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AZ CORP COMMISSION
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REVISED PIERCE PROPOSED AMENDMENT # 1

DATE PREPARED: June 15, 2010

Arizona Corporation Commission
DOCKETED
JUN 29 2010
DOCKETED BY

COMPANY: SolarCity Corporation

DOCKET NOs: E-20690A-09-0346

OPEN MEETING DATES: June 29 & 30, 2010 AGENDA ITEM: U-25

Note: For discussion and review purposes only, I have reflected deleted language with ~~strikethrough~~ font and new language (with one exception) with ALLCAP font. Such font should not appear in a final order.

Page 5, Line 20

REPLACE sentence beginning "The SSA" and ending "tax incentives" with the following:

"SSAs provide schools, governments, and non-profits with an affordable option for financing the costs associated with implementing solar power. SSAs are, more than anything else, a financing tool that allows these entities to acquire the use of solar equipment without up-front costs while putting to use otherwise stranded federal tax incentives."

Page 6, Line 21

DELETE lines 21 through Page 7, line 3 and INSERT:

"An SSA is very similar to a lease agreement. The only difference between an SSA and a lease agreement is the payment structure.[fn1] The SSA is a variable monthly fee, in which the customer pays on a per kilowatt hour ("kWh") basis, whereas the lease is a fixed monthly fee.[fn2] The customer has no additional responsibilities with respect to the solar facilities under the solar lease arrangement than it does with the SSA arrangement.[fn3]

[fn1] Tr. at 196-97; 229.
[fn2] Id.
[fn3] Id.; Exs. TEP-2, TEP-3.

"An SSA is also very similar to a purchased power agreement ("PPA"). Under an SSA and a PPA, the system is owned by a third-party investor and the customer pays on a per kWh basis. The only difference between an SSA and a PPA is that the SSA is structured so that the electricity immediately belongs to the customer upon production, whereas the electricity initially belongs to the third-party investor under the PPA.[fn4] Mr. Rive testified that 80 percent of the commercial, non-profit and governmental solar installations are third-party financed, either through a PPA or SSA.[fn5]"

~~**Page 7, Line 7**~~

~~INSERT the following after "non-profits.":~~

~~"The parties generally agree that SolarCity is not acting as a public service corporation when it uses a lease agreement to design, install, maintain, own and operate solar systems, but that SolarCity would be acting as a public service corporation if it used a PPA to accomplish the same thing. Accordingly, and assuming *arguendo* that the parties are correct that PPAs result in SolarCity being a public service corporation whereas lease agreements do not, another way to formulate the question presented in this Application is: Are SSAs more like PPAs or lease agreements? All three arrangements – PPAs, SSAs, and lease agreements – functionally accomplish the same thing. SolarCity's obligations to design, install, maintain, own and operate the solar systems are identical under all three arrangements, and the only distinctions are (1) whether the customer contractually pays a fixed monthly fee or a variable monthly fee and (2) whether the customer or SolarCity contractually owns the electrons upon production."~~

Page 7, Line 9

DELETE lines 9 through page 8, line 20 and INSERT the following:

"A. The Two-Part Test for Public Service Corporations

Whether an entity is a public service corporation under Article 15, Section 2 of the Arizona Constitution is determined pursuant to a two-part test. This test was most recently and succinctly articulated IN 2006 by the Arizona Court of Appeals in *Southwest Transmission Cooperative, Inc. v. ACC* ("*SWTC*") as follows:

> Determining whether an entity is a public service corporation requires a two-step analysis. First, we consider whether the entity satisfies the literal and textual definition of a public service corporation under Article 15, Section 2 of the Arizona Constitution. Second, we evaluate whether the entity's business and activity are such 'as to make its rates, charges, and

[fn4] Tr. at 230-31.
[fn5] Tr. at 110.

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). . . . Merely meeting the textual definition does not establish an entity as a public service corporation. To be a public service corporation an entity's 'business and activities must be such as to make its rates, charges and methods of operation, a matter of public concern, clothed with a public interest to the extent contemplated by law which subjects it to governmental control—its business must be of such a nature that competition might lead to abuse detrimental to the public interest.[fn6]

1. The Literal and Textual Definition

Article 15, Section 2 of the Arizona Constitution provides as follows:

All corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or stream for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations. (Emphasis added)

2. The Public Concern and the Eight *Serv-Yu* Factors

The *SWTC* court stated that the purposes of regulation are to preserve services indispensible to the population and ensure adequate service at fair rates where the disparity in bargaining power between the service provider and the ratepayer is such that governmental intervention is necessary.[fn7] The *SWTC* court acknowledged that in *Serv-Yu* "the Arizona Supreme Court articulated eight factors to be considered in identifying those corporations 'clothed with a public interest' and subject to regulation because they are 'indispensible to large segments of our population.'"[fn8] The eight factors are:

1. What the corporation actually does.
2. A dedication to public use.
3. Articles of incorporation, authorization, and purposes.

[fn6] 213 Ariz. 427, 430-33, 142 P.23d 1240, 1243-45 (Ariz. Ct. App. 2007) (quoting *Trico Elec. Coop, Inc. v. Ariz. Corp. Comm'n*, 86 Ariz. 29, 34-35, 339 P.2d 1046, 1052 (1959)).
[fn7] *Id.* at 432, 142 P.3d at 1245.
[fn8] *Id.* (citing *Southwest Gas Corp. v. Ariz. Corp. Comm'n*, 169 Ariz. 279, 286, 818 P.2d 714, 721 (Ariz. Ct. App. 1991)).

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.

"These factors are guidelines for analysis, and all eight factors are not required to conclude that a company is a public service corporation.[fn9]"

B. Positions of the Parties"

Page 21, Line 22.5

DELETE lines 22.5 through page 25, line 5 and INSERT the following:

"Prior to the two school projects at issue in this matter, customers seeking to do business with SolarCity in Arizona could purchase the solar equipment or they could lease it. Upon issuance of this order, Arizona schools, governments and non-profit entities will have a third option, the SSA. We believe the record supports a conclusion that SSAs are simply another option for financing the installation and use of solar equipment from SolarCity. The greatest advantage of the SSA financing option for tax-exempt entities is that it allows those entities to realize the benefits of federal tax incentives for solar energy. We found the following testimony from Scottsdale Unified School District's Deputy Superintendant, David Peterson instructive:

> [E]veryone has to remember that there is no other economically viable way for us to make this work. If SUSD could purchase the system or lease it while taking advantage of the substantial tax incentives we would explore that but as has already been explained that does not work because of our tax exempt status. All SUSD wants are the services that SolarCity provides without regulation in this State right now which are design, installation, and maintenance of the system with no upfront costs. Because we are a school the only way we can employ these services at a price that makes sense is through a SSA . . . . If SUSD buys the panels then SUSD needs to come up with approximately $10 million dollars just to install the solar system for the two schools. The SSA allows us the opportunity to get the solar panels in place and to begin saving money without spending anything up front.

[fn9] *Id.*

> We are using SolarCity to raise the upfront costs for us and are paying for that based on the savings we ultimately receive from their installation. That is "financing" in its most basic sense.[fn10]

RUCO identifies additional benefits of the SSA financing arrangement.

> In many ways SSAs are a preferable financing mechanism compared to either a lease or purchase arrangement. The SSA requires no upfront costs. The SSA establishes a repayment schedule predicated upon the amount of electricity produced and requires the installer to regularly maintain the installation. . . . Only under the SSA does the risk of poor performance fall entirely on the provider.[fn11]

"Under an SSA, the provider does not get paid if the equipment does not generate electricity. This ensures that the provider is encouraged to maintain the product in such a manner as to maximize the production of solar energy—a Commission objective. It also places the risks of underperformance on the provider, the party who has the most information (asymmetrical information) regarding expected system performance, which we believe is also good public policy.

"Characterizing SSAs as a financing mechanism for installing solar equipment is further strengthened by the fact that SolarCity's obligations to design, install, maintain, own and operate the solar systems are identical under its SSAs and lease agreements.

"In light of the foregoing, we do not believe SolarCity is "furnishing" electricity within the context of Article 15, Section 2 of the Arizona Constitution. The SSA explicitly states that SolarCity never owns the electrons that are produced by its solar equipment, and because SolarCity never owns the electrons it cannot "furnish" or transfer possession for that which it never owned.

"Staff argues that SolarCity included the provisions concerning possession of the electricity in its SSAs in order to defeat Commission jurisdiction and argues that SolarCity should not be allowed to "contract away" Commission jurisdiction. ~~We find Staff's position on this point hard to understand because~~ Staff ~~acknowledges~~ ARGUES, THOUGH, that THE COMMISSION HAS NO JURISDICTION OVER LEASE AGREEMENTS. THUS, STAFF ACCEPTS THE FACT THAT the parties can avoid Commission jurisdiction if they simply (1) change the payment provisions of the SSA agreement from variable to fixed and (2) call the REVISED agreement a lease. ~~If we were to adopt Staff's position in this case, we would have to accept the ability of parties to "contract away" Commission jurisdiction. At the risk of repeating ourselves,~~ FROM THE CUSTOMER'S PERSPECTIVE, HOWEVER, there is <u>no</u> functional difference between

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[fn10] Exhibit A-5, 13:1-20

[fn11] RUCO Exceptions p.4, lines 11-18.

THE SERVICES PROVIDED UNDER a lease agreement and UNDER an SSA. Accordingly, we do not believe there should be a jurisdictional difference either.

"TEP and UNSE argue that even if SolarCity never owns the electricity, the electricity is transported through SolarCity's facilities to the customer and that under *SWTC*, this transport is sufficient to satisfy the definition of furnishing. Further, TEP, UNSE and Staff argue that if we allow a retail generator of electricity to avoid jurisdiction by manipulating temporal ownership of electricity, the Commission would be sanctioning retail competition in Arizona. In response to these concerns, we wish to clarify that our determination that SolarCity is not "furnishing" electricity is not based solely on the contractual language of the SSA. Rather, our analysis proceeded as follows: (1) an SSA is one of several financing options available to consumers who are interested in installing solar equipment, (2) the SSA has attributes that are superior in some ways to the other financing option, and (3) FROM THE CUSTOMER'S PERSPECTIVE the SSA is functionally identical to the lease agreement, in which everyone agrees that the Commission has no jurisdiction. IT IS WITHIN THE CONTEXT ~~In light~~ of these three findings THAT we believe the contractual language of the SSA is relevant and precludes Commission jurisdiction over the transaction. We will view future applications from retail electric providers based on the totality of the circumstances, and we do not BELIEVE ~~commit ourselves to the position~~ that simple "manipulation of the temporal ownership of electricity" is, by itself, sufficient to avoid Commission jurisdiction."

"Given our determination that SolarCity is not "furnishing" electricity, we conclude that SolarCity has not met the literal textual definition of a public service corporation under Article 15, Section 2 of the Arizona Constitution. ~~However, even if SolarCity is "furnishing" electricity under a literal reading of the Constitution, we do not believe that SolarCity is subject to Commission jurisdiction as a public service corporation when the *Serv-Yu* factors are applied.~~ OUR DETERMINATION IS FURTHER SUPPORTED BY THE CASE LAW IN ARIZONA WHICH IS CLEAR THAT A FINDING THAT AN ENTITY IS A PUBIC SERVICE CORPORATION IS DEPENDANT ON THE FACTS OF EACH CASE AND IS MORE THAN JUST AN OVERLY-BROAD AND ELASTIC APPLICATION OF A TEXTUAL DEFINITION. THE ARIZONA COURTS HAVE REQUIRED: (1) A PRESUMPTION AGAINST REGULATION[fn17]; A PROHIBITION AGAINST AN UNFETTERED POWER TO ISSUE CC&NS[fn18]; (3) A DECLARATION THAT "FURNISHING" REQUIRES A TRANSFER OF POSSESSION[fn19]; AND (4) THAT EVEN WHEN A CORPORATION MEETS THE TEXTUAL DEFINITION OF A PUBLIC SERVICE CORPORATION, JURISDICTION SHALL BE DENIED IF THE PUBLIC INTEREST REQUIRES IT[fn20]. IN THIS CASE, EVEN IF SOLAR CITY IS

[fn17] *Ariz. Corp Comm'n v. Continental Sec. Guards*, 103 Ariz. 410, 415, 443 P.2d 406 (1968); *General Alarm v. Underdown*, 76 Ariz. 235, 262 P.2d 671 (1953).
[fn18] *Williams v. Pipe Trades Ind. Program of Ariz.*, 100 Ariz. 14, 20, 409 P.2d 720, 726 (1966).
[fn19] *Id.*
[fn20] *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 219 P.2d 324 (1950).

"FURNISHING" ELECTRICITY UNDER A LITERAL READING OF THE CONSTITUION, WE DO NOT BELIEVE SOLAR CITY IS SUBJECT TO COMMISSION JURISDICTION AS A PUBLIC SERVICE CORPORATION WHEN THE *SERV-YU* FACTORS ARE APPLIED."

Page 27, Line 10

DELETE line 10 through Page 28, Line 19 and INSERT:

"By arguing that the *Serv-Yu* case has little relevance to this proceeding and that the Commission should determine whether SolarCity is a public service corporation based only upon the literal textual definition in Article 15, Section 2 of the Arizona Constitution, SRP appears to be asking this Commission to ignore the black letter case law of Arizona. While SRP asserts that a case-by-case public interest analysis is "inconsistent with the Constitution," Arizona courts have plainly stated that just such an analysis is required by the Constitution. To be subject to rate regulation by this Commission, it is not enough that the entity in question simply meet the literal textual definition of a public service corporation AS THE COURT OF APPEALS HELD IN *SWTC*."

Page 31, Line 6

DELETE line 6 through Page 32, Line 18 and INSERT the following:

"Here, SolarCity is in the business of designing, installing, maintaining, and sometimes financing solar equipment. None of these actions cause or trigger regulation as a public service corporation, when carried out either individually or together.

"SolarCity has devised a number of different financing methods through which it brings its design, installation and maintenance services to the public; one of these methods happens to be the SSA. It is important to note that prior to this case, SolarCity only sold or leased solar equipment in Arizona and did no SSA transactions.[fn21] As a result, the Company never furnished electricity to any customer, incidentally or otherwise. The evidence suggests that SolarCity is merely trying to bring its traditional design, installation, and maintenance services to Arizona schools, governments, and tax-exempt entities by utilizing a SSA to take full advantage of Federal tax incentives.

"In deciding what SolarCity actually does, it would be a mistake to focus exclusively on one component of the SSA, as urged by Staff, TEP and SRP. It would be entirely too facile to claim that a multifaceted contract, contemplating long-term operation and maintenance services, end-of-term ownership and renewal options, as well as a wide

[fn21] *See* Tr. at 194:1-7, 16, 17.

variety of other factors, from a company who also provides significant numbers of non-financed systems, is "actually" providing commodity electricity.

"~~Instead~~, EVEN IF SOLARCITY WERE FURNISHING ELECTRICITY UNDER AN SSA, we WOULD view this case as similar to the issues that the *Nicholson* court faced. In *Nicholson*, there could be no mistaking that the company actually furnished water to residents of a trailer park for their domestic use and consumption – yet the Supreme Court found that the company was not a public service corporation. The Court found that while the provision of water to those ~~purchasing~~ RENTING lots in a trailer park was necessary to ~~sell~~ RENT the lots, the primary purpose of the company was to ~~sell~~ RENT lots, not furnish water.

"We find that situation to be analogous to the situation at hand. SolarCity is not an electric company. It is a company that designs, installs, maintains and sometimes finances solar equipment. The Company by no means finances all of the equipment it provides in Arizona, and where it does provide financing, it provides only a portion of this through the SSA at hand (with the majority through a lease structure that no party has argued would trigger the jurisdiction of this Commission.)

"Further, we find it would strain credulity for us to conclude that of two providers, having built, owned and contracted for the maintenance of two identical solar systems across the street from one another—one leased (with a kWh production guarantee) and one under an SSA at identical pricing—that in the case of the latter, what the company "actually does" triggers Commission jurisdiction, whereas the former does not.

"The mere fact that an SSA is more attractive to a school than a lease due to federal tax code reasons, does not change SolarCity's core business such that it suddenly becomes a company primarily concerned with selling electricity."

Page 36, Line 5

DELETE line 5 through Page 37, Line 11 and INSERT the following:

"The second *Serv-Yu* factor requires an examination of whether the entity has dedicated its property to a public use and is a question of intent shown by the circumstances of the individual case. ~~In this case,~~ SolarCity's business is to design, install, maintain and occasionally finance solar equipment. Unlike cases like *SWTC*, where the transmission company provided power that would ultimately serve thousands of homes or even *Nicholson*, where the entity was providing water service to multiple ~~lot owners~~ TENANTS in a community, SolarCity provides ~~only~~ equipment and services ONLY to a

single customer for a single solar installation,[fn22] according to individually negotiated contracts.

"SolarCity's intent in contracting with schools is not to sell electricity but rather to offer a financing mechanism that allows the schools to take advantage of SolarCity's design installation, maintenance and financing services. SolarCity's CEO, Mr. Lyndon Rive, testified that:

> You have to understand that there is simply no other economically viable way for schools, non-profits and governmental entities to utilize our unregulated services that we provide all over the state unless they use the SSA. All SolarCity is doing is trying to provide this class of non-profit customers with its core, unregulated services. If it means we somehow end up furnishing electricity then that is purely incidental. SolarCity never decided to change its business plan and start selling electricity. Instead, SolarCity tried to figure out a way to bring this class of non-profit customers its legal services and the SSA is the only way to do that. We have no reason to change our business plan as we have been highly successful. If we are furnishing electricity, which I do not agree with, it is merely incidental to us utilizing the only viable way to provide the unregulated services the non-profit group can benefit from.[fn23]

"Clearly, the provision of renewable energy is a public policy interest of the State, as evidenced by the REST rules themselves. However, we do not find that every company engaged in an activity encouraged by public policy is therefore "dedicated to the public use" and subject to detailed regulation and oversight by the Commission. ~~If the criteria for "public use" were only to examine whether the State has sought to encourage a given business activity or development, it would be difficult to find an area of enterprise *not* subject to Commission jurisdiction.~~

"To find that a privately negotiated contract for services with what is currently a ~~vanishingly~~ small PERCENT~~, and necessarily forever circumscribed percentage~~ of Arizona electric customers represents a "dedication to public use" or is "integral" to the provision of reliable electric service to the rest of the state, is inconsistent with the meaning of the term, and we decline to do so.

"Rather, it seems clear that SolarCity does not intend to provide schools or other non-profits with services or products that differ from what it provides to homeowners and businesses around Arizona, all without Commission oversight. The circumstances of this case and the basic facts presented indicate that there is no dedication to a public use within the scope of SolarCity's provision of solar services to non-profits in Arizona."

[fn22] Our analysis in this case is limited to the single-customer business model.
[fn23] Ex. A-5 at 5:28-6:12.

Page 38, Line 19

DELETE "But in any event," through line 24 and INSERT the following:

"In any event, SolarCity's Articles of Incorporation are materially different from those of other public service corporations entered into evidence in this matter. It is true that SolarCity's Articles of Incorporation do not preclude its acting as a public service corporation but they do not, like all other public service corporations' Articles that were made part of the record, reflect an intent to operate as a public service corporation or to furnish electricity to the public. While we do not attach great weight to this factor in our evaluation, we find it favors SolarCity's position that it is not a public service corporation."

Page 43, Line 18

DELETE after "plants." through Page 44, Line 9 and INSERT the following:

"However, the same could be said of any electron placed onto the grid, whether from a regenerative elevator or from a solar system sold for cash. To claim that placing a single electron on the grid places a party in the business of providing "essential" electric service is to ignore the meaning of the term "essential."

"We find that while the provision of distributed solar generation is desirable, it is not an essential public service~~ in which the public has generally been held to have an interest~~. In making this determination, we are not distinguishing between electricity generated by renewable resources and non-renewable resources, but rather are distinguishing between traditional off-site-generated electricity and electricity generated on a customer's premises, behind the customer's meter, and implemented at the customer's ~~subjective~~ prerogative while that customer remains connected to, and able to receive all needed electricity from, the grid."

Page 47, Line 2

DELETE lines 2 through 20 and INSERT the following:

"The fifth *Serv-Yu* factor looks at whether SolarCity is a monopoly or intends to monopolize territory. The existence of a monopoly provider of essential public services tends to suggest that such an entity should be subject to regulation to protect the public's interest in receiving reliable service at a reasonable price.

"SolarCity is not a monopoly and does not have market power; the Company competes for business IN A FIERCLY COMPETITIVE MARKET~~, when taking part in an RFP process~~. Thus, the need to regulate rates is not the same as with a traditional

monopolistic utility service. We reject the view that the Company's intent to enter into long-term contracts with customers is synonymous with an intent to monopolize service to the public, or even to those customers with which it successfully enters into contract."

Page 51, Line 3

DELETE beginning with "While the SSA . . ." through line 14 and INSERT the following:

"The nature of an SSA requires individualized pricing based on the specific design of panels to fit with the unique characteristics of a customer's roof, PARKING STURCUTURES, OR OTHERWISE ON THE CUSTOMER'S PROPERTY. In addition, the nature of the RFP process gives the customer especially strong bargaining power and the ability to demand individualized terms.

"The important part of the analysis here is not so much that SolarCity clearly provides services under individualized contracts, but rather that SolarCity *only* provides service under such contracts. The fact that these contracts tend to be based on generally standard templates should be accorded no consideration in this determination, as the same could be likely said of the vast majority of contracts in most comparatively mature industries.

"Public service corporations under our jurisdiction sometimes serve some customers under individual contracts, but they do not serve all customers under such contracts. While the determination of this factor is, like the other *Serv-Yu* factors, not in and of itself controlling on the issue of public service corporation status, we find that this factor weighs against finding SolarCity to be under our jurisdiction."

Page 53, Line 23

DELETE line 23 through Page 54, Line 11 and INSERT the following:

"After analyzing the *Serv-Yu* factors we find that SolarCity is not a public service corporation. ~~Under the *SWTC* language, it is not possible for us to~~ WE CANNOT determine a distinction between SolarCity's service under an SSA, under a lease, ~~or under a lease,~~ or under a cash purchase such that in the case of the SSA there is a, "disparity in bargaining power between the service provider and the utility ratepayer is such that government intervention on behalf of the ratepayer is necessary."

"SolarCity is not a business engaged in the sale of electricity. SolarCity is a business engaged in the design, installation, maintenance and financing of solar equipment. ~~The view that SolarCity is furnishing electricity via SSAs is a figment of the Federal tax code.~~

———"The fact that only a certain class of not-for-profit customers can take advantage of these otherwise unregulated services through use of the SSA arrangement does not fundamentally change SolarCity's business. SolarCity offers schools, governments and other non-profits an affordable alternative to buying solar systems. This alternative allows them to take advantage of~~, and use,~~ solar equipment without an initial outlay of capital. The schools get nothing more and nothing less from SolarCity than they would otherwise get if they purchased or utilized some other financing mechanism to acquire the solar equipment.

"Further, we cannot, in the face of a well-documented competitive RFP for services in a thriving competitive market, find that the customers of these SSAs require governmental protection. SolarCity is not a monopoly, let alone a "natural monopoly." Neither do we find that solar energy service is "indispensible" to SolarCity's customers. Hence, under the balance of the eight *Serv-Yu* factors, SolarCity's business is not clothed with the public interest sufficient to make its rates, charges and operations a matter of public concern."

Page 66, Line 15

DELETE lines 15 through Page 68, Line 17 and INSERT the following:

"B. Analysis

"As a matter of constitutional law, the question of whether SolarCity *is* a public service corporation can fairly be described as a "close call" given the broad language of Article 15, Section 2. However, as a matter of public policy, the question of whether SolarCity *should be* a public service corporation—subject to rate regulation by this Commission—is anything but a "close question." Because we do not believe that our determination of whether SolarCity is a public service corporation must preclude consideration of the public interest—indeed, Arizona courts have said that we must consider it—we have determined that SolarCity is not a public service corporation.

"Now, however, we desire to be as clear and unequivocal as we possibly can be about the public policy concerns in this case, and we invoke our constitutional discretion[fn24] in favor of finding that SolarCity is not a public service corporation. We find that in all matters potentially affecting the public interest, SolarCity is currently under adequate oversight without Commission jurisdiction. The public's interest in a safe reliable grid is adequately served through existing interconnection and operation regulations. Our

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[fn24] As duly elected corporation commissioners, we are charged with ascertaining the public interest in matters involving Article 15 of the Arizona Constitution. Accordingly, we are entitled to constitutional discretion and deference when making such findings involving the public interest. Our constitutional discretion has its origins in the principles of popular sovereignty; it helps align public policy with the public's will, as that will is expressed at the ballot box.

Interconnection Document ensures that all interconnecting distributed generation facilities meet adequate public safety and grid security requirements. If, at some future date, we learn of additional safety measures that are desirable, the Commission can modify our Interconnection Document to include those measures.

"The Registrar of Contractors provides oversight and quality control of construction practices, and the Attorney General is capable of dealing with consumer fraud concerns. Moreover, because SolarCity faces stiff competition with other solar service providers, it must provide excellent service or face the prospect of losing customers to its competitors.

"Further, the unnecessary regulation of this industry would make doing business in Arizona disproportionately difficult compared with other States where no rate regulation is present for SSAs. The record reflects that banks and insurance companies are often owners or partial owners of SSAs and that SSAs are often sold after the initial owner realizes the benefits of the tax credits and depreciation. Further, a company like SolarCity is apt to form different entities to own different SSA-funded projects. The possibility of rate regulation would likely stymie this industry as the requirement to get a CC&N for each entity, and to have banks and other financiers submit to regulation in Arizona would drive SSA providers to do business in States with lower transaction costs and greater certainty.

"Regulation under the circumstances described in this case would work against the Commission's goals of encouraging the implementation of solar and other renewable energy projects in Arizona and will particularly damage the ability of our struggling schools to reap the millions in potential savings that the solar option provides.

"Accordingly, finding SolarCity to be a public service corporation is <u>not</u> in the public interest, but directly contrary to it. SolarCity is (1) operating in a highly competitive environment AND IS NOT IN A DISPARATE POSITION OF BARGAINING POWER, (2) it has no ability to extract excessive or discriminatory profits from the public, and (3) it is not offering an essential public service to the public. As such, we fully believe that SolarCity should be guided by the "invisible hand of Adam Smith"[fn25] and not our own, despite how skilful, wise and delicate we may view our own hands to be. We want to allow the solar market to flourish, not frustrate its growth with unnecessary and legally unwarranted regulation."

Page 68, Line 18

INSERT section as follows (**The following new language is not capitalized for ease of reading**):

"**<u>VI. Guidance for Future Scenarios</u>**

[fn25] *See* ADAM SMITH, WEALTH OF NATIONS (C.J. Bullock ed., P.F. Collier & Son 1909) (1776).

"Some parties and commenters have asked us to provide a broad ruling in this case that would sweep in scenarios that are not presented to us in this case. We decline to do so. Due process requires that we not adjudicate the legal rights and obligations of entities that are not before us. Accordingly, our order in this case is limited to the facts and the parties before us.

"Nevertheless, in the interest of judicial economy and to provide additional regulatory certainty to the solar industry, we give the following guidance to entities that are offering similar services as SolarCity. For instance, what if another company offered an SSA that was identical in every way to the SSAs at issue in this case, but the customer was a for-profit entity and not a government, school, or non-profit entity? Does the tax status of the customer affect our analysis as to whether the solar services company is a public service corporation?

"We offer the following as guidance only—and anyone may seek a formal adjudication from the Commission—but we do not believe, at the present time, that the tax-status of the customer is a significant factor in the legal analysis required under Arizona law to determine whether an entity is a public service corporation. Sun Edison LLC (SunEdison) has pointed out in written comments dated June 24, 2010 to the Commission that third party financing models, such as SolarCity's SSA, are important to the commercial sector's adoption of solar energy too. We agree with the following points raised by SunEdison:

> 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.

"Additionally, what about situations where a single solar facility is serving multiple customers, or situations where multiple premises of a customer are being served from a single solar facility? Would such scenarios mean that the solar provider is acting like a public service corporation? We agree with APS that these scenarios create significant issues in the legal analysis of whether these entities are public service corporations. While we do not foreclose the possibility that solar service providers may be able to structure the arrangement in such a manner that would cause us to conclude that they are not acting as a public service corporation, we believe such scenarios would present significant legal issues. Again, any entity may seek a formal adjudication of their legal rights and obligations under a "single facility-multiple customer" scenario or a "single facility-multiple premises" scenario."

Page 70

DELETE and REPLACE Finding of Fact 15 as follows:

"The SSA is primarily a financing arrangement that allows schools, governments and other non-profit entities to take advantage of the benefits of the Federal income tax credit and grant while implementing solar at their facilities. While the school, government, or other non-profit entity could choose another method to finance the acquisition of solar equipment, those other methods would result in higher costs as a result of the failure to utilize the tax credit. Under the SSA, SolarCity designs, installs, maintains and finances solar equipment and the customer becomes the owner of all electricity the solar installation produces."

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 and REPLACE Finding of Fact 20 as follows:

"The energy from the sun's rays hit the solar panels which transform that energy into DC current. This DC current is later transformed into AC current in an inverter between the panels and the customer's electrical service entrance."

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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 Finding of Fact 23.

INSERT Finding of Fact 23 as follows:

"SOLARCITY IS NOT DEDICATING PRIVATE PROPERTY TO PUBLIC USE WHEN IT DESIGNS, INSTALLS, MAINTAINS, AND SOMETIMES FINANCES SOLAR EQUIPMENT FOR ITS CUSTOMERS."

INSERT after "public grid" in Finding of Fact 24 as follows:

", BUT THERE IS NO PUBLIC INTEREST IN CUSTOMER-SITED DISTRIBUTED ENERGY PROJECTS."

INSERT Finding of Fact 25 as follows:

"SOLARCITY IS NOT A MONOPOLY NOR DOES IT HAVE THE INTENT TO BECOME A MONOPOLY."

INSERT Finding of Fact 26 as follows:

"SOLARCITY IS NOT OFFERING ESSENTIAL SERVICES AND HAS NO OBLIGATION TO SERVE ALL POTENTIAL CUSTOMERS."

INSERT Finding of Fact 27 as follows (**renumber further FoFs accordingly**):

"THE CUSTOMERS IN THIS CASE ARE WELL INFORMED ABOUT THE AGREEMENTS THEY HAVE SIGNED WITH SOLARCITY."

DELETE and REPLACE Finding of Fact 27 as follows (**now FOF 28**):

"The Commission has adopted the Interconnection Document as the standard to govern the interconnection of solar facilities to the grid and is in the process of making Rules to further regulate interconnections and through the Interconnection Document currently and the Rules in the future, the Commission is able to protect the public safety and welfare as well as the reliability and safety of the electric grid."

DELETE and REPLACE Finding of Fact 28 as follows (**now FOF 29**):

"Electric customers rely on electricity from the public electric grid, while individual customers do not need and are not required to implement customer-sited distributed solar generation on their premises."

DELETE the words "that furnish electricity" in Finding of Fact 30 (**now FOF 31**).

DELETE Finding of Fact 31.

DELETE Finding of Fact 33.

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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:

"SolarCity is not a public service corporation and the Commission does not have jurisdiction over SolarCity when SolarCity acts pursuant to an SSA entered into between SolarCity and a school, government or non-profit entity."

DELETE and REPLACE Conclusion of Law 3 as follows:

"Under an SSA, AS DESCRIBED HEREIN, there is no furnishing of electricity by SolarCity to its customer, and even if there is a furnishing of electricity, it is incidental to the financing method by which SolarCity provides its design, installation and maintenance services. The SSA contract does not make SolarCity's actions a matter of public concern nor does it denote a public interest such that Commission regulation is necessary or desirable."

DELETE and REPLACE Conclusion of Law 4 as follows:

"Under Arizona law, we cannot determine SolarCity to be a public service corporation without an analysis of SolarCity's business operation under the eight *Serv-Yu* factors."

DELETE and REPLACE Conclusion of Law 5 as follows:

"The weight of the *Serv-Yu* factors lead to the determination that when SolarCity designs, installs, maintains and finances solar equipment for use on the premises of schools, government and non-profits AS DESCRIBED HEREIN, its activities are not clothed with a public interest and SolarCity is not acting as a public service corporation."

INSERT the word "not" after "is" and before "acting" on line 27.

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DELETE Conclusion of Law 7 and REPLACE 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 lines 7 through Page 74, Line 3 and INSERT the following:

IT IS THEREFORE ORDERED that when SolarCity Corporation enters into a Solar Services Agreement as described herein with a school, government, or non-profit entity, SPECIFICALLY LIMITED TO SUCH AN INDIVIDUAL CUSTOMER SERVING ONLY A SINGLE PREMISES OF THAT CUSTOMER, SolarCity is not acting as a public service corporation.

Conforming changes.