without turning off the system, nor can they divert the electricity elsewhere. Trans.
9 255 line 16-21. Because SolarCity never takes legal possession or ownership of the electricity
10 created, the facts of this SSA Application are factually distinct from the facts at issue in *Sw.*
11 *Transmission Coop.*, 213 Ariz. at 431, 142 P.3d at 1244. In that case, the Court of Appeals
12 found that the corporation qualified as a PSC, under the literal definition of the Arizona
13 Constitution, because the company possessed the electricity while it was being transferred from
14 the generator to the distributor along the transmission lines. Conversely, under the terms of the
15 SSA at issue in this Application, SolarCity never owns or takes possession of the electricity
16 created and therefore, is not in the business of furnishing "electricity for light, fuel, or power."
17 Ariz. Const. Art. 15, § 2.

18 As such, SolarCity and the SSA in this Application do not fit within the literal and textual
19 definition of a PSC, as spelled-out in Article 15, Section 2 of the Arizona Constitution.

20
21 **E. Even if the Commission finds that SolarCity technically is "furnishing"**
22 **electricity, it is not a PSC when examined under *Serv-Yu*; the second step of the**
23 **analysis.**

24
25 ***1. SolarCity encourages the Commission to evaluate the SSA under *Serv-Yu****
26 ***even if it finds no furnishing of electricity under the text of the Constitution.***

27 While SolarCity maintains that it cannot be furnishing electricity because it never
28 possesses the electricity produced, SolarCity encourages the Commission to move on and

1 perform an analysis of the SSA based on the Arizona Courts' factors set out in case law. Such
2 an analysis will demonstrate that there is simply nothing about the SSA arrangement that makes
3 SolarCity subject to regulation under Arizona law.

4
5 **2. Under the balance of the *Serv-Yu* factors SolarCity is not a PSC when it**
6 **enters into SSAs.**

7 After examining if there is a "furnishing" of electricity, the Commission's analysis moves
8 to an investigation of SolarCity's "business activities" to see if they are "such as to make its
9 rates, charges and methods of operation, a matter of public concern, clothed with a public interest
10 to the extent contemplated by law which subjects it to governmental control – it's business must
11 be of such a nature that competition might lead to abuse detrimental to the public interest." *Trico*
12 *Elec. Coop., Inc. v. Corp. Comm'n of Ariz.*, 86 Ariz. 27, 34-35, 339 P.2d 1046, 1052 (1959)
13 (citing *Gen. Alarm, Inc. v. Underdown*, 76 Ariz. 235, 262 P.2d 671 (1953)). In analyzing these
14 issues, the Arizona Supreme Court articulated eight (8) factors in the *Serv-Yu* case that should be
15 examined to determine which entities are "clothed with a public interest" and subject to the
16 Commission's regulation because they are "indispensible to large segments of our population."
17 *Sw. Transmission Coop.*, 213 Ariz. at 432, 142 P.3d at 1245. Those eight factors are: 1) what the
18 corporation actually does; 2) a dedication to public use; 3) the company's articles of
19 incorporation, authorization, and purposes; 4) dealing with the service of a commodity in which
20 the public has been generally held to have an interest; 5) monopolizing or intending to
21 monopolize the territory; 6) acceptance of substantially all requests for service; 7) service under
22 contracts and reserving the right to discriminate is not always controlling; and 8) actual or
23 potential competition with other corporations whose business is clothed with a public interest.
24 See *Serv-Yu*, 70 Ariz. at 237-38, 219 P.2d at 325-26. The analysis below clearly demonstrates
25 that under the balance of the eight *Serv-Yu* factors, SolarCity is not a PSC when it enters SSAs
26 and any furnishing of electricity that may occur is merely incidental.

1 a) SolarCity does not act like a PSC.

2 First, *Serv-Yu* requires the Commission to consider what SolarCity actually does to
3 determine if it performs the functions of a PSC. *See Id.* The testimony in this case
4 overwhelmingly demonstrates that SolarCity's actions and functions are nothing like those
5 actions and functions of a PSC. The testimony reflects that SolarCity designs, installs,
6 maintains and finances rooftop distributed solar generation facilities. *See Trans. 102, line 4-6.*
7 In contrast, the testimony is clear that no regulated utility in the State performs these services.
8 *See Trans. 537, line 6-9; see also Trans. 640-641 lines 15-7.* As further evidence of the contrast
9 between SolarCity and a PSC, the testimony explains how SolarCity has to go through a bid or
10 request for proposal ("RFP") process before it can even do business with the school or
11 government customer, which is easily distinguished from a monopoly provider of electricity who
12 is required to take all customers and does not compete with other providers for customers. *See*
13 *Trans. 531 l, line 17-21.*

14 An objective analysis of this factor results in a finding in favor of SolarCity and against
15 regulation.

16
17 b) SolarCity does not dedicate any property to a public use under an
18 SSA.

19 Second, whether SolarCity has dedicated its private property to a public use "is a
20 question of intent shown by the circumstances of the individual case." *Sw. Transmission Coop.,*
21 *213 Ariz. at 432-33, 142 P.3d at 1245-46.* The solar panel systems that SolarCity provides are
22 dedicated to the individual school, non-profit organization or government entity, on whose
23 private property the solar panel system is located and not to the general public. *See, Exhibit A-1*
24 *p.12 l. 3-10.*

25 The arguments made that suggest this prong favors regulation are flawed for several
26 reasons. First, Commission Staff's testimony suggests that this prong of the *Serv-Yu* analysis
27 supports regulation but Commission Staff admitted under cross examination that it did not apply
28 the proper analysis when analyzing this prong. In fact, Commission Staff failed to look at the

1 intention of SolarCity when analyzing this prong as the Courts clearly requires. *See* Trans. 1226,
2 line 4-6.

3 Next, it was argued that the mere fact that some electricity may flow from the school to
4 the grid under a net metering scenario somehow means that SolarCity is dedicating its property
5 to a public use such that as Staff claims in its testimony, “the public generally, in so far as it is
6 practicable has the right to enjoy service from the facilities.” Exhibit Staff-1 at p. 22 1.17-18.
7 SolarCity believes this to be a dangerous conclusion that strains reason. Staff’s assertion that the
8 general public “has the right to enjoy service from the facilities” is simply incorrect as no
9 customer has the right to demand service from SolarCity and certainly no customer has the right
10 to demand that his neighbor’s solar facilities be turned on or off so that the neighbor may “enjoy
11 service from the facilities.” The implications of Staff’s conclusion would be far reaching and
12 extreme as it would require a determination that any solar panel host is actually dedicating its
13 property to a public use even if they are simply a private homeowner. In fact, Chairman Mayes
14 asked Staff about this issue during her examination of Staff and Staff’s witness concluded that if
15 the Chairman had a solar panel on the roof of her condo that her condo would be of “public
16 interest” under Staff’s analysis. *See* Trans. 1065, line 2-3.

17 From a purely logical standpoint, it is hard to see how the public has an interest in the
18 panels on the roof of one private customer that are paid for entirely by the customer. Certainly,
19 the argument could be made that this public interest arises because the user of the panels will
20 necessarily take less electricity from the regulated incumbent utility in which the public has been
21 held to have an interest. However, this same argument is intellectually indistinguishable from an
22 argument that the public has an interest in the type of light bulbs one uses or the temperature an
23 individual sets their thermostat to in the privacy of their own home. In fact, if this privately
24 owned system on private property serving only the host property is held to be dedicated to a
25 public use against the wishes and intention of its owner, then it would stand to reason that all
26 equipment that uses energy or impacts or reduces the amount of energy taken from a regulated
27 incumbent utility provider would be similarly “dedicated to a public use.” This result cannot be
28 supported.

1 As a result of the above analysis it is clear that this private property is not dedicated to a
2 public use and that the analysis of this factor weighs in favor of SolarCity and against regulation.

3
4 c) SolarCity's articles of incorporation are different than a PSC's.

5 The Arizona Supreme Court stated that "while the articles of incorporation authorizing
6 the corporation to act as a public utility are not conclusive, the fact of such authorization may be
7 considered in the determination of the ultimate question." *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at
8 326. The evidence clearly demonstrates that SolarCity's articles of incorporation are
9 substantially different from the articles of incorporation of other PSCs that were entered into
10 evidence in this docket. Each of the articles of incorporation of the PSCs introduced into
11 evidence contain a clear statement that the PSC intends to act as a PSC under the Arizona
12 Constitution or was formed under an Act providing for the formation of an electric cooperative
13 and even Staff's witness concedes that SolarCity's articles of incorporation differ from those of
14 Arizona PSCs. *See* Trans. 1235, line 4; *see also* Exhibit A-5 at exhibits D, E.

15 An objective analysis of this *Serv-Yu* factor can only lead to one conclusion; that this
16 factor weighs in SolarCity's favor and against regulation.

17
18 d) The public does not have an interest in SolarCity's services.

19 The fourth *Serv-Yu* factor requires an analysis of whether or not SolarCity is dealing with
20 a commodity in which the public has generally been held to have an interest. *See Serv-Yu*, 70
21 Ariz. at 238, 219 P.2d at 326. There are three key arguments that are instructive in concluding
22 that what SolarCity is dealing with is not a commodity in which the general public has been held
23 to have an interest. The arguments supporting this conclusion can be summarized as follows: 1)
24 SolarCity's services are not essential and therefore, the public has no interest in them; 2) if
25 SolarCity is deemed to be dealing with commodity in which the public is held to have an interest
26 it is only doing so incidentally to its provision of design, installation, maintenance and financing
27 services; and 3) the public does not have a interest in these facilities merely because electricity is
28

1 involved rather, the public's interest is more appropriately placed in the utility infrastructure that
2 distributes electricity to the public rather than distributed generation on private property.

3 The Recommended Decision of the Public Regulation Commission's Administrative Law
4 Judge in New Mexico Case No. 09-00217-UT filed as part of the record in this case in Exhibit
5 Sun Power 3 explains how SolarCity's services are not of public interest because they are not
6 essential public services. The Judge in that Recommended Decision wrote, "[] while
7 Developers provide services related to essential public services, they do not provide essential
8 public services themselves. Developers provide hosts a green alternative. Hosts who receive
9 service from developers do so because they have determined that the service is to their benefit
10 not because they have no other choice." See Exhibit Sun Power 3 at Recommended Decision p.
11 16.

12 Next, while it is undisputed that solar panels help to transform the energy from the sun
13 into useable electrons, the record is clear that SolarCity's main purpose is to provide design,
14 installation, maintenance and financing of solar facilities. See T. 102, l. 4-6. In fact, even
15 SolarCity's customer, the Scottsdale Unified School District made it clear through its testimony
16 that it currently receives sufficient electricity from its incumbent utility provider and does not
17 need the electricity that the solar panels harness but rather is only interested in a way to save
18 money. See Exhibit A-5 at p. 12 l. 9-16. No evidence was presented into the record suggesting
19 that the public has an interest in the design, installation, maintenance and financing of solar panel
20 facilities.

21 It is important to note for this analysis that the Courts have held that one does not become
22 a PSC because of some merely incidental provision of electricity (see further discussion below).
23 See *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818. As a result, this factor simply cannot be
24 deemed to weigh in favor of regulation even if it is found that SolarCity does deal with a
25 commodity in which the general public has been held to have an interest if it is doing so only
26 incidentally. Any finding to the contrary would be against the principal that a merely incidental
27 provision of a commodity should not lead to regulation.
28

1 Finally, parties to the proceeding do not even agree that electricity itself was something
2 in which the public has an interest. Instead, David Berry from Western Resource Advocates
3 suggests that it is not the electricity the public has an interest in but instead the public
4 infrastructure used to deliver it reliably throughout the grid. *See*, Trans. 779, line 12-14. In this
5 case, no such public infrastructure is utilized as all solar facilities are on the customer's side of
6 the meter and the electricity flowing from the solar facilities does not travel through any public
7 infrastructure before entering the host site. *See*, Trans. 682, line 4-12.

8 From a purely logical perspective it is easier to conclude that a public interest exists as to
9 the public infrastructure (the transmission and distribution lines, transformers etc) then as to the
10 electricity itself in all cases. After all, if a person buys (as opposed to using a SSA) a solar
11 facility and places it on their roof no one is contending that the public has an interest in that
12 electricity. Further, it is hard to imagine an argument being made that the public has an interest
13 in the electricity put out by a battery in a child's toy or the static in a winter sweater. In contrast
14 to the situations where it appears that the public has no interest in electricity, it is hard to imagine
15 a situation where the public does not have an interest in all facilities designed to distribute
16 electricity to the public through the grid.

17 Certainly, as the ALJ in New Mexico stated, SolarCity's services are not essential to any
18 segment of the public and are therefore, not something in which the public has an interest.
19 Further, If SolarCity is found to provide a commodity in which the public has an interest, it only
20 does so incidentally to its design, installation, maintenance and financing services which cannot
21 lead to a weighing of this factor against SolarCity. Finally, it is not at all clear that the public
22 even has an interest in electricity itself. Instead, it is more logically explained that the public's
23 interest is in the infrastructure designed to distribute electricity to the public through the grid.
24 The analysis of this issue leads to a finding in favor of SolarCity and against regulation.

25
26 e) *SolarCity cannot and will not act as a monopoly.*

27 Fifth, under this factor of the *Serv-Yu* analysis, the Commission must determine if
28 SolarCity through the SSA at issue in this Application will be acting as a monopoly. *See, Serv-*

1 *Yu*, 70 Ariz. at 238, 219 P.2d at 326. This factor was uncontested at the hearing and even Staff
2 concedes that this factor weighs in favor of SolarCity and against regulation. *See* Exhibit Staff-1
3 at P. 26 L. 19-20.

4
5 *f) SolarCity does not accept anywhere near substantially all requests for*
6 *service.*

7 Sixth, the *Serv-Yu* test requires an analysis of whether or not SolarCity accepts
8 substantially all requests for service. *See, Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 326. SolarCity
9 does not accept substantially all requests for service, and in fact only closes approximately 9% of
10 all inquires for service. *See* Exhibit A-5 at P. 8 L. 23-28. SolarCity testified that it fails to close
11 on 91% of the requests it receives for service and that there are many reasons that SolarCity
12 either chooses not to, is precluded from servicing those that make the request, or otherwise
13 misses out on the opportunity. *See* Exhibit A-4, Testimony of Lyndon Rive at Question 23.
14 Despite the testimony from SolarCity’s CEO confirming that SolarCity does not accept
15 “substantially all requests for service,” Staff refused to re-examine its position on the issue when
16 given a chance during cross examination. *See* Trans.1238, line 11-13. In fact, Staff contended
17 that despite the fact that the evidence reflected only a 9% close rate, Staff felt it did not have
18 enough information to conclude that SolarCity does not accept substantially all requests for
19 service. *See Id.*

20 This conclusion is at odds with Arizona’s longstanding presumption against regulation
21 and the Supreme Court’s statement that “free enterprise and competition is the general rule.
22 Government control and legalized monopolies are the exception...invasion of private right
23 cannot be allowed by implication or strained construction.” *Nicholson*, 108 Ariz. at 321, 497
24 P.2d at 819 (*citing Underdown*, 76 Ariz. at 238, 262 P. 2d at 673 (1953)). Given the
25 presumption against regulation and in light of the evidence showing a 9% close rate and
26 numerous reasons for turning down business one can only conclude that this factor weighs in
27 favor of SolarCity and against regulation. There is absolutely no evidence in the record to
28 suggest that SolarCity accepts “substantially all requests for service” and the only evidence in the

1 record refutes any such claim. As a result, it would be an improper application of the
2 presumption against regulation to conclude that this factor favors regulation.

3 Finally, it should be noted that no customer has the right to demand service from
4 SolarCity as they would with a regulated PSC. *See* Trans. 755, line 17-18. This fact lends
5 support to the argument that SolarCity will not be accepting substantially all requests for service.
6 It is clear that this factor must be weighed in favor of SolarCity and against regulation.

7
8 *g) SolarCity provides service under SSAs which are separately*
9 *negotiated contracts.*

10 Seventh, the SSA at issue in this Application provides for solar panel system design,
11 installation, maintenance, and financing via an extremely detailed and specific agreement. *See*
12 A-1 at Exhibit B; *see also* Trans. 1239, line 3-6. *Serv-Yu* found that providing services under a
13 contract was a factor that supported a conclusion that the entity in question is not a PSC and
14 therefore, not subject to regulation. *See Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 326. It is
15 important to note that while *Serv-Yu* states that this factor is “not always controlling” it does not
16 indicate that any of the other factors are in and of themselves controlling. As a result, SolarCity
17 certainly believes that the Commission can place different weights on different factors as it sees
18 fit but reminds the Commission that no one of these factors is singled out as controlling and the
19 Court must have intended each of them to be considered and weighed or it would not have
20 included them.

21 Staff still contends this factor favors regulation despite the fact that it is uncontested that
22 the SSAs at issue in this docket are specific contracts subject to negotiation with each customer.
23 *See* Trans. 1239, line 3-6. When analyzing this factor Staff appears to have ignored the fact that
24 the SSA clearly is a negotiated agreement and for whatever reason Staff analyzed different issues
25 altogether. When pressed on why the fact that SolarCity provides service under contracts does
26 not conclude the examination of this issue in favor of SolarCity, Staff indicated during cross
27 examination that, “[m]ore important to the issue of whether they are a PSC is the fact that they
28 plan to enter into a very large number of those contacts and offer a wide variety of solicitation to

1 the general public and seek who comes to the table and they would like to serve on a cumulative
2 basis millions of customers and get all the business they can.” Trans. 1239-40 line 22-23. The
3 issues raised in this response may very well be valid to the issue of whether or not SolarCity is a
4 PSC however, those issues are not relevant to the narrow question of whether or not SolarCity
5 provides service under a specific contract as the seventh *Serv-Yu* factor requires.

6 While the Commission is free to attach different levels of importance to this factor there
7 are simply no facts to support a finding in favor of regulation. Again, it is uncontested in
8 evidence that SolarCity provides service under specific contracts that are subject to individual
9 negotiation with each customer. See Trans. 1239, line 3-6. It is simply illogical to conclude that
10 this factor, which only looks at whether or not services are provided under contract, can be
11 interpreted in any way other than in favor of SolarCity and against regulation.

12
13 *h) SolarCity Does Not Compete with PSCs.*

14 Finally, *Serv-Yu* asks the Commission to analyze whether or not SolarCity is going to
15 compete with entities clothed with a public interest like regulated PSCs. See *Serv-Yu*, 70 Ariz. at
16 238, 219 P.2d at 326. There are several pieces of evidence that support the notion that SSA
17 providers are not competing with PSCs.

18 Perhaps the most telling evidence that PSCs are not in competition with SSA providers
19 are the words of the only utility representative to offer testimony during the hearing. Barbara
20 Lockwood, a representative on behalf of APS, the State’s largest utility stated that, “[] APS
21 recognizes that solar providers, such as SolarCity, are essential for the implementation of the
22 distributed energy requirements of the RES Rules....” Exhibit APS-1 at Page. 3 line. 25- Page. 4
23 line. 1. APS confirmed in its live testimony that it does not view SolarCity and other providers
24 as competition. During Ms. Lockwood’s direct testimony, she stated that companies like
25 SolarCity are “critical to APS” and that “[APS] view[s] solar provider such as SolarCity as our
26 partners.” Trans. 640, line 17; Trans. 644, line 6-7.

27 This issue of competition with regulated utilities was addressed in New Mexico in the
28 Recommended Decision of the Public Regulation Commission’s Administrative Law Judge filed

1 as part of the record in this case in Sun Power Exhibit 3. The Judge in that matter wrote that
2 “[SSA providers] operate in parallel with a public utility’s electric grid, offsetting rather than
3 replacing the customer’s use of grid electricity.” Exhibit Sun Power 3 at New Mexico
4 Recommended Decision at p. 16.

5 Further, the evidence in this case indicates that the regulated utilities in Arizona simply
6 do not offer the same services that SolarCity is offering. This was evident when Scottsdale
7 Unified School District Deputy Superintendent David Peterson testified that despite issuing two
8 separate requests for proposals for SSA funded solar facilities for more than 90 different school
9 properties not one regulated utility provider submitted a proposal for the project. *See* Trans. 537,
10 line 6-9.

11 The evidence showed that the largest utility in the State views SolarCity as a partner and
12 not a competitor; that utilities actually need companies like SolarCity to meet the RES
13 requirements; other jurisdictions such as New Mexico view these industries as complimentary
14 and not competitive; and that regulated utilities have not even attempted to offer the same
15 services that SolarCity provides. For those reasons this factor of *Serv-Yu* and indeed the balance
16 of all factors, must be weighed in favor of SolarCity and against regulation.

17
18 **F. SolarCity cannot be adjudicated a PSC because any furnishing of electricity is**
19 **merely incidental to its performance of its service and financing functions.**

20 The Courts have stated that the fact that a company “may incidentally provide a public
21 commodity is not sufficient to subject it to regulation, it must be in the business of providing a
22 public service.” *Ariz. Corp. Comm’n v. Nicholson*, 108 Ariz. 317, 320, 497 P.2d 815, 818
23 (1972). Corporation Commission Staff agrees with this principal as well as noted in Exhibit A-8
24 (the Staff Report issued in the Solar Alliance Docket No. 020633A-08-0513) wherein the Staff
25 wrote, “Staff does not quibble with the notion that an entity could provide electricity in a way
26 that is incidental to its primary business and not be a public service corporation.” Exhibit A-8 at
27 p. 9. SolarCity provides its customers with design, installation, maintenance and financing of
28 solar facilities. It is undisputed that SolarCity’s financing arrangement is unique and

1 complicated and of a special benefit to its users. *See* Trans. 1153, line 3-9, *see also* Trans. 947,
2 line 8. In fact, the Scottsdale School District's representative testified that without this unique
3 financing arrangement the School District would not be able to implement solar at its facilities.
4 *See* Exhibit A-4, Pre-filed Testimony of David Peterson at questions 8, 11.

5 Further, in the Solar Alliance Docket Staff indicated that it was possible that an SSA
6 arrangement could be primarily a financing tool such that it did not subject the company to
7 regulation. Staff wrote, "it is unclear to Staff at this point to what degree the contemplated
8 financing arrangements, which may potentially involve complex tax credit considerations, are in
9 and of themselves a specialized and unique service that might dwarf any provision of
10 electricity." Exhibit A-8 p. 9. As noted above, the record reflects that the monetization of the
11 tax credit is specialized, unique and complex and as a result it can, according to Staff's own
12 words, be considered to "dwarf" the provision of electricity. Further, the Scottsdale School
13 District's testimony is that without SolarCity's assistance it would not be able to monetize the
14 Federal tax credits and as a result would not be able to implement solar. *See* Trans. 540, line 3.

15 In this situation it is clear that the tax equity financing arrangement that the SSA provides
16 is complicated, complex and unique and that SolarCity's customers rely on SolarCity to provide
17 this financing arrangement because it is the customer's only chance to implement affordable
18 solar solutions.

19
20 **G. Good public policy requires a determination that SolarCity is not a PSC.**

21 As Commissioner Newman identified during the course of the proceedings, it should be
22 the Commission's goal to have an actual purpose for their regulations rather than just creating
23 unnecessary bureaucracy. *See* Trans. 1119 line 16-19. Arizona Courts echo this sentiment and
24 have held that the purpose behind regulating PSCs is "to preserve those services indispensable to
25 the population and to ensure adequate service at fair rates where the disparity in bargaining
26 power between the service provider and the utility ratepayer is such that government intervention
27 on behalf of the ratepayer is necessary. *Sw. Transmission Coop., Inc. v. Ariz. Corp. Comm'n*,
28 213 Ariz. 427, 432, 142 P.3d 1240, 1245 (Ariz.App. 2007).

1 Because SSAs and distributed solar generation are not indispensable services (i.e. the
2 customer still receives all necessary power from the incumbent utility) and because the record
3 reflects that there clearly is no disparity in bargaining power that calls out for government
4 intervention, there is no valid purpose for the Commission to regulate SSA providers as PSCs.
5 *See* Trans. 1004 line 2-4; *see also* Trans. 1003, line 12-22; *see also* Trans. 570 line 7-16. Indeed,
6 in their attempts to justify regulation, not only did Staff stretch to make arguments as to what
7 purpose regulation would serve, but they have also asked the Commission to ignore the great
8 number of rules and regulations that already govern a solar installation and adequately protect
9 and serve the public interest.

10
11 ***1. Staff's identified purposes for regulation are not compelling or are already***
12 ***adequately addressed through existing regulations.***

13 During the course of the hearing on this matter Staff identified what it purported to be the
14 four purposes that regulation would serve. Trans. 976, line 20. The following separately
15 examines each of these four “purposes” and will clearly demonstrate that each of these
16 “purposes” is either not compelling because regulation will not serve the purported “purpose,” or
17 is already adequately addressed through existing regulations.

18
19 a) *Regulation of SSA providers is not needed to assure a “fair and level*
20 *playing field” among competitors and would give an unfair advantage to*
21 *existing PSCs.*

22 Staff alleges that SolarCity will directly benefit from regulation because regulation will
23 protect SSA providers from possible competition with SSA providers that could otherwise be
24 unregulated subsidiaries of existing PSCs. *See* Trans. 977, line 15-19. Not only does simple
25 logic fail to support this assertion, but regulation would create the exact problem that Staff seeks
26 to avoid because it would strengthen the existing PSCs and allow them to use their hold on the
27 market to directly solicit customers for SSA services. In response to staff's claim, however, it is
28 first and foremost important to note that despite the intervention of two SSA providers in

1 addition to SolarCity and the numerous public comments and letters to the docket received from
2 solar providers and industry representatives, the record does not reflect that any of these
3 individuals or entities ever expressed a concern about competing with unregulated affiliates of
4 PSCs such that they requested regulation. This is important because the purpose expressed;
5 protecting SSA providers, appears to be something SSA providers do not themselves seem to
6 want.

7 Staff's witness indicated that this purpose rests upon the notion that if an unregulated
8 affiliate of a PSC enters the SSA market that it would have some advantages over other SSA
9 providers. *See* Trans. 1017, line 22; *see also* Trans. 1018, line 21. Upon examination this logic
10 breaks down. First, Staff identifies that the unregulated affiliate could hire employees of the
11 regulated PSC that would give them access to the contacts and local knowledge that an SSA
12 provider would not otherwise have. *See* Trans. 1018, line 6-14. This argument simply ignores
13 the fact that any SSA provider could similarly hire an employee of a PSC and derive the same
14 alleged advantages.

15 Second, Staff feels that "the name alone" would provide the unregulated affiliate of the
16 PSC with an advantage in the market place. *See* Trans. 1017, line 25. Staff offered no evidence
17 of this other than its witness' opinion. One could just as easily speculate without empirical
18 evidence that the "name alone" could be a disadvantage in some instances. Again, the record
19 does not contain any reference to any solar industry representative or provider expressing a
20 concern about this such that they asked to be regulated.

21 Third, Staff fails to explain why regulation will cure any inherent advantage it feels a
22 PSC's affiliate has doing business in the unregulated world. If SolarCity was regulated and
23 PSCs decided to get into the same business as SolarCity then both SolarCity and the PSCs would
24 be subject to regulation. Staff's argument leads one to conclude that with regulation the PSC
25 will still have access to the top talent and the name recognition advantage over the other
26 providers and Staff's concerns do not seem to differentiate between a situation with or without
27 regulation. In other words, if Staff believes that unregulated affiliates of PSCs have advantages
28 over unregulated SSA providers then the regulated PSCs would seemingly have the same

1 advantages over any regulated SSA providers. In fact, if all SSA providers were regulated then
2 Staff's concern about the top talent working for the affiliate of the PSC would be magnified as
3 the talent from the incumbent PSC utility would not even need a new job because they would
4 already work for the regulated entity that is now a SSA provider. For this reason it is hard to
5 imagine what advantage regulation would provide.

6 Finally, one could much more easily argue that regulation of both the SSA providers and
7 the PSCs would have the opposite impact; giving the PSCs a far greater advantage and
8 completely skewing the playing field. Right now there is a firewall between a PSC and any
9 unregulated affiliates which prohibits the sharing of confidential information by way of a Code
10 of Conduct. *See* Trans. 1110, line 9-13. If, however, as Staff suggests, a company had to be
11 regulated to provide SSAs then there would no longer be a firewall as the PSC itself could be the
12 SSA provider. The PSC and the SSA provider would be one in the same. One can easily
13 imagine a world where the PSC would directly solicit customers in its monthly bills or when
14 meter reading. Imagine how powerful advantage that would be for the incumbent utility if
15 SolarCity and others were competing directly with APS or TEP and those utilities were offering
16 and marketing their own services in the bills that all electric consumers get each month.
17 Regulation is the surest fire way to assure the current PSCs of an advantage over new SSA
18 providers and Staff's assertions to the contrary are not only unsupportable; they are wrong.

19
20 *b) Regulation of SSA providers will not provide tangible benefits to*
21 *"ratemaking considerations" related to the incumbent utility.*

22 The "purpose" identified by Staff in this area relates to concerns of stranded costs for the
23 incumbent utilities. In other words, Staff is concerned that widespread adoption of distributed
24 generation solar systems will result in lost revenue and stranded costs for the incumbent utility
25 thus resulting in higher rates. *See* Trans. 978, line 2-8. Although Staff provided no expert
26 testimony to support this assertion, even if we assume it is true, this is a concern that relates to
27 the policy goal of distributed generation itself rather than a particular method of adoption like an
28 SSA. The Commission, through adoption of its REST rules, made a policy decision that a

1 particular amount of distributed generation was desirable. Thus, when this decision was made
2 the potential for stranded costs likely was, or should have been, considered at that time. Also, it
3 is important to note that if this is an actual concern, regulating only the portion of the solar
4 market that uses SSAs would not resolve this issue. Whether systems are installed via cash
5 purchases, leases, SSAs or other methods has no bearing on the issue of stranded costs. Further
6 stranded costs are also at issue when considering programs such as energy efficiency or demand
7 side management. In Staff's testimony under questioning from Commissioner Mayes, they
8 admit that stranded costs are not directly related to SSAs. *See* Trans. 1024-25 line 1-5. Further
9 Staff also correctly notes that the issue of potential stranded costs can and should be dealt with
10 via the existing utility ratemaking procedures. *See* Trans. 1025 line 13-20.

11
12 *c) Safety considerations are already sufficiently dealt with and regulation*
13 *is not necessary to improve safety of the public or the grid.*

14 During the course of the hearing Staff claimed that one "purpose" of regulation would be
15 to address "safety considerations." Trans. 976-77, line 25-1. However, the testimony clearly
16 shows that solar installers are already subject to numerous safety regulations including the
17 National Electric Code standards, local building code standards, the Commission's
18 Interconnection Rules and utility interconnection standards and agreements. *See* Exhibit A-4,
19 Testimony of Ben Tarbell; *see* Trans. 350 line 12-24; *see also* Trans. 364-65 line 22-25. Further,
20 A.R.S. § 32-1170.02 requires all solar contractors to be licensed by the Registrar of Contractors
21 and that chapter provides the ROC with multiple remedies for those who violate this provision.

22 Applicant's Exhibit A-9 in the docket contains a copy of the Interconnection Document
23 that controls the standards for the interconnection of distributed generation solar facilities to the
24 grid to protect the public and the grid. These rules were established by the Commission
25 alongside industry representatives and the utilities. They ensure that all connections to the grid
26 are safe and will not impact the reliability of the grid. Despite these many protections currently
27 in place Staff's witness testified that he had not personally reviewed the Interconnection
28

1 Document before testifying that regulation would be a benefit to safety. *See* Trans. 1210, line 5-
2 6.

3 Furthermore, during cross examination, Staff's witness was unable to point to any safety
4 consideration or standard that the current rules do not adequately address. *See* Trans. 1279, line
5 20-24. In fact Judge Rodda very specifically asked Staff's witness, "...does Staff believe that
6 there should be additional safety or construction standards besides those ones that were already
7 contained in the SSA or has anyone that you talked with on Staff suggested [] this doesn't go far
8 enough, that there is a gap here?" Trans. 1279, line 3-8. Staff's witness' response to this direct
9 question clearly demonstrates that there is no issue with safety that is not currently adequately
10 addressed. Staff's witness responded in relevant part, "I don't recall any engineer or staffer
11 saying that what is in place right now, interconnection standards whatever it may be, is not
12 sufficient..." Trans. 1279, line 20-23. In addition, Ms. Lockwood from APS confirmed that,
13 "APS currently implements extensive interconnection and inspection processes to assure safety
14 of all distributed energy that is interconnected to the Company's electric system and follows the
15 Commission's Interconnection Rules, which were approved in Decision No. 69674 [and in the
16 record of this proceeding as Exhibit A-9]." APS-1 at p. 9 l. 9-13.

17 If for some reason the Commission becomes aware of a safety consideration at a future
18 date that needs to be addressed then the corrective action will be a simple modification of the
19 Interconnection Rules to include whatever requirements are necessary. The fact that the
20 Commission already has authority to regulate the way in which systems are interconnected and
21 the standards by which the PSCs evaluate such systems means that there is no reason the
22 Commission cannot adequately address all safety concerns through the current framework.

23 Finally, it is important to note that customers are actually more protected under the SSA
24 arrangement than a standard unregulated purchase of solar facilities because the solar provider
25 only gets paid to the extent the system is in operation. Thus, there is a clear financial motivation
26 on the part of the SSA provider to ensure that a system is not in violation of the Interconnection
27 Rules so that the Commission and the incumbent utility will have no cause to shut it down and
28 interrupt the providers income stream.

1 d) Regulation is not needed to improve consumer services in the SSA
2 industry.

3 Staff also identifies the need to protect consumers from unqualified or irreputable solar
4 providers as a benefit of SSA regulation. However as the testimony shows, solar providers are
5 already required to obtain licenses from the Registrar of Contractors to ensure that they are
6 capable of providing customers with safe functional systems. See Trans. 343, line 1-18. Further,
7 as the record shows, customers have adequate existing remedies to deal with any complaints that
8 may arise via the Registrar of Contractors, the AZ Court system and the Attorney General. See
9 Trans. 916-22 line 10-5. Arizona law also gives the ROC the power to order corrective work,
10 fine, suspend or revoke licenses and even pursue criminal charges against those that violate the
11 ROC's requirements and perform substandard work. See A.R.S. § 32-1154. Finally, even
12 Staff's witness admitted that there was not one piece of testimony indicating that consumers
13 needed additional protections and that in fact RUCO, whose charge is to protect consumers,
14 believes regulation of SSA providers is unnecessary. See Trans. 1139, line 12-24.

15 It appears that a consumer outlet at the Commission designed just for SSA customers
16 could create intense confusion in the consumer. Would an SSA customer be allowed to
17 complain while a purchase or lease customer is given the number to the Registrar of Contractors?
18 Wouldn't the Commission be inundated with complaints from lessees of systems and owners of
19 systems over whom it has no jurisdiction?

20 Simply put, any additional regulations that would be developed or imposed by nature of
21 finding SSA providers are PSCs would be duplicative and useless at best and at worst would be
22 extremely detrimental to the growth of the solar industry in AZ.

23
24 **2. Regulation is likely to stifle competition, thwart the solar industry in AZ**
25 **leading to higher prices for consumers.**

26 The Commission has gone to great lengths to set a regulatory and policy framework to
27 increase the adoption of distributed solar power in Arizona by establishing the Commission's
28 REST Rules, Interconnections Standards, and Net Metering Rules. However, as the testimony

1 clearly shows, regulation of SSA providers as PSCs will only serve to impede or obfuscate those
2 efforts. Throughout the proceedings numerous industry professionals offered testimony stating
3 that any regulation of SSAs would create uncertainty and therefore would deter investors from
4 the AZ market. See Trans. 389-90 line 3-14; *see also* Trans. 290-92 line 17-5; *see also* Trans.
5 448-51 line 21-10; *see also* Trans. 755-56 line 19-8. The available pool for solar investment is
6 extremely limited at this time and as such any level of uncertainty or regulation of SSA providers
7 as PSCs is certain to direct that limited capital to other available markets such as California,
8 Oregon, or New Jersey. *See Id.* Even Staff admits that regulation would add costs to solar
9 providers and that they did no analysis of whether this would thwart solar investment. *See* Trans
10 1010-13 line 23-25.

11 Taking it one step further, not only is regulation likely to stifle growth according to all
12 the expert testimony in the matter but it appears that at least some view regulation as a way to
13 directly slow the growth of the industry. Staff stated that one of the purposes of regulation would
14 be to potentially suppress the growth of the SSA market in order to protect utilities. In response
15 to a question from Chairman Mayes asking if potential stranded costs could be recovered in a
16 utility rate case staff responded that, “[o]ur concern lies more with the aspect that, were SSAs
17 unregulated, then there would be very little check potentially on the proliferation of SSAs and
18 very little control on the cause of stranded costs.” Trans. 1025 line 20-24 emphasis added.
19 Clearly in Staff’s view, one role of regulation would be to directly control the growth of the
20 industry which is the direct opposite of what the Commission has sought to encourage.

21 Finally it is important to note that without third party investors, Arizona utilities simply
22 will be unable to meet their REST standards. APS’ testimony revealed that approximately 65%
23 of their commercial solar reservations are predicated upon SSA financing and that without SSAs
24 they would not be able to meet their REST requirements. *See* Trans. 640-41 line 15-7. It would
25 be a perverse result indeed for the Commission to set REST requirements with one hand and then
26 prevent utilities from meeting those requirements with the other.

1 **3. Even “light handed” regulation will stifle the industry and accomplish**
2 **nothing.**

3 Throughout the proceeding there was a great deal of discussion regarding so-called light
4 handed regulation, i.e. regulation that is not overly burdensome. However, the testimony clearly
5 shows that even light handed regulation will create sufficient uncertainty to deter third party
6 solar investors. *See* Trans. 389-90 line 3-14; *see also* Trans. 290-92 line 17-5; *see also* Trans.
7 448-51 line 21-10; *see also* Trans. 755-56 line 19-8. As Applicant’s CEO Lyndon Rive stated
8 during his testimony any regulation means uncertainty for the future and, “if something can
9 happen in the future that can affect [the tax equity investor’s] existing investment, they won't do
10 it.” Trans. 215 line 12-13.

11 At the very least, regulation of a PSC requires a determination of fair value and requires
12 the Commission to set just and reasonable rates. *Phelps Dodge Corporation v. Arizona Electric*
13 *Power Cooperative, Inc.*, 207 Ariz. 95, 104, 83 P.3d 573, 582 (Ariz.App. Div. 1, 2004). This
14 means that the Commission would be required to regulate the very core of an SSA (i.e. the price
15 to the consumer), making it impossible for a third party investor to rely on the income stream
16 from the SSA. As testimony shows, an SSA investor is extremely concerned with the ability of
17 the SSA to provide a long-term, stable income stream. If the value of this income stream is
18 subject to alteration at the hands of the Commission, investors will take their money elsewhere.
19 *See* Trans. 449 line 17-24.

20 Simply put there is no level of light regulation that would meet AZ Constitutional
21 requirements without thwarting third party investments. Thus, any finding that SSA providers
22 are PSCs would, according to the industry experts who testified, severely stifle the growth of
23 solar in AZ and the ability of AZ utilities to meet their REST requirements.

24
25 **4. Current regulations allow the Commission to keep track of what the SSA**
26 **industry is doing without regulating the industry.**

27 Throughout the course of the hearing, Staff, Commissioner Newman, and others
28 suggested that the Commission may want to be able to keep track of SSAs as they are

1 implemented so that the Commission knows how many of these arrangements are deployed.
2 Staff and Intervenor APS have also identified future resource and infrastructure planning as an
3 area of concern in this case that could benefit from additional information from SSA providers.
4 Again, however, this is an issue that is related to the larger concept and policy decision of
5 whether and how much distributed generation is desirable. It has nothing to do with SSAs
6 directly. The idea that regulating SSA providers would allow the ACC and the incumbent utility
7 to acquire useful information for planning purposes is simply incorrect. First and foremost this
8 would provide at best an incomplete picture of distributed generation (i.e. presumably sales and
9 leases would not be subject to regulation and thus reporting). Furthermore, and more
10 importantly, the tools already exist to allow the ACC and the incumbent utilities to gather any
11 information they require. A simple modification or addition to the existing Interconnection
12 Rules and/or Interconnection Agreements could require reporting information from all solar
13 providers, not just SSA providers. In fact, the testimony of Barbara Lockwood on behalf of APS
14 identifies this as a possibility. *See* Trans. 711 line 8-19.

15
16 **H. If the facts change in the future, the Commission can reconsider SolarCity's PSC**
17 **status.**

18 Commissioners and Staff have indicated at various times throughout the proceedings that
19 they are concerned about a potential future where SolarCity has so many customers and other
20 characteristics that they are, at that time, acting as a monopoly and a PSC and that this possibility
21 should lead the Commission to regulate today. However, Arizona case law clearly states that
22 PSC status is dependent upon an analysis of the facts as they are today and not the facts as they
23 may be at some point in the future. *Sw. Gas Corp. v. Ariz. Corp. Comm'n*, 169 Ariz. at 285, 818
24 P.2d at 720. Thus, should the facts of the *Serv-Yu* analysis change at some point in the future,
25 the result of the PSC analysis would also change. The Court in *Southwest Gas* contemplated this
26 possibility and that Court's holding makes it clear that the Commission may regulate SolarCity
27 as a PSC in the future should the facts change. In fact even SolarCity's CEO stated on the record
28

1 that should SolarCity secure so many customers as to become a de-facto monopoly that they
2 would be happy to submit to regulation as a PSC. See Trans. 336 line 3.

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4 **IV. Addressing Commissioner Newman's Questions**

5 In a letter to the Docket filed after the close of the hearing, Commissioner Newman
6 addressed several questions to the parties (SolarCity's response follows):

7
8 *a) Currently, the way I read the contract between SolarCity and the*
9 *schools, the schools have the option of acquiring ownership, at the end of*
10 *the contract term, of the solar facilities being installed by SolarCity*

11 *(i) Is my interpretation of the ownership issue correct?*

12 *(ii) In order for this matter to achieve the economic results*
13 *desired by SolarCity, does the acquisition of ownership*
14 *need to be optional or can it be mandatory? If ownership*
15 *must be optional, please explain, in detail, why.*

16 *(iii) If the economic results desired by SolarCity cannot be*
17 *achieved if the only change to the contracts is requiring*
18 *mandatory ownership by the schools at the end of the*
19 *contract term, how else would the contract need to be*
20 *modified to achieve the desired economic results (but still*
21 *have the schools own the solar facilities at the end of the*
22 *contract term)*

23 *b) If SolarCity were to amend its contract with the schools such that*
24 *ownership of the solar facilities being installed by SolarCity were no*
25 *longer optional but was mandatory at the end of the contract term:*

26 *(i) Could the Commission consider the contracts between*
27 *the schools and SolarCity as merely being a financing tool*
28 *since the schools would own the solar facilities at the end*
of the contract term?

1 corporation when it provides solar services through SSAs to schools, non-profits and
2 governmental entities.

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