

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION



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COMMISSIONERS

KRISTIN K. MAYES - Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

IN THE MATTER OF THE APPLICATION OF SOLARCITY CORPORATION 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

REPLY BRIEF OF THE ARIZONA CORPORATION COMMISSION STAFF

I. INTRODUCTION.

This case presents the question whether SolarCity is a public service corporation where it generates solar electricity and sells the output to members of the public through equipment it owns, installs, operates and maintains. Several parties, including Staff, Tuscon Electric Power Company and UNS Electric, Inc. ("TEP and UNS Electric"), and Salt River Project Agricultural Improvement and Power District ("SRP") believe that providers such as SolarCity meet the definition of a public service corporation under the two-part analysis utilized by Arizona courts. Others, including SolarCity, the Residential Utility Consumer Office ("RUCO"), Western Resource Advocates ("WRA"), SunPower Corporation ("SunPower"), SunRun, Inc. ("SunRun") and Freeport-McMoran Copper & Gold, Inc. and Arizonans for Electric Choice and Competition (collectively "AECC") believe (for different reasons) that it does not meet the definition of a public service corporation. Others such as Arizona Public Service Company ("APS") take no position on the issue of whether SolarCity is acting as a public service corporation under the facts in this case. All parties have a common policy objective, however, to promote the development of solar energy in the State of Arizona.

The prevailing theme driving most of the parties' positions that oppose a finding of public

1 service corporation status appears to be the belief that regulation, even a light form of regulation, will
2 thwart the development of solar energy in Arizona. But, this type of policy consideration, while
3 important, should not drive the Commission's legal determination of whether SolarCity is a public
4 service corporation given the facts presented in this case.

5 *The Commission has considerable discretion to structure regulation in a manner that fits the*
6 *circumstances before it. The record in this case indicates that a light form of regulation would be all*
7 *that is necessary. Parties and the Commission need to remain mindful of the remarks of SolarCity's*
8 *own witness Rive who said that in the end, regardless of what happens in this Docket, SolarCity is*
9 *committed to the State of Arizona. (Tr. at 157). Further, witness Rive stated that if "regulation light"*
10 *was "achievable," SolarCity would still look at going through the process.*

11 *The Staff is not suggesting that the Commission ignore the important policy considerations*
12 *identified by the parties. But, those policy considerations are best addressed by the form of*
13 *regulation adopted by the Commission. A light-handed regulatory paradigm, such as the one*
14 *discussed by Staff, will not thwart the development of this nascent industry and will continue to*
15 *promote important Commission policy objectives.*

16 17 **II. DISCUSSION.**

18 **A. All Parties Agree that Determining Whether an Entity is a Public Service** 19 **Corporation Involves a Two-Part Analysis**

20 While there is disagreement among the parties as to whether SolarCity is a public service
21 corporation under Arizona law; all parties agree that a two-part analysis is used in Arizona to
22 determine whether an entity is a public service corporation. (Staff Initial Closing Br. at 3; WRA Post
23 Hearing Brief at 4). All parties also agree that if SolarCity does not meet the first prong of the
24 analysis, that it is not necessary to undertake the second part of the analysis.

25 The first part of this analysis involves a determination of whether SolarCity meets the
26 definition contained in Art. XV, Sec. 2 of the Arizona Constitution and whether it is "furnishing"
27 electricity to the public. *Southwest Transmission Cooperative v. Ariz. Corp. Comm'n*, 213 Ariz. 427,
28 430, 142 P.3d. 1240, 1243 (App. 2007). The second part of the analysis involves consideration of

1 whether an entity's business and activity are such as to make it rates, charges and methods of
2 operation a matter of public concern through analysis of the eight factors set forth in *Serv-Yu*. See
3 *Southwest Transmission*, 213 Ariz. at 431-32, 142 P.3d at 1244-45.
4

5 1. **Contrary to Some Parties' Assertions, SolarCity Meets the First Part of**
6 **the Analysis Because it "Furnishes" Electricity to the Public.**

7 The Arizona Constitution defines the term "public service corporation" as "[a]ll corporations
8 other than municipal engaged in furnishing gas, oil or electricity for light, fuel, or power. . ." Ariz.
9 Const. Art. XV, §2.

10 Staff, TEP, UNS Electric and SRP all take the position that SolarCity meets the definition of
11 public service corporation contained in the Arizona Constitution. (Staff initial Closing Br. at 5; SRP
12 Br. at 141-15; TEP Post-Hearing Br. at 4-5). SolarCity and RUCO both take the position that
13 SolarCity does not furnish electricity to the public. (SolarCity Initial Post-Hearing Br. at 4-5; RUCO
14 Closing Br. at 3-4) WRA takes no position on this issue. AECC believes that a reasonable argument
15 can be made on either side of the issue. (AECC Initial Opening Br. at 3). SunPower and SunRun
16 focus upon the *Serv-Yu* portion of the analysis and do not really address the first issue to any degree.

17 The evidentiary record in this case clearly shows that SolarCity's operations generate
18 electricity. No party appears to have disputed this in their Briefs. Furthermore, the electricity created
19 is no different than the electricity provided by any other electric generation or distribution company
20 in the State of Arizona. (Irvine Dir. Test., Ex. S-1 at 31-32). The purpose of the solar panels on a
21 customer's roof is to provide the equipment necessary to generate electricity and furnish it to the
22 customer.

23 The controversy centers on whether SolarCity is "furnishing" electricity as required by the
24 Arizona Constitution. SolarCity and RUCO argue that a provision that SolarCity inserted into its
25 contract with the School District, which states that the School District takes legal possession of the
26 electricity the moment it is generated, precludes a finding that it is "furnishing" electricity. They
27 argue that SolarCity never takes legal possession of the electricity, and therefore it cannot transfer
28 possession or "furnish" electricity to its customers. (SolarCity Initial Post-Hearing Br. at 5-6; RUCO

1 Closing Br. at 3-4) However, Staff agrees with other parties that, “such a metaphysical distinction is
2 without merit.” (TEP Initial Post-Hearing Br. at 4). Putting the language of this provision and the
3 contract aside, an examination of what actually is taking place, indicates that there is no question
4 there is a transfer of possession. When electricity is generated, it must be in the possession of
5 someone; if at the point when the electricity is produced and usable, the customer is neither in
6 possession of it nor can he or she immediately consume it, SolarCity must be in possession of the
7 electricity and then transfer it to the customer after is generated.

8 It is also well-recognized that a party cannot simply “contract away” the jurisdiction of the
9 Commission. If this were possible, public service corporations would be utilizing contract
10 provisions in all sorts of circumstances with the sole purpose of divesting the Commission of
11 jurisdiction over their operations. WRA perhaps best made this point in its Post-Hearing Brief at 4:

12
13 “It is clear that the decision about whether SolarCity is a public service
14 corporation should not hinge on the agreement between SolarCity and
15 Scottsdale. The function of the transaction should be analyzed to make
16 that determination.”

17 In this case, SolarCity’s position is also inconsistent with other provisions of the SSA. The
18 SSA states that SolarCity is *selling* electricity and provides for that sale on a kWh basis. For
19 example, the SSA with Coronado High School repeatedly uses words that denote the provision and
20 sale of electricity; specifically the School “shall *purchase* all such electric energy as and when
21 produced by the system,” and the School’s “*purchase* of electricity under this Agreement. . .” and the
22 “*Purchaser* agrees that it will make such monthly payments to *Seller* and that such electricity
23 monthly at the \$/kWh rate. . .” (Application, Ex. A-1, Ex. B at 4). When all of the provisions of the
24 contract are viewed as a whole, it is clear that the primary purpose is for the sale of electricity.

25 Both SolarCity and RUCO also argue that the SSA is primarily a financing arrangement and
26 that it is not an agreement for the sale of electricity. (SolarCity Initial Post-Hearing Br. at 15-16;
27 RUCO Closing Br. at 4). Without the SSA, SolarCity and RUCO argue that the School Districts
28 would be unable to afford to invest in solar power. (SolarCity Br. at 16; RUCO Closing Br. at 4) But
the contract provides for SolarCity to receive payments from the customer for services provided

1 based on the energy produced by the system, on \$/kWh; the payments are not intended to cover
2 interest or principal on the equipment because the agreement is not a lease, it is a contract for the sale
3 of electricity.

4 Further SolarCity cannot have it both ways. If it is truly a financing agreement then SolarCity
5 would not meet the guidelines to obtain important tax advantages from the IRS. (Irvine Dir. Test.,
6 Ex. S-1 at 11-12) The solar industry has published guidelines on how to structure these agreements
7 to obtain the tax incentive and to do so it cannot be classified as a financing arrangement such as a
8 lease. Only if the Agreement is one for the sale of electricity, can SolarCity obtain the tax incentives
9 it seeks. (Rive Dir. Test., Ex. A-4, Ex. B at 1.13).

10
11 **2. SolarCity Also Meets the Second Part of the Analysis and is a Public**
12 **Service Corporation under the *Serv-Yu* Factors.**

13 The parties to this case agree that *Serv-Yu* did not create a rigid test, but introduced eight
14 factors for consideration, the weight of each factor being different. *Natural Gas Service Co. v. Serv-*
15 *Yu Co-op.*, 70 Ariz. 235, 219 P.2d 324 (1950). The weight to be given certain factors as opposed to
16 others is not clear, however. Staff relies on its conclusion in its Initial Closing Brief, that under the
17 balance of the *Serv-Yu* factors, SolarCity is a public service corporation.

18 **a. What The Corporation Actually Does.**

19 SolarCity claims that its actions and functions are nothing like those of a public service
20 corporation, especially since it has to go through a bid or request for approval process before it can do
21 business with a school or government customer. (SolarCity Initial Post-Hearing Br. at 7) RUCO
22 makes a similar argument that SolarCity's service is not intended to be a substitute for a customer's
23 regular electric service provider and since it is not meant to be a substitute, SolarCity is not a public
24 service corporation. (RUCO Closing Br. at 7).

25 Regardless of whether SolarCity claims to only design, install, maintain, and finance rooftop
26 distributed solar generation facilities, in practice, it actually generates electricity and then furnishes it
27 to its customers, the same as incumbent utilities. (Tr. at 718-19). Perhaps more importantly on this
28

1 point, witness Peterson testified that the School District entered into an SSA as a means to reduce the
2 amount of electricity purchased from the incumbent by substituting it for lower cost electricity
3 provided by SolarCity. *Id.* at 544. Based upon this, one can only conclude that SolarCity will own,
4 operate, and maintain solar generation facilities for the purpose of selling electricity to customers
5 who will use the electricity to reduce the amount purchased from the incumbent utility. The services
6 provided by SolarCity then are actually meant to be a substitute for a portion of the customer's load
7 received from the incumbent utility. That electricity is no less essential to the customer than the
8 electricity received from the incumbent utility. The customer needs all of this electricity to operate to
9 the same degree and extent as it did before. Which entity provides the electricity is not important.

10 **b. A Dedication to Public Use.**

11
12 SolarCity asserts that Staff failed to look at the intention of SolarCity when analyzing whether
13 or not it is dedicating its property to public use. (SolarCity Initial Post-Hearing Br. at 7-8). However,
14 in its Initial Closing Brief, Staff concluded based on testimony given by Mr. Rive that "SolarCity
15 clearly *intends* to offer service to a definable subset of the public for whom it is feasible for the
16 Company to provide service. This "holding out to the public" of an essential service constitutes "a
17 dedication to public use" under *Serv-Yu.*" (Staff's Initial Closing Br. at 16).

18 SolarCity also argues that if it is determined there is a public interest here, then it would
19 follow that all equipment that uses energy or impacts or reduces the amount of energy taken from a
20 regulated incumbent provider would similarly be of public interest and therefore dedicated to the
21 public use. (SolarCity Initial Post-Hearing Br. at 8). However, the Company takes the analogy too
22 far. The record establishes that SolarCity generates electricity through its operations and that it
23 provides this electricity to the customers it serves. It is SolarCity's provision of an essential
24 commodity to members of the public which distinguishes this case from energy efficiency measures
25 such as the light bulbs an individual uses or the temperature an individual sets his or her thermostat at
26 in order to conserve energy. *See*, SolarCity Initial Post-Hearing Br. at 8.

27 WRA and others also misconstrue the requirements of this factor by focusing too intently
28 upon the traditional model of electricity generation and distribution and assuming that an entity

1 cannot be a public service corporation unless it produces and provides electricity through a central
2 generating station. (See e.g. WRA Post-Hearing Br. at 6). These parties argue that there is little to no
3 public interest when an “individual customer obtains some of his or her electricity from a generation
4 facility located on the customer’s premises.” *Id.* But, there is no support for this narrow
5 interpretation of what constitutes a “dedication to the public use” in *Serv-Yu* or other case law on this
6 point. The fact that much of the equipment used to generate and provide the electricity may be
7 located on the customer’s premises is not important. What is important is that SolarCity intends to
8 furnish electricity, an essential commodity, to the public or a definable subset of the public. It does
9 not matter where its equipment is located, or how many customers it serves with the equipment.

10 RUCO argues that SolarCity is providing its services through contract and hence there is no
11 dedication to the public use. (RUCO Closing Br. at 7-8). While RUCO relies upon *Serv-Yu*, that
12 case actually focused more upon whether there was a holding out to serve the public generally. *See,*
13 *Serv-Yu*, 70 Ariz. at 239, 219 P.2d at 327. Here, there is no question that there is a holding out to the
14 public generally. The only limitation upon the service offering relates to standardized limitations due
15 to roof space, sunlight exposure, adequate infrastructure and credit requirements. These types of
16 limitations are not at all uncommon and in fact public service corporations oftentimes have
17 specialized tariffs which target a limited segment of the public.

18 APS takes no position on whether SolarCity is a public service corporation because the
19 business model under inquiry in this Docket involves an individual customer with a solar facility
20 serving only that customer’s premise (referred to as “one customer, one rooftop”). Nonetheless APS
21 states that if two or more customers are served by the solar provider at other sites, there would likely
22 be a dedication to the public use. (APS Initial Post-Hearing Br. at 6) (“The fact that a solar provider
23 who provides electricity to multiple customers located at other sites would likely involve the use of
24 public infrastructure, would also likely weigh in a finding of dedication to the public use.”) But in
25 Staff’s opinion, this also misconstrues the intent of this factor by suggesting that there has to be some
26 “public infrastructure used to serve more than one customer” before a dedication to the public use can
27 be found. This requirement is simply nowhere to be found in the existing case law on this factor.
28

1 Peterson testified that the School District entered into an SSA as a means to reduce the amount of
2 electricity purchased from the incumbent by substituting it for the lower cost electricity provided by
3 SolarCity. (Tr. at 544, 632). While SolarCity claims that it does not offer the same services as the
4 incumbent electric providers (SolarCity Initial Post-Hearing Br. at 15), the customer appears to view
5 the electricity produced by either provider as interchangeable. When a customer moves from one
6 provider to another due to the cost benefits, it would appear that the businesses are in competition.

7 In the end, “Solarcity competes directly with similarly situated solar energy companies and
8 incumbent utilities...” (TEP Initial Post-Hearing Br. at 8). The electricity provided by SolarCity is
9 intended to offset the electricity provided by the incumbent utility. (TEP Initial Post-Hearing Br. at
10 8; Staff Initial Closing Br. at 5).

11 **e. Accepts Substantially All Of The Service Requests.**

12
13 Several parties argue that SolarCity does not accept substantially all requests for service and
14 therefore it does not meet this *Serv-Yu* factor. (SolarCity Initial Post-Hearing Br. at 12; RUCO
15 Closing Br. at 11-12; WRA Post-Hearing Br. at 7-8). But these parties misconstrue the real meaning
16 of this factor. For instance, SolarCity continues to contend in its Brief that its closing rate percentage
17 demonstrates that it does not accept all service requests. Yet, their witness’s testimony shows the
18 Company intends to serve every person it finds feasible to serve, and they do not plan to turn away
19 any customers for any other reason than the desired location is not suitable for the solar equipment.
20 (Tr. at 271).

21 As TEP notes in its Initial Post-Hearing Brief at 8:

22
23 “SolarCity broadly markets its distributed solar electricity arrangements. Its
24 website is publicly directed at all potential customers, including residential customers.
25 It is not limiting its service to any particular segment of the market and it appears that
26 SolarCity is attempting to service as many customers as it can. SolarCity may choose
27 not to serve a particular customer if there are credit issues, facility constraints or other
28 factors. However, such limitations are not dissimilar from an incumbent utility
requiring deposits from customers with past credit issues or being unable to provide
service to a potential customer due to a remote location.”

1 SolarCity intends to do as much business as possible, with as many potential customers as
2 possible, accepting as many service requests as feasible. The fact that it has certain requirements
3 (location, etc.) before it will serve a customer which may lead to its rejecting certain customers does
4 not mean that SolarCity is not a public service corporation. Most courts recognize that to meet this
5 factor, all that is necessary is a holding out to even a small segment of the public. *Southwest*
6 *Transmission*, 213 Ariz. at 432-33, 142 P.2d at 1245-46.

7 RUCO argues that Staff has misconstrued this factor by focusing upon the “scope” of the
8 service offering, rather than the acceptance of substantially the entire request for service. (RUCO
9 Closing Br. at 11). Staff has not misconstrued this factor. The fact as RUCO notes, that SolarCity
10 has turned down 91% of the requests for service within the last 21 months, is not dispositive. *Id.* The
11 question is why the Company turned down those requests. First it is very important to note that the
12 91% is not just customers who SolarCity would not provide service to, but also includes customers
13 who actually, after they saw the price that was quoted to them, elected not to go ahead or sought the
14 services of a competitor. (Tr. at 273-74). Then, there are also circumstances where the customer may
15 simply not be positioned to benefit from SolarCity’s services. The Company has standardized
16 requirements in this regard, not unlike a special tariff offering by a traditional incumbent utility. For
17 instance, as RUCO notes, some of the reasons the Company may not provide service include:

- 18 - the customer has insufficient roof space or ground space to mount a
- 19 system;
- 20 - the potential site is not properly oriented to capture sunlight;
- 21 - zoning restrictions prohibit installation;
- 22 - there is inadequate infrastructure;
- 23 - installation would result in inadequate energy savings; and
- 24 - the customer has inadequate credit.

25 (RUCO Closing Br. at 11) (citing A-4, Direct Testimony of Lyndon Rive at 4). The point is that if
26 the customer meets the requirements, the Company will accept substantially all requests for service.
27 That is all that is needed under this factor.

28 f. **Service under contracts and reserving the right to discriminate.**

1 The fact that SolarCity provides service pursuant to contract is not dispositive. It is the nature
2 of the service provided, the terms and conditions of that service, and whether SolarCity has the right
3 to discriminate and does discriminate in the provision of service that is important. *Serv-Yu*, 70 Ariz.
4 at 240, 219 P.2d at 327. Many public service corporations provide some services under contract.
5 These providers have tariffs on file with the Commission that allow an Individual Case Basis (“ICB”)
6 treatment and pricing that reflect the customer’s specific needs. This is common in the
7 telecommunications industry. *See*, TEP Initial Post-Hearing Br. at 8. So simply because SolarCity
8 provides its services pursuant to contract is not dispositive.

9
10 g. **Monopolizing or intending to monopolize the territory with a public service commodity.**

11 SolarCity asserts that it was uncontested at the hearing that the Company is not a monopoly.
12 (SolarCity Initial Post-Hearing Br. at 12). While SolarCity may not be a monopoly now and while it
13 participates in a competitive market, there are numerous examples of public service corporations that
14 operate in a market that is competitive. As stated in Staff’s Initial Closing Brief, in the
15 telecommunications industry, competitive local exchange carriers (“CLECs”) provide service in
16 competition with the incumbent local exchange providers (“ILECs”). CLECs are not monopolies;
17 but they are regulated as public service corporations nonetheless.

18 Moreover, TEP and UNS Electric raised an excellent point in their Initial Post-Hearing Brief.
19 TEP and UNS Electric note that one must consider whether the customer really has an alternative if it
20 is not receiving satisfactory service from a provider such as SolarCity. (TEP Initial Post-Hearing Br.
21 at 7).

22
23 “Here, once the solar facilities are installed, the customer has no other realistic
24 option for solar electricity for an extended period of time, if ever. It is
25 expensive and impractical to remove SolarCity’s facilities so that another
26 provider can step in to provide solar electricity. A customer cannot easily
27 switch to a competitive alternative if SolarCity (or similar provider) provides
28 unacceptable service (such as maintenance of the facility, has repeated billing
service issues.”

1 In summary, that an entity does not have to be a monopoly in order to be a public service
2 corporation, is apparent from the various competitive entities regulated by the Commission. TEP's
3 point regarding the lack of a meaningful alternatives once the customer takes service is a important
4 consideration.

5
6 **h. Articles of Incorporation, Authorization, and Purpose.**

7 SolarCity's Articles of Incorporation are short and vague, allowing them to do business as
8 authorized by the laws of Delaware. While the Articles do not expressly state that SolarCity will be
9 operating a public service corporation, nor is it similar to the articles of incorporation of the
10 incumbent utilities, this fact in no way precludes it from doing business as one if its business is
11 affected with a public interest, as it is here. It is important to recognize that a corporation's
12 statements about its authorizations and functions can be made with the purpose of avoiding
13 regulation, but the Commission cannot allow these strategies of avoidance to deflect from the true
14 character of the business. *Serv-Yu* at 70 Ariz. at 242, 219 P.2d at 328.

15 RUCO argues that "[t]he evidence, however, should weigh against regulation since nothing in
16 the Company's Incorporating documents suggest that the purpose is to be regulated and the
17 presumption is against regulation." (RUCO Closing Br. at 9). However, since the issue of the
18 Commission's jurisdiction over providers such as SolarCity is one of first impression in Arizona, it
19 would have been surprising if SolarCity had placed in its Articles that its purpose is to be regulated as
20 RUCO suggests.

21 **Conclusion on *Serv-Yu***

22 The *Serv-Yu* factors weigh in favor of determining SolarCity is a public service corporation.
23 This does not mean, as discussed below however, that Staff believes that the Company should be
24 subject to comprehensive regulation by the Commission.

25 **B. SolarCity's Provision of Electricity is Not Incidental.**

26 SolarCity and RUCO argue that the SSA agreement and the provision of electricity is merely
27 incidental to the SSA agreement. (SolarCity Initial Post-Hearing Br. at 10; RUCO Closing Br. at 9).
28 For instance RUCO at page 10 of its Closing Brief states the following:

1 “The SSA’s are mainly financing agreements whose purpose allows customers
2 to finance a solar facility arrangement whereby only a portion of its electricity
3 needs are met. . . . The SSA is a package of services in which the public does
4 not have an interest. The electricity generated from the solar facility is merely
5 incidental to the package of services provided by the SSA.”

6 Staff disagrees with both RUCO and SolarCity. Furnishing electricity is not incidental; it is
7 the very purpose of the SSA. SolarCity cannot hide behind the argument that its agreements are
8 complex and can be viewed in more than one light. Further, as stated before, SolarCity cannot have it
9 both ways. If it is a financing agreement, as the Company and RUCO argue, then the Company will
10 not qualify for federal tax incentives. If it is a sale of electricity, as the evidence indicates was the
11 intent behind the SSA, then SolarCity receives the federal tax incentives, and is subject to oversight
12 by the Commission. It is not just the federal tax incentives that are at the heart of this, however. The
13 evidence indicates that these same types of purchase power agreements are being used by solar
14 providers such as SolarCity for for-profit entities and that they may be used in the future for
15 residential customers. (Berry Dir. Test., Ex. WRA-1 at 4) (citing Larry Sherwood, U.S. Solar market
16 Trends 2008, Interstate Renewable Energy Council, July 2009 at 4).

17 Moreover, as SRP notes, even if the Commission was to find that this was financing
18 arrangement, “it is no different from the activities of any electric utility, or any utility for that matter
19 which must finance its facilities, taking advantage of ways to reduce costs”. (SRP Br. at 17).

20 **C. There are Needs for And Benefits Associated With “Light Handed” Commission
21 Regulation**

22 Staff maintains its position taken in its Initial Closing Brief, that while regulation could be
23 structured to be light-handed, the degree to which regulation allegedly *inconveniences* the industry is
24 not a valid factor in determining if SolarCity is a public service corporation. (Staff Initial Closing Br.
25 at 26). Such concerns do not have a place in analyzing whether an entity is a public service
26 corporation because that determination is purely a question of law.

27 Staff’s proposed “regulation light” has been met with criticism for its lack of depth and detail.
28 However, the purpose of the case at hand is to determine if SolarCity is a public service corporation,
29 not to determine a regulatory scheme. Nonetheless, Staff has both discussed in its testimony and in
30 its Initial Closing Brief what it believed would be an appropriate form of regulation for the provision

1 of solar energy through purchase power agreements. Given the nascent stage of the industry at this
2 point in time, Staff believes a streamlined registration process together with requirements to (1) file
3 copies of its contracts with the Utilities Division Director, (2) be subject to the Commission's
4 complaint process, and (3) file annual reports with the Commission, would be appropriate.

5 Other parties, such as SunPower, criticize the Staff's position because they argue that the
6 Staff must identify a "need" for regulation in order for the Commission to be able to assert
7 jurisdiction over the SolarCity. (SunPower Initial Post-Hearing Br. at 6). While Staff does not agree
8 with this assertion, Staff believes that it has identified both needs and benefits for light handed
9 regulation of providers such as SolarCity. Other parties have as well. For example, TEP states in its
10 Initial Post-Hearing Brief:

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

15 *Id.* at 7.

16 Staff witness Irvine discussed these needs as well in did Staff's initial Closing Brief. (*Id.* at
17 27-33).

18 **D. The Minimum Requirements for Regulation Under the Constitution Can be Met
19 with Regulation Light.**

20 Parties to this case have argued that under "regulation light" the minimum requirements of
21 regulation under the Constitution would be impossible to meet or if they are met, it would create an
22 undue burden on the future of the business. (Tr. at 832; SolarCity Initial Post-Hearing Br. at 24,
23 WRA Post-Hearing Br. at 10). However, the parties fail to recognize that *Phelps Dodge* permits the
24 Commission not only to set a range of rates, but it also affirms its discretion to adopt various
25 approaches to fulfill its functions. *Phelps Dodge Corp. v. Ariz. Elect. Power Cooperative*, 207 Ariz.
26 95, 109, 83 P.3d 573, 587 (Ariz. App. 2004). SolarCity and others fail to recognize that this type of
27 regulation can actually open the door for more effective competition and allow the industry to
28 flourish.

1 Further, parties advancing this argument such as WRA, (WRA Post-Hearing Br. at 8-9), fail
2 to realize that there is not just one model of regulation utilized by the Commission for all providers in
3 the industries it regulates. Even the case law distinguishes between competitive providers and
4 incumbent monopoly providers and recognizes that the Commission is not required to treat all
5 providers the same. The range of the Commission's discretion might be viewed on a scale of 1 to 10,
6 with 1 representing the lightest form of regulation possible and 10 representing a more
7 comprehensive form of regulation. The point is that the Commission has considerable discretion to
8 adapt regulation to the circumstances at hand. Some parties, including the Applicant SolarCity,
9 appear to presume that classification of an entity as a public service corporation automatically results
10 in comprehensive regulation by the Commission. But, this is not the case. And, it is not Staff's
11 recommendation in this case with respect to entities such as SolarCity.

12 **E. "Regulation Light" Would not Create a "Chilling Effect".**

13
14 Virtually all parties, including Staff, are concerned that regulation light not create a "chilling
15 effect" upon providers of solar energy. (*See*, SolarCity Initial Post-Hearing Br. at 24; WRA Post-
16 Hearing Br. at 10-11; RUCO Closing Br. at 14)("If the uncontroverted goal of the parties is the
17 development of the solar industry in Arizona, then the most compelling policy reason against
18 regulation is the evidence in the record that regulation of any kind will impede the development of
19 the solar industry in Arizona"). But, this should not impact the legal determination as to jurisdiction
20 over providers such as SolarCity, which is the issue actually raised in this case. The Commission
21 should address the policy concerns raised through the regulatory paradigm it imposes upon providers
22 such as SolarCity.

23 While there are many components to regulation, SolarCity and others have fixated on the
24 issue that regulation will create a rate structure that would promote *uncertainty in an investor's eyes*,
25 to the degree that it would choose to invest elsewhere. (SolarCity Initial Post-Hearing Br. at 24).
26 SolarCity claims that this uncertainty may deter investors to the detriment of the industry, and for that
27 reason, SolarCity should not be regulated. *Id.* Regulation does not create uncertainty; in fact
28 regulation can create a well-managed, well-codified, clear route to understanding the return on

1 investment – exactly what Mr. Irvin for SunPower described as the environment that attracts
2 investment in places like California and New Jersey. (Tr. at 389-90).

3 AECC points to the telecommunications industry and the deregulation of telecommunications
4 terminal equipment as being an example of how the solar industry might flourish without regulation.
5 (AECC Post-Hearing Opening Br. at 8). It argues that when that segment of the telecommunications
6 market was deregulated, many companies entered the market bringing forward new and innovative
7 products and services, all of which have greatly expanded the market to the benefit of the public. *Id.*
8 But the suggestion that telecommunications terminal equipment is somehow comparable or similar to
9 the production of solar energy through solar panels is without merit. Staff is not recommending that
10 the Commission regulate the sale of the panels (terminal equipment) themselves, in this case. Staff is
11 recommending that the Commission regulate the provision of the electricity produced by the solar
12 panels owned by SolarCity.

13 As SRP stated in its Brief at page 18, “Commission oversight does not mean the destruction
14 of a business.” Rather, regulation is flexible depending upon the needs and circumstances of the
15 situation.

16 While no party can predict with any certainty what the ultimate impact of “regulation light”
17 would be, it is important to consider SolarCity witness Rive’s statement that in the end SolarCity will
18 not leave Arizona, regardless of what happens in this Docket. (Tr. at 157). Further, witness Rive
19 stated that if “regulation light” was “achievable” SolarCity would still look at going through the
20 process.

21 **F. Current Rules and Regulations are not enough.**

22 SolarCity and others argue that the Commission’s current regulatory and policy framework,
23 through the REST Rules, Net Metering Rules and Interconnection Standards, is sufficient to monitor
24 and promote distributed solar power in Arizona. (Tr. at 929; SolarCity Initial Post-Hearing Br. at 24-
25 25). However, Mr. Irvine has pointed out that as the solar industry grows, SSA agreements may be
26 financially viable without REST rebates, and the process will become “uncontrolled”. (Tr. at 1026).
27 As the solar industry flourishes and evolves, the current mechanisms for Commission oversight will
28

1 need to be modified. Staff has identified other needs not met by current rule and regulations in it's
2 Initial Closing Brief.

3 **G. Regulation of SolarCity Does Not Undermine or Conflict with the REST Rules.**

4 In its Initial Post-Hearing Brief, SolarCity claims that regulating the Company as a public
5 service corporation would prevent incumbent utilities from meeting the set REST requirements. *Id.*
6 at 23. The Company, and other parties to this case, appear to insinuate that Staff is undermining the
7 REST Rules with the proposition that SSAs may require regulation. First, Staff is a proponent of the
8 REST Rules (Tr. at 986) and second, by Staff bringing up the notion of stranded costs or cherry
9 picking customers, was simply pointing out that there are hidden costs associated with SolarCity's
10 method of providing service. It is important to understand that the proliferation of these types of
11 service providers will have an impact on the energy community.

12 RUCO puts forth the argument that the decision to regulate solar installers like SolarCity will
13 have the effect of selective regulation; the Commission would have jurisdiction over installers when
14 customers utilize SSAs, but not installers who sell or lease the equipment to customers. (RUCO
15 Closing Br. at 17), thereby creating an incomplete picture of the state of distributed generation. The
16 regulatory paradigm for public service corporations is set forth in the Arizona Constitution, and
17 Arizona Statutes. The regulatory paradigm with respect to who is or is not a public service
18 corporation was not established by the Commission. Moreover, the types of nuances described by
19 RUCO can be addressed by the Commission.

20 **H. The Need for Regulation and its Benefits.**

21 The determination of whether a corporation is a public service corporation is a question of
22 law, plain and simple. Nonetheless, Staff identified customer benefits, to regulation such as access to
23 the Commission's consumer services division and the ability to monitor the health and safety
24 concerns associated with proliferation. Additionally, Commission regulation can monitor this
25 developing market to create a level playing field among competitors while ensuring that the
26 customers, and the general public, are receiving adequate and reliable electric service. These benefits
27 and more were identified by Staff witness Irvine and in Staff's Initial Post-Hearing Brief.
28

1 **I. The Conclusions of Commissions In Other Jurisdictions Have Limited Persuasive**
2 **Value.**

3 In SunPower's Initial Post-Hearing Brief, it insinuated that the trend across the country is that
4 *public utility commissions are concluding that third party solar developers (companies that provide*
5 *service like SolarCity) are not public service corporations (or the respective state's equivalent).*
6 Unfortunately, the assertion is incomplete. While it is superficially correct to state that, commissions
7 in other jurisdictions have issued decisions concluding that third-party solar developers are not public
8 service corporations, it does not represent the complete picture.

9 SunPower used six (6) states as examples: Oregon, Nevada, New Mexico, Colorado,
10 Massachusetts, and Hawaii. However, in all of these states, the definition of a public service
11 corporation (or the state's equivalent) is statutorily created, whereas in Arizona, it is the Constitution
12 that defines a public service corporation. This is relevant because the process is easier to amend,
13 rescind or augment; however, the process to amend the Constitution is tedious and onerous.

14 First, Oregon stands apart not only from Arizona, but from the other States as well, because
15 its legislature made the affirmative effort to exclude solar generation from its definition of a public
16 utility. Oregon's statute states that a "public utility" does not include. . . any corporation, company,
17 individual or association of individuals providing heat, light or power. . . from solar or wind resource
18 to any number of customers. . ." (O.R.S. §757.005(1)(b)(C)(iii)). Therefore, when Oregon's Public
19 Utility Commission had to address the issue of whether or not a third-party solar developer was a
20 public utility, the answer had been clearly addressed by the Legislature in its choice of defining what
21 a public utility is. This is not the situation in Arizona.

22 Second, both Nevada and Colorado's public utility commissions concluded that third-party
23 solar developers were not public utilities (public service corporations) based on statutory definitions
24 similar to Arizona's. However, both states' legislatures changed the statutory definition of a public
25 utility shortly after those decisions. The chain of events reaffirms that this a complex issue and
26 suggests that the legislatures (and potentially the commissions) may not have felt exceptionally
27 confident in resting the commissions' conclusions on the previous definitions.
28

1 In Colorado, the Commission issued its decision in February 2009; the legislature passed a Senate
2 Bill in April 2009, which took effect in September, adding language to the statutory section that
3 defined a public utility. The statute now states that:

4 "the supply of electricity or heat to a consumer of the electricity
5 or heat from solar generating equipment located on the site of
6 the consumer's property, which equipment is owned or operated
7 by an entity other than the consumer, *shall not subject the*
8 *owner or operator of the on-site solar generating equipment to*
9 *regulation as a public utility by the commission* if the solar
10 generating equipment is sized to supply no more than 120% of
11 the average consumption of electricity by the customer at that
12 site." (C.O.S. 40-1-103(2)(C) *emphasis added*).

13 In late 2008, the Public Utility Commission of Nevada accepted the conclusion contained in a
14 Report on Third-Party Ownership of Net Metering Systems in Nevada, that third-party renewable
15 energy systems are not public utilities. However, in 2009, the Nevada legislature, similar to
16 Colorado's legislative regulatory solutions, codified an exemption from regulation for third-party
17 solar developers. The pertinent language is as follows:

18 A "public utility" or "utility" does not include:

19 (9) Persons who for compensation own or operate individual systems which use
20 renewable energy to generate electricity and sell the electricity generated from
21 those systems to not more than one customer or a public utility per system if
22 each individual system is:

23 (a) Located on the premise of another person;

24 (b) Used to produce not more than 150 percent of that other person's
25 requirements for electricity on an annual basis for the premises on
26 which the individual system is located; and

27 (c) Not part of a larger system that aggregates electricity generated from
28 renewable energy for resale or use on premises other than the premises
on which the individual system is located. (N.R.S. 704.021(9)).

In both Colorado and Nevada, the legislatures apparently felt the need to specifically define a public
service corporation to explicitly exclude third-party developers, even though their respective
commissions had already concluded that the developers did not meet the previous statutory
definition. Such action would be redundant and unnecessary if the Legislatures were confident in
their respective Commission' prior determinations.

1 Finally, New Mexico presents an example more similarly situated to the one in Arizona. New
2 Mexico statutorily defines a “public utility” to mean “every person. . .that may own, operate, lease or
3 control. . . any plant, property or facility for generation, transmission or distribution, sale or
4 furnishing to or for the public of electricity for light, heat or power or other uses. . .” (N.M.S.A. 1978
5 62-3-3(G) (1)). The New Mexico Public Regulatory Commission filed a Declaratory Order in mid-
6 December 2009 that concluded under the circumstances, third-party renewable developers are not
7 public utilities within the statutory meaning of the Public Utility Act. The decision hinged on the
8 definition of “to the public,” and it was concluded that it did not include only a single customer.

9 However, the New Mexico Commission does not appear to be overly confident in its
10 determination. Just days after the decision was issued, Commissioner Jason Marks was quoted as
11 saying, “this decision, *if it holds. . .*” (Associated Press, *NM PRC Makes Decision in Renewable*
12 *Energy Case* by Susan Montoya Bryan, *emphasis added*). Also, it has been reported that Chairman
13 Sandy Jones hopes that the Legislature tackles the issue. *Id.*

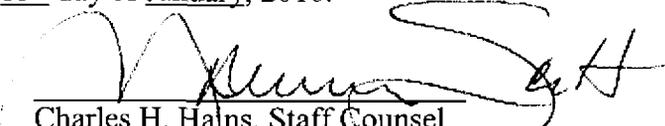
14
15 It is not as simple for Arizona to change its definition of a public service corporation as it is
16 for these other states; it is part of the Constitution and would require a Constitutional amendment.
17 While SunPower is correct in asserting that there is a trend among Commissions in this country to
18 proclaim third-party developers as non-public service corporations, it is also a trend for those same
19 states’ legislatures to modify the definition of a public service corporation soon after the Commission
20 decision. Unfortunately, that trend cannot be followed in Arizona due to the Constitutional
21 constraints. Therefore, the conclusions of Commissions in other jurisdictions have limited persuasive
22 value

23 **III. CONCLUSION.**

24 Staff is a proponent of the REST Rules, is concerned for the state of the environment, and
25 would like to see schools utilize solar energy. But this proceeding is not about any of these matters;
26 it is instead about whether an entity such as SolarCity is a public service corporation when it provides
27 electric service to the public pursuant to a purchase power agreement under Arizona law. In Staff’s
28 opinion, SolarCity meets the two-part test utilized by Arizona courts to determine whether an entity is

1 a public service corporation. However, Staff recommends that the Commission exercise its discretion
2 and impose a light-handed regulatory approach so as not to thwart the development of this nascent
3 industry.

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

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6 
7 Charles H. Hains, Staff Counsel
8 Maureen A. Scott, Senior Staff Counsel
9 Janet Wager, Assistant Chief Counsel
10 Arizona Corporation Commission
11 Legal Division
12 1200 West Washington Street
13 Phoenix, Arizona 85007

14 The Original and 13 copies of the foregoing
15 were filed this 15th day of January,
16 2010, with:

17 Docket Control
18 Arizona Corporation Commission
19 1200 West Washington Street
20 Phoenix, Arizona 85007

21 A copy of the foregoing was mailed this 15th
22 day of January, 2010:

23 Jordan R. Rose
24 Court S. Rich
25 M. Ryan Hurley
26 ROSE LAW GROUP, P.C.
27 6613 North Scottsdale Road, Suite 200
28 Scottsdale, Arizona 85250

Daniel W. Pozefsky
Chief Counsel
RESIDENTIAL UTILITY CONSUMER OFFICE
1110 West Washington Street, Suite 220
Phoenix, Arizona 85007

Kenneth C. Sundlof, Jr.
JENNINGS, STROUSS & SALMON, P.L.C.
The Collier Center, 11th floor
201 East Washington Street
Phoenix, Arizona 85004-2385

Kelly J. Barr

1 SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT & POWER DISTRICT
2 Regulatory Affairs & Contracts, PAB 221
Post Office Box 52025
3 Phoenix, Arizona 85072-2025

4 Kenneth R. Saline
K.R. SALINE & ASSOCIATES, PLC
5 160 North Pasadena, Suite 101
Mesa, Arizona 85201-06764

6
7 Michael A. Curtis
William P. Sullivan
Larry K. Udall
8 CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, PLC
9 501 East Thomas Road
Phoenix, Arizona 85012-3205

10
11 Michael Patten
ROSKA DeWULF & PATTEN, PLC
One Arizona Center
12 400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

13
14 Philip Dion
UNISOURCE ENERGY CORPORATION
One South Church Avenue, Suite 200
15 Tucson, Arizona 85701-1623

16
17 Deborah Scott
PINNACLE WEST CAPITAL CORPORATION
400 North 5th Street
P.O. Box 53999, MS 8695
18 Phoenix, Arizona 85072

19
20 C. Webb Crockett
Patrick Black
FENNEMORE CRAIG
3003 North Central Avenue, Suite 2600
21 Phoenix, Arizona 85012-2913

22
23 Bradley Carroll
SNELL & WILMER
One Arizona Center
400 East Van Buren Street
24 Phoenix, Arizona 85004-2202

25
26 Lawrence Robertson, Jr.
2247 East Frontage Road, Suite 1
P.O. Box 1448
Tubac, Arizona 85646

27
28 Timothy Hogan, Esq.
Arizona Center for the Law

1 In the Public Interest
202 East McDowell Road, Suite 153
2 Phoenix, Arizona 85004

3 Jay Moyes
Steve Wene
4 Jeffrey T. Murray
MOYES SELLERS & SIMS, LTD
5 1850 North Central Avenue, Suite 1100
Phoenix, Arizona 85004

6 David Berry
7 Western Resource Advocates
P.O. Box 1064
8 Scottsdale, Arizona 85252-1064

9 Gerry DaRosa
BRYAN CAVE LLP
10 Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4406

11 Kevin Fox
12 KEYES & FOX LLP
5727 Keith Avenue
13 Oakland, California 94618

14
15 

16
17
18
19
20
21
22
23
24
25
26
27
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