

ORIGINAL



0000106855

1 Timothy M. Hogan (004567)
2 ARIZONA CENTER FOR LAW
3 IN THE PUBLIC INTEREST
4 202 E. McDowell Rd., Suite 153
Phoenix, Arizona 85004
(602) 258-8850

RECEIVED
2008 JUL 15 AM 11:17
ARIZONA CORPORATION COMMISSION
PHOENIX ARIZONA

562

5 Attorneys for Western Resource Advocates

7 **BEFORE THE ARIZONA CORPORATION COMMISSION**

8 KRISTIN K. MAYES, Chairman
9 GARY PIERCE
10 PAUL NEWMAN
11 SANDRA D. KENNEDY
BOB STUMP

12 IN THE MATTER OF THE APPLICATION
13 OF SOLARCITY FOR A DETERMINATION
14 THAT WHEN IT PROVIDES SOLAR
15 SERVICE TO ARIZONA SCHOOLS,
16 GOVERNMENTS, AND NON-PROFIT
17 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

**WESTERN RESOURCE
ADVOCATES' REPLY BRIEF**

Arizona Corporation Commission
DOCKETED

JAN 15 2010

DOCKETED BY

19 **I. THERE IS NO NEED FOR RATE REGULATION**

20 It is notable that none of the briefs supporting Commission regulation of Solar
21 City mention the need for rate regulation as one of the reasons why SolarCity should be
22 denominated a public service corporation. As WRA pointed out in its initial brief, the
23 key question concerning regulation of SolarCity should be whether the public interest
24 requires that that its prices be regulated. See WRA Post Hearing Brief at 3 citing *General
25 Alarm v. Underdown*, 76 Ariz. 235, 238, 262 P.2d 671, 672 (1953).

1 Instead of discussing the need for price regulation, the parties supporting the
2 regulation of SolarCity go out of their way to assure the Commission that the price
3 regulation they envision will be completely innocuous. In effect, the parties supporting
4 regulation acknowledge that the need for rate regulation is nonexistent and, therefore,
5 provides no basis for a determination that SolarCity is a public service corporation.

6 As a constitutional matter, it is the need for price regulation that is the predicate
7 for regulation as a public service corporation. The fact that there is no public interest in
8 regulating SolarCity's rates or prices should be a significant, if not a controlling, factor in
9 the Commission's decision. The Commission has enough to do without regulating an
10 industry in which there is no evidence supporting the need for price regulation.

11 **II. SOLAR SERVICE AGREEMENTS SHOULD NOT BE REGULATED**

12 **A. There Is No Dedication of Private Property for Public Use Nor Does** 13 **the Public Have an Interest in Distributed Renewable Energy Systems**

14 The public does not use a photovoltaic system installed on a customer's property.
15 A customer-sited solar energy facility primarily serves only that customer and may only
16 incidentally sell excess generation back to the utility. In the absence of a public interest
17 in distributed renewable energy systems and in the absence of dedication of private
18 property for public use, there is no reason to regulate providers of distributed renewable
19 energy projects. *See Natural Gas Service Co. v. Serv-Yu Cooperative*, 70 Ariz. 235, 238-
20 9, 219 P.2d 324, 326 (1950).

21 TEP argues (p. 6) that SolarCity is using its facilities to provide electricity directly
22 to the public. This is incorrect. The public has no right to the electricity produced by
23 SolarCity's facilities located on a customer's property. The public may occasionally
24 obtain electrons from those facilities but only if SolarCity's customer (not SolarCity)
25 actually delivers excess electricity to the grid from time to time. RUCO is correct (p. 10):
there are no common facilities that serve the public.

1 TEP further states (p. 6) that the facilities owned and operated by SolarCity would
2 not be possible without incentives funded by the public, implying that SolarCity should
3 therefore be regulated. The same subsidies are available to customers who install their
4 own rooftop PV systems and the Commission does not regulate such systems. Nor does
5 the Commission regulate residential and business customers who receive subsidies for
6 energy efficiency or regulate the providers of energy efficient devices.

7 Staff states (p. 19) that "...the suggestion that only electricity provided through a
8 centralized generation facility connected to transmission facilities is a matter of public
9 interest is simply too narrow and rigid an interpretation of the public's interest." The
10 burden should be on proponents of regulation to demonstrate that the public has an
11 interest in distributed renewable energy facilities located on an individual customer's
12 premises when that customer is not served with any common facilities. It is hard to
13 imagine why the public has an interest in an individual customer's choice to hedge
14 against high utility rates and to reduce his or her environmental footprint.

15 **B. Regulation is Over-Reaching**

16 Regulation of purchased power agreements for distributed renewable energy
17 needlessly interjects the Commission into the private decisions of residential and non-
18 residential building owners over how they will hedge against high utility rates and protect
19 the environment. These decisions do not require rate regulation.

20 Staff implies (p. 19) that it is necessary to regulate SolarCity because its customers
21 may sell excess electricity into the grid. TEP makes a similar argument (p. 7). As RUCO
22 pointed out in its brief (p. 18), it is the customer and not SolarCity who is selling power
23 back to the incumbent utility. By Staff's and TEP's argument, the Commission should
24 regulate every home and business that has a rooftop PV system and could sell excess
25 electricity into the grid. With regard to the sale of excess power, the proper entity to be

1 regulated is the incumbent utility and the factor to be regulated is the buyback rate, not
2 the price paid for distributed renewable energy delivered to or generated by the end user.

3 Staff further argues (p. 11) that the electricity produced by SolarCity's system is
4 essential. If it is essential, the Scottsdale schools could not have operated for years
5 without rooftop photovoltaics. The nature of the service provided under a solar service
6 agreement is to provide a hedge against future utility rate increases and to reduce the
7 environmental impact of consuming electricity. These services do not require rate
8 regulation. Staff also asserts (p. 11) that "The electricity obtained by SolarCity displaces
9 load now provided by incumbent providers. Because of this, it is certainly essential." If
10 displacement of load makes a service essential and therefore subject to regulation, then
11 rooftop PV systems owned by the end user and energy efficiency measures are
12 "essential" and should also be regulated.

13 Staff argues (pp. 28-29) that the costs to the incumbent utility caused by solar
14 service agreement providers can be mitigated through imposing an enforceable obligation
15 to provide a reasonable and adequate level of service and through reporting requirements.
16 There is no evidence that solar service agreement providers will engage in self-defeating
17 behavior by providing poor service and reducing their own revenues. And a desire for
18 information is hardly sufficient reason to impose regulation, especially when that
19 information can be obtained as part of an interconnection agreement with the incumbent
20 utility.

21 It is worth repeating the Court's admonition in *General Alarm v. Underdown* that:

22 It was never contemplated that the definition of public service corporations
23 as defined by our constitution be so elastic as to fan out and include
24 businesses in which the public might be incidentally interested... 76 Ariz.
25 235, 239, 262 P.2d 671, 673 (1953).

1 The parties supporting regulation in this case are equating the public's incidental interest
2 in on-site solar service with a need to regulate it.

3 **C. Speculation About Future Market Structure is Insufficient Reason to**
4 **Regulate**

5 Staff argues (p. 31) that the market for solar service agreements will evolve into a
6 situation in which affiliates of incumbent utilities will dominate the market, and to
7 prevent this, it is necessary to regulate the market and market entry. The problem is
8 speculative and it is not clear how the Commission would enforce antitrust law under the
9 presumed conditions.

10 **D. Regulation May Significantly Impede the Deployment of Distributed**
11 **Renewable Energy in Arizona**

12 Staff, TEP, and SRP contend that light regulation is appropriate for SSAs.
13 However, even light regulation of SolarCity and other providers of distributed renewable
14 energy through purchased power agreements will impose an operating risk on these
15 providers. The risk is that the Commission or the courts will ultimately require more
16 intrusive regulation of rates as prescribed by the Constitution and previous judicial
17 decisions such as *Phelps Dodge. Corp v. Arizona Electric Power Co-Op*, 207 Ariz. 95,
18 83 P.3d 573 (App. 2004).

19 SolarCity and SunPower stated that this risk would make Arizona unattractive for
20 solar service agreements (SolarCity brief, p. 24; SunPower brief, pp. 34-37). Companies
21 which provide distributed renewable energy facilities and services will focus their
22 business efforts on other states where there is no rate regulation or threat of rate
23 regulation (for a partial list of these states see Sunpower brief, pp. 22-34) and will reduce
24 or eliminate the use of solar service agreements in Arizona, thereby restricting the options
25 available to customers. Regulation of distributed renewable energy services will produce
results that run counter to the Commission's desire to promote distributed renewable

1 energy, making it more difficult and more expensive to meet the Renewable Energy
2 Standard requirements for distributed generation.

3 Staff discusses (p. 17) WRA's testimony concerning the Interstate Renewable
4 Energy Council's finding that purchased power agreements for distributed renewable
5 energy are becoming more widely used. Staff then incorrectly infers that such a trend
6 supports the need for regulation. However, Staff failed to consider that the regulation
7 they seek to impose is likely to reduce or terminate the use of purchased power
8 agreements in Arizona.

9 **III. PROPONENTS OF REGULATION HAVE MISCHARACTERIZED** 10 **IMPORTANT ISSUES AND PARTIES' POSITIONS**

11 **A. TEP Has Mischaracterized SolarCity's "Monopoly" Services**

12 TEP mischaracterizes the "monopoly" position of SolarCity (p. 7). TEP states
13 that:

14 Here, once the solar facilities are installed, the customer has no other
15 realistic option for solar electricity for an extended period of time, if ever.
16 It is expensive and impractical to remove SolarCity's facilities so that
17 another provider can step in to provide solar electricity. ... Thus, SolarCity
is and will be the sole provider of solar electricity to its customer once
facilities are installed on the customer's premises.

18 The situation described by TEP is common to many goods and services that are
19 not purchased on the spot market such as cars, houses, furniture, and appliances. There is
20 a "fundamental transformation" that occurs whenever a buyer and seller enter into a
21 contract: "whatever was a large-numbers bidding condition at the outset is effectively
22 *Transformed* into one of bilateral supply thereafter."¹ Society successfully manages the

24 ¹ Oliver Williamson, "The Economics of Governance: Framework and Implications," In
25 Richard Langlois, ed., *Economics as a Process*, Cambridge University Press, 1986, at
185. Mr. Williamson was awarded the Nobel Prize in economics in 2009 for his work on
transaction cost economics.

1 risks (to buyer and seller) of this “fundamental transformation” through contractual
2 provisions, including those related to asset-specific transactions. A rush to regulate is
3 unnecessary. There is no evidence that SolarCity and its customers are incapable of
4 negotiating mutually beneficial contractual arrangements.

5 **B. SRP Mischaracterizes WRA’s Arguments**

6 On page 16 of its brief, SRP states that WRA argues that the public interest is not
7 served by regulation because SolarCity provides solar power, rather than power generated
8 from other sources. This is not WRA’s argument. It is the *distributed* nature of the
9 generation of electricity, not the technology itself, that is important in determining
10 whether SolarCity’s services should be regulated. WRA is not arguing that the rates
11 charged for electricity generated by a central station solar power plant selling power to,
12 for example, TEP, or owned by TEP, would not be subject to regulation.

13 **IV. SRP’S PROPOSED FORM OF LIGHT REGULATION IS SELF- 14 REGULATION**

15 SRP proposes (p. 19) that solar service providers would submit a form that would
16 state, among other things: the approximate values of the property to be installed and a
17 range of prices and services to be offered to customers. On the form, the solar provider
18 would also assert that its prices will be reasonably reflective of the value of the plant
19 devoted to service. Under SRP’s proposal, the Commission would issue a solar CCN
20 which would allow the applicant to serve as the general partner for any entity providing
21 service under a solar services agreement. Once granted, the applicant would provide a
22 copy of each contract to the Commission on a confidential basis. If the Commission does
23 not formally object to the terms of the contract within thirty days, the contract will be
24 deemed approved by the Commission without further action.

25 What is the point of SRP’s proposed process? The public service corporation sets
its own rates with no substantive review by the Commission. If solar service providers

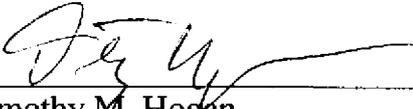
1 are to set their own rates, there is no need for regulation. As RUCO stated (p. 17) "a
2 CC&N that would automatically be rubber stamped is not legitimate government
3 oversight."

4 **V. CONCLUSION**

5 None of the parties supporting regulation of SolarCity as a public service
6 corporation provide any compelling rationale for doing so. Indeed, the same parties
7 implicitly acknowledge that there is no need to regulate the prices charged by SolarCity.
8 WRA urges the Commission to grant SolarCity's application and allow distributed
9 renewable energy to develop without the burden of regulation as the benefits claimed for
10 such regulation are speculative at best.

11 RESPECTFULLY SUBMITTED this 15th day of January, 2010.

12 ARIZONA CENTER FOR LAW IN
13 THE PUBLIC INTEREST

14 By 

15 Timothy M. Hogan
16 202 E. McDowell Rd., Suite 153
17 Phoenix, Arizona 85004
18 Attorneys for Western Resource
19 Advocates

19 ORIGINAL and 13 COPIES of
20 the foregoing filed this 15th day
21 of January, 2010, with:

22 Docketing Supervisor
23 Docket Control
24 Arizona Corporation Commission
25 1200 W. Washington
Phoenix, AZ 85007

1 COPIES of the foregoing
2 electronically served this
3 15th day of January, 2010 to:

4 All Parties of Record
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25