

# OPEN MEETING ITEM



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



## ARIZONA CORPORATION COMMISSION

**ORIGINAL**

Arizona Corporation Commission  
**DOCKETED**

MAY 28 2010

DATE: MAY 28, 2010

DOCKET NO.: E-20690A-09-0346

TO ALL PARTIES:

DOCKETED BY *MM*

Enclosed please find the recommendation of Administrative Law Judge Jane L. Rodda. The recommendation has been filed in the form of an Opinion and Order on:

### SOLARCITY CORPORATION (ADJUDICATION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

JUNE 10, 2010

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

JUNE 29, 2010 and JUNE 30, 2010

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

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*Ernest G. Johnson*  
ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR

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 CORPORATION FOR A  
10 DETERMINATION THAT WHEN IT PROVIDES  
11 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

DECISION NO. \_\_\_\_\_

**OPINION AND ORDER**

12 DATES OF HEARING: October 14, 15, 16, and 23, 2009, and November  
13 2 and 9, 2009

14 PLACE OF HEARING: Phoenix, Arizona

15 ADMINISTRATIVE LAW JUDGE: Jane L. Rodda

16 IN ATTENDANCE: Kristin K. Mayes, Chairman  
Paul Newman, Commissioner

17 APPEARANCES: Mr. Court S. Rich and Mr. M. Ryan Hurley,  
18 ROSE LAW GROUP, PC, on behalf of SolarCity  
Corporation;

19 Mr. Steve Wene, MOYES SELLERS & SIMS,  
20 LTD, on behalf of Sun Run, Inc;

21 Mr. Bradley S. Carroll, SNELL & WILMER,  
22 LLP, on behalf of Sulphur Springs Valley Electric  
Cooperative;

23 Mr. Timothy Hogan on behalf of the ARIZONA  
24 CENTER FOR LAW IN THE PUBLIC  
INTEREST;

25 Mr. Lawrence V. Robertson, Jr. on behalf of  
SunPower Corporation;

26 Mr. Kenneth C. Sundlof, Jr. JENNINGS,  
27 STROUSS & SALMON, PLC, and Robert R.  
Taylor, Salt River Project Law Department, on  
28 behalf of Salt River Project;

Ms. Deborah R. Scott and Ms. Linda Dayish Benally, PINNACLE WEST CAPITAL CORPORATION LAW DEPARTMENT, on behalf of Arizona Public Service Company;

Mr. Michael Patten, ROSHKA DeWULF & PATTEN, PLC, on behalf of Tucson Electric Power Company and UNS Electric, Inc.;

Mr. Daniel Pozefsky, Chief Counsel, on behalf of the RESIDENTIAL UTILITY CONSUMER OFFICE; and

Ms. Janet Wagner, Assistant Chief Counsel, and Ms. Maureen Scott, Mr. Charles Hains, and Mr. Wesley Van Cleve, Staff Attorneys, Legal Division on behalf of the Utilities Division of the Arizona Corporation Commission.

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1  
2 **BY THE COMMISSION:**

3 **I. Background and Procedural History**

4 On July 2, 2009, SolarCity Corporation (“SolarCity” or “Company”) filed an Application with  
5 the Arizona Corporation Commission (“Commission”) seeking a determination that SolarCity is not  
6 acting as a public service corporation pursuant to Article 15, Section 2 of the Arizona Constitution  
7 when it provides solar services to Arizona schools, governments, and non-profit entities by means of a  
8 Solar Services Agreement (“SSA”).

9 The Application requested expedited consideration so that two specific SSAs with the  
10 Scottsdale Unified School District could be finalized, and the solar facilities installed, before the end  
11 of 2009, to take advantage of expiring tax incentives.

12 By Procedural Order dated July 10, 2009, a Procedural Conference was scheduled to  
13 commence on July 16, 2009, for the purpose of discussing a schedule and establishing other  
14 procedures for processing the Application. From July 14 through July 17, 2009, requests to intervene  
15 were filed by the Residential Utility Consumer Office (“RUCO”), Salt River Project (“SRP”), Arizona  
16 Public Service Company (“APS”), Tucson Electric Power Company (“TEP”) and UNS Electric, Inc.  
17 (“UNSE”), Navopache Electric Cooperative (“Navopache”), Freeport-McMoRan Copper and Gold  
18 Inc. (“Freeport-McMoRan”) and Arizonans for Electric Choice and Competition (“AECC”), and  
19 Mohave Electric Cooperative (“MEC”).

20 At the July 16, 2009, Procedural Conference, appearances were entered through counsel for  
21 SolarCity, RUCO, APS, SRP, TEP, UNSE, Navopache, MEC, Freeport McMoRan, AECC and the  
22 Commission’s Utilities Division (“Staff”). There was general agreement among those present that a  
23 Commission determination on the issue of whether an entity is a public service corporation is a  
24 constitutional question and would require application of the factors set forth in *Natural Gas Serv. Co.*  
25 *v. Serv-Yu Cooperative*<sup>1</sup> (“*Serv-Yu*”), to the particular facts of each case in the context an evidentiary  
26 hearing. In order to move forward with a determination on the two Scottsdale Unified School District  
27 SSAs, and allow for an evidentiary hearing, Staff proposed a two track process: in Track One, the

28 <sup>1</sup> 70 Ariz. 235, 219 P.2d 324 (1950).

1 Commission would evaluate the SSAs under the criteria used to analyze special contracts; and in  
 2 Track Two, the Commission would evaluate the Application as a whole under the criteria applying to  
 3 an adjudication. The parties were in general agreement with the approach, and it was adopted in a  
 4 Procedural Order dated July 22, 2009. The July 22, 2009, Procedural Order established the procedures  
 5 for moving forward with consideration of the two SSAs, set the adjudication hearing to commence on  
 6 October 14, 2009, and granted intervention to RUCO, SRP, APS, TEP, UNSE, Navopache, Freeport  
 7 McMoRan, AECC and MEC.

8 By Procedural Order dated August 12, 2009, Sulphur Springs Valley Electric Cooperative, Inc.  
 9 (“SSVEC”), Western Resource Advocates (“WRA”), SunPower Corporation (“SunPower”), SunRun,  
 10 Inc. (“SunRun”), and a number of School Districts<sup>2</sup> were granted intervention.

11 In Track One, the two Scottsdale Unified School District SSAs were approved in Decision No.  
 12 71277 (September 17, 2009).<sup>3</sup>

13 On August 24, 2009, SolarCity filed direct testimony from Lyndon Rive, SolarCity’s CEO;  
 14 Ben Tarbell, its Director of Products; and David Peterson, the Assistant Superintendent for Operations  
 15 for the Scottsdale Unified School District.

16 On September 30, 2009, WRA filed the testimony of David Berry, its Senior Policy Advisor;  
 17 RUCO filed the testimony of its Director, Jodi Jerich; APS filed the testimony of Barbara Lockwood,  
 18 its Director of Renewable Energy; SunPower filed the testimony of H.M. Irvin III, Managing Director  
 19 of Structured Finance, and Kevin Fox, partner in the law firm of Keyes & Fox, LLP, who testified as a  
 20 representative of the Interstate Renewable Energy Council (“IREC”); and Staff filed the testimony of  
 21 Steve Irvine.

22 On October 13, 2009, SolarCity filed the additional testimony of Mr. Rive and Mr. Peterson.

23 On October 14, 2009, the Commission began the evidentiary hearing in Track Two. The  
 24

25 <sup>2</sup> Agua Fria Union High School District; Chandler Unified School District; Casa Grande Elementary School District;  
 26 Continental Elementary School District; Dysart Unified School District; Fountain Hills Unified School District; Ft.  
 27 Thomas Unified School District; Gilbert Unified School District; Miami Unified School District; Nadaburg Unified School  
 District; Payson Unified School District; Pendergast Elementary School District; Pine-Strawberry Elementary School  
 District; Riverside Elementary School District; Roosevelt Elementary School District; Round Valley Unified School  
 District; Tolleson Elementary School District and Union Elementary School District.

28 <sup>3</sup> On December 23, 2009, in Decision No. 71443, the Commission approved a modification of the range of rates in the  
 contract.

1 hearing proceeded over six days, and concluded on November 9, 2009.

2 On December 14, 2009, SunPower filed its Initial Brief.<sup>4</sup>

3 On December 15, 2009, SolarCity, Staff, RUCO,<sup>5</sup> AECC, TEP and UNSE, and WRA filed  
4 Initial Closing Briefs.

5 On January 15, 2010, SolarCity,<sup>6</sup> Staff,<sup>7</sup> RUCO, SunPower, WRA, SRP and TEP and UNSE  
6 filed Reply Briefs. The same date, SSVEC filed Reply Comments indicating it supports the positions  
7 set forth in the Initial Closing Brief of TEP and UNSE, and SunRun filed a Joinder in SunPower's  
8 Reply Brief.

9 **II. The Application: SolarCity and SSAs**

10 SolarCity is a full-service solar power company that provides design, financing, installation,  
11 and monitoring services to residential and commercial customers.<sup>8</sup> SolarCity both sells and leases its  
12 products to its customers. SolarCity provides customers with "grid-tied" photovoltaic ("PV") solar  
13 systems.<sup>9</sup> The systems provide only a portion of the customer's overall electricity needs, and the  
14 customer must remain connected to the utility grid.

15 SolarCity utilizes SSAs to provide its services to school districts, governmental entities and  
16 other non-profit entities.<sup>10</sup> An SSA is a contractual arrangement that allows SolarCity and a third-  
17 party investor (usually an insurance company or bank)<sup>11</sup> to provide a solar PV system on the premises  
18 of a school, governmental entity or non-profit with no up-front expense to the school, governmental  
19 entity or non-profit.<sup>12</sup> Because they do not pay taxes, the schools and governmental and non-profit  
20 entities are not able to make use of available federal tax credits. The SSA structure allows SolarCity  
21 and its investor(s) to capitalize on available federal tax incentives. Under the terms of the SSAs, the  
22 customer gives SolarCity access to its property to install the solar panel system, and SolarCity  
23 finances, designs, installs, owns, operates and maintains the system. The customer has no up-front

24 <sup>4</sup> On December 15, 2009, SunRun filed a Joinder in SunPower's Initial Brief.

25 <sup>5</sup> On December 29, 2009, RUCO filed a Notice of Errata correcting a typographical error in its Initial Brief.

26 <sup>6</sup> On January 19, 2010, SolarCity filed a Notice of Errata and Refiling of Reply Brief to correct formatting errors.

27 <sup>7</sup> On January 19, 2010, Staff filed a Notice of Filing Errata and corrected several typographical errors.

28 <sup>8</sup> Ex A-4, Rive testimony at Q 3.

<sup>9</sup> *Id.* at Q 5.

<sup>10</sup> SolarCity also provides services to commercial and residential customers pursuant to leases or through cash sales.

<sup>11</sup> Tr. at 104.

<sup>12</sup> SolarCity refers to the entity contracting for its services as the "customer."



1 costs and under the terms of the SSA, becomes the owner of all electricity produced by the system.  
 2 SolarCity retains ownership and “use” of the system as defined in the federal tax code, which allows  
 3 SolarCity and the investors to capitalize on the available tax incentives that the customer is not able to  
 4 utilize because of its governmental or non-profit status. The customer pays SolarCity for the design,  
 5 installation and maintenance of the PV system based on the amount of electricity produced.<sup>13</sup>

6 SolarCity structured its SSAs in order to comply with federal tax code requirements.<sup>14</sup> Mr.  
 7 Rive testified that under federal tax law, if a non-profit entity is the lessee or owner of a solar system,  
 8 the non-profit entity is considered to be the “user” of the system, and the internal Revenue service  
 9 (“IRS”) will not allow tax credits to be taken for that system.<sup>15</sup> However, Mr. Rive testified “the IRS  
 10 has stated that if the non-profit is simply paying a third-party owner a fee based on the amount of  
 11 power produced from the system (i.e. an SSA), then the third party owner will be considered the ‘user’  
 12 and thus can take advantage of available tax benefits.”<sup>16</sup>

13 At the time of the hearing, the available federal tax incentives for solar systems included a 30  
 14 percent investment tax credit that runs through December 31, 2016, and is then reduced to 10 percent;  
 15 a 50 percent first year bonus depreciation as part of the American Recovery and Renewal Act of 2009,  
 16 which was set to expire December 31, 2009; and modified Accelerated Cost Recovery System  
 17 depreciation, which had no scheduled expiration.<sup>17</sup>

18 Pursuant to the SSA, all Renewable Energy Credits (“RECs”) are transferred from SolarCity  
 19 and/or the customer to the host utility to allow it to comply with the utility’s renewable energy  
 20 mandates, and in exchange, the utility pays SolarCity any applicable incentive rebate payments.<sup>18</sup>

21 An SSA is similar to a purchased power agreement (“PPA”) in that the system is owned by a  
 22 third-party investor and the customer pays on a per kilowatt hour (“kWh”) basis. According to Mr.  
 23 Rive, the SSA is different, however, in that it is structured so that the electricity belongs to the  
 24 customer.<sup>19</sup> SSAs and PPAs both differ from solar facilities leases in that under a lease, the

25 <sup>13</sup> Ex A-4 at Q 9.

26 <sup>14</sup> *Id.* at Q 14.

27 <sup>15</sup> *Id.*

28 <sup>16</sup> *Id.*; *citing* Solar Energy Industries Association Tax Manual § 1.1.3, and IRS Code § 50(b)(3) [26 U.S.C. § 50(b)(3)].

<sup>17</sup> *Id.* at Q 12.

<sup>18</sup> *Id.* at Q 21.

<sup>19</sup> Tr. at 230-31.

1 customer/lessee pays a fixed monthly payment regardless of the energy produced by the system.<sup>20</sup> Mr.  
2 Rive testified that 80 percent of the commercial and non-profit solar installations are third-party  
3 financed, either through a PPA or SSA.<sup>21</sup>

4 In this Application, SolarCity is asking the Commission to determine that SolarCity is not  
5 acting as a public service corporation under the Arizona Constitution when it uses an SSA to design,  
6 install, maintain, own and operate distributed generation solar power systems that produce electricity  
7 for schools, governmental entities, or non-profits.

8 **III. What is a Public Service Corporation?**

9 **A. "Public Service Corporation" is Defined by the Arizona Constitution**

10 Article 15, Section 2 of the Arizona Constitution provides as follows:

11 All corporations other than municipal engaged in furnishing gas, oil, or  
12 electricity for light, fuel, or power; or in furnishing water for irrigation,  
13 fire protection, or other public purposes; or in furnishing, for profit, hot or  
14 cold air or steam for heating or cooling purposes; or engaged in  
15 collecting, transporting, treating, purifying and disposing of sewage  
16 through a system, for profit; or in transmitting messages or furnishing  
17 public telegraph or telephone service, and all corporations other than  
18 municipal, operating as common carriers, shall be deemed public service  
19 corporations. (emphasis added)

17 **B. Arizona Courts Have Created an Additional Set of Factors ("Serv-Yu Analysis")**

18 Since 1950 some Arizona courts have used an eight-factor analysis in determining whether a  
19 particular business qualifies as a public service corporation.<sup>22</sup> The Arizona Court of Appeals recently  
20 stated in *Southwest Transmission Cooperative, Inc. v. ACC*, ("SWTC"):

21 Merely meeting the textual definition does not establish an entity as a  
22 "public service corporation." To be a "public service corporation" an  
23 entity's 'business and activities must be such as to make its rates, charges  
24 and methods of operation, a matter of public concern, clothed with a  
25 public interest to the extent contemplated by law which subjects it to  
26 governmental control—its business must be of such a nature that  
27 competition might lead to abuse detrimental to the public interest."<sup>23</sup>

26 <sup>20</sup> Tr. at 229.

27 <sup>21</sup> Tr. at 110.

28 <sup>22</sup> The eight-factor test was first utilized by the Arizona Supreme Court in *Serv-Yu*.

<sup>23</sup> *Southwest Transmission Coop, Inc. v. Ariz. Corp. Comm'n*, 213 Ariz. 427, 431-32, 142 P.3d 1240, 1244-45 (Ariz. Ct. App. 2007) (quoting *Trico Elec. Coop, Inc. v Ariz. Corp Comm'n*, 86 Ariz.29, 34-35, 339 P.2d 1046, 1052 (1959) ("Trico").

1 The *SWTC* court stated that the purposes of regulation are to preserve services indispensable to  
 2 the population and ensure adequate service at fair rates where the disparity in bargaining power  
 3 between the service provider and the ratepayer is such that governmental intervention is necessary.<sup>24</sup>  
 4 The *SWTC* court acknowledged that in *Serv-Yu* “the Arizona Supreme Court articulated eight factors  
 5 to be considered in identifying those corporations ‘clothed with a public interest’ and subject to  
 6 regulation because they are ‘indispensable to large segments of our population.’”<sup>25</sup> The eight factors  
 7 are:

- 8 1. What the corporation actually does.
- 9 2. A dedication to public use.
- 10 3. Articles of incorporation, authorization, and purposes.
- 11 4. Dealing with the service of a commodity in which the public has been generally held to  
 12 have an interest.
- 13 5. Monopolizing or intending to monopolize the territory with a public service commodity.
- 14 6. Acceptance of substantially all requests for service.
- 15 7. Service under contracts and reserving the right to discriminate is not always controlling.
- 16 8. Actual or potential competition with other corporations whose business is clothed with  
 17 public interest.<sup>26</sup>

18 The courts have determined that the *Serv-Yu* factors are guidelines for analysis, and that all  
 19 eight factors are not required to conclude that a company is a public service corporation.<sup>27</sup>

## 20 C. Positions of the Parties

### 21 1. SolarCity’s Position

22 SolarCity argues (1) that it is not a public service corporation under the Arizona Constitution  
 23 because it does not “furnish” electricity under the SSA arrangement; and (2) that even if it is found to  
 24 be “furnishing” electricity, it is not a public service corporation under the *Serv-Yu* factors. SolarCity  
 25 asserts that it is uncontested in Arizona that an entity is free to generate its own power on its own

26 <sup>24</sup> *Id.* 213 Ariz. at 432, 142 P.3d at 1245.

27 <sup>25</sup> *Id.* (citing *Southwest Gas Corp. v. Ariz. Corp. Comm’n*, 169 Ariz. 279, 286, 818 P.2d 714, 721) (Ariz. Ct. App. 1991) (“*Sw Gas*”).

28 <sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing *Sw Gas*, 169 Ariz. at 286, 818 P.2d at 721).

1 premises for its own consumption without subjecting itself to Commission jurisdiction. Likewise,  
 2 SolarCity argues that no individual or entity in Arizona is compelled to utilize distributed generation.  
 3 SolarCity argues that the fact some end users have elected to finance the generation of this electricity  
 4 by an SSA or lease, or otherwise, does not change the fundamental character of the activity.

5 SolarCity asserts that those who argue for finding that its activities with SSAs create a public  
 6 service corporation mischaracterize the “essential” nature of solar distributed generation. SolarCity  
 7 argues that the Arizona Supreme Court established the guiding principle in defining a public service  
 8 corporation in *Petrolane-Arizona Gas Service v. Ariz. Corp Comm’n* (“*Petrolane*”) in which it stated:

9 [T]he purposes of regulation are to preserve and promote those services  
 10 which are indispensable to large segments of our population, and to  
 11 prevent excessive and discriminatory rates and inferior service where the  
 12 nature of the facilities used in providing the service and the disparity in the  
 relative bargaining power of a utility ratepayer are such as to prevent the  
 ratepayer from demanding a high level of service at a fair price without  
 the assistance of governmental intervention in his behalf.<sup>28</sup>

13 In addition, SolarCity asserts that Arizona courts have held that:

14 Free enterprise and competition is the general rule . . . . The public has  
 15 some interest in all business establishments but that interest must be of  
 16 such a nature that competition might lead to abuses detrimental to the  
 public interest.<sup>29</sup>

17 SolarCity argues that applying the facts of this case to the *Petrolane* standard shows that solar  
 18 distributed generation is not indispensable to anyone, much less a large segment of the population; that  
 19 there is no disparity in bargaining power; and that there is no evidence to suggest there has been any  
 20 abuse of the public under an SSA or that this industry presents more potential for abuse than any  
 21 other.<sup>30</sup>

## 22 2. RUCO’s Position

23 RUCO agrees with SolarCity that the Company is not “furnishing” electricity under the  
 24 constitutional definition and that furthermore, that the analysis using the *Serv-Yu* factors weighs in  
 25 favor of finding it is not a public service corporation. RUCO believes that this Decision will not only  
 26 affect the provision of service under SSAs, but also commercial and residential lease agreements.

27 <sup>28</sup> 119 Ariz. 257, 259, 580 P.2d 718, 720 (1978) (quoting *Re Geldbach Petroleum Co.*, 56 PUR3d 207 (Mo. 1964)).

28 <sup>29</sup> *General Alarm v. Underdown*, 76 Ariz. 235, 238-39, 262 P.2d 671, 672-73 (1953) (“*General Alarm*”).

<sup>30</sup> SolarCity Reply Brief at 21-24.

1 According to RUCO, although leases and SSAs are technically distinguishable, the legal criteria that  
2 defines a public service corporation is the same under either financing vehicle.

### 3 **3. SunPower's<sup>31</sup> and SunRun's<sup>32</sup> Positions**

4 SunPower asserts that Arizona public policy favors free enterprise and competition in the  
5 absence of a demonstrated need for regulation.<sup>33</sup> Thus, SunPower argues, the burden of demonstrating  
6 a need to regulate SolarCity falls upon those who advocate for an exception to the general rule  
7 favoring free enterprise and competition and who seek an extension of the power and scope of the  
8 Commission's jurisdiction to which the Arizona Supreme Court is generally adverse.

9 SunPower believes that the evidentiary record in this proceeding warrants a determination that  
10 there is no need to regulate SolarCity as a public service corporation and, further, that subjecting  
11 SolarCity to regulation could have a substantial negative impact and chilling effect upon the  
12 willingness of other distributed generation service providers and third-party financing entities to  
13 commit their personnel and financial resources to do business in Arizona. SunPower claims there are  
14 many other states in which providers can offer their solar financing service and products without the  
15 prospect and burden of regulation. SunPower asserts that a functional and meaningful application of  
16 the *Serv-Yu* factors to the evidentiary record indicates there is no need to regulate SolarCity.

### 17 **4. WRA's Position**

18 WRA supports SolarCity's application and argues that the key question in the determination of  
19 whether a particular corporation is a public service corporation is whether the public interest demands  
20 that the corporation's prices be regulated.<sup>34</sup> WRA notes that the most significant consequence of being  
21 a public service corporation is found in Article 15, section 3, of the Arizona Constitution which  
22 requires the Commission to prescribe just and reasonable rates and charges. WRA submits that there

23 \_\_\_\_\_  
24 <sup>31</sup> SunPower manufactures photovoltaic solar energy cells and modules that are used in residential, commercial and utility  
25 settings worldwide. SunPower sells equipment directly to end users through dealers and to third-party owners who invest in  
26 large projects supported by power purchase agreements, under which the third-party owners (or investors) own the  
27 equipment for an extended period of time through outright purchase, or partnership or lease. *See Ex-SunPower-1* at 1.

<sup>32</sup> SunRun is a retail supplier of residential solar power systems. *See SunRun's Motion to Intervene* (filed August 7, 2009).

26 <sup>33</sup> "Free enterprise and competition is the general rule. Governmental control and legalized monopolies are the exception. . .  
27 . Such invasion of private right cannot be allowed by implication or strained construction . . ." *Arizona Corp. Com'n v*  
28 *Nicolson*, 108 Ariz. 317, 321, 497 P.2d 815, 819 (1972) ("*Nicolson*") (quoting *General Alarm*, 76 Ariz. at 238, 262 P.2d at  
672-73).

<sup>34</sup> *General Alarm*, 76 Ariz. at 238, 262 P.2d at 672 ("To be a public corporation, its business and activities must be such as  
to make its rates, charges, and methods of operation a matter of public concern.")

1 is no more intrusive power than the ability of government to establish the prices that can be charged by  
2 a company for its products or services.<sup>35</sup>

3 WRA believes it is important to note that no party to this proceeding cited the need for price  
4 regulation as a reason to regulate SolarCity as a public service corporation. WRA asserts that the light  
5 handed regulation recommended by Staff would include price regulation based on a range so broad  
6 that virtually any SSA price would fall within the prescribed range, which eliminates the legal  
7 rationale for regulating SolarCity as a public service corporation.

8 WRA notes that under the *Serv-Yu* analysis there is no requirement to find all eight factors to  
9 conclude that a company is or is not a public service corporation, and WRA focuses only on those  
10 factors it believes are important to the determination: dedication to public use; dealing with a  
11 commodity in which the public has been generally held to have an interest; monopolizing or intending  
12 to monopolize the territory; and acceptance of substantially all requests for service. WRA believes the  
13 other *Serv-Yu* factors are less important and not determinative in this case.

#### 14 **5. AECC's Position**

15 AECC is a consortium of electricity users in Arizona. AECC believes it is important for its  
16 members to understand how entities who offer customers alternative forms of energy, such as  
17 distributed generation, fit into the larger regulatory framework of electric restructuring and how the  
18 Commission intends to implement its Renewable Energy Standard ("RES") with respect to these  
19 entities. AECC states that regulatory certainty is important for consumers as well as electric providers,  
20 in order to foster the type of electric industry that will best serve the public interest. AECC concludes  
21 that the Commission should grant the relief requested by SolarCity in its application by determining  
22 that SolarCity is not a public service corporation.<sup>36</sup>

23 AECC does not reach a conclusion on the question of whether SolarCity's SSA meets the  
24 definition of "furnishing" electricity under the Constitution, but does not believe that the factors set  
25 forth in *Serv-Yu* have been met to such an extent that SolarCity should be subject to Commission  
26 regulation. AECC believes that regulation will have a negative impact on the emerging solar industry  
27

28 <sup>35</sup> WRA Brief at 2.

<sup>36</sup> AECC Brief at 9.

1 in Arizona as expressed by SolarCity's and SunPower's witnesses.<sup>37</sup> AECC asserts that in  
2 recommending its "regulation lite" approach to solar providers such as SolarCity, Staff did not address  
3 the chilling effect and detrimental impact of Commission regulation.<sup>38</sup>

#### 4 **6. Staff's Position**

5 Staff notes that all parties in this proceeding share the common policy objective of promoting  
6 the development of solar energy in Arizona. Staff believes that the legal determination of whether  
7 SolarCity is a public service corporation should not be driven by a fear that even light regulation  
8 would thwart this goal.

9 Staff believes that SolarCity is acting as a public service corporation when it provides service  
10 to schools, non-profit organizations and governmental entities pursuant to an SSA. Staff believes that  
11 SSAs are primarily contracts for the sale of electricity, and not merely financing arrangements.  
12 Furthermore, Staff believes that although SolarCity currently focuses on schools, non-profit  
13 organizations and governmental entities, the SSA or PPA model may be used for residential  
14 installations in the near future.<sup>39</sup> In Staff's view, electricity is an essential commodity whether  
15 provided as part of a distributed generation model or as part of a more traditional model.

16 In addition, Staff argues that the mere presence of a competitive market does not determine  
17 whether an entity is a public service corporation. Staff notes that the Commission currently regulates  
18 the provision of competitive telecommunications services in a streamlined manner and Staff  
19 recommends a streamlined form of regulation in this case. Staff suggests that "light regulation" could  
20 be something as simple as registration (a streamlined Certificate of Convenience and Necessity  
21 ("CC&N")), the filing of the SSAs or PPAs with the Commission, the filing of annual reports, and the  
22 ongoing availability of the Commission's complaint processes. Staff insists that a light form of  
23 regulation is all that is necessary and will not deter investment in the State.<sup>40</sup>

#### 24 **7. TEP's and UNSE's Position**

25 TEP and UNSE assert that the law dictates that SolarCity be deemed a public service  
26

27 <sup>37</sup> Ex SunPower-1 at 6-7 and Ex SunPower-2 at 7-8.

<sup>38</sup> AECC Brief at 5-7.

<sup>39</sup> Staff Initial Brief at 2.

28 <sup>40</sup> Staff Reply Brief at 2.

1 corporation subject to Commission jurisdiction and regulatory oversight. TEP and UNSE believe that  
 2 as providers such as SolarCity expand their presence in Arizona, an appropriate level of Commission  
 3 oversight is in the public interest to ensure proper levels of service quality, consumer protection,  
 4 dispute resolution and the coordination of important Commission policies.<sup>41</sup> TEP and UNSE argue that  
 5 if a company is a public service corporation, the Commission has constitutional and statutory  
 6 obligations regarding oversight which it cannot ignore.<sup>42</sup>

7 Further, TEP and UNSE assert that by making the determination now that SolarCity is a public  
 8 service corporation, the Commission will provide certainty to SolarCity and the distributed generation  
 9 industry that they are subject to Commission jurisdiction, which will provide all parties the  
 10 opportunity to work on appropriate rules and standards to protect Arizona customers.

#### 11 **8. SRP's Position**

12 SRP believes that the stated activities of SolarCity fall squarely within the constitutional  
 13 definition of "public service corporation." SRP claims that the framers of the Arizona Constitution  
 14 gave the Commission regulatory authority over all corporations, but singled out corporations providing  
 15 essential services, such as transportation, electricity and water for more detailed treatment. According  
 16 to SRP, it is the nature of the service provided, not the structure of the business, that determines  
 17 Commission oversight, and Commission authority was never intended to apply only to monopoly  
 18 providers. SRP states that SolarCity provides one of the essential services that subjects a business to  
 19 the provisions of Article 15 of the Constitution and that a review of the case law shows that the courts  
 20 have exempted from regulation only those businesses that merely incidentally provide the essential  
 21 services. SRP cautions that a decision that sellers of solar electricity are not public service  
 22 corporations could have collateral and unintended consequences.

#### 23 **9. APS' Position**

24 APS is a public service corporation providing electric service in parts of Arizona. APS states  
 25 that it intervened in this matter because this is a case of first impression with significant policy  
 26

27 <sup>41</sup> TEP/UNSE Reply Brief at 5.

28 <sup>42</sup> TEP and UNSE cite *Phelps Dodge Corp. v. Arizona Elec Power Corp., Inc.*, 207 Ariz. 95,107, 83 P.3d 573, 585 (Ariz Ct App. 2004) ("*Phelps Dodge*") (the Commission cannot abdicate its responsibility to ensure a public service corporation is charging just and reasonable rates wholly to the market).



1 implications, and that APS takes no position regarding whether SolarCity should be deemed a public  
2 service corporation. However, APS advocates that should SolarCity's business model be expanded so  
3 that it supplies electricity to multiple customers from a single facility (such as a master-planned  
4 community with a solar substation or a shopping center that sells electricity to multiple commercial  
5 tenants) SolarCity would likely be a public service corporation. Thus, APS urges that if the  
6 Commission determines that SolarCity is not a public service corporation, such finding should be  
7 restricted to apply only to a business model that involves a solar installation serving a single customer.  
8 APS would not object if the Commission were to conclude that such a single-customer business model  
9 does not result in status as a "public service corporation."

10 APS states that when the Commission adopted the Renewable Energy Standard and Tariff  
11 ("REST") Rules,<sup>43</sup> the Commission found that renewable energy is in the public interest. According to  
12 APS, the REST Rules adopt a comprehensive distributed energy requirement that clearly indicates that  
13 renewable facilities located at a customer's premises are a fundamental component of the  
14 Commission's vision.<sup>44</sup> APS states that the SSAs discussed in this docket would facilitate increased  
15 use of distributed energy, which would provide an additional means for jurisdictional electric utilities  
16 to meet the distributed renewable energy requirements of the REST Rules. "APS recognizes that solar  
17 service providers, such as SolarCity, provide customers with options that allow for the broader  
18 deployment of renewable technologies and considers solar providers as partners in providing solar  
19 energy alternatives for customers."<sup>45</sup> APS states that based on requests for incentives pursuant to  
20 APS' distributed energy programs, APS believes that many non-residential customers intend to use an  
21 SSA, or something similar, when installing solar systems.<sup>46</sup>

22 APS believes that electric customers have a right to install renewable energy facilities on their  
23 premises to offset the amount of energy they need to procure from their electric provider, just as an  
24 individual might have the right to drill a well on his or her property for water. APS believes that if  
25 SolarCity were to provide electricity to multiple customers from a single facility, it could be furnishing

26 <sup>43</sup> A.A.C. R14-2-1801 through 1816.

27 <sup>44</sup> Pursuant to A.A.C. R14-2-1805, by 2012, 30 percent of a utility's Annual Renewable Energy Requirement must be  
comprised of renewable distributed energy applications.

28 <sup>45</sup> APS Initial Brief at 3 (citing Tr. at 644 and 680).

<sup>46</sup> Tr. at 640-41.

1 electricity and dedicating its facilities to the public use, making it likely that it would be a public  
 2 service corporation under the literal and textual definition of “furnishing,” which APS notes means “to  
 3 provide or supply with what is needed, useful or desirable,” and which connotes a transfer of  
 4 possession.<sup>47</sup> APS believes that providing electricity to multiple customers located at other sites  
 5 would likely involve the use of public infrastructure and would weigh in a finding of dedication to the  
 6 public use.<sup>48</sup>

#### 7 IV. Is SolarCity a Public Service Corporation?

##### 8 **A. Is SolarCity “Furnishing Electricity” Under Arizona Constitution Article 15, § 2?**

##### 9 **1. Parties’ Arguments**

##### 10 **a. SolarCity and RUCO**

11 SolarCity and RUCO argue that when SolarCity provides its services to schools, governmental  
 12 entities, or non-profits pursuant to an SSA, it is not “furnishing” electricity under Article 15, Section 2  
 13 of the Arizona Constitution.

14 SolarCity claims that it provides design, installation, maintenance and financing services to its  
 15 customers and that it does not “furnish” electricity to anyone.<sup>49</sup> The Company relies on the conclusion  
 16 of the Arizona Supreme Court in *Williams*, in which the Court concluded that the concept of  
 17 “furnishing” under the Arizona Constitution “connotes a transfer of possession.”<sup>50</sup> The Company  
 18 points to the explicit provision in the SSA that the “purchaser [the school] will take title to all electric  
 19 energy that the System generates from the moment the System produces such energy”,<sup>51</sup> and to  
 20 testimony indicating that SolarCity cannot prevent the electricity from flowing to the school without  
 21 turning off the system and cannot divert the electricity elsewhere.<sup>52</sup> Thus, SolarCity argues, from the  
 22 moment of its creation, the electricity is in the sole legal possession of the school district, and  
 23 SolarCity never takes legal possession or ownership of the electricity. SolarCity asserts that Staff’s  
 24 position to the contrary ignores the concept that ownership and possession of the tools used to create  
 25

26 <sup>47</sup> Citing *Williams v. Pipe Trades Industry Program of Arizona*, 100 Ariz 14, 20, 409 P.2d 720, 724 (1996) (“*Williams*”).

<sup>48</sup> APS Initial Brief at 6.

<sup>49</sup> Tr. at 102.

<sup>50</sup> *Williams*, 100 Ariz. at 20, 409 P.2d at 724.

<sup>51</sup> Ex A-1 Exhibit 7, ¶ 4(4)(a) of Exhibit B.

<sup>52</sup> Tr. at 255.

1 or mold something does not translate into ownership and control of the product of the tools.<sup>53</sup>

2 RUCO agrees with SolarCity that when it utilizes an SSA, SolarCity does not meet the textual  
3 definition of a public service corporation under the Arizona Constitution because it is not “furnishing”  
4 electricity, but is providing its customers with the financing, design, installation, operation and  
5 maintenance of a solar panel system on the customer’s property. RUCO asserts that there is a general  
6 presumption that a business activity is not subject to regulation by the Commission.<sup>54</sup> RUCO believes  
7 that under the terms of the SSA, the electricity is never owned by SolarCity, is not sold to the  
8 customer, and is owned by the customer from its inception. RUCO believes that the SSA is simply a  
9 financing mechanism that allows the customer to take advantage of significant tax and depreciation  
10 incentives without experiencing prohibitive up-front costs. RUCO asserts that no provision in the IRS  
11 rules, Commission rules, or the SSA contract states that an SSA is for the purpose “furnishing”  
12 electricity, but rather, the SSA specifically provides it is for the finance, design, development and  
13 operation of a solar panel system.<sup>55</sup> RUCO argues that establishing who has title and when, is an  
14 important part of the SSA, and there is no evidence in this case showing an intent to defeat  
15 Commission jurisdiction in drafting the SSA.

16 RUCO argues that those who take the position that SSAs are not financing agreements on the  
17 grounds that they do not include the payment of principal and interest with the goal of eventual  
18 ownership use faulty logic; RUCO cites the example of a car lease, which does not have to result in  
19 ownership but is undisputedly considered a financing arrangement. In this case, RUCO claims, it is  
20 the transfer of the environmental attributes and incentives to the third-party installer that allows the  
21 non-profit end users to finance the installation of the system.

22 In addition, SolarCity argues that it cannot be adjudicated a public service corporation because  
23 any “furnishing” of electricity is merely incidental to its performance of its service and financing  
24 function. SolarCity asserts that Arizona courts have found that a company “may incidentally provide a  
25 public commodity is not sufficient to subject it to regulation, it must be in the business of providing a  
26

27 <sup>53</sup> SolarCity Reply Brief at 4.

28 <sup>54</sup> *Arizona Corp. Commission v. Continental Sec. Guards*, 103 Ariz. 410, 418, 443 P.2d 406, 414 (1968) (“*Continental Sec. Guards*”).

<sup>55</sup> Ex A-1, Exhibit 7, ¶ 2 of Exhibit B.

1 public service.”<sup>56</sup> According to SolarCity, the record reflects that the monetization of the tax credit is  
 2 specialized, unique and complex, and outweighs the incidental provision of electricity.

3 **b. Staff, SRP and TEP and UNSE**

4 Staff, SRP and TEP and UNSE argue that SolarCity meets the Constitutional definition when it  
 5 employs an SSA to provide electric service to schools, governmental entities or non-profits.

6 Staff argues that by owning and operating electric generating equipment and selling the  
 7 electricity generated by that equipment, SolarCity qualifies as a public service corporation under the  
 8 plain language of the Arizona Constitution. Staff asserts that the record is clear that SolarCity’s  
 9 operations generate electricity, as the Company’s own witness, Ben Tarbell testified:

10 Once installed on the roof, the system generates electricity when sunlight  
 11 illuminates the solar modules. The illuminated solar modules produce DC  
 12 electricity and are wired together in series/parallel strings to produce the  
 13 required voltage and current characteristics for the inverters. The inverters  
 14 take DC electricity from the solar modules and convert it to AC electricity  
 15 that matches the voltage and phase of the electricity grid. The AC output  
 16 of the inverter interconnects through the main service panel of the building  
 17 on the customer side of the meter.<sup>57</sup>

18 Staff notes that pursuant to the SSA, SolarCity owns, designs, operates and maintains each  
 19 system. Staff asserts that the electricity generated by SolarCity’s system is no different from the  
 20 electricity provided by APS or any other electricity distribution company in the State.<sup>58</sup>

21 Staff believes that regardless of what the SSA states about the customer owning all electricity  
 22 the moment it is produced, there is clearly a transfer of possession. According to Staff, because  
 23 SolarCity owns the solar panels that produce the electricity, at some point the electricity contained in  
 24 SolarCity’s equipment is transferred to the customer. Staff asserts that no matter what the SSA says,  
 25 the customer does not actually receive possession of the energy until the AC power travels from the  
 26 inverter (which is owned by the Company) to the electrical cabinet or breaker box (the “electrical  
 27 panel” or “customer’s load center,” which is owned by the customer).<sup>59</sup> Staff believes that even if one  
 28 could agree that SolarCity does not own the electricity, it has custody or possession of the electricity  
 until it passes from the inverter to the customer’s load panel.

<sup>56</sup>SolarCity cites *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818.

<sup>57</sup> Ex A-4 at 1.

<sup>58</sup> Ex S-1 at 31-32.

<sup>59</sup> Ex S-1 at 5,7; Ex A-4 at 3; Tr. at 343-46.

1 Staff notes that Webster's Ninth New Collegiate Dictionary defines "furnishing" as "to provide  
 2 with what is needed" or "the provision of any or all essentials for performing a function." Staff also  
 3 cites the decision in *Williams*, which concluded that "furnishing" connotes a transfer of possession. In  
 4 the *Williams* case, the court determined that the company did not "furnish" water under the meaning of  
 5 Article 15, Section 2, because the water at issue was the conduit for supplying heat, but there was no  
 6 transfer of possession of the water itself.<sup>60</sup> Staff notes that in *SWTC*, the company, an electric  
 7 transmission company, argued that when it transmitted electricity from the generator to the distributor,  
 8 there was no transfer of possession because SWTC was only acting as a conduit. Staff claims that the  
 9 *SWTC* court rejected the company's argument because unlike in *Williams*, the commodity being  
 10 transferred or transmitted was electricity.<sup>61</sup> Staff argues that based on the findings of *SWTC*, there can  
 11 be little dispute that the generation of electricity is an essential service. Staff dismisses the argument  
 12 that "solar electricity" is not essential on the grounds that it is not part of the grid, because the  
 13 electricity produced by SolarCity displaces load provided by incumbent providers.<sup>62</sup> Staff argues the  
 14 current situation is no different than in *SWTC* because SolarCity generates electricity and ultimately  
 15 the possession of the electricity produced is transferred to the end-user customer.

16 Furthermore, Staff argues the suggestion that there is no transfer of possession of the electricity  
 17 from SolarCity to the school district is inconsistent with the provisions of the contract itself. Staff cites  
 18 provisions in the SSA that refer to the purchase of electricity and concludes that taken as a whole, the  
 19 SSA contract is for the sale of electricity.<sup>63</sup>

20 Staff asserts that it is clear that SolarCity included the provisions concerning possession of the  
 21 electricity in its contracts in order to defeat Commission jurisdiction. Staff argues that if the  
 22 Company's position is correct, nothing would prevent any other utility from including such provisions  
 23 in their contracts to defeat Commission jurisdiction. Staff argues that it is well-recognized that a party

24 <sup>60</sup>See *Williams*, 100 Ariz. at 20-21, 409 p.2d at 724 ( In *Williams* the company applied for a CC&N to furnish hot or cold  
 25 circulating chemicals, gases or water for heating or cooling purposes. See also *SWTC*, 213 Ariz. at 431, 142 P.3d at 1244  
 (discussing *Williams*).

26 <sup>61</sup>Staff cited *SWTC*, 213 Ariz. at 431, 142 P.3d at 1244.

27 <sup>62</sup>Staff Initial Brief at 11.

28 <sup>63</sup>E.g. Ex A-1, Ex B (Coronado High School SSA) at 4, under the heading "Monthly Charges"; at 5, under the heading  
 "Environmental Attributes and Environmental Incentives"; at 8, under the heading "Environmental Attributes and  
 Environmental Incentives"; at 4, under the heading "Billing and Payment, a. Monthly Charges"; and at 5, under the  
 heading "Monthly Invoices"

1 cannot “contract away” Commission jurisdiction.<sup>64</sup>

2 Staff also argues that to claim the SSA is merely a financing arrangement is inconsistent with  
3 the way the agreement is structured. Staff asserts that the SSAs were structured as contracts for the  
4 sale of electricity so that the SSA transaction would qualify for significant federal tax incentives,<sup>65</sup> and  
5 that if the SSAs were structured primarily as financing arrangement, or leases with an option to buy,  
6 they would not qualify for federal tax incentives.<sup>66</sup>

7 In response to those who question why the Commission would regulate service pursuant to an  
8 SSA or PPA, but not customers who purchase their own systems, Staff asserts that the applicable  
9 constitutional definition simply does not require regulation of a retail customer’s provision of service  
10 to him or herself. However, according to Staff, the constitutional definition clearly applies where  
11 another entity is providing an essential service to members of the public for profit.<sup>67</sup>

12 In response to SolarCity’s position, TEP and UNSE argue that SolarCity’s metaphysical  
13 distinction that it does not “furnish” electricity because it never really “owns” the electricity is without  
14 merit, and that the Commission has previously rejected this argument. TEP and UNSE note that in  
15 the *SWTC* case, a transmission cooperative was found to be a public service corporation even though it  
16 merely transmitted electricity that it did not own.<sup>68</sup> TEP and UNSE claim that even if SolarCity never  
17 owns the electricity, the fact remains that its solar panels produce the electricity and that electricity is  
18 transported through SolarCity’s facilities from the solar panels to the customer’s electric panels. TEP  
19 and UNSE argue that under *SWTC*, this transport is sufficient to meet the definition of “furnishing.”<sup>69</sup>  
20 They argue further that SolarCity’s position is counter to the Commission’s regulatory obligation  
21 because if a retail generator of electricity were permitted to avoid Commission jurisdiction by  
22 manipulating temporal ownership of electricity, the Commission would be sanctioning unregulated  
23 generation service and retail electric competition in Arizona.

24 TEP and UNSE assert that the SSA is not a financing arrangement for the end-user customer

25 <sup>64</sup> Staff Reply Brief at 4.

26 <sup>65</sup> Ex S-1 at 14; Ex A-4, Ex B at 1.13; Tr. at 473.

27 <sup>66</sup> Staff’s Initial Brief at 9-10 *citing* excerpt from the Solar Energy Industries Association Guide to Federal Tax Incentives  
for Solar Energy, Version 3.0, Released May 21, 2009.

28 <sup>67</sup> Staff Initial Brief at 10.

<sup>68</sup> TEP cites *SWTC*, 213 Ariz. at 431, 142 P.3d at 1244..

<sup>69</sup> *SWTC*, 213 Ariz. at 431, 142 P.3d at 1244.

1 because the end-user customer does not own the system. They argue that the SolarCity arrangement is  
 2 not meaningfully different than an arrangement under which a utility-scale project developer uses a  
 3 PPA with a power purchaser to support the financing for the project.<sup>70</sup>

4 SRP asserts that Article 15, Section 2, of the Constitution is clear that “all corporations other  
 5 than municipal engaged in furnishing electricity for light . . . shall be deemed public service  
 6 corporations” and also that “artful contract drafting or strained interpretation of words” cannot change  
 7 the conclusion. SRP asserts that SolarCity’s argument under the *Williams* case does not support  
 8 SolarCity’s claim. SRP claims that the point of the *Williams* case was that the customer did not  
 9 receive water, because it circulated in pipes, and hence there was no “transfer of possession.” In this  
 10 case, however, SRP notes that the customer receives and uses the electricity.

11 SRP believes that RUCO’s position that SolarCity is simply a financier and not furnishing  
 12 electricity is difficult to follow, as the practical effect of SolarCity’s ownership and generation of the  
 13 facilities is that the customer receives and uses electricity. SRP states there are few utilities of any  
 14 type that do not engage in financing the facilities that provide service to customers.

15 SRP traces the origins of Article 15 of the Arizona Constitution and concludes that Arizona  
 16 adopted a very broad definition of corporations providing essential public services.<sup>71</sup> SRP claims that  
 17 the framers did not limit the definition of public service corporation with the concept of monopoly  
 18 power and that the definition does not depend on the point or method of delivery and was never  
 19 intended to hinge upon an artful use of the term “furnished.”<sup>72</sup> SRP believes the following excerpt from  
 20 the *Petrolane* case is instructive on this point:

21 The statement of the court in *Re Geldbach Petroleum Co.*, accurately  
 22 conveys the benign objectives of the Constitution, Art. 15, § 2, and why its  
 language should not be reduced by judicial construction to insignificance:

23 “ \* \* \* the purposes of regulation are to reserve and promote those  
 24 services which are indispensable to large segments of our population, and  
 25 to prevent excessive and discriminatory rates and inferior service where  
 26 the nature of the facilities used in providing the service and the disparity in  
 the relative bargaining power of a utility ratepayer are such as to prevent  
 the ratepayer from demanding a high level of service at a fair price

27 <sup>70</sup> TEP/UNSE Reply Brief at 5.

28 <sup>71</sup> SRP Brief at 3-5.

<sup>72</sup> *Id.* at 6.

without the assistance of governmental intervention in his behalf.<sup>73</sup>

SRP argues that the position that SolarCity's business of selling electricity is incidental to a business of monetizing and processing tax credits could exempt almost every utility provider and has no support under Arizona law. SRP asserts that unlike the businesses of mobile home parks, alarm services, and security services, in SolarCity's case there is no independent business associated with the provision of electricity. In this case, SRP asserts, the entire reason for the relationship with SolarCity from the customer's point of view is to receive solar electricity or to save money.<sup>74</sup> SRP argues that SolarCity's activities of arranging for financing are conceptually no different from the activities of any electric utility that must finance its facilities, taking advantage of available ways to reduce costs.

### c. AECC and WRA

AECC believes that reasonable arguments can be made on either side of the issue of whether SolarCity is "furnishing" electricity depending on how one views ownership and maintenance of the equipment that creates the electricity and on who has possession and title to the electricity as soon as it is created. AECC never reaches a conclusion on this question, but reminds the Commission that the determination should not be based on implication or a strained construction.<sup>75</sup>

WRA does not take a position on the first prong of the constitutional analysis, but acknowledges that SolarCity and the school district cannot decide by agreement whether SolarCity is a public service corporation. WRA believes, however, that the debate about whether SolarCity is "furnishing" electricity does not lead to a conclusion that SSAs must be regulated. WRA suggests that instead of focusing on what is being "furnished" under the SSA, it is more instructive to assess the essential nature of the transaction in light of the *Serv-Yu* factors and case law.

## 2. Analysis and Conclusion

Article 15, Section 2 of the Arizona Constitution provides that public service corporations include corporations engaged in furnishing electricity for light, fuel, or power. In addition to the common meaning of "to supply" or "provide," Arizona courts have determined that the word "furnish" in Article 15, Section 2 connotes a transfer of possession.<sup>76</sup> Thus, in *Williams*, the Arizona Supreme

<sup>73</sup> *Petrolane*, 119 Ariz. at 259, 580 P.2d at 720 (citations omitted).

<sup>74</sup> Tr. at 533-34.

<sup>75</sup> AECC cites *Nicholson*, 108 Ariz. at 321, 497 P.2d at 819.

<sup>76</sup> See *SWTC*, 142 P. 3d at 1244; *Williams*, 100 Ariz. at 20, 409 P.2d at 724.



1 Court found that an entity that used circulating water to provide heating or cooling was not furnishing  
 2 water for “irrigation, fire protection, or other public purposes” and therefore was not a “water  
 3 corporation” in need of a CC&N within the meaning of A.R.S. § 40-281. The Court found that the  
 4 water was a conduit for supplying heat or refrigeration, but that because there was no transfer of the  
 5 water, there was no furnishing of water under the plain meaning of the word “furnish.” The Court  
 6 further found that the phrase “furnishing water for . . . other public purposes”<sup>77</sup> was intended by the  
 7 drafters to connote a similar purpose as for “irrigation or fire protection” which involves a transfer of  
 8 possession for consumption by the user.

9 In *SWTC*, the Arizona Court of Appeals rejected the transmission cooperative’s claim that it  
 10 was merely a conduit for the electricity and did not “furnish” electricity as contemplated by the  
 11 constitutional definition.<sup>78</sup> The court found:

12 [W]e view *SWTC* as the intermediary that takes possession of the  
 13 electrical power from the generator and transfers possession of that  
 14 electricity to the distributors. Unlike *Williams*, in which the company  
 15 retained possession of the water and the water was not the actual product  
 being provided, the commodity being transferred or transmitted in this  
 case, is in fact, electricity. *SWTC* therefore furnishes electricity pursuant  
 to Article 15, Section 2, of the Arizona Constitution.<sup>79</sup>

16 Similarly, SolarCity is furnishing electricity to its customers. In the case before us the  
 17 “furnishing” is even more directly evident than in the *SWTC* case. Facilities owned and operated by  
 18 SolarCity produce electricity that ends up in the possession of SolarCity’s customers. Under the  
 19 holding in *SWTC*, the portion of the SSA that proclaims SolarCity does not have legal title to the  
 20 power produced by its solar panels is not relevant to the question of whether there is a transfer of  
 21 possession to satisfy the definition of Article 15, Section 2. “To furnish” means “to provide with what  
 22 is needed” or “supply” or “give.”<sup>80</sup> SolarCity owns the means of producing the electricity that provides  
 23 the schools with needed light, fuel or power. Careful drafting of the SSA in an attempt to meet federal  
 24 tax code requirements or avoid state regulation does not change the fact that there is a physical transfer  
 25 of electricity from SolarCity’s equipment to the end user.

26 <sup>77</sup> With respect to water companies, Article 15, Section 2 provides “all corporations . . . engaged in . . . furnishing water for  
 27 irrigation, fire protection, or other public purposes . . . .”

<sup>78</sup> *SWTC*, 213 Ariz. at 431, 142 P.3d at 1244.

<sup>79</sup> *Id.*

28 <sup>80</sup> Webster’s New Collegiate Dictionary, (1976).

1 The evidence shows that care was taken to craft the SSA as a sale of electricity because  
2 otherwise, the transaction would not qualify for the federal tax credits. Mr. Rive attached to his  
3 testimony the "Guide to Federal Tax Incentives for Solar Energy" released May 21, 2009 by the Solar  
4 Energy Industries Association ("SEIA").<sup>81</sup> With respect to the property that is eligible for a  
5 commercial solar tax credit, section 1.1.3 of the SEIA Guide provides:

6 Equipment must be used in the United States to qualify for a commercial  
7 solar tax credit. In addition, commercial solar tax credits cannot be  
8 claimed on equipment that is "used" by someone who is not subject to  
9 U.S. income taxes.

10 Thus, "use" of the equipment by a school, municipal utility, government  
11 agency, charity or other tax-exempt organization (unless the equipment is  
12 used in a taxable side business) or in some cases by an electric cooperative  
13 will rule out a credit on the equipment. This means that solar equipment  
14 cannot be leased to such an entity. A lessee "uses" the equipment it is  
15 leasing. However, a lease with a term of less than six months does not  
16 count as a "use." The credit is calculated in the year equipment is first put  
17 into service. Ineligible use of the equipment at any time during the first  
18 five years would cause part of the tax credit claimed to be recaptured. (See  
19 section 1.10.)

20 The key when dealing with such an entity is to sign a contract merely to  
21 sell it electricity. Someone who merely buys electricity from solar  
22 equipment owned by someone else is not considered to "use" the  
23 equipment. Care should be taken to make sure the contract is not  
24 characterized by the IRS as a lease of the solar equipment in substance  
25 even though it looks in form like a power contract (See sections 1.8.4 and  
26 1.8.5 for more details and consult a tax attorney for project specific  
27 applications.)

28 In addition, Sun Power provided a document entitled "Financing Non-Residential Photovoltaic  
Projects: Options and Implications" by Mark Bolinger, Lawrence Berkeley National Laboratory  
("Bolinger Report").<sup>82</sup> The Bolinger Report discusses how entities can utilize PPAs in connection  
with tax-exempt hosts, and apparently agrees with the SEIA assessments of how to structure contracts  
with tax-exempt entities so as not to jeopardize the use of the federal tax credit. Neither the SEIA  
Guide, nor Bolinger Report cites to any IRS rulings that provide that an SSA, as used here, and as  
distinguished from a PPA, qualifies for the federal tax credit. SolarCity must believe that it does, as  
the federal tax credit is a critical component of its ability to provide competitive rates. According to

<sup>81</sup> Ex A-4, Exhibit B.

<sup>82</sup> Ex SunPower-4.

1 SolarCity's authority, the SEIA Guide, to obtain the tax credit, there must be a sale of electricity.  
2 SolarCity attempts to avoid meeting the constitutional definition of furnishing electricity by making  
3 the claim that SolarCity never has legal title to the electricity produced by the panels. But SolarCity  
4 cannot have it both ways. If SolarCity does not have title to the electricity, then what is it selling? If it  
5 is selling the access to, or the use of, the PV panels, how can it claim the federal tax credit which  
6 require the sale of electricity?

7 An SSA may encompass the design, installation, maintenance and financing of solar panels,  
8 but its purpose as a whole is to supply electricity to the end user. The schools desire the solar panels  
9 to receive electricity at a lower rate than they can obtain from the incumbent supplier.<sup>83</sup> Unlike some  
10 of the cases cited in this proceeding wherein the courts found that the businesses were not public  
11 service corporations because their transfer of the commodities was merely incidental to their main  
12 business activities, in this case, the purpose of SolarCity's SSA business is to sell or provide  
13 electricity to the end user.

14 Those businesses that have been found not to be public service corporations were clearly  
15 focused on non-public activities and only tangentially provided services that implicated the public  
16 interest. Thus, in *General Alarm*, it was found that a security alarm company that used telephone  
17 wires to transmit an alarm signal was not a public service corporation because the transmission of  
18 information was merely incidental to the main business, which was property protection. In  
19 *Continental Security Guards*, involving an armored car company, the court found that the general  
20 nature of the business was security, and the transportation component was merely a part of the  
21 security, and that the use of the public highway was not of such a nature that the public interest  
22 required regulation as a common carrier. On the other hand, in the *Petrolane* case, the Arizona  
23 Supreme Court found that the business of distributing liquid propane gas by central gas distribution  
24 systems was not incidental to the sale of liquid propane in bulk, and that the appellants needed a  
25 CC&N for that portion of their business, which was distinct and separate from the carrying on of the  
26 remainder of the appellants' business.

27

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28 <sup>83</sup> Tr. at 533.

1 In developing its SSAs, SolarCity has cleverly devised a way to utilize the tax code and utility  
2 incentives to provide solar power to a class of customers who otherwise would not be able to install  
3 the facilities, by structuring the SSA as a sale of electricity. The sale is not an insignificant or  
4 incidental part of the transaction, but critical to its viability. Under the Arizona Constitution, this sale  
5 of electricity means that SolarCity is furnishing electricity and that it is a public service corporation.

## 6 **B. The Role of the *Serv-Yu* Analysis**

### 7 **1. Parties' Arguments**

8 SRP argues that the *Serv-Yu* case itself has little relevance to the instant proceeding and that it  
9 is obvious from a careful review of the factors discussed in *Serv-Yu* that the factors were applied to the  
10 specific context of that case in 1950 and should not be extrapolated into a general test. Rather, SRP  
11 argues that whether an entity is a public service corporation hinges upon the specific facts of each  
12 case.<sup>84</sup>

13 SRP acknowledges that the *SWTC* decision indicates that the second step in the analysis is  
14 based on the eight *Serv-Yu* factors, but SRP believes that such analysis does not appear to be  
15 consistent with the Constitution and the facts of the actual decisions. SRP also asserts that a case-by-  
16 case public interest analysis is unwieldy and probably inconsistent with the Constitution. SRP argues  
17 that an analysis that focuses on whether the service is only incidental to another business is the most  
18 consistent with the Constitution and the actual outcome of the case law. Thus, according to SRP, the  
19 second step in the analysis should be whether the primary purpose of the business is to dedicate  
20 property to the "public use" of electric service.

21 SRP asserts that the words of the Constitution are to be given their normal and logical meaning  
22 and that the cases that have focused on the so-called second "step" (*i.e.* the *Serv-Yu* analysis) have  
23 exempted from regulation only those businesses that provided a public service only incidentally, so as  
24 not to fall logically within the intent of the Constitution.<sup>85</sup> Thus, an alarm company that maintained a  
25 communication system for transmission of emergency messages to its central office was not a public  
26 service corporation; an armored car service that transported money and valuables was not a common

27 \_\_\_\_\_  
28 <sup>84</sup> SRP cites *Nicholson*, 108 Ariz. at 320, 497 P. 2d at 818.

<sup>85</sup> SRP Brief at 7.

1 carrier since the armored car was merely incidental to the security provided for the protection of  
2 money and valuables; the owners of a mobile trailer park that provided water to residents as part of a  
3 package price was not a public service corporation because the furnishing of water was in support of,  
4 and incidental to, the owner's business of renting trailer spaces; the transport of insecticide from the  
5 place of landing to the field by a crop dusting company was part of "one operation" of the crop dusting  
6 service and not a public service corporation; and a company in the business of selling, servicing and  
7 repairing vehicles, which included towing cars to the place of business did so incidentally to the main  
8 business and was not a public service corporation<sup>86</sup>

9 SRP argues that the *Sw Gas* case cited by the "no-regulation" advocates in this proceeding has  
10 no similarity to SolarCity. In *Sw Gas*, the court found that El Paso Natural Gas Co., which primarily  
11 operated a wholesale natural gas transport business, was not a public service corporation even though  
12 it had ten retail customers. SRP asserts that the court based its decision in that case primarily on the  
13 fact that 100 percent of the business was regulated by the Federal Energy Regulatory Commission  
14 ("FERC") which had issued certificates of convenience and necessity for the ten retail customers, and  
15 also on the fact that El Paso's retail relationships were long-standing and it was not accepting new  
16 requests for service.<sup>87</sup>

17 SunPower asserts that the underlying purpose of the *Serv-Yu* analysis is to ascertain whether  
18 the nature and surrounding circumstances of the entity in question are such as to (1) exempt it from the  
19 general public policy favoring competition; and (2) subject it to regulation because it is required by the  
20 broad public interest. SunPower states that to date, no Arizona court of record has assigned an express  
21 order of importance or hierarchy to the *Serv-Yu* factors, however, SunPower believes that three themes  
22 or concerns characterize the courts' decisions. First, according to SunPower, is the desire to prevent  
23 wasteful competition between companies when the equivalent service could be offered by a single  
24 provider (as reflected in *Trico*). Second, is the desire to assure that a provider with effective monopoly  
25 power cannot extract unjust and unreasonable profits, or allocate recovery of costs in a discriminatory

26 \_\_\_\_\_  
27 <sup>86</sup> SRP Brief at 7-8 (citing *General Alarm*, 76 Ariz. 235, 262 P.2d 671, *Continental Sec. Guards*, 103 Ariz. 410, 443 P.2d  
28 406, *Nicholson*, 108 Ariz. 317, 497 P. 2d 815, *Quick Aviation Co. v. Kleinman*, 60 Ariz. 430, 138 P.2d 897  
(1943), *Killingsworth v. Morrow*, 83 Ariz. 23, 315 P.2d 873 (1957).

<sup>87</sup> SRP Reply Brief at 7.

1 manner (as evidenced in *Sw Gas*). The third theme identified by SunPower is a desire to facilitate the  
 2 provision of essential services to a large segment of the public (as evidenced in *Serv-Yu* and *SWTC*).  
 3 SunPower asserts that each of these themes is directly related to the ultimate underlying question of  
 4 whether there is a need for regulation. SunPower believes that an analysis of the major themes  
 5 supports a determination that (1) there has been no demonstration of a need for regulating SolarCity;  
 6 (2) the “benefits” of regulation asserted in the case are illusory and are not a lawful substitute for the  
 7 demonstration of need required under Arizona law; and (3) the regulation of SolarCity as a public  
 8 service corporation is neither required nor warranted.

## 9           2. Analysis and Conclusion

10           After a close examination of the case law, we do not find that the *Serv-Yu* factors are required  
 11 as part of every analysis of whether an entity is a public service corporation. Where the entity is  
 12 clearly furnishing electricity under the Arizona Constitution, and such activity is not merely incidental  
 13 to a primary business activity that is not clothed with the public interest, the *Serv-Yu* analysis is  
 14 superfluous.

15           When the Arizona Supreme Court considered whether Trico Electric Cooperative, Inc. was a  
 16 public service corporation, it did not engage in a second “*Serv-Yu* step.”<sup>88</sup> The *Trico* Court first found  
 17 that *Serv-Yu* had held that the Commission had jurisdiction over membership cooperatives, and then  
 18 concluded that “[t]he language of the Constitution is too clear to admit of any other interpretation than  
 19 that reached under the facts of this case. No further evidence is required . . . .”<sup>89</sup>

20           In *Serv-Yu*, a membership cooperative claimed that by providing gas only to its members, it  
 21 never indicated an intent to serve the public generally. Although the Court initially, relied upon the  
 22 corporation’s articles of incorporation to determine what it actually did, the Court ultimately  
 23 determined that there were other factors that should have been pointed out. The Court listed eight  
 24 factors which may be considered in determining the “ultimate question,” which in that case was  
 25 whether *Serv-Yu* was furnishing gas as a public service corporation subject to the jurisdiction of the  
 26 Commission. At that time, it was not settled under Arizona law whether the constitutional definition of  
 27

28 <sup>88</sup> *Trico v. Arizona Corp. Comm’n*, 86 Ariz. 27, 339 P.2d 1046 (1959) (“*Trico*”).

<sup>89</sup> *Trico*, 86 Ariz. at 33, 339 P.2d at 1051.

1 “public service corporation” extended to a cooperative corporation that only served its members. The  
 2 Court used the eight factors to conclude that Serv-Yu was furnishing gas, and consequently was a  
 3 public service corporation, as defined in the Arizona Constitution.

4 The *Serv-Yu* Court did not institute a two-part analysis. Rather it used the eight factors to  
 5 answer the question of whether there was a furnishing of a commodity as intended by the  
 6 constitutional definition of “public service corporation.” Although subsequent courts have stated that  
 7 there is a two-part analysis,<sup>90</sup> a review of the case law shows that these courts either did not find that  
 8 the plain meaning of the words in Article 15, Section 2 of the Arizona Constitution was sufficient to  
 9 find a public interest that reached a constitutional threshold, or that they used the *Serv-Yu* factors to  
 10 analyze whether the “furnishing” was incidental to the main activity of the corporation. Thus, in  
 11 *Nicholson*, the Arizona Supreme Court utilized the *Serv-Yu* factors to determine that furnishing water  
 12 as part of a trailer park business was only incidental to the business of renting trailer spaces,<sup>91</sup> and in  
 13 *SWTC*, the court engaged in the *Serv-Yu* analysis to determine whether the “furnishing” in that case  
 14 was “clothed with a public interest” and not merely an incidental facet of SWTC’s activities.<sup>92</sup>

15 Given our determination that SolarCity is a public service corporation under the plain meaning  
 16 of the definition in Article 15, Section 2 of the Arizona Constitution, we do not believe that additional  
 17 analysis under the *Serv-Yu* factors is needed. However, even applying the *Serv-Yu* factors to the facts  
 18 of this case reinforces the conclusion that SolarCity is a public service corporation when it utilizes an  
 19 SSA to provide electricity to schools, government entities or non-profits.

## 20 **C. The *Serv-Yu* Factors**

### 21 **1. *Serv-Yu* Factor 1: What the entity actually does.**

#### 22 **a. Parties’ Arguments**

23 SolarCity claims that the evidence overwhelmingly demonstrates that what SolarCity actually  
 24 does is not like a public service corporation. SolarCity argues that the testimony indicates that  
 25 SolarCity designs, installs, maintains and finances rooftop solar distributed generation facilities and  
 26

27 <sup>90</sup> See *Nicholson*, 108 Ariz 317, 497 P.2d 815, *Sw Gas*, 165 Ariz. 279, 818 P.2d 714, and *SWTC*, 213 Ariz. 427, 142 P. 3d  
 1240.

28 <sup>91</sup> See *Nicholson*, 180 Ariz. at 320, 497 P. 2d at 818

<sup>92</sup> See *SWTC*, 213 Ariz. at 433, 142 P.3d at 1245.

1 that no regulated utility in the State performs these services.<sup>93</sup> SolarCity asserts that it is clearly not a  
2 monopoly provider of its SSA services, as it is subject to the request for proposal (“RFP”) process  
3 before it can do business with a school or governmental customer, while a monopoly provider is  
4 required to take all customers and does not compete with other providers for customers.<sup>94</sup>

5 SolarCity argues that Staff’s analysis of the first *Serv-Yu* factor relies on a misapplication of  
6 *Serv-Yu* as interpreted in *SWTC*. SolarCity states that Staff relies on SolarCity’s marketing material,  
7 which expresses an intent to serve millions, but that Staff fails to consider that the stated goal includes  
8 a large number of sold or leased facilities which Staff has stated are not subject to regulation, as well  
9 as a market extending beyond the borders of Arizona.<sup>95</sup> SolarCity argues that Staff does not provide a  
10 plausible connection to support its belief that currently serving only a very small fraction of one  
11 percent of the population of Arizona is “so considerable a fraction of the public” that it “is public in  
12 the same sense in which any other may be called so” in Arizona.<sup>96</sup> SolarCity also disputes Staff’s  
13 claim that SolarCity’s customers will rely on SolarCity to the same extent as they rely upon the  
14 electricity generated by APS, arguing that the evidence is to the contrary, as APS (or the relevant  
15 incumbent) remains the provider of last resort, and SolarCity’s customers will always be hooked to the  
16 grid.

17 RUCO asserts that SolarCity is providing a service that is not intended to be a substitute for a  
18 customer’s regular electric service provider, but rather intended to offset a portion of a customer’s load  
19 requirement with a renewable resource. RUCO argues that because solar power is an optional service,  
20 SolarCity will not be providing an indispensable service to a large segment of the population.<sup>97</sup>  
21 Further, RUCO asserts that SolarCity does not, nor is it anticipated that SolarCity will, serve such a  
22 substantial portion of the public such that would make its rates a matter of public concern. RUCO  
23 noted that SolarCity’s stated goal is to help millions of homeowners, community organizations and  
24 businesses adopt solar power by lowering or eliminating the high up-front costs.<sup>98</sup>

25 \_\_\_\_\_  
26 <sup>93</sup> Tr. at 102, 537 and 640-641.

27 <sup>94</sup> Tr. at 531.

28 <sup>95</sup> SolarCity Reply Brief at 6.

<sup>96</sup> *Id.* at 6, (citing *SWTC*, 213 Ariz. 427, 142 P.3d 1240).

<sup>97</sup> Ex A-1 at 11.

<sup>98</sup> *Id.* at 2.



1 SunPower asserts that Staff's conclusion that SolarCity is "furnishing" electricity biased Staff's  
 2 analysis of the first *Serv-Yu* factor.<sup>99</sup> SunPower believes that Staff could not point to any specific data  
 3 to support the conclusion "that the furnishing of electricity was predominant in the SSA." Based on  
 4 the record, and within the analytical context of the first *Serv-Yu* factor, SunPower asserts that what  
 5 SolarCity actually does under its SSA is provide design, construction, ownership, operation and  
 6 maintenance services related to customer-specific roof-top solar panel equipment.<sup>100</sup>

7 Staff asserts that SolarCity's activities parallel those of traditional electric utilities. Staff  
 8 claims that although SolarCity or RUCO may characterize the SSA as a financing agreement, it is  
 9 clear that the Company generates electricity through facilities it owns, and then furnishes the  
 10 electricity to its customers. Staff asserts that the electricity is meant to substitute for a portion of the  
 11 customer's load otherwise obtained from the incumbent utility and is no less essential than the  
 12 electricity obtained from the incumbent.

13 TEP and UNSE state that the primary elements of what SolarCity does revolve around  
 14 providing electricity directly to a myriad of end-user customers, including residential, commercial and  
 15 governmental customers. They note that SolarCity does not intend to limit its ownership and  
 16 operation to a small number of facilities. TEP and UNSE note further that SolarCity's ability to own  
 17 and operate the solar facilities and its ability to charge a competitive rate are dependent on the  
 18 incentives it receives from the underlying electric utility, which in turn are funded through the REST  
 19 that is collected from all customers of that utility.

20 SRP asserts "Clearly the business of SolarCity is to own generating facilities and sell the  
 21 output to customers."<sup>101</sup> SRP also states that it is clear that the term in the Constitution to "furnish . .  
 22 . electric service" is to be construed broadly. SRP states that to conclude otherwise would permit huge  
 23 segments of the electric industry to avoid regulation simply by redefining the service provided to  
 24 customers.<sup>102</sup>

25 \_\_\_\_\_  
 26 <sup>99</sup> Tr. at 1056-57 ("Staff felt the furnishing of electricity figured larger into the question of the PSC status than the other  
 27 services. And ultimately we decided that the SSA represented a sale of electricity, and that the furnishing of electricity was  
 28 not incidental to the SSA.")

<sup>100</sup> SunPower Initial Brief at 15.

<sup>101</sup> SRP Opening Brief at 14.

<sup>102</sup> *Id.* at 15.

1                   **b. Analysis**

2           The first *Serv-Yu* factor looks at what a company actually does. The company's activities are  
3 analyzed to determine whether they affect so considerable a fraction of the public that it is "public in  
4 the same sense in which any other may be called so."<sup>103</sup> The *Nicholson* court directed that the analysis  
5 should focus on the substance of what an entity does, not the form.

6           Here, SolarCity furnishes the means for the school or governmental agency to obtain solar  
7 generated electricity. As discussed above, SolarCity uses an SSA to sell electricity to the schools.  
8 The situation is distinguishable from that in *Nicholson*, where the water was found to be incidental to  
9 the business of renting trailer spaces; to the facts of *General Alarm*, where use of the telephone wires  
10 was found to be incidental to the alarm business; and to *Killingsworth* where the towing service was  
11 incidental to the auto repair business. In contrast to those cases, the entire purpose and structure of the  
12 SSA contract is to sell electricity to the school.

13           Those parties who claim the sale of electricity is incidental to the other facets of the SSA  
14 transaction strain reason. Although SolarCity and RUCO claim that SolarCity is merely an "installer"  
15 or "financier" of the systems, under the terms of the SSA, SolarCity is much more than an installer; it  
16 owns the systems and remains intimately involved through the term of the contract selling the "green"  
17 energy to the end user. While each SSA provides service to one end user, each SSA also promotes the  
18 larger public interest by the expansion of renewable distributed generation. Whether one characterizes  
19 SolarCity's activities as providing distributed generation or selling electricity, there exists an important  
20 public interest in the activity.

21           The Commission adopted the REST Rules with the goal of diversifying utility resource  
22 portfolios. The Commission found that electric service provided from renewable resources is in the  
23 public interest because renewable energy sources are not subject to the same price fluctuations and  
24 transportation disruptions as are conventional fossil fuel energy sources; rely on free energy and are  
25 less polluting; and promote the security, health and safety of the public by lessening continued utility  
26 reliance on fossil fuels.<sup>104</sup> Renewable distributed generation displaces conventional energy resources

27 \_\_\_\_\_  
28 <sup>103</sup> *SWTC*, 213 Ariz. at 433, 142 P.3d at 1245.

<sup>104</sup> Decision No. 69127 (November 14, 2006), FOF 228-33.

1 and, if adopted in sufficient degree, benefits everyone, not just those who use renewable resources  
 2 directly, by lessening the need for incumbent utilities to invest in fossil fuels and transmission. The  
 3 Commission has established goals for the implementation of Renewable Distributed Generation and,  
 4 in considering the individual utilities' REST implementation tariffs, has approved incentives that are  
 5 paid by the utility to the owner of qualifying distributed generation facilities. Thus, in Arizona, the  
 6 goal of reducing utility dependence on fossil fuels through renewable distributed generation is an  
 7 important part of promoting the public safety, health and welfare, and the public has an interest in  
 8 encouraging the development of renewable distributed generation.

9 In the *SWTC* case, the Cooperative argued that it merely supplied transmission service at  
 10 wholesale by private contract, and thus was not a public service corporation. But in finding that the  
 11 cooperative's transmission service delivered electricity to the distribution cooperatives on which  
 12 thousands of retail customers relied, the court held that the first *Serv-Yu* factor weighed in favor of  
 13 finding the cooperative was a public service corporation. In this case, although SolarCity primarily  
 14 furnishes electricity, albeit "green" electricity, to one end user at a time, it is doing so pursuant to the  
 15 REST Rules and to the benefit of the public at large. Because of the important public benefits that  
 16 emanate from the REST Rules and the inter-related nature of the REST Rules and the goal of  
 17 promoting renewable distributed generation with SolarCity's activities pursuant to SSAs, SolarCity's  
 18 SSA activity affects the public at large and consequently is "clothed with a public interest."

19 **2. *Serv-Yu* Factor 2: Dedication of property to a public use.**

20 **a. Parties' Arguments**

21 SolarCity asserts that the solar panel systems that it provides are dedicated to the individual  
 22 school, non-profit organization or government entity on whose private property they are located, and  
 23 hence, are not dedicated to the general public. SolarCity believes that it "strains reason" and is  
 24 "dangerous" to conclude that the mere fact that some electricity may flow from the school to the grid  
 25 under a net metering scenario means that "the public generally, in so far as it is practicable, has the  
 26 right to enjoy service from the facilities"<sup>105</sup> or that the system is dedicated to the public use.

27  
 28 <sup>105</sup> Ex S-1 at 22.

1 According to SolarCity, such “far reaching and extreme conclusion” would imply that any solar panel  
2 host, even a private home owner, is dedicating property to a public use.<sup>106</sup> SolarCity believes that no  
3 one has the right to demand his neighbor’s solar facilities be turned on or off so that the neighbor may  
4 enjoy service from the facility.

5 SolarCity argues that Staff fails to account for the fact that each SSA involves only one  
6 customer getting service from one solar facility on that customer’s property and that no portion of the  
7 public has the right to enjoy services from SolarCity or the use of his neighbor’s PV system.<sup>107</sup>  
8 SolarCity states that not only will SolarCity refuse to offer service to more than one customer from the  
9 same solar system, but the Commission’s Interconnection Rules prohibit SolarCity from providing  
10 services to more than one customer at a time. SolarCity argues that because it is limited to the one  
11 customer, one rooftop scenario, there is no risk to the public if the system fails, and even the one  
12 customer will not be out of service. Additionally, SolarCity asserts that there is no risk to the public  
13 related to pricing because only one customer is paying.

14 SolarCity rejects TEP’s and UNSE’s arguments that the “nexus of public benefit” between  
15 SolarCity and its SSA customers is closer than that found to exist in the *SWTC* case, wherein SWTC  
16 carried bulk electricity for miles over the grid to serve thousands of ultimate end users. SolarCity  
17 claims that the opposite is true, as it provides solar energy to one customer from arrays on the  
18 customer’s rooftop. In addition, SolarCity does not believe that receiving rebate money means the  
19 systems themselves are dedicated to a public use anymore than accepting rebates to make buildings  
20 more energy efficient dedicates the buildings to public use.<sup>108</sup>

21 RUCO argues that the dedication of property to a public use is always a question of intent.<sup>109</sup>  
22 RUCO states that SolarCity has clearly stated that it has no intent of dedicating private property for a  
23 public use. RUCO asserts that SolarCity’s SSAs with the Scottsdale Unified School District are  
24 inconsistent with an entity that is dedicating its property to public use.

25 WRA argues that in the absence of a public interest in distributed renewable energy systems  
26

27 <sup>106</sup> Solar City Opening Brief at 3; Tr. at 1065.

<sup>107</sup> SolarCity Reply Brief at 7.

<sup>108</sup> *Id.* at 30.

28 <sup>109</sup> RUCO cites *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 326; *SWTC*, 213 Ariz. at 433, 142 P.3d at 1245.

1 and in a dedication of private property to public use, there is no reason to regulate providers of  
2 distributed renewable energy projects.<sup>110</sup> WRA asserts there is no dedication of private property to  
3 public use in this case because the public does not use the PV systems installed on the school's  
4 property. WRA states that a customer-sited solar energy facility primarily serves only that one  
5 customer, who only incidentally may sell excess generation back to the utility.<sup>111</sup>

6 WRA argues there is no public interest in customer-sited distributed energy projects. WRA  
7 acknowledges that there is a long history of public interest in the production and sale of electricity  
8 from central station generation resources and in the transmission and distribution of that electricity, but  
9 argues that there is little to implicate the public interest when an individual customer obtains some of  
10 his or her electricity from a generation facility located on the customer's premises because the service  
11 affects only the one customer. WRA believes that no governmental control of the price and method of  
12 operation is required for these systems.

13 According to WRA, regulation should focus on the incumbent utility through the buyback rate,  
14 not the price SolarCity's customer pays for the electricity. WRA acknowledges that the public may  
15 occasionally obtain electrons from the facilities, but only if SolarCity's customer actually delivers  
16 excess electricity to the grid. In response to comments that the SolarCity facilities would not be  
17 possible without public incentives, WRA notes that the same incentives are provided to customers who  
18 provide their own facilities, but who are not regulated.

19 Staff argues that this *Serv-Yu* factor is determined by the facts and circumstances of each case  
20 and is not solely dependent on the intent of the owner.<sup>112</sup> Staff believes that it is not necessary to hold  
21 oneself out as providing service to the entire public in order to be a public service corporation.  
22 According to Staff, the *Serv-Yu* court held that to be a public service corporation "an owner of . . . a  
23 plant must at least have undertaken to actually engage in business and supply at least some of this  
24 commodity to some of the public."<sup>113</sup> Staff cited testimony that it is physical constraints, rather than

25 <sup>110</sup> WRA Reply Brief at 2.

26 <sup>111</sup> WRA Opening Brief at 5.

27 <sup>112</sup> Staff cites *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 326.

28 <sup>113</sup> *Id.*; see also *Arizona Water Co. v Ariz. Corp. Comm'n*, 161 Ariz. 389, 778 P.2d 1285 (Ct. App. 1989) ("... while supplying water is usually a subject matter of utilities' service, this alone does not carry the presumption that all use of service in connection with such water is a dedication of public use and that dedication of private property to a public use is a question of intention to be shown by the circumstances of each case").

1 arbitrary or discriminatory reasons, that determine if SolarCity can serve a potential customer.<sup>114</sup>

2 Staff argues that the evidence shows that SolarCity intends, and holds itself out, to provide  
3 solar electric service to a substantial portion of the public and that SolarCity clearly intends to offer  
4 service to a definable subset of the public for whom service is feasible. In addition, Staff argues that  
5 the schools, non-profits and governmental entities to which SolarCity provides, or hopes to provide,  
6 service through its SSAs, comprise a large and definable segment of the public and could account for  
7 significant load over the next few years.<sup>115</sup>

8 Staff believes that SolarCity's arguments do not focus on the proper issue and that it is the  
9 provision of an essential commodity that creates the public interest, not the amount of energy taken  
10 from the incumbent.<sup>116</sup> Staff believes that WRA also focuses too intently on the traditional model of  
11 electric generation and assumes that an entity cannot be a public service corporation unless it produces  
12 and provides electricity through a central generating station.<sup>117</sup> Staff argues that the case law does not  
13 support such a narrow interpretation of what constitutes a "dedication to public use." Staff states that  
14 the fact that the equipment used to generate and provide electricity is on the customer's premises is not  
15 important. Rather, Staff argues, the important fact is the furnishing of an essential commodity to a  
16 definable subset of the public, not where the equipment is located or how many customers are  
17 served.<sup>118</sup>

18 In addition, Staff argues that despite providing service through a contract, there is "no  
19 question" that SolarCity is holding itself out to the public generally. Staff notes that public service  
20 corporations often have specialized tariffs which target a limited segment of the public. Staff also  
21 disagrees with the implication in APS' position that there has to be some "public infrastructure used to  
22 serve more than one customer" before a "dedication to public use can be found." Staff states that case  
23 law contains no such limitation.

24 TEP and UNSE assert that SolarCity is using its facilities to provide electricity directly to the  
25 public. They believe that the nexus of the public benefit is even closer than the relationship between

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26 <sup>114</sup> Tr. at 271, 272-74.

27 <sup>115</sup> Staff Initial Brief at 16.

28 <sup>116</sup> Staff Reply Brief at 6(referring to SolarCity Initial Brief at 8).

<sup>117</sup> *Id.* at 7, (referring to WRA Initial Brief at 6).

<sup>118</sup> *Id.*

1 SWTC and the public that the Arizona courts found to be a dedication of property for public use.  
 2 Moreover, TEP and UNSE assert that the facilities owned and operated by SolarCity would not be  
 3 possible without incentives funded by the public.

4 **b. Analysis**

5 The second *Serv-Yu* factor looks at whether the entity has dedicated its property to public use.  
 6 This factor is a question of intent shown by the circumstances of the individual case, and “an owner . .  
 7 . . must at least have undertaken to actually engage in business and supply at least some of his  
 8 commodity to some of the public.”<sup>119</sup> The *Serv-Yu* Court said that “[t]he public does not mean  
 9 everybody all the time”<sup>120</sup> and found a dedication to public use in *Serv-Yu* because membership was  
 10 open to anyone who applied and paid the fees to join the cooperative. In *Nicholson*, the Arizona  
 11 Supreme Court said that “public” does not mean all members of the public, and distinguished a public  
 12 service corporation from a “public utility,” stating that where the corporation “otherwise meets the  
 13 definition of a public service corporation, the fact that the general public has no right to demand such  
 14 service is not material.”<sup>121</sup> In the *SWTC* case, the Arizona Court of Appeals found that although the  
 15 cooperative did not supply electricity to retail users, its transmission role was “integral in providing  
 16 electricity to the public” and further that its self-proclaimed goal of providing reliable electric power to  
 17 homes and businesses demonstrated a commitment of its business to the public.<sup>122</sup>

18 It is the policy of promoting renewable resources, as reflected in the REST Rules and the  
 19 federal tax code, that makes SolarCity’s business activities possible. Although the individual members  
 20 of the public may not have a direct interest in receiving power from the facilities SolarCity installs and  
 21 owns at a particular site, the public in general has an interest in a safe and reliable electric grid. One of  
 22 the components of safe and reliable service is the growing renewable distributed generation sector.  
 23 Current indications are that distributed generation will grow in importance, and the record shows that  
 24 school districts are very interested in the SSA model and that SolarCity is actively pursuing this  
 25

26 <sup>119</sup> *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 326; *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818. *see also*, *SWTC*, 213 Ariz. at  
 27 433, 142 P.3d at 1245.

<sup>120</sup> *Serv-Yu*, 70 Ariz. at 247, 215 P.2d at 327.

<sup>121</sup> *Nicholson*, 108 Ariz. at 319, 497 P.2d at 817.

<sup>122</sup> *SWTC*, 213 Ariz. at 434, 142 P.3d at 1246.

1 market.<sup>123</sup> If a site is conducive to installing the panels, and the host is credit-worthy, SolarCity is  
 2 interested in serving that customer. There are no restraints on SolarCity's ability to expand its SSA  
 3 business, except the availability of tax equity financing, physically and technologically attractive sites  
 4 and credit-worthy customers. Arizona has rejected the position that all members of the public must  
 5 have an enforceable right to demand service in order for a public interest to be found.<sup>124</sup> Through its  
 6 SSA business, SolarCity holds itself out as furnishing its electricity (whether defined generically, or as  
 7 "green" power or as "distributed generation") to the public at large, as the courts have defined the  
 8 public. Thus, SolarCity has demonstrated the requisite intent to dedicate its property to public use. As  
 9 discussed in the case law, such dedication does not mean that the public at large has the ability to  
 10 demand service from SolarCity's rooftop PV systems, but rather that the activity is integral to  
 11 providing reliable electricity to the public.

### 12 **3. *Serv-Yu* Factor 3: Articles of Incorporation.**

#### 13 **a. Parties' Arguments**

14 SolarCity cites the Arizona Supreme Court's finding that "[w]hile the articles of incorporation  
 15 authorizing the corporation to act as a public utility are not conclusive, the fact of such authorization  
 16 may be considered in the determination of the ultimate question."<sup>125</sup> SolarCity asserts that the evidence  
 17 clearly demonstrates that its articles of incorporation are substantially different from the articles of  
 18 incorporation of other public service corporations, which contain clear statements of an intent to act as  
 19 a public service corporation or that the entity was formed under statutes providing for the formation of  
 20 an electric cooperative.<sup>126</sup>

21 RUCO believes that the third factor, the articles of incorporation, authorization and purpose, is  
 22 not particularly helpful in this case because SolarCity's articles of incorporation state that SolarCity's  
 23 purpose "is to engage in any lawful act or activity for which corporations may be organized under the  
 24 General Corporation Law of Delaware." Although RUCO does not find the articles of incorporation  
 25 particularly insightful on the issue, it notes that nowhere do the articles of incorporation state or even

26 \_\_\_\_\_  
 27 <sup>123</sup> Tr. at 137-40, 531-38.

<sup>124</sup> See *Nicholson*, 108 Ariz. at 319, 497 P.2d at 817.

<sup>125</sup> *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 326.

<sup>126</sup> Ex A-5 at exhibits D, E; see also Tr. at 1235.



1 suggest that the Company will act as a public utility in performing its duties.

2 Staff contends that the fact that SolarCity's articles of incorporation do not expressly state that  
3 SolarCity will operate as a public service corporation does not preclude the Company from doing  
4 business as one.<sup>127</sup> Staff states that corporate statements about an entity's authorizations and  
5 functions could be made with the purpose of avoiding regulation and should not be used to deflect  
6 attention from a determination of the true character of the business. Staff notes that the *Serv-Yu* court  
7 found that "[i]t is what the corporation is doing rather than the purpose clause that determines whether  
8 the business has the element of public utility."<sup>128</sup>

9 SRP notes that under modern corporation law, no entity restricts its operations to those of a  
10 utility.

#### 11 b. Analysis

12 The third *Serv-Yu* factor involves an examination of the articles of incorporation. The purpose  
13 of reviewing the articles of incorporation is to determine what the entity actually does. In *Serv-Yu*, the  
14 business was not yet operating, and thus, the authorizations in the articles of incorporation provided an  
15 indication of intent as to what the entity planned to do. The *Serv-Yu* Court acknowledged that more  
16 than a review of the articles of incorporation and by-laws is pertinent and that the mere recitation in  
17 the by-laws, standing alone, is not enough to brand an entity as a public service corporation. This  
18 factor does not have the same relevance today as it might have had in the 1950s, when articles of  
19 incorporation were required to be more specific as to the activities of the corporation. But in any event,  
20 it is what the entity actually does that is determinative of whether it is a public service corporation.  
21 SolarCity's articles of incorporation offer no evidence either way in the inquiry of what it actually  
22 does. They neither express an intent to act as a public service corporation, nor prevent SolarCity from  
23 acting as one. Thus, this factor is not helpful in the determination of whether SolarCity is a public  
24 service corporation.

25  
26  
27  
28 <sup>127</sup> Ex S-1 at 24.

<sup>128</sup> *Serv-Yu*, 70 Ariz. at 241, 219 P.2d at 328.

1           **4. *Serv-Yu* Factor 4: Service of a commodity in which the public is generally held to have**  
2           **an interest.**

3                   **a. Parties' Arguments**

4           SolarCity asserts that three points support the conclusion that SolarCity is not dealing with a  
5 commodity in which the public has an interest. First, SolarCity argues its services are not of public  
6 interest because they are not essential public services. SolarCity claims that it provides a vehicle for a  
7 "green" alternative and the hosts who use the solar generated power do so because they have  
8 determined that the service is to their benefit not because they have no other choice. Second, SolarCity  
9 asserts that while it is undisputed that solar panels help to transform the sun's energy into useable  
10 electrons, the record is clear that SolarCity's main purpose is to provide design, installation,  
11 maintenance and financing of solar facilities.<sup>129</sup> SolarCity cites the testimony of the Scottsdale  
12 Unified School District that it receives sufficient electricity from its incumbent utility provider and is  
13 only interested in a way to save money.<sup>130</sup>

14           Third, SolarCity argues that no evidence was presented in this proceeding to suggest that the  
15 public has an interest in the design, installation, maintenance and financing of the solar panel facilities.  
16 In addition, SolarCity argues that the courts have held that an entity does not become a public service  
17 corporation from the incidental provision of electricity.<sup>131</sup> SolarCity asserts that it is easier to  
18 conclude that a public interest exists in public infrastructure than in electricity itself and notes that if a  
19 person buys a solar facility (as opposed to using an SSA) no one is claiming that the public has an  
20 interest in the electricity generated by that solar facility.

21           SolarCity believes that Staff mischaracterizes SolarCity's arguments with respect to this *Serv-*  
22 *Yu* factor and fails to support its assertions with facts. SolarCity argues that it is clear that the public  
23 has never been held to have a general interest in distributed generation projects and that there is a  
24 distinction between "commodity electricity," which is necessarily provided using public distribution  
25 infrastructure, and distributed generation facilities. SolarCity claims it cannot be argued that the  
26 Commission has jurisdiction over all electricity in the State.

27 <sup>129</sup> Tr. at 102.

28 <sup>130</sup> Ex A-5 at 12.

<sup>131</sup> SolarCity cites *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818.

1 RUCO agrees that there is no question that the public has an interest in electricity and the  
 2 provision of electricity, but it agrees with the Company that SolarCity's provision of electricity is  
 3 merely incidental to the SSAs. RUCO cautions the Commission not to apply too expansive a  
 4 definition of "public service corporation," as the Arizona Supreme Court has made it clear that the  
 5 scope of regulation is limited:

6 It must be, as the courts express it, clothed with a public interest to the  
 7 extent clearly contemplated by the law which subjects it to governmental  
 8 control. Free enterprise and competition is the general rule. . . . Such  
 9 invasion of private right cannot be allowed by implication or strained  
 10 construction. It was never contemplated that the definition of public  
 11 service corporations as defined by our constitution be so elastic as to fan  
 12 out and include businesses in which the public might be incidentally  
 13 interested.<sup>132</sup>

14 RUCO argues that the SSA is a package of services that allows customers to finance a solar  
 15 facility through which only a portion of their electricity needs are met and that the electricity generated  
 16 from the solar facility is merely incidental to the package of services. RUCO claims that this is  
 17 entirely distinguishable from the situation of an electric service provider ("ESP") because the ESP  
 18 depends on common facilities that serve the public. RUCO claims that an SSA arrangement is  
 19 different from electricity generated by an ESP to meet all of its customers' needs as with an SSA there  
 20 is little need to protect the public because the third-party installer has an incentive to keep the  
 21 equipment in good working order because he only gets paid for the electricity that is produced. RUCO  
 22 does not find a disparity in bargaining power that regulation could ameliorate, and argues that because  
 23 the customer does not need the electricity produced by the solar systems and because there are plenty  
 24 of third-party installers available to choose from, the customer does not need the protection of  
 25 regulation.

26 SunPower argues that Staff's view of the "commodity" at issue is misplaced because Staff does  
 27 not distinguish electricity generated from roof-top PV panels pursuant to an SSA from electricity  
 28 generated from non-renewable sources.<sup>133</sup> SunPower asserts that the evidentiary record discloses that  
 some electric consumers perceive "green power," as being different from electricity generated from

<sup>132</sup> *Nicholson*, 108 Ariz. at 321, 497 P.2d at 819 (quoting *General Alarm*, 76 Ariz. at 238, 262 P. 2d at 672-73).

<sup>133</sup> Ex S-1 at 24-25; Tr. at 1070-71.

1 non-renewable resources.<sup>134</sup> SunPower argues that a proper and meaningful application of *Serv-Yu*  
 2 requires more than an assumption that the general public has an interest in roof-top solar generation.<sup>135</sup>  
 3 SunPower further argues that the services that SolarCity offers cannot be said to be “essential” to a  
 4 large segment of the general public, or to be “essential” to those people and entities among the general  
 5 public who might desire “green power.” SunPower states that the difference between what is desirable  
 6 and what is essential to one’s day-to-day existence is substantial.

7 WRA also asserts that the service SolarCity provides is not an “essential” service. While  
 8 acknowledging that furnishing electricity through a network of generators, transmission facilities and  
 9 distribution facilities may be an essential service, WRA asserts that a customer who is connected to the  
 10 grid does not have to obtain solar electric services located on its premises in order to function, and that  
 11 customers who choose “green” power because of environmental concerns or as a hedge against higher  
 12 utility rates, do not need the protections of regulation. WRA states that if the SolarCity electricity  
 13 were “essential,” then the Scottsdale schools could not have operated for years without it.

14 Staff asserts that electricity is “indisputably” a commodity in which the public has generally  
 15 been held to have an interest<sup>136</sup> and that the public has a general interest in electricity generation.<sup>137</sup>  
 16 Staff claims that the evidence shows that SolarCity will provide electricity and that the principal  
 17 objective of the SSA is to provide electric service from solar generating facilities. Staff believes that  
 18 the argument that there is a fundamental difference between electricity produced by renewable  
 19 generation and electricity produced by incumbent utilities is erroneous.<sup>138</sup> Staff notes that many  
 20 incumbent utilities have renewable generation in their resource portfolios. Further, Staff states, it is  
 21 clear from the testimony of the witness for the Scottsdale Unified School District that the schools view  
 22 SolarCity’s electricity as interchangeable with the incumbents’ electricity, as the schools’ goal is to  
 23 purchase electricity at a lower rate.<sup>139</sup> Staff states that the argument that the public only has an interest  
 24 in electricity provided through a centralized generation facility is too narrow and rigid an  
 25

26 <sup>134</sup> SunPower Initial Brief at 18.

<sup>135</sup> *Id.* at 19.

27 <sup>136</sup> Staff cites *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 394 (1983).

<sup>137</sup> Staff Reply Brief at 8

<sup>138</sup> *Id.*

28 <sup>139</sup> Tr. at 533-34, 538, 543, 561, 563-64, 565.

1 interpretation of the public's interest. Such view, Staff claims, would exempt distributed generation  
2 no matter how large in scale it ultimately became simply because it was decentralized and did not tie  
3 into the transmission network.<sup>140</sup> Staff believes that this view also ignores the fact that excess  
4 electrons are pushed back onto the public network or grid for consumption by other customers.

5 Staff also argues that the claim that SolarCity's furnishing of electricity is incidental to its  
6 financing activities because the system is not part of the public distribution system takes an  
7 unreasonably narrow view and does not consider the inter-related nature of SolarCity's electric service  
8 as a whole or the reliability issues for the overall electric grid. Staff believes that the integrity and  
9 reliability of the interconnected grid are matters of public concern. Staff argues that privately owned  
10 solar generation equipment is imbued with a public character because it is interconnected with the  
11 electric grid and, even in isolation, could have an impact on the overall operation and reliability of the  
12 grid.<sup>141</sup> Staff asserts that both a customer's interconnected facilities and a customer's transaction with  
13 the incumbent are subject to the Commission's jurisdiction and, in fact, are within the Commission's  
14 regulatory purview.<sup>142</sup> Staff states that the idea that a customer's facilities are somehow not a matter  
15 of public interest or not subject to Commission oversight is inconsistent with established regulatory  
16 practice. Because the electricity will be provided not only to the schools but also to the electric grid  
17 through net metering, Staff finds it equally unpersuasive that SolarCity's service is unimportant to the  
18 public interest.<sup>143</sup> Staff states that, over time, SolarCity's provision of electricity will be integral to  
19 the public interest.

20 TEP and UNSE claim that there is no doubt that electric power is a commodity in which the  
21 public has an interest. According to TEP and UNSE, the fact that SolarCity's facilities are  
22 interconnected with the public electric grid only enhances the public interest. They assert that the  
23 interconnected nature of the facilities creates potential issues and disputes for those incumbent  
24 providers that connect with SolarCity. TEP and UNSE believe that the Commission is the most  
25 appropriate forum to establish policies, procedures and standards that address such disputes. They

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26  
27 <sup>140</sup> Staff Initial Brief at 19.

<sup>141</sup> *Id.* at 23.

<sup>142</sup> Staff cited A.A.C. R14-2-203(A) and(C), and R14-2-208(B).

<sup>143</sup> Tr. at 368.

1 claim that without Commission jurisdiction over providers such as SolarCity, customers and  
2 incumbent providers would have no regulatory agency to govern SolarCity's actions and would have  
3 redress only in the courts.

4 SRP argues that there is no legal support for the argument by WRA that the public interest is  
5 not served by regulating SolarCity because solar power is somehow different than electricity generated  
6 by other means. In addition, SRP argues that the premise that the SSAs should not be regulated  
7 because solar panel leases or outright purchases are not regulated does not overcome the dictates of the  
8 Constitution. SRP asserts that the law needs to draw a line somewhere between regulation and non-  
9 regulation and that in the 1912 Constitution, the line was drawn between companies providing electric  
10 service to others and individuals providing electric service for their private use. SRP suggests that if  
11 SolarCity wants to avoid the regulation mandated by the Constitution, it can engage in the sale of  
12 systems.<sup>144</sup>

### 13 b. Analysis

14 The fourth *Serv-Yu* factor looks at whether the activity deals with the service of a commodity  
15 in which the public has been held generally to have an interest. Article 15, Section 2 of the Arizona  
16 Constitution deems electricity to be a commodity in which the public has an interest.<sup>145</sup> Once the  
17 electricity is produced, the electrons are indistinguishable whether they were produced by rooftop PV  
18 panels or by coal-fired plants. Once SolarCity PV facilities are installed on school property, the  
19 electricity the schools receive from SolarCity will displace electricity from the incumbent utility and  
20 thus will be equally "essential." There is no reason to distinguish between electricity generated from  
21 renewable sources and from non-renewable sources. In fact to do so could affect Commission  
22 authority over incumbent electric utilities that employ solar generation as part of their resource  
23 portfolios.

24 There is no precedential finding that renewable distributed generation is not "essential" in the  
25 same sense that other electricity is "essential" because, until now, neither the Commission nor the  
26 courts have been asked to make such a finding. Nor is there any precedential finding that that  
27

28 <sup>144</sup> SRP Opening Brief at 16.

<sup>145</sup> See also *SWTC*, 213 Ariz. at 433, 142 P.3d at 1246.

1 renewable distributed generation is not clothed with a public interest. The adoption of the REST Rules,  
 2 which rely heavily on renewable distributed generation, actually is a strong indication that there is a  
 3 public interest in renewable distributed generation.

4 Our conclusion that renewable distributed generation is clothed with a public interest does not  
 5 lead to a conclusion that the Commission has jurisdiction over all electricity produced in the state.  
 6 The Commission has jurisdiction only over electricity furnished by a public service corporation.  
 7 There is no such “furnishing” of electricity under the constitutional definition of “public service  
 8 corporation” when a household or business owns PV panels on its rooftop and uses them to produce  
 9 electricity for its own use, because there is no physical transfer of the commodity.

10 **5. *Serv-Yu* Factor 5: Monopolizing or intending to monopolize.**

11 **a. Parties’ Arguments**

12 SolarCity states it cannot and will not act as a monopoly. SolarCity notes that it was one of  
 13 four companies to win under the latest RFP with the Scottsdale Schools and that it only won an award  
 14 to serve 5 of the 90 schools.<sup>146</sup> SolarCity argues that one does not become a monopoly by serving one  
 15 customer. SolarCity claims that this factor was uncontested at the hearing and that even Staff  
 16 conceded that this factor weighs in favor of SolarCity and against regulation.<sup>147</sup> SolarCity agrees with  
 17 Staff’s argument that monopoly status is not controlling, but continues to believe the weight of this  
 18 factor supports no regulation. SolarCity distinguishes the evolution of competition in the  
 19 telecommunications industry, where the competition evolved from monopolies, to the circumstances  
 20 of the solar industry, where there has never been a monopoly.<sup>148</sup> Furthermore, SolarCity argues, it is  
 21 not appropriate to use an imaginary future pattern concerning SolarCity’s potential to argue that the  
 22 Commission must extend its regulatory authority. In addition, SolarCity argues that contrary to  
 23 suggestions from TEP and UNSE, the test of a monopoly is not related to how easy it is to replace the  
 24 purchased goods.<sup>149</sup>

25 RUCO argues that it is undisputed that SolarCity does not intend to monopolize a territory with  
 26

27 <sup>146</sup> Tr. at 137, 139, 534.

<sup>147</sup> Ex S-1 at 26.

<sup>148</sup> SolarCity Reply Brief at 10.

28 <sup>149</sup> SolarCity Reply Brief at 31, (citing TEP/UNSE Opening Brief at 7).

1 a public service commodity and that there is no evidence to support a conclusion that SolarCity  
2 intends to monopolize its service territory.

3 WRA states that one of the fundamental reasons for regulating the sale of electricity to retail  
4 consumers is that sellers have been considered to be “natural monopolies.” WRA states that in this  
5 case, there are multiple companies marketing and supplying distributed generation from renewable  
6 energy resources, none of which are in a position to monopolize the Arizona market. WRA believes  
7 that claims about lack of customer options mischaracterize SolarCity’s position because a large  
8 number of bidders transforms the buyer/seller relationship, and there is no evidence that SolarCity’s  
9 customers are incapable of negotiating mutually beneficial contractual arrangements.<sup>150</sup>

10 SunPower argues there is no need to regulate SolarCity’s SSAs to prevent uncontrolled  
11 monopoly power, extraction of unjust and unreasonable rates, or the recovery of costs in a  
12 discriminatory manner. SunPower asserts that there is no evidence that SolarCity intends to  
13 monopolize the territory in which it seeks to do business or that SolarCity is in fact monopolizing the  
14 service territory. SunPower states that SolarCity does not have a market position that would allow it  
15 to extract unjust and unreasonable rates, as illustrated by the number of proposals that the Scottsdale  
16 Unified School District received in response to its RFP. Indeed, SunPower notes competition led to  
17 SolarCity is reducing the price under the SSA that was the subject of Track One in this proceeding.<sup>151</sup>

18 Staff states that although there may have been a time when a monopoly market structure was a  
19 hallmark of public utility status, that time has passed, and points to the telecommunications industry as  
20 an example. Staff claims that in *Mountain State Telephone & Telegraph Co. v. Arizona Corp.*  
21 *Comm’n*, the Arizona Court of Appeals found that the power to regulate public service corporations is  
22 derived from their status as corporations performing a public service, not from any monopoly status.

23 <sup>152</sup> Furthermore, Staff believes that a monopoly (at least among the most lucrative customers) is a  
24 possible outcome of SolarCity’s expressed desire to do as much business as possible. Staff claims the  
25 *Serv-Yu* court implicitly recognized that the potential for a competitor to attract the most desirable  
26 customers (referred to as “cherry-picking”) is a factor that may weigh in favor of determining that a

27 <sup>150</sup> WRA Reply Brief at 7.

28 <sup>151</sup> SunPower Opening Brief at 13.

<sup>152</sup> 132 Ariz. 109, 114-15, 644 P.2d 263, 268-69 (App. 1982) (“*Mountain States*”).



1 competitor is a public service corporation.<sup>153</sup>

2 Staff states that a utility’s duties under its “obligation to serve” are not always identical to the  
3 duties of a “provider of last resort.” For a monopoly utility, Staff asserts, the obligations are co-  
4 extensive, as the nature of public utility service requires that there be a designated provider of last  
5 resort to ensure continuous and reliable service to the public. With the advent of competition and  
6 alternative providers, Staff asserts, the situation became more complicated. Staff argues that even if  
7 SolarCity is not designated a “provider of last resort,” that does not mean that it is not a public service  
8 corporation. Staff agrees with TEP and UNSE that one must consider whether the customer really has  
9 an alternative if it is not receiving satisfactory service.<sup>154</sup>

10 TEP and UNSE believe that one of the concerns raised by this factor is whether the customer  
11 has an alternative if it is not receiving satisfactory service. TEP and UNSE claim that once the solar  
12 facilities are installed, the customer has no other realistic option for solar electricity for an extended  
13 period of time, possibly forever, because it is expensive and impractical to remove the facilities so that  
14 another provider can step in to provide the solar electricity. Thus, they assert, a customer cannot easily  
15 switch to a competitive alternative if there are service issues. As a consequence, TEP and UNSE  
16 argue that increased consumer protection and a forum for dispute resolution, as can be provided  
17 through Commission oversight, will be important as this industry grows and involves more and varied  
18 end-user customers.

19 SRP argues that the existence or non-existence of market power is not relevant to the  
20 constitutional definition of a public service corporation. SRP argues that SolarCity points to no case  
21 where any court found that a business was not subject to regulation because it did not intend to provide  
22 monopoly service. SRP believes that the argument that an intent to monopolize is relevant defies logic  
23 because under such argument it would exclude both regulating a competitive electric service provider,  
24 no matter how large, and the generation portion of the business of incumbent.<sup>155</sup>

27 <sup>153</sup> Staff cites *Serv-Yu*, 70 Ariz. at 242, 219 P.2d at 328-29.

28 <sup>154</sup> Staff Reply Brief at 11,(referring to TEP/UNSE Initial Brief at 7).

<sup>155</sup> SRP Opening Brief at 15.

1                   **b. Analysis**

2           The fifth *Serv-Yu* factor looks at whether SolarCity is a monopoly or intends to monopolize a  
3 territory. Existence of a traditional monopoly may be one indication that there is a need to regulate an  
4 entity that is providing an essential public commodity, but is not determinative of whether the entity is  
5 a public service corporation. The Arizona Constitution is silent as to the concept of “regulated  
6 monopoly.” The CC&N is a legislative creation. The power to regulate derives from the status of the  
7 corporation performing a public service, not from the fact that the corporation is a regulated  
8 monopoly.<sup>156</sup> Thus, while monopoly status may provide strong argument for regulation, the absence  
9 of monopoly status or power does not indicate lack of a public interest. In this case, this factor is not  
10 helpful in the determination of whether SolarCity is supplying a public commodity.

11           SolarCity is not a monopoly and does not have market power and competes for business, at  
12 least with the schools and governmental entities, through an RFP process. Thus, the need to regulate  
13 rates is not the same as with the traditional monopolistic utility service. However, after installing the  
14 equipment, SolarCity becomes the only solar provider at the site for at least the term of the contract.  
15 The customer cannot easily change providers if SolarCity is not providing quality or reliable service  
16 and will have reduced bargaining power. Commission oversight encompasses more than rate  
17 regulation and includes overseeing reliability of service and protecting the health and safety of the  
18 public. To the extent that SSAs provide a significant portion of a governmental agency’s or non-  
19 profit’s electrical needs, and contribute to a utility’s resource portfolio, there is a continuing public  
20 interest in assuring the quality and reliability of service.

21                   **6. *Serv-Yu* Factor 6: Acceptance of substantially all requests for service.**

22                   **a. Parties’ Arguments**

23           SolarCity argues that there is no evidence in the record to suggest that it accepts “substantially  
24 all requests for service” and that the evidence in the record refutes any such claim. SolarCity’s CEO  
25 testified that the Company fails to close on over 91 percent of the requests it receives for service for  
26 many reasons, including that it is not able to provide the service for technical reasons or loses the  
27

28 <sup>156</sup> See *Mountain States*, 132 Ariz. at 114-15, 644 P.2d at 268-69.

1 opportunity to serve.<sup>157</sup> In addition, SolarCity cites testimony that due to the RFP process, SolarCity  
2 cannot directly receive or accept any requests for service from schools or governmental agencies and  
3 must compete with others.<sup>158</sup> In response to the suggestion that SolarCity is not dissimilar to an  
4 incumbent utility when it makes the decision to serve a customer, SolarCity argues that nothing in the  
5 record supports an incumbent's use of its discretion not to serve a customer. Furthermore, SolarCity  
6 argues, no customer has the right to demand service from Solar City.

7 RUCO asserts that the evidence supports SolarCity's contention that it does not intend to  
8 accept every request for service. SolarCity gave several reasons why it might not provide service: the  
9 customer has insufficient space to mount a system; the potential site is not properly oriented to capture  
10 the sunlight; zoning restrictions prohibit installation; there is inadequate infrastructure; installation  
11 would result in inadequate energy savings; and the customer has inadequate credit.<sup>159</sup> RUCO asserts  
12 that the argument that SolarCity intends to offer its services broadly misses the point because RUCO  
13 claims, the *Serv-Yu* criteria specifically require acceptance of substantially all requests for service.<sup>160</sup>  
14 RUCO asserts that the *Serv-Yu* criteria do not focus on the "scope upon which the service will be  
15 offered," but on the acceptance of substantially all requests for service.

16 WRA asserts that SolarCity is not obligated to serve all potential customers and that not every  
17 potential consumer is a suitable candidate for an SSA. In this case, WRA believes that the school  
18 districts, governmental agencies and other tax-exempt entities are capable of comparing options for  
19 distributed energy resources and that there is no reason to suppose they need regulatory assistance in  
20 bargaining with competing sellers, any more than they need assistance in bargaining with other  
21 vendors.

22 SunPower agrees with SolarCity's position on this factor and asserts that the record indicates  
23 that (1) the array of services offered by SolarCity are customized to the customer, and (2) a  
24 prospective customer and the related host site must satisfy a number of screening criteria before a  
25 given request for service is feasible. Thus, SunPower argues, there is no evidence to support a  
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27 <sup>157</sup> Ex A-4 at Q 23.

<sup>158</sup> Tr. at 531.

<sup>159</sup> Ex A-4 at 4.

28 <sup>160</sup> RUCO cites *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 327.

1 determination that SolarCity accepts substantially all requests for service.

2 Staff asserts that *Serv-Yu* held that a business may be “so far affected with a public interest that  
3 it is subject to regulation . . . even though the public does not have the right to demand and receive  
4 service.”<sup>161</sup> Staff argues that regardless of the right of the public to demand and receive service in a  
5 particular instance, the question whether a business enterprise constitutes a public service corporation  
6 is determined by the nature of the operations, and each case must stand upon its particular facts. Staff  
7 states that the evidence is clear that SolarCity does not intend to turn away customers who can be  
8 served, and that the Company intends to serve an identifiable subset (*i.e.* those who meet its criteria for  
9 service).<sup>162</sup> Staff states that most courts recognize that to meet this factor, all that is necessary is a  
10 holding out to even a small segment of the public.<sup>163</sup>

11 TEP and UNSE state that SolarCity broadly markets its distributed solar electricity  
12 arrangements, and does not limit its service to any particular segment of the market. TEP and UNSE  
13 acknowledge that SolarCity may choose not to serve a particular customer if there are credit issues,  
14 facility constraints or other factors, but, they argue that such limitations are not dissimilar from an  
15 incumbent utility’s requiring deposits from customers or being unable to provide service to a potential  
16 customer due to a remote location.

17 **b. Analysis**

18 The sixth *Serv-Yu* factor looks at whether SolarCity accepts essentially all requests for service.  
19 When dealing with school districts and governmental entities, SolarCity participates in an RFP  
20 process. While SolarCity competes vigorously for business in this sector, in a recent RFP with the  
21 schools districts, SolarCity received only a portion of the contract.<sup>164</sup> Because SolarCity is only one of  
22 several SSA providers and must compete vigorously for a share of the market, this factor is an  
23 indication that SolarCity’s SSA activities do not demonstrate the characteristic of a public service  
24 corporation that it accepts most, if not all requests for service.

26 \_\_\_\_\_  
27 <sup>161</sup> Staff cites *Serv-Yu*, 70 Ariz. at 242, 219 P.2d at 328.

<sup>162</sup> Tr. at 271; Ex A-4 at ¶ 23.

<sup>163</sup> Staff cites *SWTC*, 213 Ariz. at 432-33, 142 P.2d at 1245-46.

<sup>164</sup> Tr. at 137.

1           **7. *Serv-Yu* Factor 7: Service under contracts.**

2                   **a. Parties' Arguments**

3           SolarCity argues that the *Serv-Yu* court found that providing services under a contract is a  
4 factor supporting the conclusion that an entity is not a public service corporation.<sup>165</sup> SolarCity asserts  
5 that it provides its services pursuant to an extremely detailed and specific agreement that is negotiated  
6 with each customer.<sup>166</sup>

7           RUCO states that, in this case, the service is provided through a detailed contract, and there is  
8 no evidence of wide solicitation or other factors that would indicate the Commission is dealing with a  
9 public utility.

10          Staff asserts that SolarCity's provision of service pursuant to contract does not preclude the  
11 conclusion that SolarCity is a public service corporation. Staff states that if entering into contracts  
12 with customers would control the determination of whether an entity is a public service corporation, it  
13 would be an easy way of evading the law.<sup>167</sup> Staff notes that many public service corporations provide  
14 some services under contract or have tariffs that allow Individual Cost Basis ("ICB") treatment and  
15 pricing.<sup>168</sup>

16          TEP and UNSE also note that there are public service corporations, particularly in the  
17 telecommunications sector, that provide service under tariffs that allow ICB treatment depending on  
18 the specific circumstances of the customer.

19                   **b. Analysis**

20          The seventh factor looks at providing service pursuant to contract and reserving the right to  
21 discriminate. In *Serv-Yu*, the Court held that entering into private contracts is not controlling, because  
22 allowing use of contracts with customers to control the determination whether an owner is a public  
23 service corporation, would provide an easy way to evade the law.<sup>169</sup> The *Serv-Yu* Court also stated:

24                   [I]f the service is rendered pursuant to contract or limited membership, it  
25                   is difficult to hold that one has expressly held himself out as ready to serve

26 <sup>165</sup> *Serv-Yu*, 70 Ariz. at 239, 219 P.2d at 327.

27 <sup>166</sup> Tr. at 1239.

28 <sup>167</sup> Staff cited *Serv-Yu*, 70 Ariz. at 240, 219 P.2d at 327.

<sup>168</sup> Staff Reply Brief at 11.

<sup>169</sup> *Serv-Yu*, 70 Ariz. at 240, 219 P.2d at 327.

1 the public generally. But the text does not require an express holding out.  
 2 It may be done impliedly, as by wide solicitation and other factors.<sup>170</sup>

3 SolarCity provides its SSA services through a highly detailed and individually tailored  
 4 contract. While the SSA contract, without more, would tend to support SolarCity's position, entering  
 5 into a private contract is not controlling. The nature of the SSA arrangement necessitates  
 6 individualized pricing, as the specific size and capabilities of the solar panels affect the economies of  
 7 scale of production and the cost of each kWh produced. Even so, all of SolarCity's SSAs are based on  
 8 the same template, which to some extent standardizes the contract. SolarCity may not be able to serve  
 9 all comers, but it widely solicits and aggressively pursues schools, governmental entities and non-  
 10 profit businesses.

11 The fact that SolarCity employs a contract rather than a tariff to provide service may support  
 12 SolarCity's position that it does not possess one of the traditional attributes of a public service  
 13 corporation, but this factor is not determinative and is weakened by the standardized nature of the SSA  
 14 agreements as well as the fact that it is common for utilities to serve certain customers under special  
 15 contracts.

## 16 **8. *Serv-Yu* Factor 8: Competition with other public service corporations.**

### 17 **a. Parties' Arguments**

18 SolarCity argues that the evidence shows that SSA providers do not compete with public  
 19 service corporations. SolarCity points to APS witness testimony that APS views solar providers, like  
 20 SolarCity, as partners who are essential for the implementation of the distributed energy requirements  
 21 of the REST Rules.<sup>171</sup> Furthermore, SolarCity argues, the services that it provides via its SSAs are not  
 22 the same services provided by incumbent utilities, and other jurisdictions consider the solar industry to  
 23 be complementary to, and not competitive with, public service corporations.

24 SolarCity argues that contentions by Staff and TEP and UNSE that SolarCity will be in direct  
 25 competition with the incumbent utilities are not supported by the record. SolarCity claims that Staff  
 26 ignores the Commission's own REST Rules, which require utilities to utilize distributed generation,  
 27 and recent amendments to utilities' Renewable Energy Implementation Plans, which forbid the utilities

28 <sup>170</sup> *Serv-Yu*, 70 Ariz. at 239, 219 P.2d at 327.

<sup>171</sup> Ex APS-1 at 3-4; Tr. at 640; Tr. at 644.

1 from counting any utility-owned projects toward the distributed requirements. SolarCity claims that  
2 there is no evidence in the record that any utility in the state offers the services that SolarCity provides.

3 RUCO argues that SolarCity will not be competing with ESPs because it will not be providing  
4 base load electricity. RUCO believes that the best indicia that SolarCity is not in competition with the  
5 incumbent utilities is APS' support for the application and its recognition that rooftop solar PV  
6 systems have limited application and are unable to meet its customers' full load requirements.<sup>172</sup>

7 RUCO notes that the nature of solar PV is different from the situation the Arizona Supreme  
8 Court addressed in *Trico*,<sup>173</sup> in which the Court found that the threatened competitive war between  
9 Tucson Gas and Trico made it imperative that Trico be subject to the regulatory powers of the  
10 Commission. RUCO asserts that solar PV does not present the same kind of concern because of  
11 solar's limitations and because SSAs would not result in any ESP losing a customer.

12 WRA states that there is no evidence that "competition might lead to abuse detrimental to the  
13 public interest" that could be remedied by rate regulation.<sup>174</sup> Moreover, WRA states, the Commission  
14 has either promoted or accepted competition among energy and telecommunications public service  
15 corporations, so this factor is an anachronism.<sup>175</sup>

16 SunPower asserts that the evidentiary record does not support a determination that SolarCity's  
17 activities would lead to wasteful competition with Arizona's electric utilities. SunPower notes that of  
18 the electric utilities that intervened in this proceeding, APS, TEP and UNSE and SRP, only APS  
19 provided evidence through the testimony of Ms. Lockwood. Ms. Lockwood testified that APS did not  
20 perceive SolarCity's services to be in actual or potential competition with APS to its detriment.  
21 SunPower notes that APS believes that solar service providers perform an important role in the  
22 development and deployment of renewable distributed generation.<sup>176</sup>

23 Staff argues that provision of electric service under the SolarCity SSAs places SolarCity in  
24 direct competition with the incumbent electric utilities and that a corporation that will compete with,  
25

26 <sup>172</sup> Ex APS-1 at 13.

27 <sup>173</sup> *Trico Electric Cooperative, Inc. v Arizona Corp Comm'n*, 86 Ariz. 27, 38-39, 339 P.2d 1046 (Ariz. 1959) ("*Trico*").

27 <sup>174</sup> WRA relies on a concept from *Trico*, 86 Ariz. at 35, 339 P.2d at 1052.

28 <sup>175</sup> WRA Opening Brief at 8.

<sup>176</sup> SunPower Initial Brief at 10.

1 and take business away from, public utilities should be under similar regulatory restriction.<sup>177</sup>  
 2 Otherwise, Staff claims, corporations could operate in competition with bona fide utilities and thereby  
 3 isolate portions of the public network from public regulation and oversight. Staff also believes that it  
 4 would be inconsistent with Arizona law, and be unfair, not to regulate an SSA arrangement provided  
 5 by SolarCity when an SSA arrangement provided by an incumbent would be regulated.

6 TEP and UNSE argue that SolarCity competes directly with similarly situated solar energy  
 7 companies and the incumbent utilities for the provision of electricity and that the electricity provided  
 8 by the SolarCity facilities is intended to offset the electricity provided by the incumbent utility.

9 **b. Analysis**

10 The last *Serv-Yu* factor focuses on competition with other public service corporations. The  
 11 concern under this factor is that entities that take business away from public service utilities should be  
 12 under like regulatory restrictions if effective governmental supervision is to be maintained.<sup>178</sup> Solar  
 13 providers displace power sales by incumbent utilities, although the current limitations of solar power  
 14 generation mean that the utility will continue to serve a portion of SolarCity's customers' load. The  
 15 evidence in this proceeding is that, currently, the incumbent utilities are not providing SSA services.  
 16 However, there is no reason that the incumbents could not in the future provide these services. At this  
 17 point in time, solar providers, like SolarCity, are more a means of helping the incumbents' reach their  
 18 distributed generation goals than they are competitors. Thus, this factor weighs against finding a need  
 19 to regulate to prevent wasteful competition. As the industry and technology develops, however, the  
 20 current dynamic between utilities and solar providers may become more competitive in nature,  
 21 indicating a need to treat similarly situated providers under similar rules.

22 **D. Conclusions Concerning *Serv-Yu* Factors**

23 Our conclusion that SolarCity is a public service corporation under the definition set forth in  
 24 the Arizona Constitution is not altered by an analysis of SolarCity's activities under the *Serv-Yu* test.  
 25 It is sufficient that the SSA is a sale of electricity to conclude that SolarCity's activities under the SSA  
 26 are not an "incidental furnishing." The issue in this proceeding is ultimately whether SolarCity's SSA  
 27

28 <sup>177</sup> Staff cites *Serv-Yu*, 70 Ariz. at 241, 219 P.2d at 328.

<sup>178</sup> See *Serv-Yu*, 70 Ariz. at 241, 219 P.2d at 328.



1 business and activity are “clothed with a public interest” such that government intervention or  
 2 regulation is necessary to preserve a service that is indispensable to the population and to ensure  
 3 adequate service at fair rates when there is disparity in bargaining power.<sup>179</sup> The *Serv-Yu* factors are  
 4 only guidelines. Not all of the *Serv-Yu* factors need be present to find a public service corporation,  
 5 and not all of the *Serv-Yu* factors may have the same relevance as they once did. In determining if a  
 6 business is engaged in selling and distributing a commodity in which the public as a whole has an  
 7 interest, it is less helpful to examine each factor in isolation, and more useful to examine how the  
 8 individual factors inter-relate to form a picture of what the entity actually does and whether its  
 9 activities are clothed with a public interest. We find that under the *Serv-Yu* analysis, SolarCity’s  
 10 activities pursuant to an SSA are clothed with a public interest that brings SolarCity within the  
 11 jurisdiction of the Commission.

#### 12 V. The Public Interest and Proposed Regulatory Response

13 In addition to their analyses under the Arizona Constitution and case law, many of the parties  
 14 to this proceeding provide public policy arguments for, or against, regulation of SSA providers.

##### 15 **A. Positions of the Parties**

16 Staff asserts that an appropriate degree of regulation could be balanced with the competitive  
 17 nature of the SSA provider industry.<sup>180</sup> Staff explains that because SolarCity did not apply for a  
 18 CC&N, Staff did not evaluate whether the Commission should grant a CC&N in this proceeding and  
 19 did not evaluate the specific regulatory oversight that would be reasonable in these circumstances.  
 20 Instead, Staff identified certain features that may be appropriate in a light-handed regulatory regime.

21 Based on the record in this case, Staff recommends that only “light” regulation is necessary at  
 22 this time. Staff envisions a streamlined process encompassing: (1) registration (a streamlined CC&N);  
 23 (2) the filing of PPAs or SSAs with Staff; (3) the filing of annual reports; and (4) the applicant’s being  
 24 subject to Commission complaint jurisdiction.

25 Staff believes that there are benefits of regulation beyond the setting of monopoly rates and  
 26

27 <sup>179</sup> *SWTC*, 213 Ariz. at 432, 142 P.3d at 1245.

28 <sup>180</sup> Staff cautions, however, that notwithstanding Staff’s view that appropriate regulation could be structured so as to be light-handed, the degree to which regulation allegedly inconveniences an industry is not a sound basis to determine whether an entity is a public service corporation.

1 that regulation would promote the public interest by ensuring adequate and reliable electric service  
2 from SSA providers.<sup>181</sup> Staff argues that the SSA provision that customers only pay SolarCity if the  
3 unit produces electricity is not a substitute for the protections of regulation, which would obligate the  
4 utility to provide adequate and reliable service. Staff believes that the consequences of an SSA system  
5 failure are significant even if the incumbent utility will be able to provide the power the customer  
6 requires. Staff's witness Irvine testified to this point:

7           There was presumably a period of time when the world lived without  
8 distributed generation and the incumbent utilities could provide absent  
9 distributed generation. But I would want to point out again for the record  
10 that in the macro sense, and I would like to go back to the example where  
11 a school enters into an SSA and has an expectation for receiving energy  
12 at a given price for a long period of time and then makes financial  
13 decisions based on that expectation, I think in that area, there is a very  
14 real need for that service once the contract is entered into, especially if  
15 you ask that teacher who gets let go because suddenly the school couldn't  
16 afford them because they could no longer get the SSA cost energy if the  
17 SSA provider stopped providing.<sup>182</sup>

18           Further, Staff states that even those who are not customers of SolarCity will be impacted by the  
19 provision of electric service through SSAs. Staff is concerned that without regulation there would be  
20 no enforceable obligation to provide adequate service, which could lead to increased costs for the  
21 incumbent ratepayers. Staff states that when solar panels do not work properly, the incumbent would  
22 be responsible for providing back-up power, and the incumbent's ratepayers would be responsible for  
23 any resulting costs. In addition, Staff notes, the existence of SSA providers will require incumbents to  
24 undertake specific planning activities to ensure the reliability of the grid, and these costs would also be  
25 borne by the incumbents' ratepayers. Finally, Staff notes the growth of SSAs could present challenges  
26 to the incumbents related to forecasting. Staff argues that in the absence of regulation over the  
27 industry, the Commission has limited means to require SSA providers to provide forecasting and other  
28 information. Staff believes that using the incumbent's interconnection agreement as a means to obtain  
forecasting information is imperfect because it is indirect.<sup>183</sup> Furthermore, Staff argues that the ability  
to monitor the proliferation of SSA systems through the various REST implementation plans used by  
incumbent utilities does not account for the possibility that eventually SSA projects may be financially

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<sup>181</sup> Staff Initial Brief at 27.

<sup>182</sup> Tr. at 1243-44.

<sup>183</sup> Staff Initial Brief at 30.

1 viable without the need for REST rebates.

2 Staff asserts that another benefit of regulating SSA providers is that the Commission will be  
3 able to monitor the developing market in order to promote a level playing field among the various  
4 competitors. Staff argues that it is highly conceivable that competition with incumbent utilities for  
5 SSA service could produce an unbalanced market because the incumbent utility might exert undue  
6 market influence.<sup>184</sup> Staff asserts that regulating SSA arrangements could prove instrumental to  
7 developing this segment of the industry in a manner that is consistent with the public interest.  
8 Although the Commission may address market power through its regulation of the incumbents, Staff  
9 believes a lack of regulation over the SSA providers could affect the degree to which the Commission  
10 could regulate the incumbents' provision of similar services.<sup>185</sup>

11 Staff asserts that regulating SSA providers would create health and safety benefits and that the  
12 proliferation of SSA providers may lead to unforeseeable issues.<sup>186</sup> In addition, Staff argues that  
13 finding SSA providers are subject to Commission jurisdiction would make it possible for the  
14 Commission's Consumer Services Section to assist SSA customers with complaint issues. Staff is  
15 concerned that the typical residential customer may not have the same degree of sophistication as do  
16 school districts or governmental entities and may not have easy access to professional analytical  
17 resources. Staff believes that the Commission's Consumer Services Section is easily accessible to  
18 customers and that some customers might forego pursuing disputes against utilities if their only  
19 avenue of relief were the courts.<sup>187</sup>

20 Staff believes that assertions that "regulation light" is either impossible or unlawful are  
21 undermined by the Commission's successful regulation of the telecommunications industry under  
22 rules and principles that are uniquely appropriate for that industry. Staff does not suggest, however,  
23 that the telecommunications regulatory model should be adopted for the solar electric industry.

24 Staff argues that the "no-regulation" parties fail to recognize that the *Phelps Dodge*<sup>188</sup> decision  
25 not only allows the Commission to set a range of rates, but affirms that the Commission has discretion

26 <sup>184</sup> Tr. at 977.

27 <sup>185</sup> Staff cites *Mountain States*, 132 Ariz. at 115, 644 P.2d at 269.

28 <sup>186</sup> Tr. at 720-21.

<sup>187</sup> Staff Initial Brief at 33.

<sup>188</sup> *Phelps Dodge*, 207 Ariz. at 109, 84 P.3d at 587.

1 to adopt various approaches to fulfill its functions. Staff argues that the critics also fail to realize that  
 2 there is more than one model of regulation utilized by the Commission and that the Commission has  
 3 discretion to adapt regulations to the circumstances at hand.<sup>189</sup> Staff further argues that regulation  
 4 does not create uncertainty, but can create a well-managed, well-codified, clear route to understanding  
 5 the return on investment.

6 Staff also believes that this “light” form of regulation would not burden SolarCity, but would  
 7 allow the Commission to oversee the development of this nascent industry.<sup>190</sup> Staff maintains that  
 8 concern that regulation would “inconvenience” the industry is not a valid factor in determining if  
 9 SolarCity is a public service corporation which must be determined as a matter of law.<sup>191</sup>

10 SRP argues that there is no legal support for the notion that the Commission can pick and  
 11 chose what it wants to define as a public service corporation and then change its mind based upon the  
 12 circumstances. SRP agrees that the Commission has great discretion, not over the constitutional  
 13 definition, but how it regulates.

14 SRP argues that the public interest would be served by Commission oversight. SRP believes  
 15 that there are many aspects of SolarCity’s business that would benefit from Commission oversight and  
 16 consumer protection, asserting that Commission oversight would: (1) ensure accurate cost  
 17 comparisons with current rates; (2) ensure the clarity of pricing terms; (3) ensure the accuracy of  
 18 advertising statements; and 4) provide a forum for dispute resolution.<sup>192</sup>

19 SRP believes that Commission oversight can be flexible depending on the needs and  
 20 circumstances of the situation. SRP advocates a rulemaking process as a future step. SRP believes that  
 21 in the interim, the Commission should regulate SolarCity consistent with the purposes of the  
 22 Constitution, including its discretion in determining just and reasonable rates and the weight to be  
 23 given to fair value.<sup>193</sup>

24 SRP suggests the following framework for a light-handed CC&N process:  
 25

26 <sup>189</sup> Staff Reply Brief at 13,

<sup>190</sup> Staff Initial Brief at 26.

27 <sup>191</sup> Staff Reply Brief at 13.

<sup>192</sup> SRP Reply Brief at 8-9.

28 <sup>193</sup> SRP cites *Phelps Dodge*, 207 Ariz. at 106, 83 P.3d at 584; *Simms v. Round Valley Light & Power Company*, 13 P.U.R.3d 456, 80 Ariz. 145, 294 P.2d 378 (1956).

1. A single entity would make an application to the Commission, on a form provided by the Commission and the services of an attorney would not be needed to complete and file the form.
2. The form would generally describe the services to be provided.
3. The form would state approximate values of the property to be installed (without disclosing competitive information).
4. The form would state a range of prices and services to be offered to customers and assert that the prices will be a reasonable reflection of the value of the plant devoted to service.
5. Based on the information provided, the Commission would issue a solar CC&N, which would allow the applicant to serve as the general partner for any entity providing service under a "solar services agreement."
6. Once the CC&N is granted, the applicant would provide a copy of each contract to the Commission on a confidential basis, and if the Commission does not formally object, the contract would be deemed approved without further action.
7. The solar industry would pay reasonable fees to cover the costs of the Commission's efforts.
8. The Commission would work to develop standardized disclosures to assure customer understanding.

TEP and UNSE argue that there are substantial benefits from regulation and that Commission oversight would: (1) ensure the continuity of the operation and maintenance of the system; (2) ensure that SolarCity is properly calculating the electricity produced by the system and the bills for that electricity; (3) ensure that there are appropriate customer service and consumer protection; and (4) ensure that there is an efficient and qualified forum for the resolution of customer complaints. TEP and UNSE state that these needs extend beyond the initial installation of the solar system and that the Commission is the appropriate entity with authority under the Constitution, and with the expertise, to oversee and regulate such activities. TEP and UNSE argue the clear public benefits that would arise from Commission regulation and oversight confirm that SolarCity's business and activities are sufficiently clothed with a public interest to make its rates, charges and operations a matter of public concern.<sup>194</sup>

SolarCity argues that good public policy requires a determination that SolarCity is not a public service corporation. SolarCity notes that in the *SWTC* case, the Court of Appeals held that the purpose behind regulating public service corporations is "to preserve those services indispensable to the population and to ensure adequate service at fair rates where the disparity in bargaining power between the service provider and the utility ratepayer is such that government intervention on behalf of

<sup>194</sup> TEP/UNSE Reply Brief at 6.

1 the ratepayer is necessary.”<sup>195</sup> SolarCity states that because SSAs and distributed solar generation are  
 2 not indispensable services (since the customer can receive all necessary power from the incumbent  
 3 utility) and because the record reflects no disparity in bargaining power that calls for government  
 4 intervention, there is no valid policy reason for the Commission to regulate SSA providers as public  
 5 service corporations.

6 SolarCity claims that the purposes of the regulation that other parties advocate in this  
 7 proceeding are not compelling or are already adequately addressed through existing regulations.  
 8 SolarCity argues that regulating SSA providers is not needed to assure a “fair and level playing field”  
 9 among competitors and could unfairly advantage existing public service corporations. SolarCity  
 10 claims that regulating SSA providers would strengthen the existing public service corporations and  
 11 allow them to use their hold on the market to directly solicit customers for SSA services. SolarCity  
 12 notes that none of the solar providers participating as intervenors or who made public comments  
 13 expressed concern about competing with regulated affiliates of public service corporations. SolarCity  
 14 believes that competition with affiliates of public service corporations would exist whether SSA  
 15 providers are regulated or not.<sup>196</sup>

16 SolarCity argues that, contrary to Staff’s contention, the Commission is not needed to assure  
 17 ongoing provision of service, and the public would not be harmed if a distributed generation system  
 18 goes off line. In response to Staff’s expressed concern that the schools rely on the solar system for  
 19 budgeting purposes, SolarCity asserts that Staff does not explain why such a scenario requires  
 20 Commission regulation any more than any other school vendor contract requires regulation.<sup>197</sup>  
 21 SolarCity believes that the need to regulate utilities does not derive from budgeting inconvenience, but  
 22 from massive economic damage and real danger to the public health and well-being from a widespread  
 23 failure of electric service.

24 SolarCity argues that regulation of SSA providers will not benefit the regulation of the  
 25 incumbent utilities’ rates. SolarCity notes that Staff expressed concern at the hearing that widespread  
 26 adoption of distributed generation solar systems will result in lost revenue and stranded costs for the

27 <sup>195</sup> *SWTC*, 213 Ariz. at 432, 142 P.3d at 1245.

28 <sup>196</sup> SolarCity Initial Brief at 18-19.

<sup>197</sup> SolarCity Reply Brief at 16.

1 incumbent utilities, resulting in higher rates.<sup>198</sup> SolarCity states that even if this were true, it is a  
2 concern that relates to distributed generation in general, not to a particular method of adoption like an  
3 SSA. SolarCity asserts that when the Commission adopted the REST Rules, including the desired  
4 amount of distributed generation, the potential for stranded costs was, or should have been,  
5 considered. SolarCity believes that stranded costs should be addressed via existing ratemaking  
6 procedures.<sup>199</sup> SolarCity argues that Staff's concerns about stranded costs are overstated because the  
7 majority of solar installations are customer-owned or leased. According to SolarCity, regulating SSAs  
8 will not result in incumbent utilities receiving sufficient information to avoid stranded costs from the  
9 proliferation of distributed generation, as SSAs comprise only a portion of distributed generation  
10 projects.

11 In addition, SolarCity asserts that regulation is not necessary to improve public safety or the  
12 grid. SolarCity asserts that the testimony clearly shows that solar installers are already subject to  
13 numerous safety regulations, including National Electric Code standards, local building code  
14 standards, the Commission's Interconnection Rules and utility interconnection standards and  
15 agreements.<sup>200</sup> SolarCity also notes that A.R.S. § 32-1170.02 requires all solar contractors to be  
16 licensed by the Registrar of Contractors ("ROC"), which has multiple remedies for violations.  
17 SolarCity notes further that, in addition to bringing a complaint before the ROC, consumers can bring  
18 complaints in the court system and with the Attorney General.<sup>201</sup> SolarCity claims that Staff fails to  
19 provide evidence why these outlets for consumer complaints are inadequate. Furthermore, SolarCity  
20 suggests that giving SSA customers the opportunity to complain to the Commission, but not giving  
21 that opportunity to owners or lessees of similar systems, could create consumer confusion.

22 SolarCity states that the Commission already has authority to regulate the method and  
23 standards for interconnecting a PV system and that all safety concerns can be addressed through the  
24 current framework. SolarCity notes that in Decision No. 68674 (June 28, 2007), the Commission  
25 adopted a modified version of the Public Utility Regulatory Policy Act ("PURPA") standard on  
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27 <sup>198</sup> Tr. at 978.

<sup>199</sup> Tr. at 1024-25.

<sup>200</sup> Ex A-4; Tr. at 360, 364-65.

28 <sup>201</sup> Tr. at 916-20.

1 interconnection, to be used on an interim basis until the Commission could adopt interconnection  
2 rules, and argues that the adopted Interconnection Document protects both the public and the grid.  
3 Furthermore, SolarCity asserts that Staff was unable to point to any safety consideration or standard  
4 that the current rules do not adequately address.<sup>202</sup> SolarCity states that if the Commission becomes  
5 aware at a future date of a safety consideration that needs to be addressed, Staff could correct the  
6 situation by modifying the Interconnection Rules. SolarCity claims that customers are actually more  
7 protected under the SSA arrangement than under an unregulated purchase of solar facilities because  
8 with an SSA, the solar provider only gets paid if the system is operational. SolarCity believes that this  
9 financial motivation will ensure that a system does not violate interconnection standards.

10 SolarCity argues that regulation would stifle competition and thwart the solar industry in  
11 Arizona, resulting in higher prices for consumers. SolarCity notes that the Commission has gone to  
12 great lengths to set a regulatory and policy framework to increase the adoption of distributed solar  
13 power in Arizona by establishing the REST Rules, Interconnection Standards, and Net Metering  
14 Rules. SolarCity believes that regulation will create uncertainty that will deter investors from the  
15 Arizona market.<sup>203</sup> According to SolarCity, the limited pool of solar investors coupled with any level  
16 of uncertainty or regulation of SSA providers, will divert the limited pool of capital to other markets.  
17 SolarCity believes it is important to consider that without third-party investors, Arizona utilities will  
18 not be able to meet their REST standards, pointing to APS' testimony that approximately 65 percent of  
19 its commercial solar reservations are predicated on SSA financing and that without SSAs APS would  
20 not be able to meet its REST requirements.<sup>204</sup> SolarCity believes it would be a perverse result for the  
21 Commission to set REST requirements with one hand and then prevent utilities from meeting those  
22 requirements with the other.

23 SolarCity believes that even "light-handed" regulation would stifle the industry without  
24 producing a benefit. SolarCity argues that at the very least, regulation of a public service corporation  
25 requires determining fair value and requires the Commission to set just and reasonable rates.<sup>205</sup> The  
26

27 <sup>202</sup> Tr. at 1210, 1279.

<sup>203</sup> Tr. at 389-90, 290-92, 448-51, 755-56.

<sup>204</sup> Tr. at 640-41.

<sup>205</sup> SolarCity cites *Phelps Dodge*, 207 Ariz. at 104, 83 P.3d at 582.



1 Company interprets this to mean that the Commission would be required to regulate the very core of  
 2 an SSA, the price to the consumer, making it impossible for a third-party investor to rely on the  
 3 income stream from the SSA. SolarCity claims that if the value of the income stream could be  
 4 modified by the Commission, investors would take their money elsewhere.<sup>206</sup>

5 SolarCity states that its request is limited to schools, non-profits and governmental entities  
 6 because that class of solar users has no economically viable way to implement solar installations  
 7 without SSAs. Although SolarCity believes that the identity of the host as a school, non-profit or  
 8 governmental entity adds strength to the argument that SSAs are primarily financing tools, Solar City  
 9 supports an Order that would expand the ruling to cover all solar users.

10 SolarCity also states that if the facts change in the future, the Commission could reconsider  
 11 SolarCity's public service corporation status at that time. SolarCity asserts that Arizona case law  
 12 clearly states that public service corporation status is dependent upon an analysis of the current facts  
 13 and not at some future point.<sup>207</sup>

14 RUCO argues that SolarCity and other third-party installers that utilize SSA arrangements  
 15 should not be regulated because it would impede the growth of the solar industry and because sound  
 16 public policy disfavors regulation in this situation. RUCO argues that to the extent there is any  
 17 ambiguity in the definition of public service corporation, the courts may look behind the words  
 18 themselves to determine the intended effect.<sup>208</sup> RUCO advocates that if development of the solar  
 19 industry in Arizona is a goal, then the most compelling reason against regulation is the evidence in the  
 20 record that regulation of any kind will impede that development.<sup>209</sup> RUCO cites testimony that  
 21 regulation is likely to drive out numerous, if not all, solar providers due to the limited pool of tax  
 22 equity financiers.<sup>210</sup> RUCO asserts that because the returns on tax equity financing are low, lenders  
 23 want to avoid any additional risk, and any sort of regulation represents uncertainty that will cause  
 24 prospective lenders to look elsewhere.<sup>211</sup>

25 <sup>206</sup> Tr. at 449.

26 <sup>207</sup> SolarCity cites *Sw. Gas*, 169 Ariz. at 285, 818 P.2d at 720.

27 <sup>208</sup> RUCO cites *Ward v. Stevens*, 86 Ariz. 224, 344 P.2d 491 (1959); and *Bussanich v. Douglas*, 152 Ariz. 447, 451 P.2d 644  
 (1986).

28 <sup>209</sup> RUCO Closing Brief at 14.

<sup>210</sup> Tr. at 104.

<sup>211</sup> Tr. at 105.

1 RUCO also claims that SSAs are in the public interest because they can be preferable to leases  
2 or purchase arrangements, as they require no up-front cost to the customer, and they only require  
3 payment for the amount of energy produced.<sup>212</sup> RUCO believes that because the SSA arrangement  
4 encourages providers to maintain the panels in good working order, they encourage the proliferation of  
5 solar power generation.

6 Furthermore, RUCO argues that the Commission's exercise of jurisdiction over the SSAs is not  
7 likely to serve or protect the public health and safety. Like SolarCity, RUCO notes that there are  
8 numerous state and local laws and ordinances that provide consumer protection. RUCO claims that  
9 there is little risk of physical or other harm to the consumer, as state law already establishes standards  
10 for the selling and installing of "solar energy devices."<sup>213</sup> RUCO also states that other state agencies,  
11 such as the ROC, the Department of Commerce and the Attorney General, are in a better position to  
12 monitor and prevent perceived harm to the public, as they are tasked with preventing consumer harm  
13 and have specific expertise. RUCO believes that the ROC and local municipalities are in the best  
14 position to establish and enforce standards to preserve the structural integrity of rooftops with solar  
15 installations. RUCO further claims that the Commission does not have the resources to regulate SSAs  
16 even under "regulation light."

17 RUCO also argues that regulating SSAs would constitute selective regulation which is contrary  
18 to good public policy, as the Commission does not regulate solar installers when they lease or sell  
19 solar facilities to customers,<sup>214</sup> and questions why the manner of financing the facilities should dictate  
20 whether the transaction is subject to Commission oversight. RUCO believes that regulation should  
21 serve a legitimate government purpose and asserts that no party in this case has provided a legitimate  
22 purpose that would be served by regulation. RUCO also sees no beneficial purpose to a "light" form of  
23 regulation, as a CC&N application that would automatically be approved is not legitimate government  
24 oversight. Furthermore, RUCO sees no benefit in keeping track of SSAs, because tracking SSAs alone  
25 would not include all distributed generation installations, and incumbent utilities are in the best  
26 position to provide information on distributed generation to the Commission.

27 <sup>212</sup> Ex A-5 at 7.

28 <sup>213</sup> Ex RUCO-1 at 11.

<sup>214</sup> *Id.* at 12.

1 RUCO argues that it is sound public policy and in the public interest for customers to put  
2 excess green energy back on the grid and that the Commission has asserted its jurisdiction over this  
3 type of transaction under the net metering rule, R14-2-1811.<sup>215</sup> With respect to any excess electricity,  
4 RUCO believes the relationship is between the customer and the ESP, and the solar installer plays no  
5 role and has no interest in the transaction. Therefore, RUCO argues, the only regulated activity in this  
6 context is the furnishing of electricity from the customer to the utility.

7 RUCO states that although it takes ratepayer protection seriously, regulation is not always  
8 necessary and may be counterproductive.<sup>216</sup> RUCO believes that Staff's concerns are unfounded  
9 because the SSA's requirement that the customer pays only for the energy produced means that  
10 SolarCity has no incentive to breach the contract. Also, RUCO points out that in the event of a  
11 malfunction, the customer still receives service from the incumbent utility. RUCO argues that to the  
12 extent there are benefits to regulation here, they are relatively insignificant, duplicative, and  
13 outweighed by the potential harm to the proliferation of the solar industry in Arizona.

14 WRA believes that the rationale expressed in this case for regulating solar providers is weak.  
15 WRA argues that giving consumers the ability to file complaints with the Commission is not a reason  
16 for regulation, particularly because PV systems have been around for a long time without a  
17 documented history of complaints. WRA asserts that in the event complaints arise, the Attorney  
18 General's Office is charged with enforcement of Arizona's consumer fraud statutes, and the ROC is  
19 available to process complaints regarding the installation of PV systems.

20 Likewise, WRA believes that the possibility of stranded costs from the proliferation of PV  
21 systems is not a good reason for regulating solar providers. WRA states that while there may be an  
22 impact on utilities from decreased energy consumption, all energy efficiency measures cause the same  
23 concerns, and any stranded costs can be addressed when setting rates for incumbent utilities.

24 WRA believes that there is no reason to conclude that it would be bad for utility companies to  
25 provide the same products and services as SolarCity or other solar providers through an unregulated  
26 affiliated. Furthermore, WRA states that the Commission could set standards of conduct for incumbent  
27

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28 <sup>215</sup> *Id.* at 13.

<sup>216</sup> RUCO Reply Brief at 9.

1 utilities to avoid cross-subsidization.

2 WRA noted that electric safety is governed by regulated interconnection agreements and by  
3 local building codes and that it is highly unlikely that the Commission would inspect electric work  
4 done by solar contractors.

5 In response to the suggestion in this case that some form of “light-handed” regulation would be  
6 applied to solar providers, WRA believes that the minimum constitutional requirements would subvert  
7 a system of light-handed regulation. WRA notes that courts have previously rejected Commission  
8 regulations allowing the competitive market to set rates by approving a broad range of rates, finding it  
9 to be an abdication of the Commission’s mandatory duty under the Constitution and the requirement  
10 that approved rates be linked in some way to the fair value of the utility’s property dedicated to public  
11 service.<sup>217</sup>

12 WRA believes that the evidence in this case indicates that even light regulation would make  
13 Arizona unattractive for solar investors. Furthermore, WRA questions the point of SRP’s proposed  
14 form of regulation, as it would allow the company to set its own rates with no substantive review.

15 SunPower argues that the “benefits” of regulation asserted in this proceeding are illusory and  
16 not a lawful substitute for the required demonstration of a need for regulation, which must be actual,  
17 and not conjectural. SunPower argues that the evidentiary record does not provide probative support  
18 for the hypothetical concerns.

19 SunPower argues that a “fair and level playing field among competitors” is not the purpose of  
20 the public policy for a “regulated monopoly.” SunPower argues that Staff’s concerns that SSA  
21 providers competing with incumbent utilities could result in an unbalanced market are misplaced  
22 because the market is already competitive. SunPower asserts that Staff’s concern should be focused  
23 on regulating the incumbent utilities and their affiliates rather than the potential victims.<sup>218</sup>

24 SunPower notes that Staff acknowledged that “stranded costs” may arise from Demand Side  
25 Management and Energy Efficiency policies as well as a customer’s purchase or lease of distributed  
26 solar generation facilities.<sup>219</sup> SunPower agrees with others that Staff’s concerns about stranded costs

27 <sup>217</sup> WRA cites *Phelps Dodge*, 207 Ariz. 95, 83 P. 3d 573.

28 <sup>218</sup> SunPower Reply Brief at 8.

<sup>219</sup> Tr. at 1084-85.

1 can be addressed by the Commission in a future rate case. SunPower also agrees that most, if not all,  
2 of Staff's concerns about the "safety" benefits of regulation are adequately addressed through the  
3 Commission's Interconnection and Net Metering regulations, and ROC regulations.<sup>220</sup> SunPower  
4 asserts that there is no probative evidence of customer complaints or information exchange problems  
5 and that Staff did not demonstrate that the Commission or Staff is uniquely qualified to evaluate and  
6 resolve such complaints. SunPower suggests that the Arizona ROC is best suited for that purpose  
7 under a regulatory scheme that already exists.

8 Finally, SunPower argues that there are potential negative ramifications that could result from  
9 regulating solar service providers. SunPower provided testimony from Mr. Irvin and Mr. Fox about  
10 the essential role that third-party financing entities play in the development and deployment of  
11 distributed solar generation systems. Mr. Irvin testified that investors in the projects would not  
12 understand "light regulation" as it has been discussed in this proceeding because it is an undefined  
13 term, and Mr. Fox testified that the issue is one of risk and uncertainty, which hamper the financing of  
14 projects.<sup>221</sup>

## 15 **B. Conclusions**

16 Based upon our analysis of the Arizona Constitution and relevant case law, we have  
17 determined that when SolarCity sells electricity to a customer via an SSA, it is operating as a public  
18 service corporation. The relevant question then becomes – what kind of regulation of such a public  
19 service corporation serves the public interest?

20 The Commission has repeatedly expressed its determination that increasing the amount of  
21 energy generated through renewable sources is in the public interest, and nothing we decide in this  
22 Decision should be viewed as detracting from that finding. Our goal herein is to continue to  
23 encourage generation diversity while at the same time complying with the Constitution's mandate that  
24 we regulate public service corporations. Although the Commission has no choice but to meet its  
25 constitutional mandate over public service corporations, the Commission does have discretion in how  
26

27 \_\_\_\_\_  
28 <sup>220</sup> SunPower Initial Brief at 22.

<sup>221</sup> Tr at 448-51.

1 to exercise that power for the public interest. It is in that context that the discussion of public policy is  
2 relevant and important.

3 Article 15, § 3 of the Arizona Constitution provides:

4  
5 The Corporation Commission shall have full power to, and shall, prescribe  
6 just and reasonable classifications to be used and just and reasonable rates  
7 and charges to be made and collected, by public service corporations  
8 within the State for service rendered therein, and make reasonable rules,  
9 regulations, and orders, by which such corporations shall be governed in  
10 the transaction of business within the State, and may prescribe the forms  
of contracts and the systems of keeping accounts to be used by such  
corporations in transacting such business, and make and enforce  
reasonable rules, regulations, and orders for the convenience, comfort, and  
safety, and the preservation of the health, of the employees and patrons of  
such corporations . . . .

11  
12 While ensuring just and reasonable rates is one aspect of the Commission oversight, because of  
13 existing market forces and the RFP process, in this case it may not be the most important area  
14 requiring oversight. The Constitution provides the Commission with “full power” to make  
15 “classifications,” and “reasonable rules, regulations, and orders” to govern the transaction of business  
16 by public service corporations and for the convenience, comfort, safety, and health of the public. The  
17 Commission clearly has the power to create a regulatory environment that encourages the development  
18 of renewable distributed generation, while also promoting safe and reliable electric service not only for  
19 SolarCity’s customers, but for everyone in the State.

20 The installation and interconnection of the solar facilities is only one facet of safety and  
21 reliability. As we noted earlier, SolarCity is not merely a “solar installer,” and SSAs are not merely  
22 “financing arrangements;” rather, SolarCity is the generation owner and provider, and the SSA is the  
23 means by which SolarCity sells electricity to end-user customers.<sup>222</sup> Such a relationship requires a  
24 long-term commitment by the provider; it is the continuing obligation to provide reliable service that  
25 implicates the Commission’s expertise and promises the greatest benefit to ratepayers through the  
26 Commission’s oversight. While the ROC may be able to handle design or construction issues

27  
28 <sup>222</sup> RUCO’s argument about selective regulation ignores the fact that SolarCity is not just an “installer” but the owner of the solar generator who sells electricity to an end user. The Commission does not regulate “solar installers.”

1 associated with the installation of a “solar energy device,” and the Attorney General may handle  
 2 consumer fraud concerns, those are not necessarily the primary areas that the Commission’s oversight  
 3 should address.

4 We agree with Staff that an SSA provider does not need to be regulated as if it were an  
 5 incumbent provider or provider of last resort. Staff and SRP advocate for a form of light-handed  
 6 regulation. Similar to how the Commission regulates competitive telecommunications providers,  
 7 procedures or rules can be specifically tailored to meet the needs of the Commission to obtain relevant  
 8 information from SSA providers that will aid in the Commission’s duty to ensure reliable service at  
 9 just and reasonable rates. We believe that a streamlined process could be developed that would not  
 10 discourage the development of the solar industry in Arizona and we direct Staff to immediately  
 11 develop such processes to this end.

12 In the interim, SolarCity should file an application for a CC&N that will apply to all of  
 13 SolarCity’s SSAs for which SolarCity is the managing partner. Furthermore, nothing herein should be  
 14 interpreted as disturbing those SSA contracts that the Commission has separately approved, as they  
 15 have already been found in the public interest. Nor should SolarCity be prohibited from submitting  
 16 other contracts for Commission approval as special contracts during the pendency of its CC&N  
 17 application.

18 \* \* \* \* \*

19 Having considered the entire record herein and being fully advised in the premises, the  
 20 Commission finds, concludes, and orders that:

21 **FINDINGS OF FACT**

22 1. On July 2, 2009, SolarCity filed with the Commission an Application seeking a  
 23 determination that SolarCity is not acting as a public service corporation pursuant to Article 15,  
 24 Section 2 of the Arizona Constitution when it provides solar services to Arizona schools, governments,  
 25 and non-profit entities by means of an SSA.

26 2. The Application requested expedited consideration so that two specific SSAs with the  
 27 Scottsdale Unified School District could be finalized, and the solar facilities installed, before the end  
 28 of 2009, to take advantage of expiring tax incentives.

1           3.       By Procedural Order dated July 22, 2009, a Two Track procedure was established, with  
2 Track One including the Commission's evaluation of the SSAs under the criteria used to analyze  
3 special contracts; and Track Two, involving the evaluation of the Application under the criteria  
4 applying to an adjudication.

5           4.       Intervention was granted to RUCO, SRP, APS, TEP and UNSE, Navopache, Freeport-  
6 McMoRan and AECC, MEC, SSVEC, WRA, SunPower, SunRun, and a number of School Districts.

7           5.       In Track One, the two Scottsdale Unified School District SSAs were approved in  
8 Decision No. 71277 (September 17, 2009), and modified as to the rates, on December 23, 2009, in  
9 Decision No. 71443.

10          6.       On August 24, 2009, SolarCity filed direct testimony from Lyndon Rive, SolarCity's  
11 CEO; Ben Tarbell, its Director of Products, and David Peterson, the Assistant Superintendent for  
12 Operations for the Scottsdale Unified School District.

13          7.       On September 30, 2009, WRA filed the testimony of David Berry, its Senior Policy  
14 Advisor; RUCO filed the testimony of its Director, Jodi Jerich; APS filed the testimony of Barbara  
15 Lockwood, its Director of Renewable Energy; SunPower filed the testimony of H.M. Irvin III,  
16 Managing Director of Structured Finance, and Kevin Fox, partner in the law firm of Keyes & Fox,  
17 LLP who testified as a representative of the IREC; and Staff filed the testimony of Steve Irvine.

18          8.       On October 13, 2009, SolarCity filed the additional testimony of Mr. Rive and Mr.  
19 Peterson.

20          9.       On October 14, 2009, the Commission began the Track Two evidentiary hearing, which  
21 required six days, and concluded on November 9, 2009.

22          10.      On December 14, 2009, SunPower filed its Initial Brief on December 15, 2009, SunRun  
23 filed a Joinder in SunPower's Initial Brief.

24          11.      On December 15, 2009, SolarCity, Staff, RUCO, AECC, TEP and UNSE, and WRA  
25 filed Initial Closing Briefs.

26          12.      On January 15, 2010, SolarCity, Staff, RUCO, SunPower, WRA, SRP and TEP and  
27 UNSE filed Reply Briefs. The same date, SSVEC filed Reply Comments indicating it supports the  
28 positions set forth in the Initial Closing Brief of TEP and UNSE, and SunRun filed a Joinder in



1 SunPower's Reply Brief.

2 13. SolarCity is a full-service solar power company that provides design, financing,  
3 installation, and monitoring services to residential and commercial customers by means of sales and  
4 lease arrangements and SSAs. It provides its customers with "grid-tied" PV solar systems, which  
5 provide a portion of the customers' overall electricity needs, and the customer must remain connected  
6 to the utility grid.

7 14. SolarCity utilizes SSAs to provide its services to school districts, governmental entities  
8 and non-profits. An SSA is a contractual third-party financing arrangement that allows SolarCity and a  
9 third-party investor to finance, install, own, operate and maintain a solar PV system on the customer's  
10 premises with no up-front expense to the customer. Under the SSA, SolarCity and the investors own  
11 the PV system.

12 15. SolarCity designed the SSAs to allow SolarCity and investors to capitalize on available  
13 federal tax incentives. Under the terms of a typical SSA, the customer gives SolarCity access to the  
14 customer's property to install the solar panel system, and SolarCity arranges the financing, and  
15 designs, installs, operates and maintains the system. The customer has no up-front costs, and under  
16 the terms of the SSA, is the "owner" of all electricity produced by the system.

17 16. Pursuant to the SSA, SolarCity retains ownership and "use" of the system as defined in  
18 the federal tax code, in order for SolarCity to capitalize on the available tax incentives that the  
19 customer is not able to utilize because of its governmental or non-profit status.

20 17. The customer pays SolarCity for the kWhs produced by the system.

21 18. SolarCity structured the SSAs as a sale of electricity to enable SolarCity to take  
22 advantage of federal tax incentives that would be unavailable if SolarCity did not retain ownership and  
23 "use" of each solar PV system.

24 19. An SSA is a contract for the sale of electricity.

25 20. Electricity is generated when the sun's rays hit the solar panels which are owned by  
26 SolarCity. The end user does not take physical possession of the electricity until it reaches the  
27 customer's load center. Consequently, there is a physical transfer of possession of the electricity from  
28 SolarCity to the customer.

1           21.     The transfer of possession of electricity from SolarCity's facilities to the end user  
2 customer meets the plain meaning of "furnish" in Article 15, Section 2 of the Arizona Constitution.

3           22.     SolarCity's furnishing of electricity is not incidental to its other obligations under the  
4 SSA contract.

5           23.     When SolarCity provides electricity to a customer pursuant to an SSA arrangement, it  
6 is engaging in a long-term relationship with the customer to provide electricity and is not acting  
7 merely as a financier of the PV system.

8           24.     There is a public interest in safe and reliable electric service, which includes a well-  
9 functioning public grid.

10          25.     There is a public interest in promoting the use of renewable distributed generation.

11          26.     Renewable distributed generation is an important and growing component of safe and  
12 reliable electric service and of a well-functioning public electric grid.

13          27.     Commission oversight of the sale of electricity under an SSA promotes the public  
14 convenience, comfort, safety and health.

15          28.     To the end user, the electrons produced by solar-generation technology are  
16 indistinguishable from electrons generated by other means.

17          29.     The Commission makes no finding in this Order regarding the SSA arrangements'  
18 compliance with federal tax code requirements in general or with the eligibility criteria to receive  
19 federal tax incentives related to solar energy.

20          30.     The Commission has jurisdiction over public service corporations that furnish  
21 electricity.

22          31.     The parties' public policy arguments are relevant to the type of regulation that is  
23 appropriate for the sale of electricity pursuant to an SSA.

24          32.     Article 15, § 3 of the Arizona Constitution provides the Commission with "full power"  
25 to make "classifications," and "reasonable rules, regulations, and orders" to govern the transaction of  
26 business by public service corporations and for the convenience, comfort, safety, and health of the  
27 public.

28          33.     The Commission has the power to devise and implement a regulatory process that

1 balances the development of the renewable distributed generation industry in the State with the  
2 Commission's Constitutional mandate to regulate public service corporations and to promote safe and  
3 reliable electric service for SSA customers as well as for everyone in the State.

4 34. By this Order, the Commission is not asserting jurisdiction over entities that have  
5 purchased or leased rooftop solar panels to produce electricity for their own use on their property, as  
6 that situation does not include the "furnishing [of] electricity" under the Arizona Constitution, Art. 15,  
7 § 2.

8 35. The Commission has already approved SolarCity SSAs and found them to be in the  
9 public interest, and nothing in this Order interferes with SolarCity's ability and obligation to continue  
10 to provide service under the approved SSAs.

#### 11 CONCLUSIONS OF LAW

12 1. The Commission has jurisdiction over SolarCity when it provides electricity pursuant to  
13 an SSA and over the subject matter of this application pursuant to Article 15 of the Arizona  
14 Constitution and Title 40 of the Arizona Revised Statutes.

15 2. Notice of the proceeding was provided in accordance with the law.

16 3. When SolarCity utilizes an SSA arrangement, it is selling electricity to the school,  
17 governmental entity or non-profit and is "furnishing electricity" as included in the definition of a  
18 "public service corporation" in Article 15, § 2 of the Arizona Constitution.

19 4. SolarCity's SSA activity falls with the plain meaning of "furnishing . . . electricity" as  
20 included in the definition of "public service corporation" in Article 15, Section 2 of the Arizona  
21 Constitution, and additional analysis using the *Serv-Yu* factors is not needed to determine whether  
22 SolarCity's SSA activities are clothed with the public interest so as to warrant Commission regulation.

23 5. Notwithstanding the foregoing, the weight of the *Serv-Yu* factors supports a  
24 determination that when SolarCity designs, installs, owns, maintains and finances solar PV panels for  
25 schools, governmental entities, and non-profits pursuant to an SSA arrangement, its activities are  
26 clothed with the public interest such that SolarCity is acting as a public service corporation.

27 6. Based on the facts of this case, SolarCity is acting as a public service corporation when  
28 it provides electric service to schools, governmental entities or non-profits pursuant to an SSA

1 arrangement.

2 7. Pursuant to Article 15, § 3 of the Arizona Constitution the Commission has authority to  
3 make “classifications,” and “reasonable rules, regulations, and orders” to govern the transaction of  
4 business by public service corporations and for the convenience, comfort, safety, and health of the  
5 public.

6 **ORDER**

7 IT IS THEREFORE ORDERED that when SolarCity Corporation utilizes a Solar Services  
8 Agreement as described herein to furnish electricity to a school, governmental entity, or non-profit,  
9 SolarCity is operating as a public service corporation.

10 IT IS FURTHER ORDERED that SolarCity Corporation shall file an application for a  
11 Certificate of Convenience and Necessity authorizing it to provide service pursuant to future Solar  
12 Services Agreements.

13 IT IS FURTHER ORDERED that Solar Service Agreements which have already heretofore  
14 been approved by the Commission shall remain in effect and SolarCity Corporation may continue to  
15 provide service thereunder.

16 IT IS FURTHER ORDERED that SolarCity may during the pendency of its Certificate of  
17 Convenience and Necessity application, submit for specific Commission approval, as special  
18 contracts, new Solar Service Agreements, and that any Solar Service Agreements that were filed  
19 prior to the effective date of this Decision may continue to be processed as applications for approval  
20 of special contracts.

21 ...  
22 ...  
23 ...  
24 ...  
25 ...  
26 ...  
27 ...  
28 ...

1 IT IS FURTHER ORDERED that Commission Staff shall develop an appropriate process  
2 specifically tailored for Commission evaluation of Applications for Certificates of Convenience and  
3 Necessity from Solar Services Agreement providers.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.  
6  
7

8 CHAIRMAN \_\_\_\_\_ COMMISSIONER \_\_\_\_\_

9  
10 COMMISSIONER \_\_\_\_\_ COMMISSIONER \_\_\_\_\_ COMMISSIONER \_\_\_\_\_  
11

12 IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,  
13 Executive Director of the Arizona Corporation Commission,  
14 have hereunto set my hand and caused the official seal of the  
15 Commission to be affixed at the Capitol, in the City of  
16 Phoenix, this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

17 \_\_\_\_\_  
18 ERNEST G. JOHNSON  
19 EXECUTIVE DIRECTOR

20 DISSENT \_\_\_\_\_  
21

22 DISSENT \_\_\_\_\_  
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26  
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1 SERVICE LIST FOR: SOLARCITY CORPORATION

2 DOCKET NO.: E-20690A-09-0346

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