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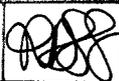
2010 JUN 10 P 3: 23
ARIZONA CORP COMMISSION
DOCKET CONTROL

BEFORE THE ARIZONA CORPORATION COMMISSION

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

Docket No. E-20690A-09-0346

Arizona Corporation Commission
DOCKETED
JUN 10 2010

DOCKETED BY 

**EXCEPTIONS OF FREEPORT-MCMORAN COPPER & GOLD INC. AND
ARIZONANS FOR ELECTRIC CHOICE AND COMPETITION**

Pursuant to A.A.C. Rule R14-3-110, Freeport-McMoran Copper & Gold, Inc. and Arizonans for Electric Choice & Competition (collectively "AECC") hereby submits the following Exceptions to the Recommended Opinion and Order ("the ROO") of Administrative Law Judge Jane Rodda issued on May 28, 2010, in this proceeding. Prior to addressing the substantive issues in this matter, AECC would respectfully request that it be added to the APPEARANCES section of the ROO.

1 **INTRODUCTION**

2 These Exceptions address two main issues: (i) the ROO’s over-reliance on one
3 Arizona Supreme Court case in determining that because SolarCity’s activities meet the
4 textual definition of ‘public service corporation’ under Article 15, Section 2 of the
5 Arizona Constitution, the Commission need not analyze the particular facts of the case to
6 determine whether SolarCity’s activities require Commission oversight, and (ii) the
7 recommendation that Commission Staff develop an appropriate process specifically
8 tailored for Commission evaluation of applications for Certificates of Convenience and
9 Necessity (“CC&Ns”) from Solar Services Agreement (“SSA”) providers. AECC does
10 not opine on the ultimate holding in the ROO that SolarCity is a public service
11 corporation when providing SSAs to government institutions, public schools and non-
12 profit organizations.¹ However, both the reasoning used to arrive at this conclusion, and
13 the proposed remedy, is not consistent with Arizona law.

14
15 **I. Merely Meeting the Textual Definition of “Public Service Corporation”**
16 **Found in Article 15, Section 2 of the Arizona Constitution Does Not Establish**
17 **SolarCity as a Public Service Corporation.**

18 According to the ROO, the analysis of whether SolarCity is a public service
19 corporation ends once it is established that SolarCity is “furnishing” electricity for power
20 as described in Article 15, Section 2 of the Arizona Constitution. Because SolarCity’s
21 activity meets the textual definition of ‘public service corporation,’ an analysis of factors
22 established by the Arizona Supreme Court in *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70
23 Ariz. 235, 219 P.2d 324 (1950) (“*Serv-Yu*”) would be ‘superfluous.’ In support of this
24 conclusion, the ROO cites *Trico Elec. Coop., Inc. v. Arizona Corp. Comm’n*, 86 Ariz. 27,
25 339 P.2d 1046 (1959) (“*Trico*”). Unfortunately, this conclusion is not consistent with the
majority of case law, and completely ignores the Arizona Supreme Court’s admonition in

26

¹ AECC incorporates the argument set forth in its Post-Hearing Brief that SolarCity’s activities do not constitute those of a public service corporation.

1 *Serv-Yu* that "...the question of whether an enterprise is a public utility is determined by
2 the nature of its operations. **Each case must stand upon the facts peculiar to it.**"
3 [emphasis added] *Serv-Yu* at 239, 326. See also *Southwest Transmission Coop, Inc. v.*
4 *Ariz. Corp. Comm'n* ("SWTC"), 213 Ariz, 427, 431-32, 142 P.3d 1240, 1244-45 (Ariz.
5 Ct. App. 2007) [quoting *Trico* at 86 Ariz. 29, 34-35, 339 P.2d 1046, 1052 (1959)].

6 "Merely meeting the textual definition does not establish an entity as a
7 "public service corporation." To be a public service corporation an entity's
8 business and activities must be such as to make its rates, charges and
9 methods of operation a matter of public concern, clothed with a public
10 interest to the extent contemplated by law which subjects it to government
control – its business must be such a nature that competition might lead to
abuse detrimental to the public interest."

11 By adopting the above-referenced quote, the Arizona Supreme Court in *Trico*
12 recognized - as it did nearly a decade earlier in *Serv-Yu* – that meeting the textual
13 definition alone does not establish whether an entity is a public service corporation.
14 More recently in the case *Mohave County Disposal, Inc. v. City of Kingman*, 186 Ariz.
15 343, 922 P.2d 308 (1996) ("Mohave"), the Arizona Supreme Court described its actions
16 in *Serv-Yu* and *Trico* as being "called upon to determine whether to violate the 'free
17 enterprise' general rule, and our deference to free enterprise led us to recognize the
18 Corporation Commission's jurisdiction only in limited circumstances." *Mohave* at 186
19 Arizona 343, 348; 922 P.2d 313.

20 Since the *Trico* decision, the Arizona Supreme Court and several appellate courts
21 have recognized that meeting the textual definition under Article 15, Section 2 is not
22 enough to establish that a company is a public service corporation. *Arizona Corp. Com'n*
23 *v. Nicholson*, 108 Ariz. 317, 497 P.2d 815 (1972); *Southwest Gas Corp. v. Arizona Corp.*
24 *Com'n*, 169 Ariz. 279, 818 P.2d 714, *SWTC*. The analysis contained in this line of case
25 law demonstrates that there must be some nexus between the utility service or commodity
26 being provided and the public interest need to regulate such activity. Indeed, if the

1 Commission were to rely solely on the *Trico* decision in determining whether an entity is
2 a public service corporation, **then any corporation that sells batteries** must be a public
3 service corporation under the Arizona Constitution, as it is “furnishing” electricity for
4 light, fuel or power. According to the ROO, the analysis must stop there. Now, although
5 the sale of batteries is a rather extreme example, it demonstrates the implications of
6 asserting jurisdiction over SSA providers based on such a broad and sweeping application
7 of Article 15, Section 2.

8 **II. If SSA Providers are Public Service Corporations By Virtue of Furnishing**
9 **Electricity to Retail Customers, Then the Commission Must Allow All Retail**
10 **Providers of Electricity, Including Electric Service Providers, an Opportunity**
11 **to Participate in the Electric Retail Market.**

12 A CC&N confers upon its holder an exclusive right to provide the relevant service
13 for as long as the grantee can provide adequate service at a reasonable rate. *James P.*
14 *Paul Water Co. v. Arizona Corp. Com'm*, 137 Ariz. 426, 671 P.2d 404 (1983). The
15 authority to grant a CC&N is conferred upon the Commission by the Arizona legislature,
16 and is not derived from the Commission’s constitutional authority. A.R.S. § 40-281.

17 A.R.S. § 40-202.B states that “It is the public policy of this state that a competitive
18 market shall exist in the sale of electric generation service.” The statute does not
19 distinguish between electrons produced from renewable technology from electrons
20 produced by more traditional generation resources such as coal, natural gas or nuclear.²

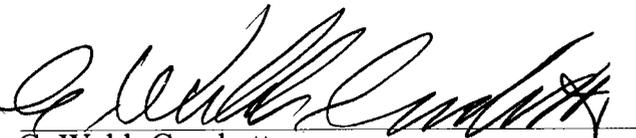
21 A.R.S. §40-202.B further directs the Commission to, among other things, open the
22 service territories of public service corporations to retail competition, and establish
23 reasonable requirements for certificating and regulating electric suppliers that are public
24 service corporations. But the Commission has already gone through this exercise in
25 promulgating and adopting the Retail Electric Competition Rules (“Rules”), issuing
26 various stranded cost orders for affected utilities, and issuing CC&Ns to electric service

² As pointed out in the ROO, electrons produced by solar-generation are indistinguishable from electrons generated by other means.

1 Commission cannot abdicate its rate-making authority and allow the competitive market
2 alone to determine what is a 'just and reasonable' rate. However, *Phelps Dodge* allows
3 the Commission to establish a range of rates. In short, the idea of 'light-handed'
4 regulation would have to comply with – at a minimum – the requirements set forth in
5 *Phelps Dodge*. In conclusion, AECC contends that electric retail competition in whatever
6 form must include all market participants, not just SSA providers, and the ROO should be
7 so amended to incorporate the Staff Report on retail competition required by Decision
8 No. 71479.

9 RESPECTFULLY SUBMITTED this 10th day of June, 2010.

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18 **ORIGINAL and 13 COPIES** of the foregoing
19 **FILED** this 10th day of June, 2010 with:

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