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ADMITTED TO PRACTICE IN:
ARIZONA, COLORADO, MONTANA,
NEVADA, TEXAS, WYOMING,
DISTRICT OF COLUMBIA

January 15, 2010

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

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

To Whom It May Concern:

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

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

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

Sincerely,

Angela R. Trujillo
Secretary

Lawrence V. Robertson, Jr.

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ARIZONA CORP. COMM
400 W CONGRESS STE 218 TUCSON AZ 85707

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

DOCKET NO. E-20690A-09-0346

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SUNPOWER CORPORATION
REPLY POST-HEARING BRIEF

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ARIZONA CORP. COMM
400 W CONGRESS STE 218 TUCSON AZ 85701

January 15, 2010
Lawrence V. Robertson, Jr.
Attorney for SunPower Corporation

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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

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

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

16 **I.**

17 **INTRODUCTION**

18 **A. Restatement of SunPower's Position**

19 As indicated and discussed in its Initial Post-Hearing Brief, it is SunPower's position that
20 the evidentiary record in the instant proceeding warrants a determination by the Commission that
21 there is no demonstrated need to regulate SolarCity Corporation ("SolarCity") as a public service
22 corporation under Arizona law.¹ In addition, it is SunPower's belief that subjecting SolarCity to
23 regulation as a public service corporation could have a substantial negative impact and chilling
24 effect upon the willingness of other solar service providers and third-party financing entities to
25 commit their personnel and financial resources to the conduct of business in Arizona.²

26 ¹ Nine (9) other parties filed Initial Post-Hearing Briefs. Five (5) of those parties similarly concluded that SolarCity
27 should not be subject to regulation as a public service corporation. Those five (5) parties are: (i) RUCO; (ii)
28 Western Resource Advocates ("WRA"); (iii) Arizonans for Electric Choice and Competition ("AECC"); (iv) Sun
Run Corporation ("Sun Run"); and, (v) SolarCity. Arizona Public Service Company ("APS") in essence remained
neutral on this question. Three (3) other parties concluded that SolarCity should be subject to regulation by the
Commission as a public service corporation, when it provides distributed solar generation services under a Solar
Services Agreement ("SSA") of the nature of the two (2) SSAs examined in the instant proceeding. Those three (3)
parties are: (i) Commission Staff; (ii) Salt River Project ("SRP"); and (iii) Tucson Electric Power Company
("TEP").

² The relationship between regulation and this "chilling" effect was discussed at length by SunPower witnesses H. R.
Irvin, III and Kevin Fox during the evidentiary hearings in the instant proceeding; and, illustrative excerpts of such
testimony are set forth verbatim at pages 35 through 37 of SunPower's Initial Post-Hearing Brief. In that regard,
Commission Staff's and SRP's proposals for some form of minimal or "light regulation" do not address and dispose

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1 More specifically, solar market development opportunities are the principal reason
2 numerous photovoltaic manufacturers are now considering locating new manufacturing facilities
3 in Arizona. These proposed plants would create well-paying, long-term new jobs in the region.
4 However, these economic development opportunities would be lost to Arizona if the expected
5 solar market fails to materialize, due to lack of project financing opportunities and third-party
6 investment occasioned by the aforesaid "chilling" effect. Instead, photovoltaic manufacturers
7 and solar equipment installers will move to other states that support all necessary components of
8 a solar market development plan without the burden of a regulatory overly on industry
9 participants.

10 **B. Organization of Brief**

11 This Reply Post-Hearing Brief is organized into five (5) sections, including this
12 Introduction section, and various subsections. In that regard, this brief will not offer comment
13 upon subjects discussed in SunPower's Initial Post-Hearing Brief which were not addressed by
14 the other nine (9) parties in their respective Initial Post-Hearing Briefs, inasmuch as there is no
15 discussion as such to which SunPower now has occasion to reply. An example of this
16 circumstance is Section IV of SunPower's Initial Post-Hearing Brief, which contained an
17 extensive review of other regulatory jurisdictional determinations on the question of whether and
18 when a provider of solar services should be subject to regulation as a public service corporation
19 or public utility.³

20 Section II of this Reply Post-Hearing Brief discusses why the evidentiary record in the
21 instant proceeding warrants a determination that there is no demonstrated need to regulate
22

23 of the potential for this "chilling" effect; and, once the "bell of regulation" has been "rung," by the imposition of a
24 regulatory scheme, the strong likelihood is that it cannot be meaningfully and effectively "unrung."

25 ³ In that regard, on January 7, 2010, SunPower docketed a Supplement to Late-filed Exhibit SunPower-3 in the form
26 of a December 17, 2009 Declaratory Order Partially Adopting and Modifying Recommended Decision ("Final
27 Decision") by the New Mexico Public Regulatory Commission ("PRC") in Docket No. 09-00217-UT. A copy of
28 the Supplement was electronically transmitted to ALJ Rodda and the parties by SunPower on January 5, 2010. In
Section IV of its Initial Post-Hearing Brief, SunPower had discussed at length the October 23, 2009 Recommended
Decision of the Hearing Examiner assigned to the PRC proceeding in question. In terms of analytical relevance to
the jurisdictional issue before the Commission in the instant proceeding, there is no material difference between the
Recommended Decision and the Final Decision in the New Mexico PRC proceeding. In each instance, third party
distributed generation developers such as SolarCity were determined not to be a public utility subject to regulation
by the PRC.

1 SolarCity as a public service corporation. As therein noted, such a demonstration is required by
2 the applicable Arizona judicial decisions. Section III discusses why the “benefits” of regulation
3 asserted by the Commission’s Staff, and supported by SRP and TEP, are intangible and illusory
4 in nature, and are not a lawful substitute for that demonstration of a need for regulation which is
5 required by Arizona law. Succinctly stated, the Commission lawfully cannot, and should not,
6 adopt the precautionary or prophylactic regulatory course of action advocated by the
7 Commission Staff, SRP and TEP upon the basis of conjecture and hypothecated “problems” or
8 scenarios. More is required under Arizona law, and that “more” is not present in this instance.
9 In Section IV, SunPower discusses why a Commission decision concluding that SolarCity should
10 be subject to regulation as a public service corporation must, as a matter of law, be limited in
11 terms of scope as to the evidentiary record in the instant proceeding. Finally, Section V
12 summarizes the conclusions that SunPower believes the Commission should reach incident to
13 rendering a decision on SolarCity’s July 2, 2009 Application.

14 **II.**

15 **THE EVIDENTIARY RECORD IN THE INSTANT PROCEEDING**
16 **WARRANTS A DETERMINATION THAT THERE IS NO DEMONSTRATED**
17 **NEED TO REGULATE SOLARCITY AS A PUBLIC SERVICE CORPORATION**

18 In Section III of its Initial Post-Hearing Brief, SunPower discussed at length why the
19 Commission can and should conclude that the evidentiary record in the instant proceeding does
20 not demonstrate the existence of a “need” to regulate SolarCity as a public service corporation.
21 As therein noted, the determination of the existence or non-existence of such a “need” has been a
22 central background theme in those Arizona court decisions which considered and applied the
23 Serv-Yu factors in connection with resolution of the type of jurisdictional question now before
24 the Commission. In that regard, SunPower also there discussed why the burden of demonstrating
25 the existence of a need for regulation of SolarCity falls upon those who (i) advocate for an
26 exception to the public policy and general rule in Arizona favoring free enterprise and
27
28

1 competition, and (ii) seek an extension of the power and scope of the Commission's jurisdiction
2 to which the Arizona Supreme Court is generally averse.⁴

3 In their respective Initial Post-Hearing Briefs, Commission Staff, SRP and TEP each
4 have attempted to construct an argument for regulating SolarCity based upon use of the Serv-Yu
5 factors. In that regard, and in connection with a meaningful application of the Serv-Yu factors to
6 the evidentiary record in the instant proceeding, SunPower has suggested that the eight (8)
7 factors be classified under three (3) functional categories, which capture the essence of previous
8 Arizona judicial decisions upon the subject. Those functional categories and the suggested
9 classifications of the Serv-Yu factors therein were depicted in a matrix set forth on page 7 of
10 SunPower's Initial Post-Hearing Brief. Functional Classification No. 1 was "Prevention of
11 Wasteful Competition." Functional Classification No. 2 was "Prevention of Uncontrolled
12 Monopoly Power, Extraction of Unjust and Unreasonable Rates, and Recovery of Costs In A
13 Discriminatory Manner." Functional Classification No. 3 was "Provision of Essential Services
14 to Large Segment of the Public."

15 At page 9, line 25 through page 19, line 21 of its Initial Post-Hearing Brief, SunPower
16 discussed at length how an application of the Serv-Yu factors to the evidentiary record in the
17 instant proceeding, using these suggested functional classification categories, clearly indicates
18 that a "need" to regulate SolarCity as a public service corporation has not been demonstrated.
19 The results of SunPower's analysis in this regard were summarized as follows:

20
21 **"Summary of Serv-Yu Factors Functional Classifications No. 1
Analysis**

22 It is readily apparent from the preceding discussion that the
23 evidentiary record in the instant proceeding cannot lawfully
24 support a determination that the activities of SolarCity would lead
25 to wasteful competition vis-à-vis Arizona's electric utilities. More
26 specifically, there is no credible evidence that SolarCity does or
27 will hereafter accept and effectuate substantially all of the requests
for its services that it receives in Arizona. In addition, there is no
probative evidence that those requests that it does accept will result
in actual or potential competition with Arizona's electric utilities.
To the contrary, the one (1) electric utility intervenor who offered

28 ⁴ As noted in Footnote 1 above, in the context of the instant proceeding, "those" advocating parties are Commission Staff, SRP and TEP.

1 testimony expressed the belief that the services offered by
2 SolarCity and other solar services providers could be beneficial in
3 the development and deployment of distributed renewable
4 generation as a part of Arizona's energy future. [SunPower Initial
5 Post-Hearing Brief, page 11, lines 12-23]

6 * * *

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

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

22 * * *

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

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

However, the services that SolarCity offers cannot be said
to be "essential" to a large segment of the general public. Nor, for
that matter, can such services be said to be "essential" to those
persons and entities among the general public who might desire
"green power" or a "green alternative" in the form of a roof-top
solar generation facility on their premises. The difference between
what is desirable and what is essential to one's day-to-day

⁵ Illustrative of such competition is the number of proposals from solar services providers that the SUSD received in response to its Distributed Solar Generation Request(s) For Proposals, and how such responses ultimately led to a reduction in price under the SSAs which are the subject of the instant proceeding. [Note: This Footnote number is from SunPower's Initial Post-Hearing Brief]

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1 existence is substantial; and, that difference must be recognized
2 and maintained for purposes of the Serv-Yu analysis which is the
subject of the instant proceeding.

3 Finally, it is neither appropriate nor constructive to
4 speculate as to the nature of business activities that SolarCity may
5 or may not intend or actually undertake at some future date. The
6 jurisdictional question before the Commission pertains to the
7 nature of SolarCity's activities as of this point in time.
8 Jurisdictional determinations must be based upon facts, not
9 conjecture. Moreover, as Chairman Mayes observed during the
10 evidentiary hearings in the instant proceeding, the Commission has
ongoing authority under A.R.S. § 40-252 to reconsider the
jurisdictional question at a later date if future events suggest that
SolarCity's activities are such as to require regulation of it as a
public service corporation." [SunPower Initial Post-Hearing Brief,
page 10, line 26-page 20, line 21]

11 The arguments made by Commission Staff, SRP and TEP in their respective Initial Post-
12 Hearing Briefs both (i) fail to discharge that burden of proof to be required of those who
13 advocate for a regulatory result, and (ii) fail to rebut the arguments set forth in Section III of
14 SunPower's Initial Post-Hearing Brief which correctly anticipated and effectively addressed the
15 arguments to be made by Commission Staff, SRP and TEP on the jurisdictional issue. As a
16 consequence, the Commission can and should conclude that the evidentiary record in the instant
17 proceeding warrants a determination that there is no demonstrated need to regulate SolarCity as a
18 public service corporation.

19 III.

20 THE "BENEFITS" OF REGULATION ASSERTED BY THE COMMISSION'S STAFF 21 ARE INTANGIBLE AND ILLUSORY, AND ARE NOT A LAWFUL SUBSTITUTE FOR 22 THAT DEMONSTRATION OF A NEED FOR REGULATION WHICH IS REQUIRED

23 A. "Benefits" Are Not a Lawful Substitute For "Need"

24 The section description for Section III of this Reply Post-Hearing Brief is the same as the
25 description for Section III(C) of SunPower's Initial Post-Hearing Brief because the same
26 collateral issue continues to exist. As noted by SunPower in the latter document, at the time he
27 testified in the instant proceeding, Commission Staff witness Irvine orally supplemented his pre-
28 filed prepared Direct Testimony by describing what he perceived would be "benefits" resulting
from the regulation of providers of distributed solar generation services as public service

1 corporations. In Section III(E) of its Initial Post-Hearing Brief, Commission Staff endeavors to
2 buttress its previous “benefits” reasoning. However, its arguments continue to be based upon
3 predicate assumptions for which there is no tangible support in the underlying evidentiary record.
4 Illustrative of this is the use of qualifying terms such as “if,” “may,” “could” and “possible” in
5 connection with the description of asserted benefits. In that regard, no examples (supported by
6 evidence) of “problems” to be avoided or resolved, or currently unmet “needs” to be satisfied are
7 provided by the advocates for regulation.⁶ Moreover, and as noted in SunPower’s Initial Post-
8 Hearing Brief, what Commission Staff’s approach fails to acknowledge is that such asserted
9 “benefits” do not and cannot represent a lawful substitute for that demonstration of a “need” for
10 regulation required by Arizona case law.

11 **B. The Requisite “Need” Must Be Actual, Not Conjectural**

12 In addition, the requisite “need” must be actual, not conjectural. In that regard,
13 Commission Staff also endeavors in Section III(E) of its Initial Post-Hearing Brief to construct a
14 concern with regard to the adequacy and reliability of service from SSA providers, which
15 regulation as public service corporation allegedly would address and resolve. However, the
16 evidentiary record in the instant proceeding does not provide any probative support for such a
17 hypothecated concern upon the part of Commission Staff, and the purported “need” for
18 regulation which it desires to derive therefrom.⁷ In that regard, the same observation may also be
19 made in connection with Commission Staff’s assertion of a “need” for a distributed solar
20 generation customer complaint procedure to be administered by the Commission.⁸

21
22
23
24
25 ⁶ These same criticisms also apply to the potential “benefits” of regulation postulated by SRP and TEP as well.

26 ⁷ To the contrary, the hearing testimony indicates that an SSA provider has a substantial financial interest in assuring
27 that the distributed solar generation equipment is properly maintained and functioning, because the economic return
28 on its investment is a direct function of the amount of electricity it generates.

⁸ Commission Staff also suggests that regulation could provide the Commission and the incumbent electric utilities
with information that might be helpful for planning purposes. However, none of the incumbent electric utilities has
indicated a “need” for such information; and, this asserted “benefit” in and of itself is not a valid basis for the
imposition of regulation.

1 **C. Promotion of a “Level Playing Field”**

2 Finally, Commission Staff expresses a concern that incumbent electric utilities might
3 choose to enter the competitive distributed solar generation market, and thereafter exert market
4 power to the detriment of current market participants. In that regard, Commission Staff states

5 “If the goal is to develop a market with many competitors, a
6 market that is transitioning to competition justifies regulatory
7 oversight.” It is highly conceivable that competition with
8 incumbent utilities for SSA service could produce an unbalanced
9 market.” [Commission Staff Initial Post-Hearing Brief at page 31,
10 lines 1-2] [emphasis added]

11 However, Commission Staff’s beneficent observation is misplaced. More specifically, the solar
12 market in Arizona is already highly competitive, with a number of active participants. Thus, it is
13 not “transitioning” to that state of existence. In addition, there is a discordant element in a
14 reasoning process which suggests that the best way to protect an existing competitive market is
15 to subject all participants in that market to regulation. In the law of anti-trust, imbalances in
16 market power are dealt with by addressing the conduct of the transgressor, not the conduct of
17 those against whom it transgresses. A similar approach would be readily available to the
18 Commission in this instance, given that it already possesses the authority to address market
19 power abuses by incumbent electric utilities and their affiliates.⁹

20 **D. “A Solution In Search of a Problem”**

21 Quite frankly, when carefully analyzed, Commission Staff’s (and SRP’s and TEP’s)
22 advocacy of regulation appears to be A SOLUTION IN SEARCH OF A PROBLEM which in
23 fact does not exist. Moreover, and as previously noted, a Commission decision adopting the
24 prophylactic¹⁰ regulatory recommendation of those parties entails a substantial risk that such
25 action could effectively smother the competitive solar industry in Arizona, as discussed during

26 ⁹ Also, as APS testified during the evidentiary hearings in the instant proceeding, it perceives independent providers
27 of distributed solar generation services as collaborative partners in the effort to increase Arizona’s use of renewable
28 energy.

¹⁰ As Chairman Mayes observed during the evidentiary hearings in the instant proceeding, the Commission
possesses the authority to re-examine at a future date the question of whether regulation of one or more providers of
SSA services is warranted, depending upon the circumstances which might then exist. What is not warranted is the
imposition of regulation at this time to prevent problems for which the existence has yet to be demonstrated through
probative evidence.

1 the evidentiary hearings by SunPower witnesses Irvin and Fox. How ironic it would be if
2 Commission adoption of Commission's Staff recommendation undermined that very industry
3 that Commission Staff purportedly seeks to protect!

4 **IV.**

5 **ANY COMMISSION DECISION IN THE INSTANT PROCEEDING TO IMPOSE**
6 **REGULATION MUST BE (i) EXPRESSLY LIMITED TO A RULING ON THE RELIEF**
7 **REQUESTED IN SOLARCITY'S JULY 2, 2009 APPLICATION, AND (ii) BASED**
8 **UPON THE EVIDENTIARY RECORD IN THE INSTANT PROCEEDING**

9 **A. Introduction**

10 In their respective Initial Post-Hearing Briefs, in varying degrees and ways, TEP, SRP
11 and Commission Staff insinuate that the Commission should consider issuing a decision either
12 concluding or inferring that all providers of distributed solar generation services under SSA-like
13 arrangements are subject to regulation as public service corporations. No other party to the
14 instant proceeding has made such a suggestion. In the following subsections of Section IV of
15 this Reply Post-Hearing Brief, SunPower will examine the positions of these three (3) parties;
16 and, it will discuss the legal standards governing the scope of any decision to impose regulation
17 that the Commission might issue in the instant proceeding.

18 **B. Positions Of The Parties**

19 **1. TEP Approach**

20 The most egregious example of such an insinuation is the discussion set forth in TEP's
21 Initial Post-Hearing Brief under the topical heading of "Impact of the Decision" (Section II).
22 The following excerpts from TEP's brief will suffice to support this observation:

23 "This adjudication will impact more than the determination of
24 whether SolarCity is a public service corporation as a result of its
25 provision of electricity . . . pursuant to the specific Solar Service
26 Agreements ("SSA") submitted in this docket. [TEP Initial Post-
Hearing Brief at page 2, lines 8-11] [emphasis added]

27 * * *

1 “. . . this is much more than a narrow, single-company
2 adjudication.” [TEP Initial Post-Hearing Brief at page 2, line 17]
3 [emphasis added]

4 * * *

5 “By making this determination [that SolarCity is a public service
6 corporation] now, the Commission will provide clear certainty to
7 SolarCity and the distributed solar generation industry that they
8 will be subject to Commission jurisdiction.” [TEP Initial Post-
9 Hearing Brief at page 2, lines 19-21] [emphasis added]

10 In the Conclusion section (VIII) of its Initial Post-Hearing Brief, TEP retrenches somewhat, and
11 confines the scope of its jurisdictional finding request to SolarCity. However, in the above-
12 quoted language from Section II of its brief, TEP has clearly laid down its “marker” as to the
13 scope of the Commission’s decision it would prefer.

14 **2. SRP Approach**

15 SRP’s approach is somewhat more subtle, but nonetheless equally expansive as to the
16 jurisdictional end result it seeks to accomplish. More specifically, in the “Arizona Cases”
17 section (unnumbered) of its Initial Post-Hearing Brief, SRP dismissively refers to the court’s use
18 of the Serv-Yu factors in Southwest Transmission Cooperative v. Arizona Corp. Comm’n, in
19 order to determine the jurisdictional status of the transmission cooperative, as being inconsistent
20 with the law;¹¹ and, SRP further argues that

21 “A case by case public interest analysis [such as done in Southwest
22 Transmission] would by [sic] unwieldy, and probably inconsistent
23 with the Constitution.” [SRP Initial Post-Hearing Brief at page 13,
24 line 25-page 14, line 1]

25 Thereafter, in the “Recommendation” section (unnumbered) of its brief, SRP asserts that

26 “The issues here would be best addressed in a rule-making process,
27 and this should be a future step. But, there is no reason that, right
28 now, the Commission could not address the issues, at least for this
applicant. [SRP Initial Post-Hearing Brief at page 18, lines 4-6]
[emphasis added]

¹¹ In so doing, SRP ignores the Arizona courts’ use of those very factors for that very purpose in several seminal Arizona cases upon the subject, including Serv-Yu, Southwest Gas Corporation v. Arizona Corporation Commission, and Southwest Transmission.

1 Finally, in the "Conclusion" section (unnumbered) of its Initial Post-Hearing Brief, SRP
2 recommends that the Commission find SolarCity is a public service corporation subject to
3 regulation by the Commission; and, SRP further suggests

4
5 " . . . that the Commission convene a rule making process to deal
6 with the issues raised in this application on a global scale." [SRP
Initial Post-Hearing Brief at page 20, line 23-page 21, line 1]

7 However, when carefully analyzed, it becomes clear that SRP's generic analytical
8 approach and resulting line of argument are predicated upon an unarticulated premise that all
9 providers of distributed solar generation services are public service corporations subject to
10 regulation by the Commission. More specifically, SRP is in effect suggesting that the
11 Commission engage in a game of jurisdictional "leap frog," which starts with a case-specific
12 jurisdictional determination in the instant proceeding, and then directly proceeds to an industry-
13 wide rulemaking proceeding, which implicitly assumes all other distributed solar generation
14 industry members also have been determined to be public service corporations.¹²

15 In that regard, rather than the case-by-case analysis approach utilized by the courts in
16 Southwest Transmission and other Arizona cases¹³ dealing with the same jurisdictional question
17 being in error as SRP contends, it is SRP with its generic approach to jurisdictional
18 determinations who is in error.¹⁴ As the Arizona Supreme Court observed in the second Serv-Yu
19 decision,

20 " . . . the question whether a business enterprise constitutes a public
21 utility is determined by the nature of its operations. Each case
22 must stand [and be determined] upon the facts peculiar to it."
Natural Gas Service Co. v. Serv-Yu Cooperative, Inc. 70 Ariz.
235, 241, 219 P.2d 324, 328 (Ariz. Sup. Ct. 1950)

23 In recognition of this principle of Arizona jurisprudence, in its July 6, 2009 Procedural Order in
24 Docket No. E-20633A-08-0513, the Commission declined to process the Application of the Solar

25
26 ¹² As SRP is fully aware, the Commission's Rules and Regulations are applicable only to entities which have been
determined to be subject to the Commission's jurisdiction.

27 ¹³ See Footnote 4 text.

28 ¹⁴ SRP's reliance on the Petrolane decision's consideration of (i) the nature of the facilities used to provide the
service in question, and (ii) whether a disparity exists in the relative bargaining power between the service provider
and the customer, does not support a conclusion that SolarCity should be regulated as a public service corporation,
given the evidentiary record in the instant proceeding.

1 Alliance for a generic jurisdictional determination for the business model that was the subject of
2 that Application, therein noting

3
4 “While the Application was carefully crafted to be limited to 12
5 characteristics of an SSA, the constitutional issue of whether an
6 individual SSA provider is a public service corporation necessarily
7 depends on individual cases and specific facts.” [Procedural Order
8 at page 7, lines 1-3, citing *Natural Gas Serv. Co. v. Serv-Yu*
9 *Cooperative, Inc.*, 70 Ariz. 235, 219 P.2d 324, (1950)] [emphasis
10 added]

11 3. Commission Staff Approach

12 Commission Staff acknowledges the legal requirement that the determination as to
13 whether an entity is a public service corporation under Arizona law is to be governed by the facts
14 and circumstances of each case.¹⁵ However, in making its various arguments as to (i) why it
15 believes that a “need” exists to regulate SolarCity as a public service corporation, and (ii) what it
16 perceives would be the “benefits” resulting from regulation, Commission Staff seamlessly moves
17 back and forth between a discussion of the specific circumstances surrounding SolarCity as a
18 single entity, and Commission Staff’s perceptions of the distributed solar generation industry as a
19 whole. Thus, it does not confine its analysis and arguments to the particular facts and
20 circumstances of SolarCity and the evidentiary record in the instant proceeding. Moreover, in a
21 discussion of “The Extent and Effect of A Commission Order In This Matter” (Section III(F)) in
22 its Initial Post-Hearing Brief, Commission Staff makes the following statements:

23 “The adjudicative effect of any Commission order in this matter
24 should probably be limited to the facts before the Commission and
25 the relief requested by the Application.” [Commission Initial Post-
26 Hearing Brief at page 34, lines 10-11] [emphasis added]

27 * * *

28 “. . . although the Commission’s order in this matter will likely be
limited to resolving SolarCity’s Application, its implication may
be far-reaching.” [Commission Initial Post-Hearing Brief at page
34, lines 17-18] [emphasis added]

¹⁵ See, for example, Commission Staff Initial Post-Hearing Brief at page 14, lines 10-11.

1 Thus, in its cautious own way, Commission Staff also appears to be urging the Commission to
2 issue as expansive a jurisdictional determination in the instant proceeding as the Commission
3 believes might withstand judicial scrutiny.

4 **4. SunPower Position**

5 As indicated by the heading for Section IV of this Reply Post-Hearing Brief, it is
6 SunPower's position that any Commission decision in the instant proceeding to impose
7 regulation must be (i) expressly limited to a ruling on the relief requested in SolarCity's July 2,
8 2009 Application, and (ii) based upon the evidentiary record in the instant proceeding. In
9 addition to the above-discussed requirement of Arizona case law that jurisdictional
10 determinations of the nature here in question must be made on a case-by-case basis, giving
11 careful consideration to the factual circumstances peculiar to a given case, SunPower's position
12 is also based upon the due process and substantial evidence legal requirements discussed below
13 in subsections IV(C) and IV(D) of this Reply Post-Hearing Brief.

14 **C. The Requirement of Due Process**

15 **I. Scope of the Instant Proceeding**

16 The following language from the Procedural order issued by the Commission on July 22,
17 2009 in the instant proceeding clearly prescribes the parameters of the matter to be addressed and
18 resolved therein:

19 "On July 2, 2009, SolarCity Corporation ("SolarCity" or
20 "Company") filed with the Arizona Corporation Commission
21 ("Commission") an application to determine that when SolarCity
22 provides solar service to Arizona schools, governments, and non-
23 profit entities it is not acting as a public service corporation
24 pursuant to Article 15, Section 2 of the Arizona Constitution
25 ("Application"). [Procedural Order at page 1, lines 12.5-15.5]
26 [emphasis added]

27 * * *

28 "There was general agreement among those present at the [July 16,
29 2009] procedural conference that a Commission determination on
30 the issue of whether an entity is a public service corporation
31 requires an application of the factors set forth in *Natural Gas Serv.*
32 *Co. v. Serv-Yu Cooperative* to the particular facts of each case any

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time an entity requests relief similar to that requested by SolarCity in the Application.” [Procedural Order at page 2, lines 27-page 3, line 3] [emphasis added]

* * *

“IT IS FURTHER ORDERED that the hearing on the relief requested in the Application is hereby scheduled . . .” [Procedural Order at page 5, lines 11-12] [emphasis added]

* * *

“IT IS FURTHER ORDERED that SolarCity shall provide public notice of the proceedings and hearing on the Application in the following form and style . . .” [Procedural Order at page 7, lines 17-18] [emphasis added]

In that regard, the Procedural Order prescribed specific language for the public notice which described the precise and limited nature of the Application and the request filed by SolarCity; and, it provided that

“Other parties [in addition to Commission Staff] granted intervention will also have an opportunity to make recommendations to the Commission regarding the Application.” [Procedural Order at page 8, lines 6.5-7] [emphasis added]

2. Notice and the Opportunity

To Be Heard

It is a fundamental requirement of due process that persons or entities who would be affected by a decision of the Commission must have had proper notice and an opportunity to be heard as to the subject matter of the decision. In the context of the instant proceeding, and given the content of the Commission’s July 22, 2009 Procedural Order which articulated the parameters of the same and prescribed the language of that public notice to be provided, it is inarguably clear that no members of the solar industry in Arizona (other than SolarCity) were provided legal notice that a decision by the Commission in the instant proceeding in and of itself could subject them to regulation as a public service corporation.

As a consequence, fundamental due process requires that a decision by the Commission in the instant proceeding to subject SolarCity to regulation as a public service corporation be limited to SolarCity. Other members of the solar industry in Arizona were not provided the

1 requisite advance legal notice that the instant proceeding might result in a decision by the
2 Commission which could directly affect their respective and particular jurisdictional status; and,
3 thus, they were denied that opportunity to be heard to which they are legally entitled.

4 **D. The Requirement of Substantial Evidence**

5 Arizona law requires that a Commission decision must be supported by substantial
6 evidence. In addition, as noted above on page 19 in Section IV(B) above,

7
8 “... the constitutional issue of whether an individual SSA provider
9 is a public service corporation necessarily depends on individual
10 cases and specific facts . . .” [Citing July 6, 2009 Procedural Order
in Docket No. E-20633A-08-0513, which cited Natural Gas Serv.
Co. v. Serv-Yu Cooperative, Inc.] [emphasis added]

11 And, as the Serv-Yu decision itself states,

12 “... the question whether a business enterprise constitutes a public
13 utility is determined by the nature of its operations. Each case
14 must stand [and be determined] upon the facts peculiar to it.”
[emphasis added]

15 The evidentiary record in the instant proceeding does not contain evidence as to the precise
16 nature of the business enterprise operations of any member of the distributed solar generation
17 community in Arizona (other than SolarCity) sufficient to allow a meaningful application of the
18 Serv-Yu factors. Accordingly, a decision by the Commission in the instant proceeding to
19 regulate any of the members of that community (other than SolarCity) as a public service
20 corporation would lack substantial evidence to support the same; and, such a decision therefore
21 would be legally defective.

22 **E. Summary**

23 As noted in subsections C and D of this Section IV, the requirements of due process
24 and substantial evidence preclude the Commission from issuing a decision in the instant
25 proceeding which would subject members of the solar industry in Arizona (other than SolarCity)
26 to regulation by the Commission as public service corporations. However, a decision by the
27 Commission not to regulate SolarCity would not be subject to the same constraints in terms of its
28 applicability by analogy or implication to other members of the solar industry. It is the prospect

1 of regulation which triggers the requirements of due process and substantial evidence. The need
2 for satisfaction of those legal requirements is absent if the prospect of regulation is removed.
3 Accordingly, in the event that the Commission determines in the instant proceeding that
4 SolarCity is not subject to regulation as a public service corporation, it would be appropriate for
5 the Commission to discuss in its decision the specific reasons underlying its conclusion in that
6 regard which are of general applicability.

7
8 **V.**

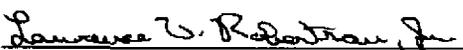
9 **CONCLUSION**

10 Based upon the discussion set forth in Sections II through IV above in this Reply Post-
11 Hearing Brief, as well as the discussion set forth in Sections II through VI of its Initial Post-
12 Hearing Brief, SunPower believes that the Commission can and should issue a decision in the
13 instant proceeding concluding the following:

- 14 1. Arizona case law interpreting and applying Article XV, Section 2 of the Arizona
15 Constitution, together with Arizona's public policy generally favoring free
16 enterprise and competition, require that there must be a demonstrated "need" in
17 order to warrant regulation of a person or entity as a public service corporation;
- 18 2. The evidentiary record in the instant proceeding does not contain a demonstration
19 of the requisite "need" to regulate SolarCity as a public service corporation under
20 Arizona law; and,
- 21 3. As a consequence, that declaratory relief requested in SolarCity's July 2, 2009
22 Application as to its jurisdictional status should be granted.

23 Dated this 15th day of January 2010.

24
25 Respectfully submitted,

26 

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28 Attorney for SunPower Corporation

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2 foregoing Reply Post-Hearing Brief will be
filed on the 15th day of January 2010 with:

3 Docket Control
4 C/O Arizona Corporation Commission
400 West Congress, Suite 218
5 Tucson, Arizona 85701

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

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