

OPEN MEETING AGENDA ITEM



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BEFORE THE ARIZONA CORPORATION COMMISSION

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JUN 28 2010

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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

COMMENTS OF THE SOLAR ALLIANCE

The Solar Alliance (“Alliance”) appreciates this opportunity to address the Arizona Corporation Commission (“Commission”) with regard to SolarCity’s application for a determination that it is not acting as a public service corporation (“PSC”) when it provides services pursuant to a Solar Services Agreement (“SSA”). As a trade association for the solar industry, the Alliance can offer a perspective which is broader than that of a particular solar company that may be focused on pursuing opportunities in a particular market segment.<sup>1</sup> As such, the Alliance offers these comments on the Recommended Opinion and Order (“ROO”), and the amendments that were docketed by Chairman Mayes and Commissioner Pierce. The Alliance’s goal is to assist the Commission in crafting a Decision to resolve SolarCity’s application that will both survive any appeal and provide the greatest indication to the solar industry (and those entities that finance solar projects) of what the Commission believes to be the public

<sup>1</sup> The Alliance’s comments represent the views of the Alliance, and not necessarily those of any individual member company.

1 interest regarding regulation of SSAs.

2 The amendments proffered by both Chairman Mayes and Commissioner Pierce are  
3 helpful modifications to the ROO. However, the Alliance believes the modifications to  
4 either of the amendments would produce a more useful, and defensible, order.

5  
6 **OVERVIEW**

7 The resources devoted to this proceeding, by the Commission, the parties, and the  
8 members of the public that have provided comments, has been substantial. The result is a  
9 record that is extensive as to the public interest implications of the regulation of SSAs.  
10 Though the Commission's decision in this matter may have specific application only to  
11 the SSAs that are a part of the record in this proceeding, the Commission is in a position  
12 to provide a certain level of guidance as to the broader market as to what factors the  
13 Commission finds relevant to its evaluation of the issues, including its analysis of the  
14 public interest. By identifying the features of the SSAs at issue here that are relevant to  
15 its decision as to the public interest (and correspondingly, those features that do not have  
16 an impact on the public interest analysis), the Commission can provide useful insight to  
17 the broader solar industry. Therefore, to the extent the Commission can set forth its  
18 reasoning in a way that provides the maximum instruction to the solar industry, the  
19 Commission should take this opportunity to do so (and thereby potentially conserve the  
20 resources that would otherwise be expended by others in the industry to discern the  
21 Commission's position on their own business models).

22  
23 **TAX STATUS OF THE SSA CUSTOMER**

24 SolarCity's customer for the SSAs that are the subject of this docket is Scottsdale  
25 Unified School District ("District"). The record includes much testimony that certain  
26 financing models other than SSAs are not available to customers that are schools,

1 government entities and non-profit entities as a result of the parameters of certain tax  
2 incentives. Adoption of either the amendments filed by Chairman Mayes and  
3 Commissioner Pierce would result in an order in which the Commission concluded that it  
4 is not in the public interest for the Commission to regulate SolarCity as a PSC when it  
5 utilizes SSAs similar to those utilized with the District for other customers that are  
6 schools, governments or non-profit entities.

7 The SSA financing model is useful not only to customers that are schools,  
8 governments and non-profits. For-profit entities and residential customers may prefer  
9 financing their solar facilities with an SSA, particularly if they do not have sufficient tax  
10 liability to utilize the entire scope of the tax incentives available. Neither Chairman  
11 Mayes' nor Commissioner Pierce's amendments indicates why the tax status of the  
12 customer would be a relevant distinction in when evaluating the public interest of  
13 regulating SSAs. If the Commission believes that the tax status of the customer is not  
14 relevant to that analysis of the public interest, it could provide more meaning guidance to  
15 the solar industry by either explicitly indicating so, or by replacing references to the  
16 "schools, governments and non-profits" in its discussion of the public interest with  
17 references to "customers."

#### 18 19 **"FURNISHING" ELECTRICITY**

20 The ROO concludes that SolarCity would be "furnishing" electricity when it  
21 provides its services under the SSAs, and Chairman Mayes' amendment proposes no  
22 change to the ROO's result in that regard. Commissioner Pierce's amendment concludes  
23 that SolarCity is not "furnishing" electricity. The Alliance believes that the  
24 Commission's final decision on this matter would be more defensible if it concluded that  
25 SolarCity was not furnishing electricity.

26 By finding that SolarCity was not furnishing electricity, and that even if it were

1 furnishing electricity there is no public interest need to regulate SolarCity, the  
2 Commission would be providing two independent bases for its the result. For a court to  
3 overturn the Commission's result when that outcome is reached on two independent legal  
4 frameworks would require the court to find that there was error in the Commission's  
5 reasoning in both analytical frameworks. Therefore, the Commission can decrease the  
6 likelihood of reversal of its decision if it reaches its conclusion on the bases of two  
7 independent analyses: 1) that SolarCity is not furnishing electricity, and 2) that  
8 SolarCity's provision of the services of the SSAs is not sufficiently clothed with the  
9 public interest to require regulation as a PSC. If a court found that the Commission erred  
10 in some way in reaching its conclusions on one, but not both, of the bases for the  
11 Commission's decision, the court could nonetheless uphold the decision.

### 12 13 **THE ROLE OF THE SERV-YU FACTORS**

14 In interpreting the scope of Article XV, Arizona's courts have been guided by the  
15 principle that "[f]ree enterprise and competition is the general rule. Government control  
16 ... [is] the exception." *See Arizona Corporation Commission v. Nicholson*, 108 Ariz.  
17 317, 321, 497 P.2d 815 (1972); *General Alarm, Inc. v. Underdown*, 76 Ariz. 235, 238,  
18 262 P.2d 671,672 (1953). The courts have expressed their aversion to "any extension of  
19 the power and scope of the corporation commission to businesses not patently in need of  
20 the Commission's control." *Arizona Corporation Commission v. Continental Security*  
21 *Guards*, 103 Ariz. 410, 415, 443 P.2d 406 (1968).

22 When exploring the scope of what entities can be labeled "public service  
23 corporations," the purposes for the regulation that the Commission is created to  
24 administer must be considered. The Commission's regulatory authority is necessary "to  
25 preserve those services indispensable to the population and to ensure adequate service at  
26 fair rates where the disparity in bargaining power between service provider and the utility

1 ratepayer is such that government intervention on behalf of the ratepayer is necessary.”  
2 *Southwest Transmission Co-operative, Inc. v. Ariz. Corp. Comm’n* at 432 ¶ 24, 142 P.3d  
3 at 1245, citing *Southwest Gas* at 286, 818 P.2d at 721, *Petrolane-Ariz. Gas Service v.*  
4 *Ariz. Corp. Comm’n*, 119 Ariz. 257, 259, 580 P.2d 718, 720 (1978). One must consider  
5 whether the business is of such a nature that competition might lead to abuses detrimental  
6 to the public interest, including the nature of the business and the means by which it  
7 touches the public, and the potential abuses that could be anticipated if the entity were not  
8 regulated. *General Alarm* at 239, 262 P.2d 673.

9 To fall within the ambit of the Commission’s regulation, an entity’s “business and  
10 activities must be such as to make its rates, charges, and methods of operation a matter of  
11 public concern, clothed with a public interest ... its business must be of such a nature that  
12 competition might lead to abuse detrimental to the public interest.” *Southwest*  
13 *Transmission Cooperative, Inc. v. Arizona Corporation Commission*, 213 Ariz. 427, 431-  
14 32, 142 P.3d 1240 (App. 2006) (citations omitted). Further, any small degree of “public  
15 interest” in the business is not enough to cause an entity to be considered a public service  
16 corporation. The Arizona Supreme Court has indicated that “[i]t was never contemplated  
17 that the definition of public service corporations as defined by our constitution be so  
18 elastic as to fan out and include businesses in which the public might be incidentally  
19 interested...” *Visco v. State ex. Rel Pickrell*, 95 Ariz. 154, 164, 388 P.2d 155, 162  
20 (1964). *See also Ariz. Corp. Comm’n v. Nicholson*, 108 Ariz. 317, 497 P.2d 815 (where  
21 provision of a utility service is incidental to the business, the entity is not a public service  
22 corporation; protection of the public is provided by other statutes dealing with public  
23 health, etc.).

24 In identifying those corporations that are sufficiently “clothed with a public  
25 interest” to merit Commission regulation, Arizona courts have considered a number of  
26 factors. In *Natural Gas Service Corporation v. Serv-Yu Cooperative*, 70 Ariz. 235, 237-

1 38 219 P.2d 324, 325-26 (1950), the Arizona Supreme Court set forth a list of eight  
2 factors to consider when evaluating that issue. The *Serv-Yu* factors are guidelines for  
3 analysis of the question of whether an entity is “clothed with the public interest” to the  
4 degree that it should be considered a public service corporation. In fact, in a number of  
5 instances since the *Serv-Yu* case, Arizona’s courts, including the Supreme Court, have  
6 analyzed the question of whether an entity is clothed with the public interest to the degree  
7 that it would be considered a public service corporation, without referring to the *Serv-Yu*  
8 factors. See, e.g., *General Alarm v. Underdown*, 76 Ariz. 235, 262 P.2d 671 (1953);  
9 *Williams v. Pipe Trades Industry Program of Arizona*, 100 Ariz.14, 409 P.2d 720 (1966).  
10 Thus, in determining whether an entity is a public service corporation, the *Serv-Yu* factors  
11 must be regarded in the context of the larger question of whether the entity is clothed with  
12 the public interest such that the Commission’s economic regulation is necessary to protect  
13 the public. The Alliance believes that Chairman Mayes amendment to Page 27 of the  
14 ROO accurately describes the role of the *Serv-Yu* factors.

## 16 MISCELLANEOUS

17 Commission Pierce’s amendment includes language<sup>2</sup> both suggesting and  
18 specifically stating that there is a difference between a purchased power agreement  
19 (“PPA”) and an SSA. The Alliance does not agree that there is such a difference between  
20 a PPA and an SSA. The distinction identified in Commissioner Pierce’s amendment is  
21 that SSAs provide that the electricity produced by the solar facility is owned by the  
22 customer immediately upon production, where PPAs do not so provide. While  
23 undoubtedly the SSAs examined in this proceeding do include that term, there is no  
24 evidence in the record that any particular agreement would be labeled either a PPA or an

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26 <sup>2</sup> Inserts at Page 6, Line 21 and at Page 7, line 7.

1 SSA based on the absence or presence of such a term.

2 SolarCity's exceptions in several instances referred to the facts of *Nicholson* as  
3 involving an entity that provided water in connection with the sale of trailer park lots.  
4 However, the provider of water in the *Nicholson* case merely rented trailer park lots to  
5 customers. Both Chairman Mayes'<sup>3</sup> and Commissioner Pierce's<sup>4</sup> amendments repeat the  
6 same error when referring to the *Nicholson* decision. While the Alliance does not believe  
7 that the distinction is meaningful to the application of the principles of *Nicholson* to the  
8 case at hand, to minimize any potential misunderstanding in the future, the Commission's  
9 final decision should recite the fact of *Nicholson* as involving the renting of trailer spaces.

10  
11 **CONCLUSION**

12 The Commission's resolution of SolarCity's application will provide important  
13 guidance to the solar and financial industries that will affect their opportunities to partner  
14 with the Commission and Arizona customers in achieving the goals of increasing the use  
15 of renewable electric resources. By carefully crafting its Decision to clearly identify the  
16 features of the SSAs at issue in this proceeding that the Commission finds are relevant to  
17 its public interest analysis, the Commission can maximize the usefulness of that guidance.  
18 The Alliance requests that the Commission to provide as much clarity as possible in its  
19 final order so that the solar industry can offer solar SSAs to the widest extent possible  
20 without requiring the further adjudication of similar SSA applications.

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26 <sup>3</sup> Insert at page 31.

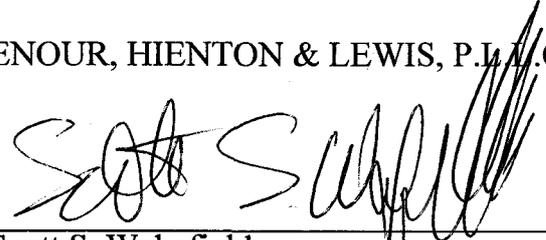
<sup>4</sup> Inserts at pages 31 and 36.

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Dated this 28<sup>th</sup> day of June, 2010.

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By



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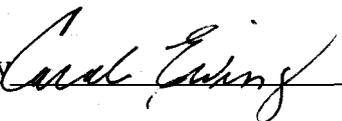
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