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Arizona Corporation Commission

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MAYES PROPOSED AMENDMENT 1

AZ CORP COMMISSION
DOCKET CONTROL

TIME/DATE PREPARED: June 18, 2010

DOCKETED BY	
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COMPANY: SolarCity Corporation

AGENDA ITEM NO. U-

DOCKET NO. E-20690A-09-0346

OPEN MEETING DATE: June 29-30, 2010

Page 25, Line 3, DELETE:

“The sale is not an insignificant or incidental part of the transaction, but critical to its viability. Under the Arizona Constitution, this sale of electricity means that SolarCity is furnishing electricity and that it is a public service corporation.”

AND REPLACE WITH:

“At first impression, the SSA transaction may appear to meet the textual definition of a public service corporation under the Constitution. However, SolarCity is not in the business of selling electricity, but rather, is in the business of designing, financing, installing, and monitoring solar systems to residential and commercial customers. Further consideration must be given to the public interest and the entity’s primary business purpose, activities and methods of operation. Under Arizona law, we must therefore undertake further analysis of whether Solar City is operating as a public service corporation when it operates pursuant to an SSA.”

DELETE Page 27, line 10 through Page 28 line 19

INSERT:

“After a close examination of the case law, we find that our analysis of whether an entity is a public service corporation requires consideration of whether the entity satisfies both the literal and textual definition of a public service corporation under Article 15, Section 2 of the Arizona Constitution and consideration of the broader public interest involved. While the *Serv-Yu* factors may not be specifically required as part of this two-step analysis, they inform the necessary public interest analysis required under the Constitution and by Arizona courts.

Upon applying the *Serv-Yu* factors to the record in this case, we do not believe that the services that SolarCity provides to schools, government entities or non-profits pursuant to an SSA cause SolarCity to act as a public service corporation.

DELETE Page 31, Line 6 through Page 32, Line 18

INSERT:

“Here, SolarCity provides a variety of services to its customers including design, installation, maintenance and financing of solar equipment. From *Nicholson*, where the Court found that the primary purpose of a company was the sale of trailer park lots notwithstanding the provisioning of water, it is clear that transactions must be examined in total when determining a company’s primary purpose. Accordingly, consideration must be given to the totality of SolarCity’s activities in order to derive its primary purpose.

SolarCity utilizes a variety of transaction structures in undertaking its business, including sales, leases and SSA transactions. Functionally, there is little distinction between these transaction types as each offers SolarCity the opportunity to conduct its installation, maintenance and financing activities. Only with SSA transactions is there a question as to whether SolarCity is a public service corporation.

It is clear that SolarCity’s current business activities are not focused on furnishing electricity, but rather on supplying varied services to individual customers. SolarCity promotes the distribution of systems which minimize a customer’s use of an underlying utility’s electricity service; however, these customers remain reliant upon their utility for service when their solar equipment is non-operational and in other circumstances. It is clear that SolarCity is not seeking to stand in the place of the underlying utility, as SolarCity is not providing a service which severs the linkage between the utility and the SolarCity customer. Further, the Commission’s net metering rules contemplate a continued relationship between SolarCity’s customers and their utility, as any credit for excess generation necessarily requires that the SolarCity customer continue to be a utility customer.

If SolarCity were to broaden its business activities by providing continuous service to customers, thus severing linkages between a utility and its customers, or extending its use of SSAs to customers other than schools, government or other non-profit entities, this would weigh in favor of regulation as it would suggest the Company’s primary purpose was the sale of electricity. However, SolarCity’s current core business, namely provision of varied services and promotion of distributed solar systems, is not such to conclude that it is primarily concerned with selling electricity.”

DELETE Page 36, Line 18 through Page 37, Line 11 and

INSERT:

“Here, SolarCity’s primary business is the design, installation, maintenance and financing of solar equipment. While development and promotion of renewable resources is in the public

interest, SolarCity's activities pursuant to SSAs are not integral to the provision of electricity to the public at large, as SolarCity enables schools, government and other non-profit entities to employ customer-sited solar facilities which serve their individual needs and only incidentally provide generation back to the grid.

While the public in general has an interest in a safe and reliable electric grid, SolarCity's existing activities pursuant to SSAs, where limited to individual customer-sited solar facilities, make only incidental impacts to the electric grid as they primarily serve individual customer needs. This is distinct from central station generation resources which make use of both transmission and distribution facilities and from provision of service from a common solar facility to multiple customers. Both of these activities more directly impact the electric grid thus triggering greater public use concerns in favor of regulatory oversight.

The public use factor necessarily requires line drawing, otherwise it would inappropriately include or exclude business activities. SolarCity's design, installation, maintenance and financing of individual customer-sited solar facilities for schools, government and other non-profit entities does not trigger a public use finding where it is not integral to the public at large and only incidentally impacts the public interest in a safe and reliable electric grid."

Page 38, Line 19, DELETE "But in any event," through Line 24 AND REPLACE WITH:

"Nevertheless, SolarCity's articles of incorporation, while not precluding activities as a public service corporation, do not reflect an intent to act as a public service corporation. This is materially different from the Articles of public service corporations entered into the record which reflected intent to act as a public service corporation or to furnish electricity to the public. While this factor is not particularly helpful in determining whether SolarCity is a public service corporation, in balance it favors SolarCity's position that it is not a public service corporation."

DELETE Page 43, Line 16, beginning with "Once", through page 44, line 9 AND REPLACE WITH:

"While we find that electrons produced from a coal plant and a solar system are indistinguishable from a physical standpoint, under the circumstances of this case, the electricity produced under an SSA for schools, government and other non-profit entities is not sufficiently essential for it to be characterized as a commodity in which the public has an interest. The evidence in the record demonstrates that SolarCity's SSAs never surpass 50 percent of the total connected load of the schools served by SolarCity, and the schools, governmental entities and non-profits that utilize SSAs would never be completely disconnected from the grid under the terms of the SSA. We also take note that SSAs do not use the transmission grid.

Additionally, we agree with SolarCity that the ramifications of a cessation of SolarCity's service to one of its customers are a far cry from those associated with a shut-down in utility

service by a regulated electric company such as APS. In the first example, the customer would continue to benefit from electric service from the provider of first resort – the regulated utility that is providing the majority of the customer’s electricity to begin with. In the latter instance, hundreds of thousands if not millions of customers would be left without any electricity whatsoever. Schools, government, and other non-profit entities who sign up for service under a SolarCity SSA do so entirely voluntarily; they are not captive customers, and may elect to own their own solar systems, or simply not to take service from SolarCity under an SSA, choosing to have all of their electricity needs met by the incumbent utility.

We are analyzing this Serv-Yu factor in light of the facts of this case; however there may be circumstances where our analysis of this factor may well find that this prong of the ServYu test has been met.¹”

DELETE Page 47, Line 13 beginning with “However, after installing...” through Line 20 and REPLACE WITH:

“Additionally, while SolarCity is targeting an identifiable subset of the overall solar market through its SSAs, it is not holding itself open for business from the entire retail electricity market in the same way that a regulated monopoly utility or an Electric Service Provider does. In the case of the regulated monopoly utility, the utility must serve all customers and must be capable of providing continuous, comprehensive, reliable service to any customer who signs up for service within the regulated monopoly utility’s designated service territory. In contrast, SolarCity does not hold itself out as a provider of last resort. For example, SolarCity does not promise to provide continuous and comprehensive electricity service to every school, government or non-profit entity within a given region, and retains the right not to serve facilities if the facilities are ill-suited for a solar system or if the potential customer’s credit is inadequate.”

DELETE Page 51, Line 3, beginning with “While the SSA contract ...” through Line 14 and REPLACE WITH:

“SolarCity provides its SSA services through a highly detailed and individually tailored contract. The nature of the SSA arrangement necessitates individualized pricing, as the specific size and capabilities of the solar panels affect the economies of scale of production and the cost of each kWh produced. Notably, SolarCity employs contracts for every instance where it provides its services unlike public utilities which primarily utilize tariffs and selectively use contracts.

The *Serv-Yu* Court recognized that rendering of services pursuant to contract weighed against finding that an entity was a public service corporation. The fact that SolarCity employs individualized contracts rather than open tariffs to provide service tends to support SolarCity’s position that it does not possess one of the traditional attributes of a public service corporation.

¹ For example, if all or such a significant portion of a school, government or non-profit’s electricity is being furnished pursuant to an SSA, or if market power issues in Arizona create public interest issues

However, this factor alone is not determinative of our inquiry in light of the broad business solicitation of SolarCity.”

**Page 53, Line 14 after “customers’ load.” DELETE through Line 21,
AND REPLACE WITH:**

“This continued relationship between the utility and SolarCity is critical as it affords the Commission and utility an opportunity to structure rate designs which ensure these customers contribute to fixed system costs and expenses. If SolarCity’s services were broadly directed at severing this utility/customer relationship, this would weigh in favor of concluding that SolarCity was in competition with public service corporations and was itself a public service corporation.

At this point in time, solar providers, like SolarCity, are more a means of helping the incumbents’ reach their distributed generation goals than they are competitors. Thus, this factor weighs against finding a need to regulate to prevent wasteful competition. As the industry and technology develops, however, the current dynamic between utilities and solar providers may become more competitive in nature, indicating a need to treat similarly situated providers under similar rules.”

DELETE Page 53, Line 23 through Page 54, Line 11 and REPLACE WITH:

“The issue in this proceeding is ultimately whether SolarCity’s SSA business and activity are “clothed with a public interest” such that government intervention or regulation is necessary to preserve a service that is indispensable to the population and to ensure adequate service at fair rates when there is disparity in bargaining power.² The *Serv-Yu* factors are only guidelines. Not all of the *Serv-Yu* factors need be present to find a public service corporation, and not all of the *Serv-Yu* factors may have the same relevance as they once did. In determining if a business is engaged in selling and distributing a commodity in which the public as a whole has an interest, it is less helpful to examine each factor in isolation, and more useful to examine how the individual factors inter-relate to form a picture of what the entity actually does and whether its activities are clothed with a public interest.

While at first impression, SolarCity’s provision of service to schools, governments and other non-profit entities pursuant to SSAs may appear to meet the textual definition of a public service corporation under the Constitution, after considering the public interest and applying the specific *Serv-Yu* factors, we conclude that when SolarCity provides services to schools, government or other non-profit entities pursuant to an SSA, it is not acting as a public service corporation, as limited to the facts of this record.”

² *SWTC*, 213 Ariz. at 432, 142 P.3d at 1245.

DELETE Page 66, Line 16 thru Page 68, Line 17 and REPLACE WITH:

“Based on our analysis of the Arizona Constitution and relevant case law, we believe that our determination of whether SolarCity is a public service corporation requires consideration of the textual requirements of the Constitution and consideration of the public interest. Applying the specific facts in this record, we have determined that when SolarCity provides services to schools, government or other non-profit entities pursuant to an SSA, it is not acting as a public service corporation.

While public policy concerns related to consumer protection are implicated in this case, we find that Commission regulations and measures, such as existing interconnection regulations, adequately address some of the expressed concerns. Further, oversight of SolarCity’s activities is not exclusively limited to the Commission; other avenues are available where the Registrar of Contractors oversees construction practices, the Attorney General addresses consumer fraud concerns and civil remedies remain available to SolarCity customers.

Other public policy concerns related to renewable energy are implicated by this decision, where regulation of SolarCity would impair the ability of Arizona utilities to meet the renewable energy requirements of this Commission. The record in this case reflects the strong likelihood that regulation would diminish the ability of SolarCity to secure financing leading to increased transaction costs and greater expense for customers. In adopting the Renewable Energy Standard, the Commission established an aggressive 30 percent distributed generation carve-out, which includes a provision requiring that 50 percent of the distributed generation must come from commercial projects. Schools, non-profits and governmental entities fall within this commercial distributed generation category, meaning that their inability to deploy solar could impair the utilities’ ability to meet the commercial portion of the RES. There is evidence in the record that at least among this sub-set of the market, the SSA is a preferred method of financing distributed projects, as schools, non-profits, governmental entities are unable to draw down the crucial tax credits that today assist in making solar systems economical. The record reflects that SSAs are a critical method by which schools, non-profits and governmental entities may take advantage of these tax credits. Finally, there is evidence in the record demonstrating that schools in particular are interested in deploying solar systems on their campuses, as a way to reduce their exposure to volatile and rising electricity rates and shield their increasingly stressed budgets from these escalating energy costs. It would run counter to the public interest to unnecessarily throw up hurdles to an important sector of the solar market being able to participate in meeting the very RES that this Commission created, and it would be an unfortunate result for schools, who appear ready and eager to implement solar energy systems for the benefit of taxpayers and students. The ratepayers, taxpayers and the public as a whole benefit when schools and governmental entities are able to lower their operating costs by purchasing lower priced electricity through SSAs.

Both our analysis of *Serv-Yu* and broader public interest considerations weigh against the conclusion that SolarCity is acting as a public service corporation when it provides service to schools, government and other non-profit entities pursuant to an SSA.”

Page 70

DELETE and REPLACE Finding of Fact 17 as follows:

“The customer pays SolarCity a variable amount each month based upon the kWh production of the solar equipment.”

DELETE Finding of Fact 19.

DELETE Finding of Fact 20

Page 71

DELETE Finding of Fact 21.

DELETE and REPLACE Finding of Fact 22 as follows:

“SolarCity provides its customers with design, installation, maintenance and financing services; any furnishing of electricity is incidental to its attempt to provide these services to schools, governments, and other non-profits.”

DELETE and REPLACE Finding of Fact 23 as follows:

“When SolarCity contracts with a customer pursuant to an SSA arrangement, it is principally financing the PV system and providing design, installation, maintenance and other services.”

DELETE Finding of Fact 27

DELETE Finding of Fact 28

DELETE Finding of Fact 30.

DELETE Finding of Fact 31.

DELETE Finding of Fact 33.

Page 72

DELETE and REPLACE Finding of Fact 34 as follows:

“Entities that purchase or lease (including the lessor and lessee in such transactions) distributed solar panels to produce electricity for use on their personal property are not public service corporations, as they do not furnish electricity under the Arizona Constitution, Article 15, Section 2.”

DELETE Finding of Fact 35.

DELETE and REPLACE Conclusion of Law 1 as follows:

“When SolarCity provides services to schools, government or other non-profit entities pursuant to an SSA, as described herein, it is not acting as a public service corporation.”

DELETE Conclusion of Law 3:

DELETE AND REPLACE Conclusion of Law 4 as follows:

“SolarCity’s SSA activity at first impression falls within the plain meaning of the definition of “public service corporation” in Article 15, Section 2 of the Arizona Constitution. However, additional analysis of SolarCity’s business operations is required under Arizona law to determine whether SolarCity’s SSA activities, as described herein, are clothed with the public interest so as to warrant Commission regulation.”

DELETE AND REPLACE Conclusion of Law 5 as follows:

“Considering the public interest, the weight of the *Serv-Yu* factors supports a determination that when SolarCity designs, installs, owns, maintains and finances solar PV panels for schools, governmental entities, and non-profits pursuant to an SSA arrangement, as described herein, its activities are not clothed with the public interest such that SolarCity is acting as a public service corporation.”

DELETE AND Replace Conclusion of Law 6 as follows:

“Based on the facts of this case, SolarCity is not acting as a public service corporation when it provides electric service to schools, governmental entities or non-profits pursuant to an SSA arrangement as described herein.”

DELETE Conclusion of Law 7

DELETE lines 7 through Page 74, Line 3 and INSERT the following:

“IT IS THEREFORE ORDERED that when SolarCity Corporation provides services to a school, government, or non-profit entity pursuant to a Solar Services Agreement as described herein, SolarCity Corporation is not acting as a public service corporation.”

Make Conforming Changes