

ORIGINAL

OPEN MEETING AGENDA ITEM

E-20690A-09-0346

Antonio Gill

From: John LeSueur on behalf of Pierce-Web
Sent: Thursday, June 24, 2010 6:19 PM
To: Antonio Gill
Subject: FW: SunEdison Comments in ACC Docket No. E-20690A-09-0346
Attachments: SunEdison comment letter re ROO FINAL signed (24 June 2010).doc.pdf

Docket



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From: Cindy Burda [mailto:cburda@sunedison.com]
Sent: Thursday, June 24, 2010 12:06 PM
To: Mayes-WebEmail; Newman-Web; Pierce-Web; Kennedy-Web; Stump-Web
Cc: Rick Gilliam
Subject: SunEdison Comments in ACC Docket No. E-20690A-09-0346

Dear Commissioners:

Sun Edison LLC ("SunEdison") respectfully submits the attached letter for your consideration regarding ACC Docket No. E-20690A-09-0346 on Solar City's status as a Public Service Corporation. Should you deem it appropriate, we ask that you file our letter with docket control.

Thank you,

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Assistant General Counsel



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Arizona Corporation Commission

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June 24, 2010

Chairman Mayes
Commissioners Pierce, Stump, Kennedy and Newman
Arizona Corporation Commission
1200 W. Washington St., 2nd Floor
Phoenix, AZ 85007

Dear Commissioners:

Sun Edison LLC ("SunEdison") respectfully submits this letter to express our concerns regarding the Recommended Opinion and Order ("ROO") on Solar City's status as a Public Service Corporation (ACC Docket No. E-20690A-09-0346).

SunEdison is North America's largest solar energy services provider, and operates across a global marketplace. Headquartered in Maryland, SunEdison maintains offices and employees in all of our major markets, including New Jersey, California, Colorado, Ontario, Spain, France, and Italy. In addition to employing more than 300 people on our own staff, we create new opportunities for national, regional, and local solar installers and their employees through our channel partner program, which allows these small and mid-size businesses to leverage their regional market experience while gaining access to SunEdison's strong financing and service capabilities.

SunEdison provides a fully managed service; we finance, install, operate, monitor and maintain photovoltaic power plants for commercial, government and utility customers without the high capital outlays to customers traditionally associated with solar. To date, SunEdison has installed more than 113 MW (DC) of solar capacity worldwide. The vast majority is installed pursuant to our solar power and services agreement, a third-party financing ("TPF") mechanism, that operates in substantially the same manner as the solar service agreement ("SSA") at issue in the ROO. As such, the Commission's determination in this matter will have a real and meaningful impact on SunEdison's ability to expand our operations in Arizona under our core business model.

A number of parties have provided well considered legal critiques of the ROO. In particular, SunEdison supports the exceptions submitted by Western Resource Advocates ("WRA"), SunPower Corporation, and the Residential Utility Consumer Office ("RUCO"), as well as the amendments proposed by Commissioner Pierce¹ and Commissioner Mayes² (with certain exceptions noted below). In each case, these parties correctly explain that under Arizona case law, an arrangement is not a public service corporation ("PSC") merely because it meets the Arizona Constitution's literal, textual definition of a PSC. The activities at issue must also be "clothed with a public interest and subject to regulation because they are indispensable to large

¹ Pierce Proposed Amendment # 1 (prepared June 15, 2010), hereinafter "Pierce Amendment."

² Mayes Proposed Amendment 1 (June 18, 2010), hereinafter "Mayes Amendment."



segments of [the] population.”³ SSA providers and other TPF providers simply do not meet this standard.

This is true regardless of whether a TPF provider’s customer is a tax-exempt entity such as a school, or a commercial customer such as a large retailer. An application of the so-called *Serv-Yu* factors yields the same result in either case.⁴ In this regard, SunEdison believes that the analyses provided by the parties mentioned above do not go far enough, because they focus on the importance of TPF models to tax-exempt customers. TPF models are just as crucial to the commercial sector’s adoption of solar energy as they are to the not-for-profit and government sectors’ adoption.

Commissioner Mayes notes in her proposed amendment to the ROO, that “[t]here is evidence in the record that at least among [the government and non-profit sub set] of the market, the SSA is a preferred method of financing distributed projects”⁵ In fact, TPFs such as SSAs are the preferred method of financing for the *entire* market: According to a 2007 report, GreenTech Media predicted that in 2008, “the clear majority of new commercial installations [would] be third-party managed, 65-75% of the market,” and by 2009, TPFs “[would] be established as the standard way that American businesses pay for on-site green power, bringing solar to the rooftops of mainstream corporate America with yearly additional growth of 30-50%.”⁶ Clearly, TPFs are attractive to potential solar hosts, irrespective of tax status.

As a practical matter, many taxable entities do not have the “tax appetite” (i.e., tax liability) to take advantage of solar tax incentives. And even those organizations that do have sufficient tax appetite typically have no more desire or ability to enter the often-complex business of solar than do schools and other not-for-profit entities. None of these potential solar hosts have the time or resources to figure out and apply for ever-changing solar incentives. They don’t have the expertise to select the right solar modules and system configuration for a given site. And they don’t have the personnel to monitor, operate and maintain a solar installation. These activities are well beyond the scope of the core operations of not only schools and other not-for-profit entities, but retailers, manufacturers, and other businesses, too. All solar host customers want, whether they are for-profit or not-for-profit, is long-term, predictably priced energy and the opportunity to make a positive difference in their communities by installing solar energy systems.

³ Southwest Gas Corp. v. Arizona Corp. Comm’n, 169 Ariz. App. at 286 (1991).

⁴ In the case of Natural Gas Service Co. v Serv-Yu Co-op, 219 P.2d 324 (Ariz. 1950) (*Serv-Yu*), the Arizona Supreme described eight factors to consider in determining whether an arrangement qualifies as a PSC. These factors are: (1) What the corporation actually does; (2) A dedication to public use; (3) Articles of incorporation, authorization, and purposes; (4) Dealing with the service of a commodity in which the public has been generally held to have an interest; (5) Monopolizing or intending to monopolize the territory with a public service commodity; (6) Acceptance of substantially all requests for service; (7) Service under contracts and reserving the right to discriminate is not always controlling; (8) Actual or potential competition with other corporations whose business is clothed with public interest. *Id.* at 326.

⁵ Mayes Amendment at 6.

⁶ Jon Guice & John D.H. King, *Solar Power Services: How PPAs are Changing the PV Value Chain*, Greentech InDetail, Feb. 14, 2008, at 4.



SunEdison and other TPF providers have found a means to help customers accomplish these goals. As a number of parties have described, TPF providers do this by matching investors that have tax appetite with individual systems and host customers. In some instances, SunEdison may build a project, sell it to the investor, then, through a special purpose subsidiary company, lease it back from the investor under a long-term lease. In other instances, SunEdison and the investor may share joint ownership of a special purpose company that owns the project. However, while there are a handful of financing structures that are common across the industry, the underlying deals and contracts are unique to each investor and each SSA provider. And each year, as incentives change and laws evolve, so too do deal structures.

This diversity of approaches to financing is one of the many reasons we believe that, if adopted, the ROO would impede or even halt the use of SSAs and other TPF structures in Arizona. No matter how carefully crafted, any regulation is likely to apply differently to different deal structures, even if the end result of the deal structure is the same. For instance, in a sale-leaseback transaction, which entity would the Commission regulate? The investor that “owns” the system (usually a bank or an insurance company)? The special purpose company that leases the system from the investor? Or the parent company of the special purpose company “lessee”? What if the bank investor had an ownership interest in the special purpose company that owned a project? What about in yet-to-be-created deal structures?

Moreover, investors will be concerned about the extent of the Commission’s authority over the project itself. If the price of grid electricity falls below the price the customer pays the SSA provider for a given project, will the Commission require a reduction in the SSA rate? Will traditional utilities with existing certificates be able to challenge an SSA provider’s application for a certificate to provide service in the same territory? What consequences will attach if the SSA provider inadvertently fails to make a routine, form filing? All of these questions add doubt to a project’s success, increase uncertainty, and reduce potential investors’ interest.

In our experience, investors have no appetite for this kind of uncertainty. An investor would likely insist on an exhaustive analysis of the Commission’s authority under each particular deal structure, adding substantial cost to the project. If the analysis revealed even moderate regulatory risk, the investor would more than likely decline the project. Without investors to finance projects, SunEdison and other TPF providers cannot install solar for our customers. And without TPF providers, most classes of potential solar hosts—commercial and not-for-profit alike—are likely to simply forgo solar installations altogether.

For these reasons, SunEdison believes that, if adopted, the ROO would cripple the installation of customer-sited distributed generation solar in Arizona and halt the associated job creation. Currently, SunEdison has more than ten megawatts of projects in Arizona that we can develop in the near term under our traditional TPF model. We anticipate that these projects would support hundreds of direct installation jobs, as well as numerous ongoing operations and maintenance positions. It is possible that this volume of installations could support a regional SunEdison office in Arizona. Yet, to date, regulatory uncertainty has prevented us from moving forward with these installations. Few if any of these activities will occur if the ROO is adopted.



Therefore, we respectfully ask the Commission to consider the exceptions submitted by WRA, SunPower, and RUCO, as well as Commissioner Pierce's and Commissioner Mayes' Amendments, modified to reflect that third-party solar providers, whether offering services to for-profit commercial entities or to tax-exempt entities, and whether operating under an SSA or another TPF agreement, are not PSCs, requiring the Commission's oversight.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Rick Gilliam", written over a horizontal line.

Rick Gilliam
Vice President, Government Affairs
Sun Edison LLC