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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner
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Commissioner
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Commissioner
- 6 **BOB STUMP**
Commissioner
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Arizona Corporation Commission
 AZ CORP COMMISSION
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DEC 15 2009

DOCKETED BY

DOCKET NO. E-20690A-09-0346

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

**SALT RIVER PROJECT
 AGRICULTURAL IMPROVEMENT
 AND POWER DISTRICT'S BRIEF**

13 It is the policy of the Arizona Corporation Commission to encourage the
 14 development of solar energy in Arizona. The desire for solar does not mean we must
 15 ignore the Constitution and laws intended to protect Arizonans. The challenge is to
 16 encourage solar energy within Arizona's regulatory structure. The laws of Arizona
 17 are intended to compliment and encourage business, and their application to solar
 18 providers is no exception.

19 In this application SolarCity states its intention to design, install, own and
 20 maintain "rooftop solar" facilities. SolarCity intends to charge customers for the use
 21 of these facilities based on a charge per unit of electricity produced by the solar
 22 facility. SolarCity requests a determination that it is not a public service corporation
 23 under the Constitution because is it not "furnishing" electricity. SolarCity further
 24 argues that even if it is a public service corporation, the Commission should not
 25 exercise authority over SolarCity.

26 SRP believes that the stated activities of SolarCity are squarely within the
 27 Constitutional definition of a public service corporation and the nature of its activities

1 does not exempt it from oversight. SRP suggests an appropriate level of oversight
2 by the Commission which would compliment and encourage these businesses, within
3 the dictates of the law.

4 The brief begins by discussing the history of the Arizona Constitution and
5 detailing the development of the Commission's regulatory authorities. The intent of
6 the framers was that the Commission has regulatory authority over all corporations.
7 Corporations providing essential services, for example transportation, electricity and
8 water, were singled out for more detailed treatment.

9 The Constitution draws a line between the regulation of all corporations and
10 the regulation of corporations whose business is to provide essential public service.
11 The line is that the more intense oversight goes to those corporations who provide
12 the essential services of electricity, water, and natural gas (among others). It is the
13 nature of the service provided, not the structure of the business that is
14 determinative. The Commission's authority was never intended, nor does it, apply
15 only to "monopoly" providers.

16 Second, we address the various Arizona cases that define a public service
17 corporation. While it is tempting for the practitioner to simply look at the eight
18 factors of *Serv-Yu*, Arizona law requires a more rigorous analysis. The discussion
19 below demonstrates that *Serv-Yu* is based in the context of that time (1950) and is
20 not in any sense a thorough recitation of Arizona law. A complete analysis of Arizona
21 law demonstrates that the Constitution asks that the Commission give special
22 scrutiny to corporations providing certain essential public services. SolarCity is
23 providing one of those essential services, electricity, and is subject to the provisions
24 of Article 15 of the Constitution. The few exceptions recognized by the courts
25 involve businesses that only incidentally provide electric, water, communications or
26 transportation services.

1 SRP concludes by pointing out that this does not mean that the Commission is
2 constitutionally required to place obstacles in the way of solar development. The
3 Commission has great flexibility to exercise its authorities in the public interest.
4 Discussed below is an approach that meets Arizona law. It is not the only one.

5 The precedent of a decision that sellers of photovoltaic electricity are not
6 public service corporations could have collateral and unintended consequences.
7 Perhaps the Constitutional Convention did not anticipate rooftop solar. But, it did
8 understand that electricity is an essential public service and that customers need a
9 body with specific expertise to protect customers in terms of price and risk. We only
10 need look at abuses in the past, for example solar water heating in the 1980's to
11 understand that an agency with expertise, not the Registrar of Contractors or the
12 Attorney General, have an oversight role. The solar photovoltaic industry is diverse
13 with large players and many small ones. The possibility of issues is significant. It is
14 the position of SRP that the Commission must "keep its toe in the water" on this one.

15 **The Arizona Constitution**

16 Consider the era in which the Arizona Constitution was conceptualized. It was
17 the time of the robber barons, big corporations, and unbridled power. The resulting
18 populist movement sought to place limits on what was viewed as a major threat to
19 the lifestyles of workers and farmers (*Arizona State Law Journal* 20 (1988), 88-89).

20 We see the effects of this movement in a number of laws, but for our purposes
21 we can start with the Constitution of the 46th State, Oklahoma. In its 1907
22 Constitution we see reflections of the populist movement, most notably the
23 treatment of corporations as a separate, distinct constitutional article. (Article IX,
24 Oklahoma Constitution (1907)). In Oklahoma the constitution established a three
25 person "corporation commission" given broad powers to regulate corporations
26 generally, railroad and pipeline companies, and public service corporations. In
27 Article IX Section 34 the 1907 Oklahoma constitution set forth a very broad

1 definition of a "public service corporation":

2 The term "public service corporation" shall include all
3 transportation and transmission companies, all gas, electric
4 light, heat and power companies, and all persons
5 authorized to exercise the right of eminent domain, or to
6 use or occupy any right of way, street, alley or public
7 highway, whether along, over, or under the same, in a
8 manner not permitted to the general public; the term
9 "person" as used in this article, shall include individuals,
10 partnerships and corporations in the singular as well as
11 plural number;. . .

12 In 1910, the Arizona Constitutional Convention borrowed many ideas from
13 Oklahoma, most notably the Corporation Commission (*Annual Report on Utility and*
14 *Carrier Regulation* (Washington, D.C.: National Association of Regulatory Utility
15 Commissioners, 1988). The minutes from the convention show a lively discussion of
16 the general regulation of corporations, of railroads and transportation, and for our
17 purposes most importantly, public service corporations (*Minutes of the Constitutional*
18 *Convention of the Territory of Arizona*, pp. 967-970 (1910)). Though not reflected
19 directly in the minutes, it is clear that the starting point for Arizona was the
20 Oklahoma definition. The delegates debated the provisions including all entities with
21 the authority of eminent domain, concluding that this provision was overbroad. The
22 delegates also debated adding "oil", arguing that this category could include many
23 small distributors, but ultimately included this category. (*Minutes of the*
24 *Constitutional Convention of the Territory of Arizona*, pp. 967-970 (1910)).

25 The delegates approved language which appears to reflect the substance if not
26 the words of the Oklahoma constitution:

27 Article XV, Section 2. All corporations other than municipal
engaged in carrying persons or property for hire; or in
furnishing gas, oil, or electricity for light, fuel, or power; or
in furnishing water for irrigation, fire protection, or other
public purposes; or in furnishing, for profit, hot or cold air
or steam for heating or cooling purposes; or in transmitting
messages or furnishing public telegraph or telephone
service, and all corporations other than municipal,

operating as common carriers, shall be deemed public service corporations.

1912, Arizona Constitution, Article XV, Section 2. As with Oklahoma, Arizona provides a very broad definition of "corporations" providing essential public services.

Others have, and will argue in this case that the term "public service corporation" connotes an entity with monopoly power. It is clear by the lack of any such reference coupled with the broad definitions that this concept was never the intent of the framers.

It is instructive to look at the first statutory definition of "public service corporation" in the 1913 Code. It is reflective of the views of the framers of the Constitution as it is a contemporaneous explanation of the meaning of the term. In fact, the United States Supreme Court in *Van Dyke v. Geary*, 244 U.S. 39 37 S.Ct. 483 (1917) held that it is this 1913 definition that could be used to clarify the definitions in the Constitution.¹ *Id.* At 45, 485 It is hard to imagine a more comprehensive definition of "electric plant", "electric corporation" and "public service corporation":

Chapter XI. 2277. This chapter shall be known as the "Public Service Corporation Act" and shall apply to the public service corporations herein described and to the commission herein referred to.

2278 . . .

(q) The term "Electric plant", when used in this chapter, includes all real estate, fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate the production, generation, transmission,

¹ Specifically the Supreme Court affirmed the District Court's determination, relying both on the contemporaneous expression of intent by the legislature and the ability of the legislature to expand the definition of a public service corporation:

This construction of the Arizona Constitution by the district court is in harmony with the contemporaneous construction evidenced by the Public Service Corporation Act (supra) enacted at the first session of its legislature. In the absence of an authoritative decision of the Arizona supreme court to the contrary, this legislative construction, reasonable in itself and designed to accomplish the obvious purpose of the constitutional provision, ought not to be set aside by this court.

delivery, or furnishing of electricity for light, heat or power.

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...
(r) The term "Electrical corporation", when used in this chapter, includes every corporation, or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any electric plant for compensation within this state. . . .

(z) The term "Public service corporation", when used in this chapter, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, and warehouseman, as these terms are defined in this section, and each thereof is hereby declared to be a public service corporation and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of this chapter.

10 Considering the derivation of the Arizona definition of public service
11 corporation, considering the words of the Constitution itself, and considering the
12 contemporaneous extrapolation of the term in the statutes there can be no question
13 that the term was intended to have a broad definition. We particularly point out the
14 words of the statute "to facilitate the production, generation, transmission, delivery
15 or furnishing of electricity". The term was not intended to be limited by whether the
16 corporation has "monopoly" power. It certainly is not susceptible to an interpretation
17 that the definition depends upon the point or method of delivery. And, it was never
18 intended to hinge upon an artful use of the term "furnished".

19 We are guided by the words of the Arizona Supreme Court in *Petrolane-*
20 *Arizona Gas Service v. Arizona Corp. Comm'n*, 119 Ariz. 257, 259 580 P.2d 718, 720
21 (1978)

22 The statement of the court in *Re Geldbach Petroleum Co.*,
23 56 PUR3d 207 (Mo.1964), accurately conveys the benign
24 objectives of the Constitution, Art. 15, s 2, and why its
25 language should not be reduced by judicial construction to
26 insignificance:

27 " * * * 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

1 disparity in the relative bargaining power of a utility
2 ratepayer are such as to prevent the ratepayer from
3 demanding a high level of service at a fair price without the
4 assistance of governmental intervention in his behalf." Id.
5 at 213

6 **Arizona cases**

7 As mentioned above, the United States Supreme Court in *Van Dyke v. Geary*
8 was clear that the scope of the term "public service corporation" could be defined by
9 the broad definition of the 1913 Code. Since that time no Arizona court has
10 questioned that the words of the Constitution are to be given their normal and logical
11 meaning. The action has been with a second "step" of the analysis, a court-imposed
12 overlay that has exempted certain businesses.

13 As a practical matter this second step has resulted in a court determining that
14 Commission oversight is not needed where an element of a public service corporation
15 (found in step one of the analysis) is an incidental part of a different business, so as
16 to logically not fall within the intent of the Constitution.

17 Thus, for example, these activities have been found to be outside the
18 Constitution:

- 19 • *General Alarm v. Underdown*, 76 Ariz. 235, 262 P.2d 671 (1953)

20 General Alarm maintained a communication system for transmission of
21 emergency messages to its central office. The Court held that General Alarm
22 was not a public service corporation under the Arizona Constitution because it
23 was not engaged in the business of sending messages. General Alarm's
24 transmission of messages was merely incidental to the operation of its main
25 business of property protection.

- 26 • *Arizona Corporation Commission v. Continental Security Guards*, 103 Ariz.
27 410, 443 P.2d 406 (1968)

 Continental Security Guards operated five different divisions including an
 armored car service which transported money and valuables. The Supreme

1 Court held that Continental was not a common carrier since the armored car
2 use was merely incidental to the security provided for the protection of money
3 and valuables.

- 4 • *Arizona Corporation Commission v. Nicholson*, 108 Ariz. 317, 497 P.2d 815
5 (1972)

6 The owners of a mobile trailer park served water to trailer park residents as
7 part of a package price that included trailer space, garbage pickup, mail
8 delivery, clubhouse facilities, pool and sporting privileges, use of laundry and
9 car wash facilities, and various planned recreational events. The Supreme
10 Court held that the furnishing of water was in support of and was incidental to
11 the owners' business of renting trailer spaces and therefore the owners are not
12 a public service corporation.

- 13 • *Quick Aviation Co. v. Kleinman*, 60 Ariz. 430, 138 P.2d 897 (1943)

14 The Supreme Court held that a crop dusting service that transported
15 insecticide from the place of landing to the field was not a common carrier
16 because the transport of the insecticide was a part of "one operation", the
17 crop dusting service.

- 18 • *Killingsworth v. Morrow*, 83 Ariz. 23, 315 P.2d 873 (1957).

19 Morrow's business consisted of selling, servicing and repairing vehicles, which
20 included towing vehicles to his place of business. The Supreme Court ruled
21 that at that time, Morrow was a private motor carrier and that the towing of
22 cars to his place of business was merely incidental to his business of selling,
23 servicing or repairing vehicles.

24 But, these businesses were found to be a public service corporation:

- 25 • *Natural Gas Service Co. v. Serv-Yu Cooperative, Inc.*, 69 Ariz. 328, 213 P.2d
26 677 (1950)

27 Serv-Yu was a membership organization that had the power to manufacture,

1 purchase, acquire and accumulate natural gas resulting from the manufacture
2 of gas for its members. The Supreme Court held that Serv-Yu was a public
3 service corporation, based upon the description of its business contained in its
4 articles of incorporation and bylaws.

- 5 • *Natural Gas Service Co. v. Serv-Yu Cooperative, Inc.*, 84 P.U.R.(NS) 148, 70
6 Ariz. 235, 219 P.2d 324 (1950)

7 On rehearing, the Supreme Court stated that while its previous opinion was
8 technically correct, the statement is too broad and that there were other
9 factors that should have been pointed out. The Supreme Court again held
10 that Serv-Yu was a public service corporation and could not avoid public
11 regulation by simply incorporating as a non-profit membership organization.

- 12 • *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 922 P.2d 308 (1996)

13 The Supreme Court determined that refuse collection companies were not
14 public service corporations under the Arizona Constitution. However, the
15 Supreme Court did determine that a company that is neither a public service
16 corporation nor a political subdivision of the state can be a "public utility
17 service" as long as it satisfies the requisite qualifications of a business
18 traditionally affected with the public interest.

- 19 • *Southwest Transmission Cooperative, Inc. v. Arizona Corporation Commission*,
20 213 Ariz. 427, 142 P.3d 1240 (Ariz.App.Div.1 2007)

21 The Court of Appeals held that Southwest Transmission Cooperative, Inc.
22 ("SWTC") a non-profit Arizona rural electric transmission cooperative was a
23 public service corporation because it transmitted electricity for ultimate use by
24 consumers and consequently SWTC is engaging in a service "indispensable to
25 large segments of our population". Further although the Court of Appeals
26 determined that although SWTC did not meet all of the 8 factors articulated in
27 *Serv-Yu*, the factors that it did meet, weighed in favor of finding that SWTC

1 was a public service corporation.

- 2 • *Petrolane-Arizona Gas Service, et al. v. Arizona Corporation Commission*, 119
3 Ariz. 257, 580 P.2d 718 (1978)

4 The plaintiffs delivered liquid propane gas through a central gas distribution
5 system and sold the propane gas to individual customers under pressure
6 through a meter for use in home heating, cooking and heating water. The
7 Supreme Court held that the plaintiffs were furnishing gas for light, fuel or
8 power because at some point, plaintiffs' liquid becomes a gas.

- 9 • *Olsen v. Union Canal & Irrigation Co.*, 58 Ariz. 306, 119 P.2d 569, 574 (1941)

10 The Court determined a canal company serving owners and non-owners of the
11 system was a public service corporation because it was supplying water and
12 dealing with public property and was required to provide water under the
13 same terms and conditions and same charges as the owners of the company.

14 The Serv-Yu case was appropriately criticized by Jodi Jerich in sworn

15 testimony:

16 But as an aside, I think law professors use the Serv-Yu
17 case as an example of how not to write an opinion,
18 because they throw out these eight factors and then, in its
19 own opinion, it does not provide a constructive detailed
20 analysis following those eight criteria. I mean, I find, the
case highly frustrating and I don't find the eight factors
particularly illuminating, and some of them are duplicative
in my opinion.

21 *Transcript of Proceedings, October 23, 2009, P. 845/LL. 7-15*

22 While *Serv-Yu* can be read to support any position in this docket, and it sure is
23 convenient to have eight factors in one place, the case in reality does little to further
24 the resolution of the issues in this case, either way.

25 *Serv-Yu* is really two cases *Natural Gas Service Co. v. Serv-Yu Cooperative*, 69
26 Ariz. 328, 213 P.2d 677 (1950) and *Natural Gas Service Co. v. Serv-Yu Cooperative*,

1 70 Ariz. 235, 219 P.2d 324 (1950). The issue in both cases was whether a
2 corporation formed by a group of farmers to purchase natural gas directly from El
3 Paso Gas was a public service corporation. The first *Serv-Yu* case decided the issue
4 on one point: the purpose set forth in the corporation articles stated a general utility
5 purpose. The court concluded that it was not really important what the corporation
6 was doing at present, the important consideration was what the corporation was
7 authorized to do.

8 Before going to the second case we point out that the first case was based
9 upon state law that no longer exists. In 1950 a corporation was required to state its
10 specific business purpose. The corporation's authority did not extend beyond this
11 purpose *Id.* at 338, 684. Thus corporations engaged in utility businesses were
12 required to state a utility purpose in the corporate charter.

13 This is no longer the case. In 1975 Arizona's corporations code (Article 10)
14 was modernized (*Laws 1975 Ch. 69*). No longer is a corporation's business limited to
15 a specific purpose set out in the articles. Rather, corporations are allowed to
16 incorporate under a broad charter, allowing any lawful business (A.R.S. § 10-301).
17 The factor that was determinative in *Serv-Yu I*, does not exist today.

18 *Serv-Yu II* followed an argument on rehearing that this one factor should not
19 be determinative. The court responded by affirming *Serv-Yu I*, and citing additional
20 reasons why the corporation should be defined as a public service corporation. It is
21 important to note that these eight points were not stated as a definitive test for
22 whether or not a corporation is a public service corporation, or particularly that these
23 points should be used as a test to determine whether a corporation *is not* a public
24 service company. Rather, these were simply seven additional points, taken from the
25 record in the case that supported the Court's decision in *Serv-Yu I*.

1 Upon careful review it is obvious that these points were specific to the analysis
2 and the context of the analysis of this specific company in 1950, and should not be
3 extrapolated into a general test:

4 1. *What the corporation actually does.* This certainly would be the basis of
5 any analysis.

6 2. *Articles of incorporation, authorization, and purposes.* The 1975
7 amendments to the corporations code eliminated this as a *factor*.

8 3. *A dedication to public use.* At the time of the Constitutional Convention
9 the concept was that certain corporations provided a public service. This *factor* can
10 be read consistently with the Constitution.

11 4. *Dealing with the service of a commodity in which the public has been*
12 *generally held to have an interest.* The "commodities" are specified in the
13 Constitution, therefore this factor has no relevance.

14 5. *Monopolizing or intending to monopolize the territory with a public*
15 *service commodity.* This was never a requirement for a public service corporation
16 under the Constitution. To apply this requirement, for example, would exempt the
17 entire telecommunications industry. It would also have exempted, in 1912, the
18 entire industry of "carrying persons or property for hire", obviously directly contrary
19 to the constitutional language at that time.

20 6. *Acceptance of substantially all requests for service.* This was never a
21 requirement of the Constitution. As above, such a requirement would exempt entire
22 utility segments.

23 7. *Actual or potential competition with other corporations whose business*
24 *is clothed with public interest.* This might apply to a certificate of convenience and
25 necessity, but does not relate to the definition of a public service corporation.

26 8. *Service under contracts and reserving the right to discriminate.* As
27 above, this *factor* could exempt entire segments of the utility industry.

1 *Serv-Yu* has never been cited by the Arizona Supreme Court as a definitive
2 test as to whether an entity is a public service corporation subject to Commission
3 oversight. In fact, the Supreme Court has held expressly to the contrary:

4 We do not, however, read *Natural Gas Service Co. v. Serv-*
5 *Yu Cooperative, supra*, as saying that the eight criteria
6 which were used there to establish a public service
 corporation are those which must be found present or a
 public service corporation does not exist.

7 *Petrolane-Arizona Gas* at 259, 720.

8 It is the position of the Supreme Court that *Serv-Yu* represents an
9 examination of the facts before the court, and that each case hinges upon its specific
10 facts:

11 Dedication of private property to a public use is a question
12 of intention to be shown by the circumstances of each case

13 *Nicholson* at 320, 818

14 It is fair to say, based not on *dicta* but on actual rulings, that there is a two
15 step process in determining whether an entity is a public service corporation. The
16 first is whether the corporation engages in the activities set forth in the Constitution,
17 giving those provisions a broad and logical reading. Thus, a corporation providing
18 services, including water, to trailer park residents was found to meet the
19 constitutional definition as was a corporation providing security services, including
20 the transmission of messages.

21 The second step is ambiguous. The Court of Appeals in *Southwestern*
22 *Transmission Cooperative v. Arizona Corp. Comm'n*, 213 Ariz. 427, 142 P.3d 1240
23 (Ariz.App.Div.1 2007) indicated that the second step is a public interest analysis (and
24 that this analysis is based on the eight *Serv-Yu* factors). But that analysis does not
25 appear to be consistent with the Constitution and the facts of the actual decisions. A
26 case by case public interest analysis would be unwieldy, and probably inconsistent
27

1 with the Constitution.

2 Probably the analysis that is most consistent with the Constitution and the
3 actual outcome of the cases is that the Constitution is not implicated where the
4 service provided is incidental to another business. Thus, the second step in the
5 analysis is whether the provision of a service defined in the Constitution is whether
6 the primary purpose of the business is to dedicate property to the "public use" of
7 electric service (or other enumerated public services).

8 **The SolarCity Arguments**

9 It appears that SolarCity makes several arguments to support its contention
10 that it is not subject to Commission regulation.

11 The first is that SolarCity does not "furnish" electricity, and thus the
12 constitutional provision is not triggered. SolarCity argues instead that it is just
13 making the generating unit available for the customer's use, and is charging for the
14 right to use based upon the kWh output of the generation (like a copy machine
15 lease).

16 Clearly the business of SolarCity is to own generating facilities and sell the
17 output to customers. It is necessary for SolarCity to own the facilities, and not lease
18 them or sell them, because to do otherwise would be to risk the benefits of federal
19 tax law.²

20 Rather than the narrow definition that is advocated by SolarCity, it is clear
21 that the term in the Constitution "furnish . . . electric service" is intended to be
22 broadly construed, not subject to avoidance by contract terms. Reference the
23 contemporaneous definition of "electric corporation" from the 1913 Code: "every
24 corporation or person . . . owning, controlling, operating, or managing any electric
25 plant for compensation within this state." A simple glance at SolarCity's business
26

27 ² See *Application of SolarCity*, P.6, LL.1-11

1 model or the contract for service confirms this conclusion. To conclude otherwise
2 would permit huge segments of the electric industry to avoid regulation simply by
3 redefining the service provided to customers.

4 SolarCity then appears to argue that even if it is within the Constitutional
5 definition, it should not be subject to regulation. SolarCity makes several
6 arguments.

7 First, SolarCity argues that it should not be subject to regulation because its
8 organizational documents do not specify a utility purpose. Supporting this premise
9 SolarCity points to pre-1975 organizational documents of other utilities. This
10 designation is no longer required in Arizona. Under modern corporation law no entity
11 restricts its operations to those of a utility. Corporations operating as a utility are
12 free to conduct other businesses, and corporations conducting other businesses are
13 free (at least under corporation law) to engage in a utility business.

14 SolarCity then argues that it should not be subject to regulation because it is
15 not a monopoly, or does not intend to monopolize the provision of electric service.
16 As discussed above, the existence or non-existence of market power is not relevant
17 to the Constitutional definition of public service corporations. The Constitution
18 simply defines classes of service. SolarCity can point to no case where any court
19 found that a business was not subject to regulation because it did not intend to
20 provide monopoly service.

21 This argument also defies logic when extrapolated to the many structures of
22 modern utility service. Based on this argument, a competitive electric service
23 provider, no matter how large, and the generation portion of the business of
24 incumbent utilities, would not be subject to Commission regulation. More dramatic
25 would be the effect on the telecommunications industry. Almost the entire industry
26 is competitive, in one way or the other. Most providers do not have monopoly power
27 and do not reasonably aspire to monopoly power. And, most providers discriminate

1 among customers.

2 This is not a case of one isolated installation. SolarCity, and its brethren, are
3 large companies with business plans to expand market share. They are in concept
4 no different from electric service providers or competitive telecommunications
5 companies.

6 There is another argument that, apparently, is being made by Western
7 Resource Advocates. It argues that the public interest is not served by regulation
8 because SolarCity provides solar power, rather than power generated from other
9 sources. There is no law that would support such a distinction.

10 SolarCity also appears to argue that since sales and leases of solar generating
11 units are not subject to regulation, it does not make sense that it, providing
12 essentially the same equipment, should be regulated. If there is a public interest to
13 be regulated, it argues, then surely the same interest is present in a lease or a
14 purchased power agreement.

15 While intriguing, this argument cannot overcome the dictates of the
16 Constitution. The law needs to draw a line somewhere between regulation and non-
17 regulation. In the 1912 constitution, the line was drawn between companies
18 providing electric service to others, and individuals providing electric service for their
19 personal use. If SolarCity wants to avoid the Constitution, then it can engage in the
20 sale of systems. It is not doing so here, by its own admission.

21 Next, SolarCity argues that its business of selling electricity is incidental to a
22 different business, which is the business of monetizing and processing tax credits.
23 But, this argument again could exempt almost every utility provider and has no
24 support under Arizona law.

25 Unlike the businesses before the courts in the past, mobile home parks, alarm
26 services, security services, and the like, there is no independent business associated
27 with the provision of electricity. From the customer's viewpoint, the reasons for this

1 relationship are to receive solar electricity or to save money. (*Hearing Transcript,*
2 *Vol. III, pp.533-534, ll.6-25, 1-7*)

3 Yes, SolarCity arranges for financing of its own facilities, and takes advantage
4 of tax benefits. But, this is no different in concept from the activities of any electric
5 utility, or any utility for that matter, which must finance its facilities, taking
6 advantage of available ways to reduce costs. Financing of facilities is a part of the
7 electric business. We only need look at the many provisions of Arizona law that
8 contemplate the financing of facilities, e.g. A.R.S. §§ 40-301, 40-302, and 40-207.
9 As financing facilities is integral to any utility business, the fact that SolarCity does
10 so (even if it is at the request of a customer) does not distinguish it from any other
11 provider of electric service.

12 Finally there is the suggestion made by SolarCity and others that the
13 Commission can pick and chose what it wants to define as a public service
14 corporation, changing its mind based upon the circumstances. There is no legal
15 support for this view. Either a business is a public service corporation or it is not.
16 Yes, the Commission has great discretion. But, the discretion lies in how it treats the
17 regulation of public service corporations (discussed in more detail below), not in
18 modifying the constitutional definition as it may suit the Commission's current
19 purposes.

20 The law in Arizona is that it is the provision of electricity that triggers the
21 dedication to a public use concept (electric service is the public use). Here SolarCity
22 and others will be delivering the same electricity as a customer could receive from its
23 distribution utility. There is just a different delivery mechanism. There is no legally
24 cognizable difference between the electricity provided by APS, TEP or SRP, and the
25 electricity provided by SolarCity.

1 **Recommendation**

2 Commission oversight does not mean the destruction of a business. Rather,
3 regulation is flexible depending upon the needs and circumstances of the situation.
4 The issues here would be best addressed in a rule-making process, and this should
5 be a future step. But, there is no reason that, right now, the Commission could not
6 address the issues, at least for this applicant.

7 It is the position of Salt River Project that the Commission should engage in
8 *appropriate* regulation, as may be consistent with the purposes of the Constitution as
9 enunciated by the Supreme Court:

10 to preserve and promote those services which are
11 indispensable to large segments of our population, and to
12 prevent excessive and discriminatory rates and inferior
13 service where the nature of the facilities used in providing
14 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 behalf³

15 Based on the evidence in the record, for this particular applicant, it appears that the
16 oversight could be designed to be consistent with the business needs of the industry.

17 In exercising its oversight the Commission is guided by a number of legal
18 principles, which are being promoted in this case as presenting insurmountable
19 burdens.

20 1. The Commission must consider fair value in setting rates. Fair value is
21 the value of assets devoted to providing service. It is not necessary that rates be
22 based on fair value, only that the Commission "consider" fair value. The Commission
23 should consider fair value when setting rates within a competitive market, although
24 the Commission has broad discretion in determining the weight to be given that
25 factor in any particular case. *Phelps Dodge Corporation v. Arizona Electric Power*

26 _____
27 ³ *Petrolane-Arizona Gas* at 259, 720

1 *Cooperative, Inc.*, 207 Ariz. 95, 106, 83 P.3d 573, 584 (Ariz.App.Div.1 2004)

2 2. Rates should be just and reasonable. This requirement imposes great
3 discretion in the Commission, which will not be overturned by the courts unless
4 abused. *Simms v. Round Valley Light & Power Company*, 13 P.U.R.3d 456, 80 Ariz.
5 145, 294 P.2d 378 (1956) (The commission in exercising its rate-making power of
6 necessity has a range of legislative discretion and so long as that discretion is not
7 abused, the court cannot substitute its judgment as to what is fair value or a just
8 and reasonable rate.)

9 Coupled with these constitutional requirements are the practical matters of
10 issuing a certificate of convenience and necessity and the determination of prices and
11 service requirements.

12 With this in mind, the following is a concept for light-handed oversight:

13 1. A single entity would make application to the Commission, on a form
14 provided by the Commission. As with corporations, the services of an attorney
15 would not be needed to complete and file the form.

16 2. The form would generally describe the services to be provided (e.g.
17 solar generation to be located on the customer premises).

18 3. The form would state approximate values of the property to be installed
19 (e.g. the value of the solar installation will range between --- and --- per kilowatt of
20 output (without giving up competitive information).

21 4. The form would state a range of prices and services to be offered to
22 customers and assert that the prices will be reasonably reflective of the value of the
23 plant devoted to service.

24 5. Based on the information on the form, the Commission would issue a
25 solar CCN. The CC&N would allow the applicant to serve as the general partner for
26 any entity providing service under a "solar services agreement".

27

1 6. Once granted, the applicant would provide a copy of each contract to
2 the Commission on a confidential basis. If the Commission does not formally object
3 to the terms of the contract within thirty days, the contract will be deemed approved
4 by the Commission without further action.

5 7. The solar industry would pay reasonable fees to cover the costs of the
6 Commission's efforts.

7 8. The Commission would work to develop standardized disclosures to
8 assure customer understanding and avoidance of risk.

9 The result could be a simple process, without the need to retain counsel. The
10 process would result in finality for each contract within a short time. And, the
11 process would permit the Commission to handle complaints and intervene if needed
12 to curb abuses.

13 **Conclusion**

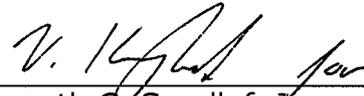
14 It is not the intent of the Salt River Project by its participation in this case to
15 delay or hinder in any unreasonable way the development of all forms of ownership
16 structures for solar and renewable energy in Arizona. To the contrary SRP is
17 engaged in significant efforts to promote the development of many models of
18 service. These efforts include successful work with the applicant

19 In this docket, SRP recommends that the Commission find that SolarCity, in
20 connection with its business defined in this application, is a public service corporation
21 subject to oversight by the Commission. SRP further recommends that the
22 Commission adopt a reasonable approach to regulation, as may the public interest.
23 Finally, SRP suggests that the Commission convene a rule making process to deal
24
25
26
27

1 with the issues raised in this application on a global scale.

2 DATED this 15th day of December, 2009.

3 JENNINGS, STROUSS & SALMON, P.L.C.

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8 ORIGINAL and 13 copies filed this 15th
9 day of December, 2009, with:

10 Docket Control
11 ARIZONA CORPORATION COMMISSION
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12 COPY mailed or emailed this 15th day of
13 December, 2009, to:

14 All parties of record

15
16 By: 