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# ORIGINAL EXCEPTION

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

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### SUNPOWER CORPORATION

**EXCEPTIONS TO MAY 28, 2010  
 RECOMMENDED OPINION AND ORDER**

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**June 10, 2010  
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*6/10/10*

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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

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

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

16 Pursuant to A.A.C. R14-3-110 (B), SunPower Corporation ("SunPower") submits the  
17 following Exceptions to the May 28, 2010 Recommended Opinion And Order ("ROO") which  
18 has been issued in the above-captioned and above-docketed proceeding. In that regard, and as  
19 background and a supplement to these Exceptions, SunPower incorporates herein by this  
20 reference the Initial Post-Hearing Brief and the Reply Post-Hearing Brief filed by SunPower in  
21 the instant proceeding on December 15, 2009 and January 15, 2010, respectively.

22 **I.**

23 **INTRODUCTION**

24 It is SunPower's position that the evidentiary record in the instant proceeding warrants a  
25 determination by the Commission that there is no need to regulate SolarCity Corporation  
26 ("SolarCity") as a public service corporation under Arizona law. In addition, it is SunPower's  
27 belief that subjecting SolarCity to regulation as a public service corporation could have a  
28 substantial negative impact and chilling effect upon the willingness of other distributed  
generation service providers and third-party financing entities to commit their personnel and  
financial resources to the conduct of business in Arizona. There are many other states in which  
they can productively offer their solar financing services and products without the prospect and

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1 burden of regulation. In turn, a decision by such solar providers and third-party financing  
2 entities to transact business elsewhere could result in the loss of multiple sustained, local  
3 business opportunities and hundreds if not thousands of jobs within Arizona's nascent solar  
4 industry. Accordingly, SunPower recommends that (i) the May 28, 2010 ROO filed in the  
5 instant proceeding be rejected by the Commission, and (ii) the assigned Administrative Law  
6 Judge be instructed to prepare a ROO for consideration by the Commission concluding that  
7 SolarCity is not a public service corporation subject to regulation under Arizona law.

8  
9 **II.**

10 **THE ROO MISPERCEIVES APPLICABLE ARIZONA CASE LAW WHEN**  
11 **IT CONCLUDES A SERV-YU FACTORS ANALYSIS OF THE JURISDICTIONAL**  
12 **QUESTION PRESENTED BY SOLARCITY'S APPLICATION WOULD BE**  
13 **"SUPERFLUOUS" AND UNNECESSARY**

14 At page 27, lines 10-14, the ROO states as follows:

15 "After a close examination of the case law, we do not find that the  
16 *Serv-Yu* factors are required as part of every analysis of whether an  
17 entity is a public service corporation. Where the entity is clearly  
18 furnishing electricity under the Arizona Constitution, and such  
19 activity is not merely incidental to a primary business activity that  
20 is not clothed with the public interest, the *Serv-Yu* analysis is  
21 superfluous." [ROO at page 27, lines 10-14] [emphasis added]

22 What the ROO misperceives, and perhaps because of its undue reliance on the limited fact  
23 situation and holding in Trico v. Arizona Corp. Comm'n, 86 Ariz. 27, 339 P.2d 1046 (1959), is  
24 that the use of a *Serv-Yu* factor analysis is optional. Rather, it is the required second step in a  
25 two-step analytical process; and, it is that second step which enables a determination of whether  
26 an activity is sufficiently "clothed with a public interest" so as to require regulation as a matter of  
27 public policy.

28 In that regard, the most recent Arizona court to articulate the nature of the analytical  
process involved in determining whether SolarCity is a public service corporation requiring  
regulation was the Arizona Court of Appeals in the case of Southwest Transmission Cooperative,

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1 Inc. v. Arizona Corporation Commission, 213 Ariz. 427, 142 P.3<sup>rd</sup> 1240 (2006). Therein the  
2 court observed that

3  
4 “Determining whether an entity is a public service corporation  
5 requires a two-step analysis. First, we consider whether the entity  
6 satisfies the literal and textual definition of a public service  
7 corporation under Article 15, Section 2 of the Arizona  
8 Constitution. Second, we evaluate whether the entity’s business  
9 and activity are such ‘as to make its rates, charges, and methods of  
operations a matter of public concern,’ by considering the eight  
factors articulated in Natural Gas Serv. Co. v. Serv-Yu Coop., 70  
Ariz. At 237-38, 219 P.2d at 325-26 (1950)” [at page 430, 1243]  
[emphasis added]

10 The public policy purpose behind why the analysis in question proceeds to the second  
11 level of inquiry was best articulated by the Arizona Court of Appeals in the case of Southwest  
12 Gas Corporation v. Arizona Corporation Commission, 169 Ariz. 279, 818 P.2d 714 (1991).  
13 Therein, after confirming that the jurisdictional analysis begins with the Article 15, Section 2  
14 inquiry, the Southwest Gas court commented at length as follows:

15 “Although *Trico Electric Cooperative v. Corporation Commission*,  
16 86 Ariz. 27, 339 P.2d 1046 (1959), applied this definition literally,  
17 our supreme court has held more recently that meeting the literal  
textual definition is insufficient. [emphasis added] In *Arizona*  
*Corporation Commission v. Nicholson*, the Supreme Court stated:

18 “To be a public service corporation, its business and  
19 activity must be such as to make its rates, charges,  
20 and methods of operations a matter of public  
21 concern. It must be, as the courts express it, clothed  
22 with a public interest to the extent clearly  
23 contemplated by the law which subjects it to  
24 governmental control. Free enterprise and  
25 competition is the general rule. Governmental  
26 control and legalized monopolies are the exception  
27 and are authorized under our constitution only for  
28 that class of business that might be characterized as  
a public service enterprise. The theory is that the  
right to public regulation and protection outweighs  
the customary right of competition. If the public  
contact with a business is such that its necessities  
and convenience can be better served through  
governmental supervision and controlled monopoly,  
thereby eliminating customary competition, the

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state may exercise its police power to that end. *Such invasion of private right cannot be allowed by implication or strained construction. It was never contemplated that the definition of public service corporations as defined by our constitution be so elastic as to fan out and include businesses in which the public might be incidentally interested \* \* \**” [emphasis in original]

108 Ariz. 317, 321, 497 P.2d [\*\*\*21] 815, 819 (1972) (quoting *General Alarm v. Underdown*, 76 Ariz. 235, 238, 262 P.2d 671, 672-73 (1953)).

“In *Petrolane-Arizona Gas Service v. Arizona Corporation Commission*, the supreme court discussed the purposes of exercising governmental regulatory power over public service corporations:

‘The statement of the court in *Re Geldbach Petroleum Co.*, 56 P.U.R.3d 207 (Mo.1964), accurately conveys the benign objectives of the Constitution, Art. 15, § 2, and why its language should not be reduced by judicial constructions to insignificance:

“\* \* \* the purposes of regulation are to preserve and promote those services which are indispensable to large segments of our population, and to prevent excessive and discriminatory rates and inferior service where 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 without the assistance of governmental intervention in his behalf.” *Id.* at 213.’ [emphasis in original]

119 Ariz. 257, 259, 580 P.2d 718, 720 (1978) (emphasis added).

“In identifying those corporations ‘clothed with a public interest’ and subject to regulation because they are ‘indispensable to large segments of our population,’ Arizona courts have often focused on

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1 the following factors set forth in *Natural Gas Service Co. v. Serv-*  
2 *Yu Cooperative*:

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

12 *70 Ariz. 235, 237-38, 219 P.2d 324, 325-36 (1956)* (citations  
13 omitted). These eight factors are merely guides for analysis and  
14 they need not all be found to exist before the company in question  
15 may be deemed a public service corporation. *See Petrolane-*  
*Arizona Gas Serv. v. Arizona Corp. Comm'n, 119 Ariz. at 259, 580*  
16 *P.2d at 720."*

17 As discussed in Section III below, the factual circumstances surrounding the instant  
18 proceeding do not support the ROO's conclusion that SolarCity should be subject to regulation  
19 as a public service corporation within the contemplation of the Serv-Yu, Nicholson, Petrolane,  
20 Southwest Gas and Southwest Transmission decisions.

### 21 III.

#### 22 THE ROO'S THRESHOLD DETERMINATION THAT SOLARCITY IS 23 "FURNISHING ELECTRICITY" APPEARS TO HAVE PRECLUDED AN 24 OBJECTIVE APPLICATION OF THE SERV-YU FACTORS TO THE 25 EVIDENTIARY RECORD IN THE INSTANT PROCEEDING

26 Rather than objectively evaluating whether SolarCity's overall Solar Services Agreement  
27 ("SSA") business and activities are such "as to make its rates, charges, and methods of operation  
28 a matter of public concern" within the context of a Serv-Yu analysis, as contemplated by the  
Arizona courts in the decisions discussed in Section II above, the ROO appears to have accorded

1 undue weight to the singular activity of “furnishing” electricity. In turn, the analytical effect of  
2 such undue weighting is to create a lens through which the array of other<sup>1</sup> SSA services provided  
3 by SolarCity are consequently diluted or marginalized in relation to the “furnishing” of  
4 electricity.

5 The correct analytical approach would be to first examine the “furnishing” of electricity  
6 and the other services provided by SolarCity as a whole, within the overall context of a Serv-Yu  
7 factors analysis. Thereafter the relative role and weight to be accorded to the “furnishing” of  
8 electricity should be determined. Only in this manner can an objective determination be made as  
9 to whether SolarCity’s SSA activities are

10 “clothed with a public interest and subject to regulation because  
11 they are indispensable to large segments of our population,”

12 as that jurisdictional standard was articulated in the Nicholson and Petrolane decisions.

13 Particularly illustrative of the effect of the aforesaid undue weighting attributed to the  
14 “furnishing” of electricity is the following conclusion from the ROO, in connection with the  
15 ROO’s “gratuitous” discussion of Serv-Yu Factor No. 1, which in this instance entails an  
16 analysis of what SolarCity actually does under an SSA:

17 “Those parties who claim the sale of electricity is incidental to the  
18 other facets of the SSA transaction strain reason.” [ROO at page  
19 31, lines 13-14] [Emphasis added]

20 The effect of this perspective is to marginalize and significantly diminish the consideration given  
21 to the other services provided by SolarCity under its SSA, including the critical provision of  
22 financing for the transaction. In that regard, the evidentiary record in the instant proceeding  
23 illustrates that, but for the provision of financing by SolarCity, the customer host-site solar  
24 transactions with the school district would not have occurred. Similarly, if the school district had  
25 been confronted with an arrangement under which it assumed responsibility for design,  
26 installation, operation and maintenance of the photovoltaic facilities (rather than SolarCity), the  
27

28 <sup>1</sup> As noted in the ROO, these services include the financing, design, installation, operation and maintenance of the photovoltaic rooftop solar facility in question. [ROO at page 5, lines 20-23]

1 transaction well might not have occurred. Thus, the ROO's conclusion that SolarCity's primary  
2 activity under the SSA is to "furnish" electricity should be re-examined.

3 Similarly, SunPower believes that the reasoning of the ROO overreaches to the extent it  
4 implies an analogy exists between the fact situation embraced within a SolarCity SSA  
5 arrangement and the fact situation before the Arizona Court of Appeals in the Southwest  
6 Transmission case. The former situation involves a single-customer with a voltage and volume  
7 of electricity which has been designed to meet a portion of that single customer's on-site needs.  
8 Whereas, the latter situation involves the high voltage transmission of hundreds of thousands of  
9 kilowatts over miles and miles of transmission facilities with the intent and design of serving the  
10 needs of thousands (if not tens of thousands) of customers. As the above-quoted passage from  
11 the Nicholson and Southwest Gas decisions indicates, an assertion of regulation

12 ". . . cannot be allowed by implication or strained construction. . ."

13 In that regard, SunPower respectfully submits that any implied analogy of the aforesaid nature in  
14 the ROO would represent precisely that type of "strained construction" or reasoning which  
15 should be rejected.

16 Elsewhere, in an apparent endeavor to support the proposition that SolarCity's  
17 "furnishing" of electricity under its SSA is "indispensable to large segments of our population,"  
18 which demonstration is required under the Arizona judicial decisions discussed in Section II  
19 above, the ROO undertakes the following "bootstrap" line of reasoning:

20 "While each SSA provides service to one end user, each SSA also  
21 promotes the larger public interest by the expansion of renewable  
22 distributed generation. Whether one characterizes SolarCity's  
23 activities as providing distributed generation or selling electricity,  
24 there exists an important public interest in the activity." [ROO at  
25 page 31, lines 17-20] [emphasis added]

26 \* \* \*

27 "In this case, although SolarCity primarily furnishes electricity,  
28 albeit "green" electricity, to one end user at a time, it is doing so  
pursuant to the REST Rules and to the benefit of the public at  
large. Because of the important public benefits that emanate from  
the REST Rules and the inter-related nature of the REST Rules and  
the goal of promoting renewable distributed generation with

1 SolarCity's activities pursuant to SSAs, SolarCity's SSA activity  
2 affects the public at large and consequently is "clothed with a  
3 public interest." [ROO at page 32, lines 13-18] [emphasis added]  
4 SunPower submits that reliance upon such "promotion," "emanation" and "inter-related nature"  
5 in order to achieve that demonstration of a service "indispensable to large segments of our  
6 population" falls far short of what the Arizona courts have contemplated and require in order to  
7 support a conclusion that regulation as a public service corporation is necessary and warranted.  
8 Rather, this "bootstrap" reasoning endeavor represents the very type of "strained construction"  
9 against which the Nicholson and Southwest Gas decisions counseled; and, accordingly, it should  
10 be rejected.

11 With further reference to whether a "need" to regulate SolarCity as a public service  
12 corporation has been demonstrated, the ROO itself appears to acknowledge that there is not an  
13 actual concern or need for price regulation, given the combination of (i) the competitive solar  
14 market in which SolarCity participates in Arizona, and (ii) the fact that SolarCity's SSA  
15 transactions are the result of a customer-initiated and administered Request For Proposal  
16 ("RFP") process.<sup>2</sup>

17 The ROO does attempt to suggest that regulation would assure the provision of ongoing  
18 reliable service to SolarCity's end-use customers.<sup>3</sup> However, the ROO does not cite any  
19 evidence which indicates that any reliability of service problems have been experienced as a  
20 result of SolarCity's business activities in Arizona. Similarly, while the ROO characterizes  
21 SolarCity's continuing obligation to provide reliable service as something which

22 ". . . implicates the Commission's expertise . . ." [ROO at page 67,  
23 lines 24-25] [emphasis added],  
24 the ROO contains no demonstration or discussion of an actual "expertise" upon the part of the  
25 Commission to regulate single-customer photovoltaic panels from a reliability of service  
26 perspective. Furthermore, the record in the instant proceeding would not appear to demonstrate  
27 the existence of such an expertise within the Commission or its Staff.

28 <sup>2</sup> See ROO at page 67, lines 11-13.  
<sup>3</sup> See ROO at page 67, lines 19-26.

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In addition, the ROO acknowledges the ability of the Arizona Registrar of Contractors (“ROC”)

“ . . . to handle design or construction issues associated with the installation of a ‘solar energy device’” [ROO at page 67, lines 25- page 68, line 1];

and, the ROO also acknowledges the ability of the Office of the Arizona Attorney General to

“ . . . handle consumer fraud concerns. . .” [ROO at page 68, lines 1-2].

In that regard, the ROO then states that these types of concerns

“ . . . are not necessarily the primary areas that the Commission’s oversight should address.” [ROO at page 68, lines 2-3]

However, other than the previously-mentioned area of service reliability, for which there has been no demonstrated “expertise” upon the part of the Commission as to the type of facilities in question, the ROO is incredibly vague as to what meaningful public purpose regulation of SolarCity by the Commission would achieve. To the contrary, one senses that the yet-to-be defined “light regulation” proposed by the ROO is in the nature of “a solution in search of a problem”!

Against the background of the preceding discussion in this Section III, SunPower submits that an objective and balanced application of the Serv-Yu factors within the context of the instant proceeding readily discloses that SolarCity’s activities under its SSAs are not of such a nature as to be

“ . . . clothed with a public interest and [thus] subject to regulation because they are indispensable to large segments of our population.”<sup>4</sup>

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<sup>4</sup> See discussion of Nicholson and Petrolane decisions in Section II above.

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IV.

**THE ROO SHOULD BE MODIFIED BY THE ADDITION OF A FURTHER  
CONCLUSION OF LAW WHICH REFLECTS THE JURISDICTIONAL ANALYTICAL  
PROCESS UTILIZED AND CONCLUSION REACHED AS TO OWNERSHIP AND  
LEASE ARRANGEMENTS.<sup>5</sup>**

A critical feature in the jurisdictional analysis set forth in the May 28, 2010 ROO is the transfer of possession of electricity from some person or entity other than the end use customer to the end use customer. According to the ROO, it is this transfer of possession which “meets the plain meaning of ‘furnish’ in Article 15, Section 2 of the Arizona Constitution.” [Finding of Fact no. 21] Accordingly,

“There is no such ‘furnishing’ of electricity under the constitutional definition of ‘public service corporation’ when a household or business owns PV panels on its rooftop and uses them to produce electricity for its own use, because there is no physical transfer of the commodity. [ROO at page 44, lines 7-9] [emphasis added]

Similarly, the jurisdictionally requisite physical transfer of electricity from a person or entity other than the end use customer to the end use customer is absent when the generating facility is leased to the host-site end use customer. As stated in Finding of Fact No. 34,

“By this order, the Commission is not asserting jurisdiction over entities that have purchased or leased rooftop solar panels to produce electricity for their own use on their property, and that situation does not include the ‘furnishing [of] electricity’ under the Arizona Constitution, Art. 15, §2.” [ROO at page 72, lines 4-7] [emphasis added]

Based upon the foregoing, SunPower submits that the ROO should be amended to add a Conclusion of Law which embodies the analytical process and result reflected in Finding of Fact Nos. 21 and 34, and discussed elsewhere in the ROO. Those findings of fact are predicated upon a legal analysis of what activities are within and without the term “furnishing,” as contained in

---

<sup>5</sup> The discussion and recommendation set forth in this Section IV assume, for discussion purposes only, that the Commission ultimately determines to adopt a ROO substantially similar to the May 28, 2010 ROO prepared by the Administrative Law Judge. However, SunPower’s primary position and recommendation continues to be as set forth in Section I above.

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1 Article 15, Section 2 of the Arizona Constitution. The legal result of that analysis as it pertains  
2 to the situation where a customer owns or leases the solar panels should be reflected in a  
3 Conclusion of Law, as well as in a Finding of Fact. By so doing, the Commission would provide  
4 important jurisdictional guidance to all concerned, including the end use customer.

5 Accordingly, SunPower proposes that the following language be inserted within the ROO  
6 as Conclusion of Law 8:

7  
8 “8. Persons or entities who purchase or lease rooftop solar panels  
9 to produce electricity for their own use on their own property, and  
10 those persons or entities who sell or lease such rooftop solar panels  
11 to such persons for such purpose, are not engaged in the  
12 ‘furnishing [of] electricity’ within the meaning of Article 15,  
13 Section 2 of the Arizona Constitution.”

14 V.

15 **IT IS CRITICAL THE COMMISSION UNDERSTAND THAT THE JURISDICTIONAL**  
16 **DETERMINATION SET FORTH IN THE ROO IS BASED UPON, AND**  
17 **NECESSARILY LIMITED TO, THE SCOPE AND EVIDENTIARY RECORD**  
18 **IN THE INSTANT PROCEEDING AND THE SOLARCITY – TYPE OF**  
19 **BUSINESS MODEL THEREIN ANALYZED.<sup>6</sup>**

20 Although never expressly stated, the ROO appears to implicitly assume that its  
21 jurisdictional determination with regard to SolarCity is equally applicable to other solar services  
22 providers doing business in Arizona. Illustrative of this mindset are the following excerpts from  
23 the ROO:

24 “We agree with Staff that an SSA provider does not need to be  
25 regulated as if it were an incumbent provider or provider of last  
26 resort . . . we believe that a streamlined process could be developed  
27 that would not discourage the development of the solar industry in  
28 Arizona and we direct Staff to immediately develop such processes  
to that end.” [ROO at page 68, lines 4-5 and 9-11, respectfully]  
[emphasis added]

<sup>6</sup> The discussion and recommendation set forth in this Section V assume, for discussion purposes only, that the Commission ultimately determines to adopt a ROO substantially similar to the May 28, 2010 ROO prepared by the Administrative Law Judge. However, SunPower’s primary position and recommendation continues to be as set forth in Section I above.

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1 \* \* \*

2 "IT IS FURTHER ORDERED that Commission Staff shall

3 develop an appropriate process specifically tailored for

4 Commission evaluation of Applications for Certificates of

5 Convenience and Necessity from Solar Service Agreement

6 providers." [Fifth Ordering Paragraph of ROO at page 74, lines 1-

7 3] [emphasis added]

8 In that regard, it is the position of SunPower that the Commission does not have before it

9 in the instant proceeding an evidentiary record which allows the Commission to lawfully

10 conclude that SunPower or any other solar provider (other than SolarCity) is a "public service

11 corporation" within the meaning of Article 15, Section 2 of the Arizona Constitution.<sup>7</sup> A

12 jurisdictional determination of that nature is fact-intensive and fact-specific;<sup>8</sup> and, within the

13 context of the instant proceeding, the Commission simply does not have before it the facts to

14 make the requisite jurisdictional determination as to solar providers other than SolarCity. Nor

15 have the requirements of due process been satisfied as to such other solar providers.

16 In addition, and in connection with any future decision as to whether the Commission

17 should seek to regulate solar providers other than SolarCity, the Commission should be aware

18 that not all solar providers utilize the company-owned solar generating facilities SSA business

19 model discussed in the ROO. For example, some solar providers create a separate legal entity

20 (such as a limited liability company) for each host site transaction; and, ultimately that legal

21 entity is sold to a third-party financing entity, which then owns the photovoltaic facility in

22 question.

23 Thus, under the jurisdictional analysis set forth in the ROO, the Commission and its Staff

24 could be confronted with the prospect of trying to regulate dozens, if not hundreds, of single-

25 transaction solar generating facility owners, rather than a dozen or two dozen solar providers.

26 This could take months to years. Moreover, even under the "light regulation" scheme

27 <sup>7</sup> In that regard, Section IV of SunPower's January 15, 2010 Reply Post-Hearing Brief contains an extensive

28 discussion of the requirement of due process and requirement of substantial evidence as they pertain to the scope of

any Commission decision in this proceeding.

<sup>8</sup> See Section IV(B) of SunPower's January 15, 2010 Reply Post-Hearing Brief, at pages 11, lines 17.5-page 12, line

7, citing and discussing the Serv-Yu decision and the Commission's July 6, 2009 Procedural Order in Docket No. E-

20633A-08-0513 on this point.

1 hypothecated by the ROO, each such transaction would require that "fair value" analysis  
2 required by the Phelps Dodge decision in connection with each Commission decision approving  
3 the solar rate to be charged in a given transaction.<sup>9</sup>

4 Finally, as SunPower witnesses Irvin and Fox testified during the hearings in the instant  
5 proceeding, the prospect of being regulated as a public service corporation by the Commission  
6 could lead prospective third-party financing entities to decline to participate in customer host site  
7 transactions in Arizona due to high levels of perceived financial risk, thereby severely limiting  
8 development of the solar industry in this state:

9  
10 "Q. Well, you are very familiar or have an intricate knowledge of  
11 what goes on with the financiers of these solar projects. Would that  
12 be fair to say?

13 A. My corner of the financial world has to do with those entities  
14 that are willing to extend project capital to solar projects, correct.

15 Q. So you probably would be the perfect person to answer this  
16 question, Mr. Irvin. And that is: Are these financiers really that  
17 worried about regulation in Arizona?

18 A. Yes.

19 Q. Can you elaborate on that? I mean I am talking about even a  
20 light form of regulation. Why would they be so concerned?

21 A. Two answers to that. I don't understand light regulation, nor  
22 would the investors. It is an undefined term at this point. And I  
23 have a very healthy respect for the difference between actual risk,  
24 whatever that is, and perceived risk. And it is the case that capital  
25 flows freely in this country and it flows relatively freely for terms  
26 of investment in the tax credit world and in the solar geography. If  
27 Arizona proves to be a contentious or unwieldy regulatory  
28 environment for investment of projects of this type, it just won't  
happen. They will take that capacity, take that investment money  
and go elsewhere.

Q. So you really believe that any form of regulation would actually  
hinder development of the solar industry in this state?

A. I have a very healthy distrust of absolutes. So when your  
question includes any, I can't make a meaningful response to that.

Q. Okay. Well, I don't --

A. It is possible.

Q. -- want to put it in terms of any. I think we are all trying to find  
out the same thing here.

<sup>9</sup> As the Commission is aware from its experience under Track 1 in the instant proceeding, each solar transaction required the preparation of a detailed cost-benefit and "fair value" analysis by the Commission's Staff. In that regard, the "fair value" determination required by the Phelps Dodge decision is not a matter which may be treated lightly in the pursuit of "light regulation"!

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A. Yes.

Q. That is, it is likely to hinder, is there a chance that it will actually hinder? What we want to do is really facilitate solar development here, not hinder it. So...

A. It is my view it would hinder development in this state.

Q. And is it just because of the -- is the basis for your opinion just what you had testified earlier to about the financiers or is there other reasons?

A. We are still an industry for a couple reasons that depends on investment from third parties. One, they have the tax capacity, and I explained that. The second is that a lot of participants in this business, SunPower included, have a different business model. We don't intend to own, [we] have alternate uses for our capital. We want to build plants that produce cells and panels. And so we are reliant on third parties [to provide financing]. And third parties will go to those situations with their [financial] capacity where it is most fruitful, least onerous. [Irvin Testimony at Tr. 399, l. 15-Tr. 401, l. 20] [emphasis added]

Similarly, during oral supplemental Direct Testimony, Mr. Fox testified upon the potential impact of regulation upon access to third-party distributed solar generation financing in Arizona as follows:

“Q. Would you now move to discuss how regulation of third-party financing entities and PPAs or SSAs would adversely affect the use of those types of documents in Arizona and why.

A. I agree with witness Irvin who just testified that this really is about risk and uncertainty. And to the extent, you know, a cloud now hangs over this issue in this state, as Mr. Irvin testified, he has not been able to procure financing for projects because of the current uncertainty. If the Commission were to decide that it was going to regulate even in a light capacity, I think there would still be a lot of uncertainty as to just exactly what that means and what the requirements would be for a provider of solar services in this state in complying with Commission regulation.

I also think that it is very important, and again this goes back to a point that Mr. Irvin just testified to, that one of the primary concerns of a financing entity is the robustness of the stream of revenue that they can expect to realize from a project in order to meet the rate of return that they expect to get in return for making that investment. To the extent they perceive that there is uncertainty or risk associated with their ability to realize that income stream, it, I believe it would turn away many potential investors, as Mr. Irvin testified to in the case with the financing for the [City of] Tucson project. For those who may have an appetite for that risk, I believe that it would be priced into the financing.

1           There is a report that was produced by the Lawrence Berkeley  
2           National Laboratory. I quoted from it and cited to it in my  
3           testimony. And it had a very interesting statistic. It talked about  
4           what the impact would be of a 2 percent increase in the expected  
5           return on investment of a tax equity investor and, in other words,  
6           what is the cost of capital that the investor is going to need to get  
7           in order to make an investment in something that's perceived as  
8           perhaps slightly more risky. And this statistic in the Lawrence  
9           Berkeley Lab report suggested that a 2 percent increase, or 200  
10           basis point increase, in that lending rate, in that financing rate,  
11           would require the SSA to generate 7 cents per kilowatt hour in  
12           revenue in order to be able to finance that project.

13           So I think that's a direct example of the relationship between  
14           uncertainty and risk and what financial impact that's going to have  
15           on providers of this service.

16           Q. And it sounds as though you are saying that, at best, regulation  
17           lite would be a lessening of that risk of uncertainty slightly, but a  
18           matter of degree, and that risk would clearly still be there in the  
19           mind of the prospective investor, is that correct?

20           A. I agree with that. I believe that -- I do agree with Mr. Irvin. I am  
21           not sure I really understand what regulation lite means. In my  
22           mind, to an extent, it was like the clean coal initiative or the blue  
23           skies initiative. It is wording that might make someone feel better,  
24           but when you start to look more deeply into the issue, people are  
25           going to want to assess what the risk is. And as long as there is  
26           uncertainty, I believe there is going to be perceived risk. And I do  
27           agree with Mr. Irvin, that that would likely cause those who have  
28           tax equity to invest to look to markets where there is lower risk.  
          [Tr. 448, l. 21-Tr. 451, l. 10] [emphasis added]

          SunPower believes the foregoing observations of Messrs. Irvin and Fox clearly set forth  
the risk of loss of access to third-party financing for distributed solar generation projects in  
Arizona which SolarCity could face, in the event of a decision by the Commission in the instant  
proceeding that SolarCity should be regulated as a public service corporation.<sup>10</sup>

          Accordingly, despite its abundance of solar resources, Arizona is not the only State  
within the continental United States within which ample opportunities exist for third-party  
lenders who wish to invest in rooftop solar panel arrangements. Nor, is the United States the

<sup>10</sup> In that regard, in connection with counsel for RUCO's cross-examination of Commission Staff witness Irvine's  
concept of "light regulation" and its potential impact on the willingness of third-party financing entities to invest in  
distributed solar generation in Arizona prospectively, the following exchange between Mr. Pozefsky and Mr. Irvine  
occurred:

          "Q. In Staff's analysis, Staff hasn't contacted any investors to determine whether or not regulation  
would in fact affect their decision, has it?"

          A. We did not contact anyone to explore that." [Tr. 1013, l. 1-4]

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1 only global marketplace in which such investment opportunities exist. However, if the  
2 Commission hereafter endeavors to extend the jurisdictional determination set forth in the ROO  
3 as to SolarCity to other solar providers within the State of Arizona, including third-party  
4 financing entities who own rooftop solar panel facilities, Arizona may well be the only State  
5 which undertakes to regulate such entities as public service corporations. In turn, such regulation  
6 could lead those subject to the prospect of such regulation to take the proverbial “pass” on  
7 Arizona, and instead do business in other states and/or nations with lower transaction costs and  
8 greater certainty. In such event, the loss of multiple sustained, local and business opportunities  
9 and hundreds if not thousands of jobs within the nascent solar industry in Arizona would be most  
10 unfortunate.

11 Accordingly, and in view of the considerations raised in the preceding discussion,  
12 SunPower recommends that the above-quoted Fifth Ordering Paragraph in the ROO, as set forth  
13 at Page 74, lines 1-3, be deleted in its entirety.<sup>11</sup>

## 14 VI.

### 15 CONCLUSION

16 Based upon the preceding discussion, as well as the arguments set forth in its December  
17 15, 2009 Initial Post-Hearing Brief and its January 15, 2010 Reply Post-Hearing Brief,  
18 SunPower recommends that (i) the May 28, 2010 ROO filed in the instant proceeding be rejected  
19 by the Commission, and (ii) the assigned Administrative Law Judge be instructed to prepare a  
20 ROO for consideration by the Commission concluding that SolarCity is not a public service  
21 corporation subject to regulation under Arizona law. Alternatively, and only in the event that the  
22 Commission should conclude that SolarCity is a public service corporation subject to regulation  
23 in connection with activities undertaken pursuant to SolarCity’s SSA, SunPower requests that the  
24

25 <sup>11</sup> The Fifth Ordering Paragraph within the ROO provides as follows:

26 “IT IS FURTHER ORDERED that Commission Staff shall develop an  
27 appropriate process specifically tailored for Commission evaluation of  
28 Applications for Certificates of Convenience and Necessity from Solar Service  
Agreement providers.” [Fifth Ordering Paragraph of ROO at page 74, lines 1-3]  
[emphasis added]

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1 Commission's final form of decision provide for and reflect the substantive recommendations  
2 made by SunPower in Sections IV and V above with respect to the Conclusions of Law and  
3 Ordering Paragraphs portion of such decision.  
4

5 Dated this 10<sup>th</sup> day of June 2010.  
6

7 Respectfully submitted,



8 Lawrence V. Robertson, Jr.  
9 Attorney for SunPower Corporation

10 The original and thirteen (13) copies of the  
11 foregoing Exceptions will be filed on  
12 the 10<sup>th</sup> day of June 2010 with:

13 Docket Control  
14 C/O Arizona Corporation Commission  
15 400 West Congress, Suite 218  
16 Tucson, Arizona 85701

17 A copy of the foregoing Exceptions will also be  
18 emailed or mailed that same date to:

19 Judge Jane Rodda  
20 Arizona Corporation Commission  
21 400 West Congress, Suite 218  
22 Tucson, Arizona 85701

23 Bradley S. Carroll  
24 Snell & Wilmer L.L.P.  
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