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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

Arizona Corporation Commission

DOCKETED

JUL 12 2010

- KRISTIN K. MAYES - Chairman
- GARY PIERCE
- PAUL NEWMAN
- SANDRA D. KENNEDY
- BOB STUMP

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IN THE MATTER OF THE APPLICATION OF SOLARCITY CORPORATION 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

DECISION NO. 71795

OPINION AND ORDER

DATES OF HEARING:

October 14, 15, 16, and 23, 2009, and November 2 and 9, 2009

PLACE OF HEARING:

Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE:

Jane L. Rodda

IN ATTENDANCE:

Kristin K. Mayes, Chairman
Paul Newman, Commissioner

APPEARANCES:

Mr. Court S. Rich and Mr. M. Ryan Hurley, ROSE LAW GROUP, PC, on behalf of SolarCity Corporation;

Mr. Steve Wene, MOYES SELLERS & SIMS, LTD, on behalf of Sun Run, Inc;

Mr. Bradley S. Carroll, SNELL & WILMER, LLP, on behalf of Sulphur Springs Valley Electric Cooperative;

Mr. Timothy Hogan on behalf of the ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST;

Mr. Lawrence V. Robertson, Jr. on behalf of SunPower Corporation;

Mr. Kenneth C. Sundlof, Jr. JENNINGS, STROUSS & SALMON, PLC, and Robert R. Taylor, Salt River Project Law Department, on behalf of Salt River Project;

1 Ms. Deborah R. Scott and Ms. Linda Dayish
2 Benally, PINNACLE WEST CAPITAL
CORPORATION LAW DEPARTMENT, on
3 behalf of Arizona Public Service Company;

4 Mr. Michael Patten, ROSHKA DeWULF &
5 PATTEN, PLC, on behalf of Tucson Electric
6 Power Company and UNS Electric, Inc.;

7 Mr. C. Webb Crockett, FENNEMORE CRAIG,
8 P.C., on behalf of Freeport-McMoRan Copper &
9 Gold, Inc. and Arizonans for Electric Choice and
10 Competition;

11 Mr. Daniel Pozefsky, Chief Counsel, on behalf
12 of the RESIDENTIAL UTILITY CONSUMER
13 OFFICE; and

14 Ms. Janet Wagner, Assistant Chief Counsel, and
15 Ms. Maureen Scott, Mr. Charles Hains, and Mr.
16 Wesley Van Cleve, Staff Attorneys, Legal
17 Division on behalf of the Utilities Division of the
18 Arizona Corporation Commission.
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1 **BY THE COMMISSION:**

2 **I. Background and Procedural History**

3 On July 2, 2009, SolarCity Corporation (“SolarCity” or “Company”) filed an Application with
4 the Arizona Corporation Commission (“Commission”) seeking a determination that SolarCity is not
5 acting as a public service corporation pursuant to Article 15, Section 2 of the Arizona Constitution
6 when it provides solar services to Arizona schools, governments, and non-profit entities by means of
7 a Solar Services Agreement (“SSA”).

8 The Application requested expedited consideration so that two specific SSAs with the
9 Scottsdale Unified School District could be finalized, and the solar facilities installed, before the end
10 of 2009, to take advantage of expiring tax incentives.

11 By Procedural Order dated July 10, 2009, a Procedural Conference was scheduled to
12 commence on July 16, 2009, for the purpose of discussing a schedule and establishing other
13 procedures for processing the Application. From July 14 through July 17, 2009, requests to intervene
14 were filed by the Residential Utility Consumer Office (“RUCO”), Salt River Project (“SRP”),
15 Arizona Public Service Company (“APS”), Tucson Electric Power Company (“TEP”) and UNS
16 Electric, Inc. (“UNSE”), Navopache Electric Cooperative (“Navopache”), Freeport-McMoRan
17 Copper and Gold Inc. (“Freeport-McMoRan”) and Arizonans for Electric Choice and Competition
18 (“AECC”), and Mohave Electric Cooperative (“MEC”).

19 At the July 16, 2009, Procedural Conference, appearances were entered through counsel for
20 SolarCity, RUCO, APS, SRP, TEP, UNSE, Navopache, MEC, Freeport McMoRan, AECC and the
21 Commission’s Utilities Division (“Staff”). There was general agreement among those present that a
22 Commission determination on the issue of whether an entity is a public service corporation is a
23 constitutional question and would require application of the factors set forth in *Natural Gas Serv. Co.*
24 *v. Serv-Yu Cooperative*¹ (“*Serv-Yu*”), to the particular facts of each case in the context an evidentiary
25 hearing. In order to move forward with a determination on the two Scottsdale Unified School District
26 SSAs, and allow for an evidentiary hearing, Staff proposed a two track process: in Track One, the
27

28 ¹ 70 Ariz. 235, 219 P.2d 324 (1950).

1 Commission would evaluate the SSAs under the criteria used to analyze special contracts; and in
 2 Track Two, the Commission would evaluate the Application as a whole under the criteria applying to
 3 an adjudication. The parties were in general agreement with the approach, and it was adopted in a
 4 Procedural Order dated July 22, 2009. The July 22, 2009, Procedural Order established the
 5 procedures for moving forward with consideration of the two SSAs, set the adjudication hearing to
 6 commence on October 14, 2009, and granted intervention to RUCO, SRP, APS, TEP, UNSE,
 7 Navopache, Freeport McMoRan, AECC and MEC.

8 By Procedural Order dated August 12, 2009, Sulphur Springs Valley Electric Cooperative,
 9 Inc. ("SSVEC"), Western Resource Advocates ("WRA"), SunPower Corporation ("SunPower"),
 10 SunRun, Inc. ("SunRun"), and a number of School Districts² were granted intervention.

11 In Track One, the two Scottsdale Unified School District SSAs were approved in Decision
 12 No. 71277 (September 17, 2009).³

13 On August 24, 2009, SolarCity filed direct testimony from Lyndon Rive, SolarCity's CEO;
 14 Ben Tarbell, its Director of Products; and David Peterson, the Assistant Superintendent for
 15 Operations for the Scottsdale Unified School District.

16 On September 30, 2009, WRA filed the testimony of David Berry, its Senior Policy Advisor;
 17 RUCO filed the testimony of its Director, Jodi Jerich; APS filed the testimony of Barbara Lockwood,
 18 its Director of Renewable Energy; SunPower filed the testimony of H.M. Irvin III, Managing Director
 19 of Structured Finance, and Kevin Fox, partner in the law firm of Keyes & Fox, LLP, who testified as
 20 a representative of the Interstate Renewable Energy Council ("IREC"); and Staff filed the testimony
 21 of Steve Irvine.

22 On October 13, 2009, SolarCity filed the additional testimony of Mr. Rive and Mr. Peterson.

23 On October 14, 2009, the Commission began the evidentiary hearing in Track Two. The
 24

25 ² Agua Fria Union High School District; Chandler Unified School District; Casa Grande Elementary School District;
 26 Continental Elementary School District; Dysart Unified School District; Fountain Hills Unified School District; Ft.
 27 Thomas Unified School District; Gilbert Unified School District; Miami Unified School District; Nadaburg Unified
 28 School District; Payson Unified School District; Pendergast Elementary School District; Pine-Strawberry Elementary
 School District; Riverside Elementary School District; Roosevelt Elementary School District; Round Valley Unified
 School District; Tolleson Elementary School District and Union Elementary School District.

³ On December 23, 2009, in Decision No. 71443, the Commission approved a modification of the range of rates in the
 contract.

1 hearing proceeded over six days, and concluded on November 9, 2009.

2 On December 14, 2009, SunPower filed its Initial Brief.⁴

3 On December 15, 2009, SolarCity, Staff, RUCO,⁵ AECC, TEP and UNSE, and WRA filed
4 Initial Closing Briefs.

5 On January 15, 2010, SolarCity,⁶ Staff,⁷ RUCO, SunPower, WRA, SRP and TEP and UNSE
6 filed Reply Briefs. The same date, SSVEC filed Reply Comments indicating it supports the positions
7 set forth in the Initial Closing Brief of TEP and UNSE, and SunRun filed a Joinder in SunPower's
8 Reply Brief.

9 **II. The Application: SolarCity and SSAs**

10 SolarCity is a full-service solar power company that provides design, financing, installation,
11 and monitoring services to residential and commercial customers.⁸ SolarCity both sells and leases its
12 products to its customers. SolarCity provides customers with "grid-tied" photovoltaic ("PV") solar
13 systems.⁹ The systems provide only a portion of the customer's overall electricity needs, and the
14 customer must remain connected to the utility grid.

15 SolarCity utilizes SSAs to provide its services to school districts, governmental entities and
16 other non-profit entities.¹⁰ An SSA is a contractual arrangement that allows SolarCity and a third-
17 party investor (usually an insurance company or bank)¹¹ to provide a solar PV system on the premises
18 of a school, governmental entity or non-profit with no up-front expense to the school, governmental
19 entity or non-profit.¹² Because they do not pay taxes, the schools and governmental and non-profit
20 entities are not able to make use of available federal tax credits. The SSA structure allows SolarCity
21 and its investor(s) to capitalize on available federal tax incentives. Under the terms of the SSAs, the
22 customer gives SolarCity access to its property to install the solar panel system, and SolarCity
23 finances, designs, installs, owns, operates and maintains the system. The customer has no up-front

24 ⁴ On December 15, 2009, SunRun filed a Joinder in SunPower's Initial Brief.

25 ⁵ On December 29, 2009, RUCO filed a Notice of Errata correcting a typographical error in its Initial Brief.

26 ⁶ On January 19, 2010, SolarCity filed a Notice of Errata and Refiling of Reply Brief to correct formatting errors.

27 ⁷ On January 19, 2010, Staff filed a Notice of Filing Errata and corrected several typographical errors.

28 ⁸ Ex A-4, Rive testimony at Q 3.

⁹ *Id.* at Q 5.

¹⁰ SolarCity also provides services to commercial and residential customers pursuant to leases or through cash sales.

¹¹ Tr. at 104.

¹² SolarCity refers to the entity contracting for its services as the "customer."

1 costs and under the terms of the SSA, becomes the owner of all electricity produced by the system.
 2 SolarCity retains ownership and “use” of the system as defined in the federal tax code, which allows
 3 SolarCity and the investors to capitalize on the available tax incentives that the customer is not able to
 4 utilize because of its governmental or non-profit status. The customer pays SolarCity for the design,
 5 installation and maintenance of the PV system based on the amount of electricity produced.¹³

6 SolarCity structured its SSAs in order to comply with federal tax code requirements.¹⁴ Mr.
 7 Rive testified that under federal tax law, if a non-profit entity is the lessee or owner of a solar system,
 8 the non-profit entity is considered to be the “user” of the system, and the internal Revenue service
 9 (“IRS”) will not allow tax credits to be taken for that system.¹⁵ However, Mr. Rive testified “the IRS
 10 has stated that if the non-profit is simply paying a third-party owner a fee based on the amount of
 11 power produced from the system (i.e. an SSA), then the third party owner will be considered the
 12 ‘user’ and thus can take advantage of available tax benefits.”¹⁶

13 At the time of the hearing, the available federal tax incentives for solar systems included a 30
 14 percent investment tax credit that runs through December 31, 2016, and is then reduced to 10 percent;
 15 a 50 percent first year bonus depreciation as part of the American Recovery and Renewal Act of
 16 2009, which was set to expire December 31, 2009; and modified Accelerated Cost Recovery System
 17 depreciation, which had no scheduled expiration.¹⁷

18 Pursuant to the SSA, all Renewable Energy Credits (“RECs”) are transferred from SolarCity
 19 and/or the customer to the host utility to allow it to comply with the utility’s renewable energy
 20 mandates, and in exchange, the utility pays SolarCity any applicable incentive rebate payments.¹⁸

21 An SSA is similar to a purchased power agreement (“PPA”) in that the system is owned by a
 22 third-party investor and the customer pays on a per kilowatt hour (“kWh”) basis. According to Mr.
 23 Rive, the SSA is different, however, in that it is structured so that the electricity belongs to the
 24 customer.¹⁹ SSAs and PPAs both differ from solar facilities leases in that under a lease, the

25 ¹³ Ex A-4 at Q 9.

26 ¹⁴ *Id.* at Q 14.

27 ¹⁵ *Id.*

28 ¹⁶ *Id.*; *citing* Solar Energy Industries Association Tax Manual § 1.1.3, and IRS Code § 50(b)(3) [26 U.S.C. § 50(b)(3)].

¹⁷ *Id.* at Q 12.

¹⁸ *Id.* at Q 21.

¹⁹ Tr. at 230-31.

1 customer/lessee pays a fixed monthly payment regardless of the energy produced by the system.²⁰

2 Mr. Rive testified that 80 percent of the commercial and non-profit solar installations are third-party
3 financed, either through a PPA or SSA.²¹

4 In this Application, SolarCity is asking the Commission to determine that SolarCity is not
5 acting as a public service corporation under the Arizona Constitution when it uses an SSA to design,
6 install, maintain, own and operate distributed generation solar power systems that produce electricity
7 for schools, governmental entities, or non-profits.

8 III. What is a Public Service Corporation?

9 A. "Public Service Corporation" is Defined by the Arizona Constitution

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

11 All corporations other than municipal engaged in furnishing gas, oil, or
12 electricity for light, fuel, or power; or in furnishing water for irrigation,
13 fire protection, or other public purposes; or in furnishing, for profit, hot
14 or cold air or steam for heating or cooling purposes; or engaged in
15 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)

17 B. Arizona Courts Have Created an Additional Set of Factors ("Serv-Yu Analysis")

18 Since 1950 some Arizona courts have used an eight-factor analysis in determining whether a
19 particular business qualifies as a public service corporation.²² The Arizona Court of Appeals recently
20 stated in *Southwest Transmission Cooperative, Inc. v. ACC*, ("SWTC"):

21 Merely meeting the textual definition does not establish an entity as a
22 "public service corporation." To be a "public service corporation" an
23 entity's "business and activities must be such as to make its rates, charges
24 and methods of operation, a matter of public concern, clothed with a
25 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."²³

26 ²⁰ Tr. at 229.

27 ²¹ Tr. at 110.

28 ²² The eight-factor test was first utilized by the Arizona Supreme Court in *Serv-Yu*.

²³ *Southwest Transmission Coop, Inc. v. Ariz. Corp. Comm'n*, 213 Ariz. 427, 431-32, 142 P.3d 1240, 1244-45 (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) ("Trico").

1 The *SWTC* court stated that the purposes of regulation are to preserve services indispensable to
 2 the population and ensure adequate service at fair rates where the disparity in bargaining power
 3 between the service provider and the ratepayer is such that governmental intervention is necessary.²⁴
 4 The *SWTC* court acknowledged that in *Serv-Yu* “the Arizona Supreme Court articulated eight factors
 5 to be considered in identifying those corporations ‘clothed with a public interest’ and subject to
 6 regulation because they are ‘indispensable to large segments of our population.’”²⁵ The eight factors
 7 are:

- 8 1. What the corporation actually does.
- 9 2. A dedication to public use.
- 10 3. Articles of incorporation, authorization, and purposes.
- 11 4. Dealing with the service of a commodity in which the public has been generally held to
 12 have an interest.
- 13 5. Monopolizing or intending to monopolize the territory with a public service commodity.
- 14 6. Acceptance of substantially all requests for service.
- 15 7. Service under contracts and reserving the right to discriminate is not always controlling.
- 16 8. Actual or potential competition with other corporations whose business is clothed with
 17 public interest.²⁶

18 The courts have determined that the *Serv-Yu* factors are guidelines for analysis, and that all
 19 eight factors are not required to conclude that a company is a public service corporation.²⁷

20 C. Positions of the Parties

21 1. SolarCity’s Position

22 SolarCity argues (1) that it is not a public service corporation under the Arizona Constitution
 23 because it does not “furnish” electricity under the SSA arrangement; and (2) that even if it is found to
 24 be “furnishing” electricity, it is not a public service corporation under the *Serv-Yu* factors. SolarCity
 25 asserts that it is uncontested in Arizona that an entity is free to generate its own power on its own

26 ²⁴ *Id.* 213 Ariz. at 432, 142 P.3d at 1245.

27 ²⁵ *Id.* (citing *Southwest Gas Corp. v. Ariz. Corp. Comm’n*, 169 Ariz. 279, 286, 818 P.2d 714, 721) (Ariz. Ct. App. 1991)
 (“*Sw Gas*”).

28 ²⁶ *Id.*

²⁷ *Id.* (citing *Sw Gas*, 169 Ariz. at 286, 818 P.2d at 721).

1 premises for its own consumption without subjecting itself to Commission jurisdiction. Likewise,
 2 SolarCity argues that no individual or entity in Arizona is compelled to utilize distributed generation.
 3 SolarCity argues that the fact some end users have elected to finance the generation of this electricity
 4 by an SSA or lease, or otherwise, does not change the fundamental character of the activity.

5 SolarCity asserts that those who argue for finding that its activities with SSAs create a public
 6 service corporation mischaracterize the “essential” nature of solar distributed generation. SolarCity
 7 argues that the Arizona Supreme Court established the guiding principle in defining a public service
 8 corporation in *Petrolane-Arizona Gas Service v. Ariz. Corp Comm’n* (“*Petrolane*”) in which it stated:

9 [T]he purposes of regulation are to preserve and promote those services
 10 which are indispensable to large segments of our population, and to
 11 prevent excessive and discriminatory rates and inferior service where the
 12 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.²⁸

13 In addition, SolarCity asserts that Arizona courts have held that:

14 Free enterprise and competition is the general rule The public has
 15 some interest in all business establishments but that interest must be of
 16 such a nature that competition might lead to abuses detrimental to the
 public interest.²⁹

17 SolarCity argues that applying the facts of this case to the *Petrolane* standard shows that solar
 18 distributed generation is not indispensable to anyone, much less a large segment of the population;
 19 that there is no disparity in bargaining power; and that there is no evidence to suggest there has been
 20 any abuse of the public under an SSA or that this industry presents more potential for abuse than any
 21 other.³⁰

22 2. RUCO’s Position

23 RUCO agrees with SolarCity that the Company is not “furnishing” electricity under the
 24 constitutional definition and that furthermore, that the analysis using the *Serv-Yu* factors weighs in
 25 favor of finding it is not a public service corporation. RUCO believes that this Decision will not only
 26 affect the provision of service under SSAs, but also commercial and residential lease agreements.

27 ²⁸ 119 Ariz. 257, 259, 580 P.2d 718, 720 (1978) (quoting *Re Geldbach Petroleum Co.*, 56 PUR3d 207 (Mo. 1964)).

28 ²⁹ *General Alarm v. Underdown*, 76 Ariz. 235, 238-39, 262 P.2d 671, 672-73 (1953) (“*General Alarm*”).

³⁰ SolarCity Reply Brief at 21-24.

1 According to RUCO, although leases and SSAs are technically distinguishable, the legal criteria that
2 defines a public service corporation is the same under either financing vehicle.

3 **3. SunPower's³¹ and SunRun's³² Positions**

4 SunPower asserts that Arizona public policy favors free enterprise and competition in the
5 absence of a demonstrated need for regulation.³³ Thus, SunPower argues, the burden of
6 demonstrating a need to regulate SolarCity falls upon those who advocate for an exception to the
7 general rule favoring free enterprise and competition and who seek an extension of the power and
8 scope of the Commission's jurisdiction to which the Arizona Supreme Court is generally adverse.

9 SunPower believes that the evidentiary record in this proceeding warrants a determination that
10 there is no need to regulate SolarCity as a public service corporation and, further, that subjecting
11 SolarCity to regulation could have a substantial negative impact and chilling effect upon the
12 willingness of other distributed generation service providers and third-party financing entities to
13 commit their personnel and financial resources to do business in Arizona. SunPower claims there are
14 many other states in which providers can offer their solar financing service and products without the
15 prospect and burden of regulation. SunPower asserts that a functional and meaningful application of
16 the *Serv-Yu* factors to the evidentiary record indicates there is no need to regulate SolarCity.

17 **4. WRA's Position**

18 WRA supports SolarCity's application and argues that the key question in the determination
19 of whether a particular corporation is a public service corporation is whether the public interest
20 demands that the corporation's prices be regulated.³⁴ WRA notes that the most significant
21 consequence of being a public service corporation is found in Article 15, section 3, of the Arizona
22 Constitution which requires the Commission to prescribe just and reasonable rates and charges.

23 ³¹ SunPower manufactures photovoltaic solar energy cells and modules that are used in residential, commercial and utility
24 settings worldwide. SunPower sells equipment directly to end users through dealers and to third-party owners who invest
25 in large projects supported by power purchase agreements, under which the third-party owners (or investors) own the
26 equipment for an extended period of time through outright purchase, or partnership or lease. See Ex-SunPower-1 at 1.

27 ³² SunRun is a retail supplier of residential solar power systems. See SunRun's Motion to Intervene (filed August 7, 2009).

28 ³³ "Free enterprise and competition is the general rule. Governmental control and legalized monopolies are the exception. . . Such invasion of private right cannot be allowed by implication or strained construction . . ." *Arizona Corp. Com'n v Nicolson*, 108 Ariz. 317, 321, 497 P.2d 815, 819 (1972) ("*Nicholson*") (quoting *General Alarm*, 76 Ariz. at 238, 262 P.2d at 672-73).

³⁴ *General Alarm*, 76 Ariz. at 238, 262 P.2d at 672 ("To be a public corporation, its business and activities must be such as to make its rates, charges, and methods of operation a matter of public concern.")

1 WRA submits that there is no more intrusive power than the ability of government to establish the
2 prices that can be charged by a company for its products or services.³⁵

3 WRA believes it is important to note that no party to this proceeding cited the need for price
4 regulation as a reason to regulate SolarCity as a public service corporation. WRA asserts that the light
5 handed regulation recommended by Staff would include price regulation based on a range so broad
6 that virtually any SSA price would fall within the prescribed range, which eliminates the legal
7 rationale for regulating SolarCity as a public service corporation.

8 WRA notes that under the *Serv-Yu* analysis there is no requirement to find all eight factors to
9 conclude that a company is or is not a public service corporation, and WRA focuses only on those
10 factors it believes are important to the determination: dedication to public use; dealing with a
11 commodity in which the public has been generally held to have an interest; monopolizing or
12 intending to monopolize the territory; and acceptance of substantially all requests for service. WRA
13 believes the other *Serv-Yu* factors are less important and not determinative in this case.

14 **5. AECC's Position**

15 AECC is a consortium of electricity users in Arizona. AECC believes it is important for its
16 members to understand how entities who offer customers alternative forms of energy, such as
17 distributed generation, fit into the larger regulatory framework of electric restructuring and how the
18 Commission intends to implement its Renewable Energy Standard ("RES") with respect to these
19 entities. AECC states that regulatory certainty is important for consumers as well as electric
20 providers, in order to foster the type of electric industry that will best serve the public interest. AECC
21 concludes that the Commission should grant the relief requested by SolarCity in its application by
22 determining that SolarCity is not a public service corporation.³⁶

23 AECC does not reach a conclusion on the question of whether SolarCity's SSA meets the
24 definition of "furnishing" electricity under the Constitution, but does not believe that the factors set
25 forth in *Serv-Yu* have been met to such an extent that SolarCity should be subject to Commission
26 regulation. AECC believes that regulation will have a negative impact on the emerging solar industry

27 _____
28 ³⁵ WRA Brief at 2.

³⁶ AECC Brief at 9.

1 in Arizona as expressed by SolarCity's and SunPower's witnesses.³⁷ AECC asserts that in
 2 recommending its "regulation lite" approach to solar providers such as SolarCity, Staff did not
 3 address the chilling effect and detrimental impact of Commission regulation.³⁸

4 **6. Staff's Position**

5 Staff notes that all parties in this proceeding share the common policy objective of promoting
 6 the development of solar energy in Arizona. Staff believes that the legal determination of whether
 7 SolarCity is a public service corporation should not be driven by a fear that even light regulation
 8 would thwart this goal.

9 Staff believes that SolarCity is acting as a public service corporation when it provides service
 10 to schools, non-profit organizations and governmental entities pursuant to an SSA. Staff believes that
 11 SSAs are primarily contracts for the sale of electricity, and not merely financing arrangements.
 12 Furthermore, Staff believes that although SolarCity currently focuses on schools, non-profit
 13 organizations and governmental entities, the SSA or PPA model may be used for residential
 14 installations in the near future.³⁹ In Staff's view, electricity is an essential commodity whether
 15 provided as part of a distributed generation model or as part of a more traditional model.

16 In addition, Staff argues that the mere presence of a competitive market does not determine
 17 whether an entity is a public service corporation. Staff notes that the Commission currently regulates
 18 the provision of competitive telecommunications services in a streamlined manner and Staff
 19 recommends a streamlined form of regulation in this case. Staff suggests that "light regulation" could
 20 be something as simple as registration (a streamlined Certificate of Convenience and Necessity
 21 ("CC&N")), the filing of the SSAs or PPAs with the Commission, the filing of annual reports, and the
 22 ongoing availability of the Commission's complaint processes. Staff insists that a light form of
 23 regulation is all that is necessary and will not deter investment in the State.⁴⁰

24 **7. TEP's and UNSE's Position**

25 TEP and UNSE assert that the law dictates that SolarCity be deemed a public service
 26

27 ³⁷ Ex SunPower-1 at 6-7 and Ex SunPower-2 at 7-8.

³⁸ AECC Brief at 5-7.

³⁹ Staff Initial Brief at 2.

28 ⁴⁰ Staff Reply Brief at 2.

1 corporation subject to Commission jurisdiction and regulatory oversight. TEP and UNSE believe that
 2 as providers such as SolarCity expand their presence in Arizona, an appropriate level of Commission
 3 oversight is in the public interest to ensure proper levels of service quality, consumer protection,
 4 dispute resolution and the coordination of important Commission policies.⁴¹ TEP and UNSE argue
 5 that if a company is a public service corporation, the Commission has constitutional and statutory
 6 obligations regarding oversight which it cannot ignore.⁴²

7 Further, TEP and UNSE assert that by making the determination now that SolarCity is a
 8 public service corporation, the Commission will provide certainty to SolarCity and the distributed
 9 generation industry that they are subject to Commission jurisdiction, which will provide all parties the
 10 opportunity to work on appropriate rules and standards to protect Arizona customers.

11 8. SRP's Position

12 SRP believes that the stated activities of SolarCity fall squarely within the constitutional
 13 definition of "public service corporation." SRP claims that the framers of the Arizona Constitution
 14 gave the Commission regulatory authority over all corporations, but singled out corporations
 15 providing essential services, such as transportation, electricity and water for more detailed treatment.
 16 According to SRP, it is the nature of the service provided, not the structure of the business, that
 17 determines Commission oversight, and Commission authority was never intended to apply only to
 18 monopoly providers. SRP states that SolarCity provides one of the essential services that subjects a
 19 business to the provisions of Article 15 of the Constitution and that a review of the case law shows
 20 that the courts have exempted from regulation only those businesses that merely incidentally provide
 21 the essential services. SRP cautions that a decision that sellers of solar electricity are not public
 22 service corporations could have collateral and unintended consequences.

23 9. APS' Position

24 APS is a public service corporation providing electric service in parts of Arizona. APS states
 25 that it intervened in this matter because this is a case of first impression with significant policy
 26

27 ⁴¹ TEP/UNSE Reply Brief at 5.

28 ⁴² TEP and UNSE cite *Phelps Dodge Corp. v. Arizona Elec Power Corp., Inc.*, 207 Ariz. 95,107, 83 P.3d 573, 585 (Ariz Ct. App. 2004) ("*Phelps Dodge*") (the Commission cannot abdicate its responsibility to ensure a public service corporation is charging just and reasonable rates wholly to the market).

1 implications, and that APS takes no position regarding whether SolarCity should be deemed a public
2 service corporation. However, APS advocates that should SolarCity's business model be expanded so
3 that it supplies electricity to multiple customers from a single facility (such as a master-planned
4 community with a solar substation or a shopping center that sells electricity to multiple commercial
5 tenants) SolarCity would likely be a public service corporation. Thus, APS urges that if the
6 Commission determines that SolarCity is not a public service corporation, such finding should be
7 restricted to apply only to a business model that involves a solar installation serving a single
8 customer. APS would not object if the Commission were to conclude that such a single-customer
9 business model does not result in status as a "public service corporation."

10 APS states that when the Commission adopted the Renewable Energy Standard and Tariff
11 ("REST") Rules,⁴³ the Commission found that renewable energy is in the public interest. According
12 to APS, the REST Rules adopt a comprehensive distributed energy requirement that clearly indicates
13 that renewable facilities located at a customer's premises are a fundamental component of the
14 Commission's vision.⁴⁴ APS states that the SSAs discussed in this docket would facilitate increased
15 use of distributed energy, which would provide an additional means for jurisdictional electric utilities
16 to meet the distributed renewable energy requirements of the REST Rules. "APS recognizes that
17 solar service providers, such as SolarCity, provide customers with options that allow for the broader
18 deployment of renewable technologies and considers solar providers as partners in providing solar
19 energy alternatives for customers."⁴⁵ APS states that based on requests for incentives pursuant to
20 APS' distributed energy programs, APS believes that many non-residential customers intend to use
21 an SSA, or something similar, when installing solar systems.⁴⁶

22 APS believes that electric customers have a right to install renewable energy facilities on their
23 premises to offset the amount of energy they need to procure from their electric provider, just as an
24 individual might have the right to drill a well on his or her property for water. APS believes that if
25 SolarCity were to provide electricity to multiple customers from a single facility, it could be

26 ⁴³ A.A.C. R14-2-1801 through 1816.

27 ⁴⁴ Pursuant to A.A.C. R14-2-1805, by 2012, 30 percent of a utility's Annual Renewable Energy Requirement must be
comprised of renewable distributed energy applications.

28 ⁴⁵ APS Initial Brief at 3 (citing Tr. at 644 and 680).

⁴⁶ Tr. at 640-41.

1 furnishing electricity and dedicating its facilities to the public use, making it likely that it would be a
 2 public service corporation under the literal and textual definition of “furnishing,” which APS notes
 3 means “to provide or supply with what is needed, useful or desirable,” and which connotes a transfer
 4 of possession.⁴⁷ APS believes that providing electricity to multiple customers located at other sites
 5 would likely involve the use of public infrastructure and would weigh in a finding of dedication to the
 6 public use.⁴⁸

7 IV. Is SolarCity a Public Service Corporation?

8 **A. Is SolarCity “Furnishing Electricity” Under Arizona Constitution Article 15, § 2?**

9 **1. Parties’ Arguments**

10 **a. SolarCity and RUCO**

11 SolarCity and RUCO argue that when SolarCity provides its services to schools,
 12 governmental entities, or non-profits pursuant to an SSA, it is not “furnishing” electricity under
 13 Article 15, Section 2 of the Arizona Constitution.

14 SolarCity claims that it provides design, installation, maintenance and financing services to its
 15 customers and that it does not “furnish” electricity to anyone.⁴⁹ The Company relies on the
 16 conclusion of the Arizona Supreme Court in *Williams*, in which the Court concluded that the concept
 17 of “furnishing” under the Arizona Constitution “connotes a transfer of possession.”⁵⁰ The Company
 18 points to the explicit provision in the SSA that the “purchaser [the school] will take title to all electric
 19 energy that the System generates from the moment the System produces such energy”,⁵¹ and to
 20 testimony indicating that SolarCity cannot prevent the electricity from flowing to the school without
 21 turning off the system and cannot divert the electricity elsewhere.⁵² Thus, SolarCity argues, from the
 22 moment of its creation, the electricity is in the sole legal possession of the school district, and
 23 SolarCity never takes legal possession or ownership of the electricity. SolarCity asserts that Staff’s
 24 position to the contrary ignores the concept that ownership and possession of the tools used to create
 25

26 ⁴⁷ Citing *Williams v. Pipe Trades Industry Program of Arizona*, 100 Ariz 14, 20, 409 P.2d 720, 724 (1996) (“*Williams*”).

⁴⁸ APS Initial Brief at 6.

⁴⁹ Tr. at 102.

⁵⁰ *Williams*, 100 Ariz. at 20, 409 P.2d at 724.

⁵¹ Ex A-1 Exhibit 7, ¶ 4(4)(a) of Exhibit B.

⁵² Tr. at 255.

1 or mold something does not translate into ownership and control of the product of the tools.⁵³

2 RUCO agrees with SolarCity that when it utilizes an SSA, SolarCity does not meet the textual
3 definition of a public service corporation under the Arizona Constitution because it is not
4 “furnishing” electricity, but is providing its customers with the financing, design, installation,
5 operation and maintenance of a solar panel system on the customer’s property. RUCO asserts that
6 there is a general presumption that a business activity is not subject to regulation by the
7 Commission.⁵⁴ RUCO believes that under the terms of the SSA, the electricity is never owned by
8 SolarCity, is not sold to the customer, and is owned by the customer from its inception. RUCO
9 believes that the SSA is simply a financing mechanism that allows the customer to take advantage of
10 significant tax and depreciation incentives without experiencing prohibitive up-front costs. RUCO
11 asserts that no provision in the IRS rules, Commission rules, or the SSA contract states that an SSA is
12 for the purpose “furnishing” electricity, but rather, the SSA specifically provides it is for the finance,
13 design, development and operation of a solar panel system.⁵⁵ RUCO argues that establishing who has
14 title and when, is an important part of the SSA, and there is no evidence in this case showing an intent
15 to defeat Commission jurisdiction in drafting the SSA.

16 RUCO argues that those who take the position that SSAs are not financing agreements on the
17 grounds that they do not include the payment of principal and interest with the goal of eventual
18 ownership use faulty logic; RUCO cites the example of a car lease, which does not have to result in
19 ownership but is undisputedly considered a financing arrangement. In this case, RUCO claims, it is
20 the transfer of the environmental attributes and incentives to the third-party installer that allows the
21 non-profit end users to finance the installation of the system.

22 In addition, SolarCity argues that it cannot be adjudicated a public service corporation
23 because any “furnishing” of electricity is merely incidental to its performance of its service and
24 financing function. SolarCity asserts that Arizona courts have found that a company “may
25 incidentally provide a public commodity is not sufficient to subject it to regulation, it must be in the

26 _____
27 ⁵³ SolarCity Reply Brief at 4.

28 ⁵⁴ *Arizona Corp. Commission v. Continental Sec. Guards*, 103 Ariz. 410, 418, 443 P.2d 406, 414 (1968) (“*Continental Sec. Guards*”).

⁵⁵ Ex A-1, Exhibit 7, ¶ 2 of Exhibit B.

1 business of providing a public service.”⁵⁶ According to SolarCity, the record reflects that the
 2 monetization of the tax credit is specialized, unique and complex, and outweighs the incidental
 3 provision of electricity.

4 **b. Staff, SRP and TEP and UNSE**

5 Staff, SRP and TEP and UNSE argue that SolarCity meets the Constitutional definition when
 6 it employs an SSA to provide electric service to schools, governmental entities or non-profits.

7 Staff argues that by owning and operating electric generating equipment and selling the
 8 electricity generated by that equipment, SolarCity qualifies as a public service corporation under the
 9 plain language of the Arizona Constitution. Staff asserts that the record is clear that SolarCity’s
 10 operations generate electricity, as the Company’s own witness, Ben Tarbell testified:

11 Once installed on the roof, the system generates electricity when sunlight
 12 illuminates the solar modules. The illuminated solar modules produce
 13 DC electricity and are wired together in series/parallel strings to produce
 14 the required voltage and current characteristics for the inverters. The
 15 inverters take DC electricity from the solar modules and convert it to AC
 electricity that matches the voltage and phase of the electricity grid. The
 AC output of the inverter interconnects through the main service panel of
 the building on the customer side of the meter.⁵⁷

16 Staff notes that pursuant to the SSA, SolarCity owns, designs, operates and maintains each
 17 system. Staff asserts that the electricity generated by SolarCity’s system is no different from the
 18 electricity provided by APS or any other electricity distribution company in the State.⁵⁸

19 Staff believes that regardless of what the SSA states about the customer owning all electricity
 20 the moment it is produced, there is clearly a transfer of possession. According to Staff, because
 21 SolarCity owns the solar panels that produce the electricity, at some point the electricity contained in
 22 SolarCity’s equipment is transferred to the customer. Staff asserts that no matter what the SSA says,
 23 the customer does not actually receive possession of the energy until the AC power travels from the
 24 inverter (which is owned by the Company) to the electrical cabinet or breaker box (the “electrical
 25 panel” or “customer’s load center,” which is owned by the customer).⁵⁹ Staff believes that even if
 26 one could agree that SolarCity does not own the electricity, it has custody or possession of the

27 ⁵⁶SolarCity cites *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818.

⁵⁷ Ex A-4 at 1.

⁵⁸ Ex S-1 at 31-32.

⁵⁹ Ex S-1 at 5,7; Ex A-4 at 3; Tr. at 343-46.

1 electricity until it passes from the inverter to the customer's load panel.

2 Staff notes that Webster's Ninth New Collegiate Dictionary defines 'furnishing' as "to
3 provide with what is needed" or "the provision of any or all essentials for performing a function."
4 Staff also cites the decision in *Williams*, which concluded that "furnishing" connotes a transfer of
5 possession. In the *Williams* case, the court determined that the company did not "furnish" water
6 under the meaning of Article 15, Section 2, because the water at issue was the conduit for supplying
7 heat, but there was no transfer of possession of the water itself.⁶⁰ Staff notes that in *SWTC*, the
8 company, an electric transmission company, argued that when it transmitted electricity from the
9 generator to the distributor, there was no transfer of possession because *SWTC* was only acting as a
10 conduit. Staff claims that the *SWTC* court rejected the company's argument because unlike in
11 *Williams*, the commodity being transferred or transmitted was electricity.⁶¹ Staff argues that based on
12 the findings of *SWTC*, there can be little dispute that the generation of electricity is an essential
13 service. Staff dismisses the argument that "solar electricity" is not essential on the grounds that it is
14 not part of the grid, because the electricity produced by SolarCity displaces load provided by
15 incumbent providers.⁶² Staff argues the current situation is no different than in *SWTC* because
16 SolarCity generates electricity and ultimately the possession of the electricity produced is transferred
17 to the end-user customer.

18 Furthermore, Staff argues the suggestion that there is no transfer of possession of the
19 electricity from SolarCity to the school district is inconsistent with the provisions of the contract
20 itself. Staff cites provisions in the SSA that refer to the purchase of electricity and concludes that
21 taken as a whole, the SSA contract is for the sale of electricity.⁶³

22 Staff asserts that it is clear that SolarCity included the provisions concerning possession of the
23 electricity in its contracts in order to defeat Commission jurisdiction. Staff argues that if the

24 ⁶⁰See *Williams*, 100 Ariz. at 20-21, 409 p.2d at 724 (In *Williams* the company applied for a CC&N to furnish hot or cold
25 circulating chemicals, gases or water for heating or cooling purposes. See also *SWTC*, 213 Ariz. at 431, 142 P.3d at 1244
(discussing *Williams*).

26 ⁶¹ Staff cited *SWTC*, 213 Ariz. at 431, 142 P.3d at 1244.

27 ⁶² Staff Initial Brief at 11.

28 ⁶³ E.g. Ex A-1, Ex B (Coronado High School SSA) at 4, under the heading "Monthly Charges"; at 5, under the heading
"Environmental Attributes and Environmental Incentives"; at 8, under the heading "Environmental Attributes and
Environmental Incentives"; at 4, under the heading "Billing and Payment, a. Monthly Charges"; and at 5, under the
heading "Monthly Invoices"

1 Company's position is correct, nothing would prevent any other utility from including such
 2 provisions in their contracts to defeat Commission jurisdiction. Staff argues that it is well-recognized
 3 that a party cannot "contract away" Commission jurisdiction.⁶⁴

4 Staff also argues that to claim the SSA is merely a financing arrangement is inconsistent with
 5 the way the agreement is structured. Staff asserts that the SSAs were structured as contracts for the
 6 sale of electricity so that the SSA transaction would qualify for significant federal tax incentives,⁶⁵
 7 and that if the SSAs were structured primarily as financing arrangement, or leases with an option to
 8 buy, they would not qualify for federal tax incentives.⁶⁶

9 In response to those who question why the Commission would regulate service pursuant to an
 10 SSA or PPA, but not customers who purchase their own systems, Staff asserts that the applicable
 11 constitutional definition simply does not require regulation of a retail customer's provision of service
 12 to him or herself. However, according to Staff, the constitutional definition clearly applies where
 13 another entity is providing an essential service to members of the public for profit.⁶⁷

14 In response to SolarCity's position, TEP and UNSE argue that SolarCity's metaphysical
 15 distinction that it does not "furnish" electricity because it never really "owns" the electricity is
 16 without merit, and that the Commission has previously rejected this argument. TEP and UNSE note
 17 that in the *SWTC* case, a transmission cooperative was found to be a public service corporation even
 18 though it merely transmitted electricity that it did not own.⁶⁸ TEP and UNSE claim that even if
 19 SolarCity never owns the electricity, the fact remains that its solar panels produce the electricity and
 20 that electricity is transported through SolarCity's facilities from the solar panels to the customer's
 21 electric panels. TEP and UNSE argue that under *SWTC*, this transport is sufficient to meet the
 22 definition of "furnishing."⁶⁹ They argue further that SolarCity's position is counter to the
 23 Commission's regulatory obligation because if a retail generator of electricity were permitted to avoid
 24 Commission jurisdiction by manipulating temporal ownership of electricity, the Commission would

25 ⁶⁴ Staff Reply Brief at 4.

26 ⁶⁵ Ex S-1 at 14; Ex A-4, Ex B at 1.13; Tr. at 473.

27 ⁶⁶ Staff's Initial Brief at 9-10 *citing* excerpt from the Solar Energy Industries Association Guide to Federal Tax Incentives
 for Solar Energy, Version 3.0, Released May 21, 2009.

27 ⁶⁷ Staff Initial Brief at 10.

28 ⁶⁸ TEP cites *SWTC*, 213 Ariz. at 431, 142 P.3d at 1244..

28 ⁶⁹ . *SWTC*, 213 Ariz. at 431, 142 P.3d at 1244.

1 be sanctioning unregulated generation service and retail electric competition in Arizona.

2 TEP and UNSE assert that the SSA is not a financing arrangement for the end-user customer
3 because the end-user customer does not own the system. They argue that the SolarCity arrangement is
4 not meaningfully different than an arrangement under which a utility-scale project developer uses a
5 PPA with a power purchaser to support the financing for the project.⁷⁰

6 SRP asserts that Article 15, Section 2, of the Constitution is clear that “all corporations other
7 than municipal engaged in furnishing electricity for light . . . shall be deemed public service
8 corporations” and also that “artful contract drafting or strained interpretation of words” cannot change
9 the conclusion. SRP asserts that SolarCity’s argument under the *Williams* case does not support
10 SolarCity’s claim. SRP claims that the point of the *Williams* case was that the customer did not
11 receive water, because it circulated in pipes, and hence there was no “transfer of possession.” In this
12 case, however, SRP notes that the customer receives and uses the electricity.

13 SRP believes that RUCO’s position that SolarCity is simply a financier and not furnishing
14 electricity is difficult to follow, as the practical effect of SolarCity’s ownership and generation of the
15 facilities is that the customer receives and uses electricity. SRP states there are few utilities of any
16 type that do not engage in financing the facilities that provide service to customers.

17 SRP traces the origins of Article 15 of the Arizona Constitution and concludes that Arizona
18 adopted a very broad definition of corporations providing essential public services.⁷¹ SRP claims that
19 the framers did not limit the definition of public service corporation with the concept of monopoly
20 power and that the definition does not depend on the point or method of delivery and was never
21 intended to hinge upon an artful use of the term “furnished.”⁷² SRP believes the following excerpt
22 fro the *Petrolane* case is instructive on this point:

23 The statement of the court in *Re Geldbach Petroleum Co.*, accurately
24 conveys the benign objectives of the Constitution, Art. 15, § 2, and why
25 its language should not be reduced by judicial construction to
insignificance:

26 “ * * * the purposes of regulation are to reserve and promote those
services which are indispensable to large segments of our population, and

27 ⁷⁰ TEP/UNSE Reply Brief at 5.

28 ⁷¹ SRP Brief at 3-5.

⁷² *Id.* at 6.

1 to prevent excessive and discriminatory rates and inferior service where
 2 the nature of the facilities used in providing the service and the disparity
 3 in the relative bargaining power of a utility ratepayer are such as to
 4 prevent the ratepayer from demanding a high level of service at a fair
 5 price without the assistance of governmental intervention in his behalf.⁷³

6 SRP argues that the position that SolarCity's business of selling electricity is incidental to a
 7 business of monetizing and processing tax credits could exempt almost every utility provider and has
 8 no support under Arizona law. SRP asserts that unlike the businesses of mobile home parks, alarm
 9 services, and security services, in SolarCity's case there is no independent business associated with
 10 the provision of electricity. In this case, SRP asserts, the entire reason for the relationship with
 11 SolarCity from the customer's point of view is to receive solar electricity or to save money.⁷⁴ SRP
 12 argues that SolarCity's activities of arranging for financing are conceptually no different from the
 13 activities of any electric utility that must finance its facilities, taking advantage of available ways to
 14 reduce costs.

15 c. AECC and WRA

16 AECC believes that reasonable arguments can be made on either side of the issue of whether
 17 SolarCity is "furnishing" electricity depending on how one views ownership and maintenance of the
 18 equipment that creates the electricity and on who has possession and title to the electricity as soon as
 19 it is created. AECC never reaches a conclusion on this question, but reminds the Commission that the
 20 determination should not be based on implication or a strained construction.⁷⁵

21 WRA does not take a position on the first prong of the constitutional analysis, but
 22 acknowledges that SolarCity and the school district cannot decide by agreement whether SolarCity is
 23 a public service corporation. WRA believes, however, that the debate about whether SolarCity is
 24 "furnishing" electricity does not lead to a conclusion that SSAs must be regulated. WRA suggests
 25 that instead of focusing on what is being "furnished" under the SSA, it is more instructive to assess
 26 the essential nature of the transaction in light of the *Serv-Yu* factors and case law.

27 2. Analysis and Conclusion

28 ⁷³ *Petrolane*, 119 Ariz. at 259, 580 P.2d at 720 (citations omitted).

⁷⁴ Tr. at 533-34.

⁷⁵ AECC cites *Nicholson*, 108 Ariz. at 321, 497 P.2d at 819.

1 Article 15, Section 2 of the Arizona Constitution provides that public service corporations
 2 include corporations engaged in furnishing electricity for light, fuel, or power. In addition to the
 3 common meaning of “to supply” or “provide,” Arizona courts have determined that the word
 4 “furnish” in Article 15, Section 2 connotes a transfer of possession.⁷⁶ Thus, in *Williams*, the Arizona
 5 Supreme Court found that an entity that used circulating water to provide heating or cooling was not
 6 furnishing water for “irrigation, fire protection, or other public purposes” and therefore was not a
 7 “water corporation” in need of a CC&N within the meaning of A.R.S. § 40-281. The Court found that
 8 the water was a conduit for supplying heat or refrigeration, but that because there was no transfer of
 9 the water, there was no furnishing of water under the plain meaning of the word “furnish.” The Court
 10 further found that the phrase “furnishing water for . . . other public purposes”⁷⁷ was intended by the
 11 drafters to connote a similar purpose as for “irrigation or fire protection” which involves a transfer of
 12 possession for consumption by the user.

13 In *SWTC*, the Arizona Court of Appeals rejected the transmission cooperative’s claim that it
 14 was merely a conduit for the electricity and did not “furnish” electricity as contemplated by the
 15 constitutional definition.⁷⁸ The court found:

16 [W]e view *SWTC* as the intermediary that takes possession of the
 17 electrical power from the generator and transfers possession of that
 18 electricity to the distributors. Unlike *Williams*, in which the company
 19 retained possession of the water and the water was not the actual product
 20 being provided, the commodity being transferred or transmitted in this
 21 case, is in fact, electricity. *SWTC* therefore furnishes electricity pursuant
 22 to Article 15, Section 2, of the Arizona Constitution.⁷⁹

23 Similarly, SolarCity is furnishing electricity to its customers. In the case before us the
 24 “furnishing” is even more directly evident than in the *SWTC* case. Facilities owned and operated by
 25 SolarCity produce electricity that ends up in the possession of SolarCity’s customers. Under the
 26 holding in *SWTC*, the portion of the SSA that proclaims SolarCity does not have legal title to the
 27 power produced by its solar panels is not relevant to the question of whether there is a transfer of
 28 possession to satisfy the definition of Article 15, Section 2. “To furnish” means “to provide with what

26 ⁷⁶ See *SWTC*, 142 P. 3d at 1244; *Williams*, 100 Ariz. at 20, 409 P.2d at 724.

27 ⁷⁷ With respect to water companies, Article 15, Section 2 provides “all corporations . . . engaged in . . . furnishing water for
 irrigation, fire protection, or other public purposes”

28 ⁷⁸ *SWTC*, 213 Ariz. at 431, 142 P.3d at 1244.

⁷⁹ *Id.*

1 is needed” or “supply” or “give.”⁸⁰ SolarCity owns the means of producing the electricity that
 2 provides the schools with needed light, fuel or power. Careful drafting of the SSA in an attempt to
 3 meet federal tax code requirements or avoid state regulation does not change the fact that there is a
 4 physical transfer of electricity from SolarCity’s equipment to the end user.

5 The evidence shows that care was taken to craft the SSA as a sale of electricity because
 6 otherwise, the transaction would not qualify for the federal tax credits. Mr. Rive attached to his
 7 testimony the “Guide to Federal Tax Incentives for Solar Energy” released May 21, 2009 by the Solar
 8 Energy Industries Association (“SEIA”).⁸¹ With respect to the property that is eligible for a
 9 commercial solar tax credit, section 1.1.3 of the SEIA Guide provides:

10 Equipment must be used in the United States to qualify for a commercial
 11 solar tax credit. In addition, commercial solar tax credits cannot be
 12 claimed on equipment that is “used” by someone who is not subject to
 U.S. income taxes.

13 Thus, “use” of the equipment by a school, municipal utility, government
 14 agency, charity or other tax-exempt organization (unless the equipment is
 15 used in a taxable side business) or in some cases by an electric
 16 cooperative will rule out a credit on the equipment. This means that solar
 17 equipment cannot be leased to such an entity. A lessee “uses” the
 equipment it is leasing. However, a lease with a term of less than six
 months does not count as a “use.” The credit is calculated in the year
 equipment is first put into service. Ineligible use of the equipment at any
 time during the first five years would cause part of the tax credit claimed
 to be recaptured. (See section 1.10.)

18 The key when dealing with such an entity is to sign a contract merely to
 19 sell it electricity. Someone who merely buys electricity from solar
 20 equipment owned by someone else is not considered to “use” the
 21 equipment. Care should be taken to make sure the contract is not
 22 characterized by the IRS as a lease of the solar equipment in substance
 even though it looks in form like a power contract (See sections 1.8.4 and
 1.8.5 for more details and consult a tax attorney for project specific
 applications.)

23 In addition, Sun Power provided a document entitled “Financing Non-Residential Photovoltaic
 24 Projects: Options and Implications” by Mark Bolinger, Lawrence Berkeley National Laboratory
 25 (“Bolinger Report”).⁸² The Bolinger Report discusses how entities can utilize PPAs in connection
 26 with tax-exempt hosts, and apparently agrees with the SEIA assessments of how to structure contracts

27 ⁸⁰ Webster’s New Collegiate Dictionary, (1976).

28 ⁸¹ Ex A-4, Exhibit B.

⁸² Ex SunPower-4.

1 with tax-exempt entities so as not to jeopardize the use of the federal tax credit. Neither the SEIA
2 Guide, nor Bolinger Report cites to any IRS rulings that provide that an SSA, as used here, and as
3 distinguished from a PPA, qualifies for the federal tax credit. SolarCity must believe that it does, as
4 the federal tax credit is a critical component of its ability to provide competitive rates. According to
5 SolarCity's authority, the SEIA Guide, to obtain the tax credit, there must be a sale of electricity.
6 SolarCity attempts to avoid meeting the constitutional definition of furnishing electricity by making
7 the claim that SolarCity never has legal title to the electricity produced by the panels. But SolarCity
8 cannot have it both ways. If SolarCity does not have title to the electricity, then what is it selling? If
9 it is selling the access to, or the use of, the PV panels, how can it claim the federal tax credit which
10 require the sale of electricity?

11 An SSA may encompass the design, installation, maintenance and financing of solar panels,
12 but its purpose as a whole is to supply electricity to the end user. The schools desire the solar panels
13 to receive electricity at a lower rate than they can obtain from the incumbent supplier.⁸³ Unlike some
14 of the cases cited in this proceeding wherein the courts found that the businesses were not public
15 service corporations because their transfer of the commodities was merely incidental to their main
16 business activities, in this case, the purpose of SolarCity's SSA business is to sell or provide
17 electricity to the end user.

18 Those businesses that have been found not to be public service corporations were clearly
19 focused on non-public activities and only tangentially provided services that implicated the public
20 interest. Thus, in *General Alarm*, it was found that a security alarm company that used telephone
21 wires to transmit an alarm signal was not a public service corporation because the transmission of
22 information was merely incidental to the main business, which was property protection. In
23 *Continental Security Guards*, involving an armored car company, the court found that the general
24 nature of the business was security, and the transportation component was merely a part of the
25 security, and that the use of the public highway was not of such a nature that the public interest
26 required regulation as a common carrier. On the other hand, in the *Petrolane* case, the Arizona
27

28 ⁸³ Tr. at 533.

1 Supreme Court found that the business of distributing liquid propane gas by central gas distribution
2 systems was not incidental to the sale of liquid propane in bulk, and that the appellants needed a
3 CC&N for that portion of their business, which was distinct and separate from the carrying on of the
4 remainder of the appellants' business.

5 In developing its SSAs, SolarCity has cleverly devised a way to utilize the tax code and utility
6 incentives to provide solar power to a class of customers who otherwise would not be able to install
7 the facilities, by structuring the SSA as a sale of electricity. At first impression, the SSA transaction
8 may appear to meet the textual definition of a public service corporation under the Constitution.
9 However, SolarCity is not in the business of selling electricity, but rather, is in the business of
10 designing, financing, installing, and monitoring solar systems for residential and commercial
11 customers. Further consideration must be given to the public interest and the entity's primary
12 business purpose, activities and methods of operation. Under Arizona law, we must therefore
13 undertake further analysis of whether SolarCity is operating as a public service corporation when it
14 operates pursuant to an SSA.

15 **B. The Role of the *Serv-Yu* Analysis**

16 **1. Parties' Arguments**

17 SRP argues that the *Serv-Yu* case itself has little relevance to the instant proceeding and that it
18 is obvious from a careful review of the factors discussed in *Serv-Yu* that the factors were applied to
19 the specific context of that case in 1950 and should not be extrapolated into a general test. Rather,
20 SRP argues that whether an entity is a public service corporation hinges upon the specific facts of
21 each case.⁸⁴

22 SRP acknowledges that the *SWTC* decision indicates that the second step in the analysis is
23 based on the eight *Serv-Yu* factors, but SRP believes that such analysis does not appear to be
24 consistent with the Constitution and the facts of the actual decisions. SRP also asserts that a case-by-
25 case public interest analysis is unwieldy and probably inconsistent with the Constitution. SRP argues
26 that an analysis that focuses on whether the service is only incidental to another business is the most
27

28 ⁸⁴ SRP cites *Nicholson*, 108 Ariz. at 320, 497 P. 2d at 818.

1 consistent with the Constitution and the actual outcome of the case law. Thus, according to SRP, the
 2 second step in the analysis should be whether the primary purpose of the business is to dedicate
 3 property to the “public use” of electric service.

4 SRP asserts that the words of the Constitution are to be given their normal and logical
 5 meaning and that the cases that have focused on the so-called second “step” (*i.e.* the *Serv-Yu* analysis)
 6 have exempted from regulation only those businesses that provided a public service only incidentally,
 7 so as not to fall logically within the intent of the Constitution.⁸⁵ Thus, an alarm company that
 8 maintained a communication system for transmission of emergency messages to its central office was
 9 not a public service corporation; an armored car service that transported money and valuables was not
 10 a common carrier since the armored car was merely incidental to the security provided for the
 11 protection of money and valuables; the owners of a mobile trailer park that provided water to
 12 residents as part of a package price was not a public service corporation because the furnishing of
 13 water was in support of, and incidental to, the owner’s business of renting trailer spaces; the transport
 14 of insecticide from the place of landing to the field by a crop dusting company was part of “one
 15 operation” of the crop dusting service and not a public service corporation; and a company in the
 16 business of selling, servicing and repairing vehicles, which included towing cars to the place of
 17 business did so incidentally to the main business and was not a public service corporation⁸⁶

18 SRP argues that the *Sw Gas* case cited by the “no-regulation” advocates in this proceeding has
 19 no similarity to SolarCity. In *Sw Gas*, the court found that El Paso Natural Gas Co., which primarily
 20 operated a wholesale natural gas transport business, was not a public service corporation even though
 21 it had ten retail customers. SRP asserts that the court based its decision in that case primarily on the
 22 fact that 100 percent of the business was regulated by the Federal Energy Regulatory Commission
 23 (“FERC”) which had issued certificates of convenience and necessity for the ten retail customers, and
 24 also on the fact that El Paso’s retail relationships were long-standing and it was not accepting new
 25 requests for service.⁸⁷

26 ⁸⁵ SRP Brief at 7.

27 ⁸⁶ SRP Brief at 7-8 (citing *General Alarm*, 76 Ariz. 235, 262 P.2d 671, *Continental Sec. Guards*, 103 Ariz. 410, 443 P.2d
 406, *Nicholson*, 108 Ariz. 317, 497 P. 2d 815, *Quick Aviation Co. v. Kleinman*, 60 Ariz. 430, 138 P.2d 897
 (1943), *Killingsworth v. Morrow*, 83 Ariz. 23, 315 P.2d 873 (1957).

28 ⁸⁷ SRP Reply Brief at 7.

1 SunPower asserts that the underlying purpose of the *Serv-Yu* analysis is to ascertain whether
2 the nature and surrounding circumstances of the entity in question are such as to (1) except it from the
3 general public policy favoring competition: and (2) subject it to regulation because it is required by
4 the broad public interest. SunPower states that to date, no Arizona court of record has assigned an
5 express order of importance or hierarchy to the *Serv-Yu* factors, however, SunPower believes that
6 three themes or concerns characterize the courts' decisions. First, according to SunPower, is the
7 desire to prevent wasteful competition between companies when the equivalent service could be
8 offered by a single provider (as reflected in *Trico*). Second, is the desire to assure that a provider with
9 effective monopoly power cannot extract unjust and unreasonable profits, or allocate recovery of
10 costs in a discriminatory manner (as evidenced in *Sw Gas*). The third theme identified by SunPower
11 is a desire to facilitate the provision of essential services to a large segment of the public (as
12 evidenced in *Serv-Yu* and *SWTC*). SunPower asserts that each of these themes is directly related to
13 the ultimate underlying question of whether there is a need for regulation. SunPower believes that an
14 analysis of the major themes supports a determination that (1) there has been no demonstration of a
15 need for regulating SolarCity; (2) the "benefits" of regulation asserted in the case are illusory and are
16 not a lawful substitute for the demonstration of need required under Arizona law; and (3) the
17 regulation of SolarCity as a public service corporation is neither required nor warranted.

18 2. Analysis and Conclusion

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

25 Upon applying the *Serv-Yu* factors to the record in this case, we do not believe that the
26 services that SolarCity provides to schools, government entities or non-profits pursuant to an SSA
27 cause SolarCity to act as a public service corporation.
28 ..

1 **C. The Serv-Yu Factors**

2 **1. *Serv-Yu* Factor 1: What the entity actually does.**

3 **a. Parties' Arguments**

4 SolarCity claims that the evidence overwhelmingly demonstrates that what SolarCity actually
5 does is not like a public service corporation. SolarCity argues that the testimony indicates that
6 SolarCity designs, installs, maintains and finances rooftop solar distributed generation facilities and
7 that no regulated utility in the State performs these services.⁸⁸ SolarCity asserts that it is clearly not a
8 monopoly provider of its SSA services, as it is subject to the request for proposal ("RFP") process
9 before it can do business with a school or governmental customer, while a monopoly provider is
10 required to take all customers and does not compete with other providers for customers.⁸⁹

11 SolarCity argues that Staff's analysis of the first *Serv-Yu* factor relies on a misapplication of
12 *Serv-Yu* as interpreted in *SWTC*. SolarCity states that Staff relies on SolarCity's marketing material,
13 which expresses an intent to serve millions, but that Staff fails to consider that the stated goal
14 includes a large number of sold or leased facilities which Staff has stated are not subject to regulation,
15 as well as a market extending beyond the borders of Arizona.⁹⁰ SolarCity argues that Staff does not
16 provide a plausible connection to support its belief that currently serving only a very small fraction of
17 one percent of the population of Arizona is "so considerable a fraction of the public" that it "is public
18 in the same sense in which any other may be called so" in Arizona.⁹¹ SolarCity also disputes Staff's
19 claim that SolarCity's customers will rely on SolarCity to the same extent as they rely upon the
20 electricity generated by APS, arguing that the evidence is to the contrary, as APS (or the relevant
21 incumbent) remains the provider of last resort, and SolarCity's customers will always be hooked to
22 the grid.

23 RUCO asserts that SolarCity is providing a service that is not intended to be a substitute for a
24 customer's regular electric service provider, but rather intended to offset a portion of a customer's
25 load requirement with a renewable resource. RUCO argues that because solar power is an optional
26

27 ⁸⁸ Tr. at 102, 537 and 640-641.

⁸⁹ Tr. at 531.

⁹⁰ SolarCity Reply Brief at 6.

28 ⁹¹ *Id.* at 6, (citing *SWTC*, 213 Ariz. 427, 142 P.3d 1240).

1 service, SolarCity will not be providing an indispensable service to a large segment of the
2 population.⁹² Further, RUCO asserts that SolarCity does not, nor is it anticipated that SolarCity will,
3 serve such a substantial portion of the public such that would make its rates a matter of public
4 concern. RUCO noted that SolarCity's stated goal is to help millions of homeowners, community
5 organizations and businesses adopt solar power by lowering or eliminating the high up-front costs.⁹³

6 SunPower asserts that Staff's conclusion that SolarCity is "furnishing" electricity biased
7 Staff's analysis of the first *Serv-Yu* factor.⁹⁴ SunPower believes that Staff could not point to any
8 specific data to support the conclusion "that the furnishing of electricity was predominant in the
9 SSA." Based on the record, and within the analytical context of the first *Serv-Yu* factor, SunPower
10 asserts that what SolarCity actually does under its SSA is provide design, construction, ownership,
11 operation and maintenance services related to customer-specific roof-top solar panel equipment.⁹⁵

12 Staff asserts that SolarCity's activities parallel those of traditional electric utilities. Staff
13 claims that although SolarCity or RUCO may characterize the SSA as a financing agreement, it is
14 clear that the Company generates electricity through facilities it owns, and then furnishes the
15 electricity to its customers. Staff asserts that the electricity is meant to substitute for a portion of the
16 customer's load otherwise obtained from the incumbent utility and is no less essential than the
17 electricity obtained from the incumbent.

18 TEP and UNSE state that the primary elements of what SolarCity does revolve around
19 providing electricity directly to a myriad of end-user customers, including residential, commercial
20 and governmental customers. They note that SolarCity does not intend to limit its ownership and
21 operation to a small number of facilities. TEP and UNSE note further that SolarCity's ability to own
22 and operate the solar facilities and its ability to charge a competitive rate are dependent on the
23 incentives it receives from the underlying electric utility, which in turn are funded through the REST
24 that is collected from all customers of that utility.

25 _____
26 ⁹² Ex A-1 at 11.

27 ⁹³ *Id.* at 2.

28 ⁹⁴ Tr. at 1056-57 ("Staff felt the furnishing of electricity figured larger into the question of the PSC status than the other services. And ultimately we decided that the SSA represented a sale of electricity, and that the furnishing of electricity was not incidental to the SSA.")

⁹⁵ SunPower Initial Brief at 15.

1 SRP asserts "Clearly the business of SolarCity is to own generating facilities and sell the
2 output to customers."⁹⁶ SRP also states that it is clear that the term in the Constitution to "furnish . .
3 . electric service" is to be construed broadly. SRP states that to conclude otherwise would permit
4 huge segments of the electric industry to avoid regulation simply by redefining the service provided
5 to customers.⁹⁷

6 **b. Analysis**

7 The first *Serv-Yu* factor looks at what a company actually does. The company's activities are
8 analyzed to determine whether they affect so considerable a fraction of the public that it is "public in
9 the same sense in which any other may be called so."⁹⁸ The *Nicholson* court directed that the analysis
10 should focus on the substance of what an entity does, not the form.

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

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

22 It is clear that SolarCity's current business activities are not focused on furnishing electricity,
23 but rather on supplying varied services to individual customers. SolarCity promotes the distribution
24 of systems which minimize a customer's use of an underlying utility's electricity service; however,
25 these customers remain reliant upon their utility for service when their solar equipment is non-
26 operational and in other circumstances. It is clear that SolarCity is not seeking to stand in the place of

27 ⁹⁶ SRP Opening Brief at 14.

⁹⁷ *Id.* at 15.

28 ⁹⁸ *SWTC*, 213 Ariz. at 433, 142 P.3d at 1245.

1 the underlying utility, as SolarCity is not providing a service which severs the linkage between the
 2 utility and the SolarCity customer. Further, the Commission's net metering rules contemplate a
 3 continued relationship between SolarCity's customers and their utility, as any credit for excess
 4 generation necessarily requires that the SolarCity customer continue to be a utility customer.

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

11 **2. *Serv-Yu* Factor 2: Dedication of property to a public use.**

12 **a. Parties' Arguments**

13 SolarCity asserts that the solar panel systems that it provides are dedicated to the individual
 14 school, non-profit organization or government entity on whose private property they are located, and
 15 hence, are not dedicated to the general public. SolarCity believes that it "strains reason" and is
 16 "dangerous" to conclude that the mere fact that some electricity may flow from the school to the grid
 17 under a net metering scenario means that "the public generally, in so far as it is practicable, has the
 18 right to enjoy service from the facilities"⁹⁹ or that the system is dedicated to the public use.
 19 According to SolarCity, such "far reaching and extreme conclusion" would imply that any solar panel
 20 host, even a private home owner, is dedicating property to a public use.¹⁰⁰ SolarCity believes that no
 21 one has the right to demand his neighbor's solar facilities be turned on or off so that the neighbor may
 22 enjoy service from the facility.

23 SolarCity argues that Staff fails to account for the fact that each SSA involves only one
 24 customer getting service from one solar facility on that customer's property and that no portion of the
 25 public has the right to enjoy services from SolarCity or the use of his neighbor's PV system.¹⁰¹
 26 SolarCity states that not only will SolarCity refuse to offer service to more than one customer from

27 ⁹⁹ Ex S-1 at 22.

¹⁰⁰ Solar City Opening Brief at 3; Tr. at 1065.

28 ¹⁰¹ SolarCity Reply Brief at 7.

1 the same solar system, but the Commission's Interconnection Rules prohibit SolarCity from
2 providing services to more than one customer at a time. SolarCity argues that because it is limited to
3 the one customer, one rooftop scenario, there is no risk to the public if the system fails, and even the
4 one customer will not be out of service. Additionally, SolarCity asserts that there is no risk to the
5 public related to pricing because only one customer is paying.

6 SolarCity rejects TEP's and UNSE's arguments that the "nexus of public benefit" between
7 SolarCity and its SSA customers is closer than that found to exist in the *SWTC* case, wherein SWTC
8 carried bulk electricity for miles over the grid to serve thousands of ultimate end users. SolarCity
9 claims that the opposite is true, as it provides solar energy to one customer from arrays on the
10 customer's rooftop. In addition, SolarCity does not believe that receiving rebate money means the
11 systems themselves are dedicated to a public use anymore than accepting rebates to make buildings
12 more energy efficient dedicates the buildings to public use.¹⁰²

13 RUCO argues that the dedication of property to a public use is always a question of intent.¹⁰³
14 RUCO states that SolarCity has clearly stated that it has no intent of dedicating private property for a
15 public use. RUCO asserts that SolarCity's SSAs with the Scottsdale Unified School District are
16 inconsistent with an entity that is dedicating its property to public use.

17 WRA argues that in the absence of a public interest in distributed renewable energy systems
18 and in a dedication of private property to public use, there is no reason to regulate providers of
19 distributed renewable energy projects.¹⁰⁴ WRA asserts there is no dedication of private property to
20 public use in this case because the public does not use the PV systems installed on the school's
21 property. WRA states that a customer-sited solar energy facility primarily serves only that one
22 customer, who only incidentally may sell excess generation back to the utility.¹⁰⁵

23 WRA argues there is no public interest in customer-sited distributed energy projects. WRA
24 acknowledges that there is a long history of public interest in the production and sale of electricity
25 from central station generation resources and in the transmission and distribution of that electricity,
26

27 ¹⁰² *Id.* at 30.

¹⁰³ RUCO cites *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 326; *SWTC*, 213 Ariz. at 433, 142 P.3d at 1245.

¹⁰⁴ WRA Reply Brief at 2.

¹⁰⁵ WRA Opening Brief at 5.

1 but argues that there is little to implicate the public interest when an individual customer obtains
 2 some of his or her electricity from a generation facility located on the customer's premises because
 3 the service affects only the one customer. WRA believes that no governmental control of the price
 4 and method of operation is required for these systems.

5 According to WRA, regulation should focus on the incumbent utility through the buyback
 6 rate, not the price SolarCity's customer pays for the electricity. WRA acknowledges that the public
 7 may occasionally obtain electrons from the facilities, but only if SolarCity's customer actually
 8 delivers excess electricity to the grid. In response to comments that the SolarCity facilities would not
 9 be possible without public incentives, WRA notes that the same incentives are provided to customers
 10 who provide their own facilities, but who are not regulated.

11 Staff argues that this *Serv-Yu* factor is determined by the facts and circumstances of each case
 12 and is not solely dependent on the intent of the owner.¹⁰⁶ Staff believes that it is not necessary to hold
 13 oneself out as providing service to the entire public in order to be a public service corporation.
 14 According to Staff, the *Serv-Yu* court held that to be a public service corporation "an owner of . . . a
 15 plant must at least have undertaken to actually engage in business and supply at least some of this
 16 commodity to some of the public."¹⁰⁷ Staff cited testimony that it is physical constraints, rather than
 17 arbitrary or discriminatory reasons, that determine if SolarCity can serve a potential customer.¹⁰⁸

18 Staff argues that the evidence shows that SolarCity intends, and holds itself out, to provide
 19 solar electric service to a substantial portion of the public and that SolarCity clearly intends to offer
 20 service to a definable subset of the public for whom service is feasible. In addition, Staff argues that
 21 the schools, non-profits and governmental entities to which SolarCity provides, or hopes to provide,
 22 service through its SSAs, comprise a large and definable segment of the public and could account for
 23 significant load over the next few years.¹⁰⁹

24 Staff believes that SolarCity's arguments do not focus on the proper issue and that it is the

25 ¹⁰⁶ Staff cites *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 326.

26 ¹⁰⁷ *Id.*; see also *Arizona Water Co. v Ariz. Corp. Comm'n*, 161 Ariz. 389, 778 P.2d 1285 (Ct. App. 1989) ("... while
 27 supplying water is usually a subject matter of utilities' service, this alone does not carry the presumption that all use of
 28 service in connection with such water is a dedication of public use and that dedication of private property to a public use is
 a question of intention to be shown by the circumstances of each case").

¹⁰⁸ Tr. at 271, 272-74.

¹⁰⁹ Staff Initial Brief at 16.

1 provision of an essential commodity that creates the public interest, not the amount of energy taken
 2 from the incumbent.¹¹⁰ Staff believes that WRA also focuses too intently on the traditional model of
 3 electric generation and assumes that an entity cannot be a public service corporation unless it
 4 produces and provides electricity through a central generating station.¹¹¹ Staff argues that the case
 5 law does not support such a narrow interpretation of what constitutes a “dedication to public use.”
 6 Staff states that the fact that the equipment used to generate and provide electricity is on the
 7 customer’s premises is not important. Rather, Staff argues, the important fact is the furnishing of an
 8 essential commodity to a definable subset of the public, not where the equipment is located or how
 9 many customers are served.¹¹²

10 In addition, Staff argues that despite providing service through a contract, there is “no
 11 question” that SolarCity is holding itself out to the public generally. Staff notes that public service
 12 corporations often have specialized tariffs which target a limited segment of the public. Staff also
 13 disagrees with the implication in APS’ position that there has to be some “public infrastructure used
 14 to serve more than one customer” before a “dedication to public use can be found.” Staff states that
 15 case law contains no such limitation.

16 TEP and UNSE assert that SolarCity is using its facilities to provide electricity directly to the
 17 public. They believe that the nexus of the public benefit is even closer than the relationship between
 18 SWTC and the public that the Arizona courts found to be a dedication of property for public use.
 19 Moreover, TEP and UNSE assert that the facilities owned and operated by SolarCity would not be
 20 possible without incentives funded by the public.

21 b. Analysis

22 The second *Serv-Yu* factor looks at whether the entity has dedicated its property to public use.
 23 This factor is a question of intent shown by the circumstances of the individual case, and “an owner . .
 24 . must at least have undertaken to actually engage in business and supply at least some of his
 25 commodity to some of the public.”¹¹³ The *Serv-Yu* Court said that “[t]he public does not mean

26 ¹¹⁰ Staff Reply Brief at 6(referring to SolarCity Initial Brief at 8).

27 ¹¹¹ *Id.* at 7, (referring to WRA Initial Brief at 6).

28 ¹¹² *Id.*

¹¹³ *Serv-Yu*, 70 Ariz. At 238, 219 P.2d at 326; *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818. *see also*, *SWTC*, 213 Ariz. at 433, 142 P.3d at 1245.

1 everybody all the time”¹¹⁴ and found a dedication to public use in *Serv-Yu* because membership was
2 open to anyone who applied and paid the fees to join the cooperative. In *Nicholson*, the Arizona
3 Supreme Court said that “public” does not mean all members of the public, and distinguished a public
4 service corporation from a “public utility,” stating that where the corporation “otherwise meets the
5 definition of a public service corporation, the fact that the general public has no right to demand such
6 service is not material.”¹¹⁵ In the *SWTC* case, the Arizona Court of Appeals found that although the
7 cooperative did not supply electricity to retail users, its transmission role was “integral in providing
8 electricity to the public” and further that its self-proclaimed goal of providing reliable electric power
9 to homes and businesses demonstrated a commitment of its business to the public.¹¹⁶

10 Here, SolarCity’s primary business is the design, installation, maintenance and financing of
11 solar equipment. While development and promotion of renewable resources is in the public interest,
12 SolarCity’s activities pursuant to SSAs are not integral to the provision of electricity to the public at
13 large, as SolarCity enables schools, government and other non-profit entities to employ customer-sited
14 solar facilities which serve their individual needs and only incidentally provide generation back to the
15 grid.

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

23 The public use factor necessarily requires line drawing, otherwise it would inappropriately
24 include or exclude business activities. SolarCity’s design, installation, maintenance and financing of
25 individual customer-sited solar facilities for schools, government and other non-profit entities does
26

27 ¹¹⁴ *Serv-Yu*, 70 at 247, 215 P.2d at 327.

28 ¹¹⁵ *Nicholson*, 108 Ariz. at 319, 497 P.2d at 817.

¹¹⁶ *SWTC*, 213 Ariz. at 434, 142 P.3d at 1246.

1 not trigger a public use finding where it is not integral to the public at large and only incidentally
2 impacts the public interest in a safe and reliable electric grid.

3 **3. *Serv-Yu* Factor 3: Articles of Incorporation.**

4 **a. Parties' Arguments**

5 SolarCity cites the Arizona Supreme Court's finding that "[w]hile the articles of incorporation
6 authorizing the corporation to act as a public utility are not conclusive, the fact of such authorization
7 may be considered in the determination of the ultimate question."¹¹⁷ SolarCity asserts that the
8 evidence clearly demonstrates that its articles of incorporation are substantially different from the
9 articles of incorporation of other public service corporations, which contain clear statements of an
10 intent to act as a public service corporation or that the entity was formed under statutes providing for
11 the formation of an electric cooperative.¹¹⁸

12 RUCO believes that the third factor, the articles of incorporation, authorization and purpose,
13 is not particularly helpful in this case because SolarCity's articles of incorporation state that
14 SolarCity's purpose "is to engage in any lawful act or activity for which corporations may be
15 organized under the General Corporation Law of Delaware." Although RUCO does not find the
16 articles of incorporation particularly insightful on the issue, it notes that nowhere do the articles of
17 incorporation state or even suggest that the Company will act as a public utility in performing its
18 duties.

19 Staff contends that the fact that SolarCity's articles of incorporation do not expressly state that
20 SolarCity will operate as a public service corporation does not preclude the Company from doing
21 business as one.¹¹⁹ Staff states that corporate statements about an entity's authorizations and
22 functions could be made with the purpose of avoiding regulation and should not be used to deflect
23 attention from a determination of the true character of the business. Staff notes that the *Serv-Yu* court
24 found that "[i]t is what the corporation is doing rather than the purpose clause that determines
25 whether the business has the element of public utility."¹²⁰

26 _____
27 ¹¹⁷ *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 326.

¹¹⁸ Ex A-5 at exhibits D, E; *see also* Tr. at 1235.

¹¹⁹ Ex S-1 at 24.

28 ¹²⁰ *Serv-Yu*, 70 Ariz. at 241, 219 P.2d at 328.

1 SRP notes that under modern corporation law, no entity restricts its operations to those of a
2 utility.

3 **b. Analysis**

4 The third *Serv-Yu* factor involves an examination of the articles of incorporation. The purpose
5 of reviewing the articles of incorporation is to determine what the entity actually does. In *Serv-Yu*,
6 the business was not yet operating, and thus, the authorizations in the articles of incorporation
7 provided an indication of intent as to what the entity planned to do. The *Serv-Yu* Court
8 acknowledged that more than a review of the articles of incorporation and by-laws is pertinent and
9 that the mere recitation in the by-laws, standing alone, is not enough to brand an entity as a public
10 service corporation. This factor does not have the same relevance today as in might have had in the
11 1950s, when articles of incorporation were required to be more specific as to the activities of the
12 corporation. Nevertheless, SolarCity's articles of incorporation, while not precluding activities as a
13 public service corporation, do not reflect an intent to act as a public service corporation. This is
14 materially different from the Articles of public service corporations entered into the record which
15 reflected intent to act as a public service corporation or to furnish electricity to the public. While this
16 factor is not particularly helpful in determining whether SolarCity is a public service corporation, in
17 balance it favors SolarCity's position that it is not a public service corporation.

18 **4. *Serv-Yu* Factor 4: Service of a commodity in which the public is generally held to have
19 an interest.**

20 **a. Parties' Arguments**

21 SolarCity asserts that three points support the conclusion that SolarCity is not dealing with a
22 commodity in which the public has an interest. First, SolarCity argues its services are not of public
23 interest because they are not essential public services. SolarCity claims that it provides a vehicle for
24 a "green" alternative and the hosts who use the solar generated power do so because they have
25 determined that the service is to their benefit not because they have no other choice. Second,
26 SolarCity asserts that while it is undisputed that solar panels help to transform the sun's energy into
27 useable electrons, the record is clear that SolarCity's main purpose is to provide design, installation,
28

1 maintenance and financing of solar facilities.¹²¹ SolarCity cites the testimony of the Scottsdale
2 Unified School District that it receives sufficient electricity from its incumbent utility provider and is
3 only interested in a way to save money.¹²²

4 Third, SolarCity argues that no evidence was presented in this proceeding to suggest that the
5 public has an interest in the design, installation, maintenance and financing of the solar panel
6 facilities. In addition, SolarCity argues that the courts have held that an entity does not become a
7 public service corporation from the incidental provision of electricity.¹²³ SolarCity asserts that it is
8 easier to conclude that a public interest exists in public infrastructure than in electricity itself and
9 notes that if a person buys a solar facility (as opposed to using an SSA) no one is claiming that the
10 public has an interest in the electricity generated by that solar facility.

11 SolarCity believes that Staff mischaracterizes SolarCity's arguments with respect to this *Serv-*
12 *Yu* factor and fails to support its assertions with facts. SolarCity argues that it is clear that the public
13 has never been held to have a general interest in distributed generation projects and that there is a
14 distinction between "commodity electricity," which is necessarily provided using public distribution
15 infrastructure, and distributed generation facilities. SolarCity claims it cannot be argued that the
16 Commission has jurisdiction over all electricity in the State.

17 RUCO agrees that there is no question that the public has an interest in electricity and the
18 provision of electricity, but it agrees with the Company that SolarCity's provision of electricity is
19 merely incidental to the SSAs. RUCO cautions the Commission not to apply too expansive a
20 definition of "public service corporation," as the Arizona Supreme Court has made it clear that the
21 scope of regulation is limited:

22 It must be, as the courts express it, clothed with a public interest to the
23 extent clearly contemplated by the law which subjects it to governmental
24 control. Free enterprise and competition is the general rule. . . . Such
25 invasion of private right cannot be allowed by implication or strained
26 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.¹²⁴

27 ¹²¹ Tr. at 102.

¹²² Ex A-5 at 12.

¹²³ SolarCity cites *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818.

¹²⁴ *Nicholson*, 108 Ariz. at 321, 497 P.2d at 819 (quoting *General Alarm*, 76 Ariz. at 238, 262 P. 2d at 672-73).

1 RUCO argues that the SSA is a package of services that allows customers to finance a solar
2 facility through which only a portion of their electricity needs are met and that the electricity
3 generated from the solar facility is merely incidental to the package of services. RUCO claims that
4 this is entirely distinguishable from the situation of an electric service provider (“ESP”) because the
5 ESP depends on common facilities that serve the public. RUCO claims that an SSA arrangement is
6 different from electricity generated by an ESP to meet all of its customers’ needs as with an SSA
7 there is little need to protect the public because the third-party installer has an incentive to keep the
8 equipment in good working order because he only gets paid for the electricity that is produced.
9 RUCO does not find a disparity in bargaining power that regulation could ameliorate, and argues that
10 because the customer does not need the electricity produced by the solar systems and because there
11 are plenty of third-party installers available to choose from, the customer does not need the protection
12 of regulation.

13 SunPower argues that Staff’s view of the “commodity” at issue is misplaced because Staff
14 does not distinguish electricity generated from roof-top PV panels pursuant to an SSA from
15 electricity generated from non-renewable sources.¹²⁵ SunPower asserts that the evidentiary record
16 discloses that some electric consumers perceive “green power,” as being different from electricity
17 generated from non-renewable resources.¹²⁶ SunPower argues that a proper and meaningful
18 application of *Serv-Yu* requires more than an assumption that the general public has an interest in
19 roof-top solar generation.¹²⁷ SunPower further argues that the services that SolarCity offers cannot be
20 said to be “essential” to a large segment of the general public, or to be “essential” to those people and
21 entities among the general public who might desire “green power.” SunPower states that the
22 difference between what is desirable and what is essential to one’s day-to-day existence is substantial.

23 WRA also asserts that the service SolarCity provides is not an “essential” service. While
24 acknowledging that furnishing electricity through a network of generators, transmission facilities and
25 distribution facilities may be an essential service, WRA asserts that a customer who is connected to
26 the grid does not have to obtain solar electric services located on its premises in order to function, and

27 ¹²⁵ Ex S-1 at 24-25; Tr. at 1070-71.

28 ¹²⁶ SunPower Initial Brief at 18.

¹²⁷ *Id.* at 19.

1 that customers who choose “green” power because of environmental concerns or as a hedge against
 2 higher utility rates, do not need the protections of regulation. WRA states that if the SolarCity
 3 electricity were “essential,” then the Scottsdale schools could not have operated for years without it.

4 Staff asserts that electricity is “indisputably” a commodity in which the public has generally
 5 been held to have an interest¹²⁸ and that the public has a general interest in electricity generation.¹²⁹
 6 Staff claims that the evidence shows that SolarCity will provide electricity and that the principal
 7 objective of the SSA is to provide electric service from solar generating facilities. Staff believes that
 8 the argument that there is a fundamental difference between electricity produced by renewable
 9 generation and electricity produced by incumbent utilities is erroneous.¹³⁰ Staff notes that many
 10 incumbent utilities have renewable generation in their resource portfolios. Further, Staff states, it is
 11 clear from the testimony of the witness for the Scottsdale Unified School District that the schools
 12 view SolarCity’s electricity as interchangeable with the incumbents’ electricity, as the schools’ goal
 13 is to purchase electricity at a lower rate.¹³¹ Staff states that the argument that the public only has an
 14 interest in electricity provided through a centralized generation facility is too narrow and rigid an
 15 interpretation of the public’s interest. Such view, Staff claims, would exempt distributed generation
 16 no matter how large in scale it ultimately became simply because it was decentralized and did not tie
 17 into the transmission network.¹³² Staff believes that this view also ignores the fact that excess
 18 electrons are pushed back onto the public network or grid for consumption by other customers.

19 Staff also argues that the claim that SolarCity’s furnishing of electricity is incidental to its
 20 financing activities because the system is not part of the public distribution system takes an
 21 unreasonably narrow view and does not consider the inter-related nature of SolarCity’s electric
 22 service as a whole or the reliability issues for the overall electric grid. Staff believes that the integrity
 23 and reliability of the interconnected grid are matters of public concern. Staff argues that privately
 24 owned solar generation equipment is imbued with a public character because it is interconnected with
 25 the electric grid and, even in isolation, could have an impact on the overall operation and reliability of

26 ¹²⁸ Staff cites *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 394 (1983).

27 ¹²⁹ Staff Reply Brief at 8

28 ¹³⁰ *Id.*

¹³¹ Tr. at 533-34, 538, 543, 561, 563-64, 565.

¹³² Staff Initial Brief at 19.

1 the grid.¹³³ Staff asserts that both a customer's interconnected facilities and a customer's transaction
 2 with the incumbent are subject to the Commission's jurisdiction and, in fact, are within the
 3 Commission's regulatory purview.¹³⁴ Staff states that the idea that a customer's facilities are
 4 somehow not a matter of public interest or not subject to Commission oversight is inconsistent with
 5 established regulatory practice. Because the electricity will be provided not only to the schools but
 6 also to the electric grid through net metering, Staff finds it equally unpersuasive that SolarCity's
 7 service is unimportant to the public interest.¹³⁵ Staff states that, over time, SolarCity's provision of
 8 electricity will be integral to the public interest.

9 TEP and UNSE claim that there is no doubt that electric power is a commodity in which the
 10 public has an interest. According to TEP and UNSE, the fact that SolarCity's facilities are
 11 interconnected with the public electric grid only enhances the public interest. They assert that the
 12 interconnected nature of the facilities creates potential issues and disputes for those incumbent
 13 providers that connect with SolarCity. TEP and UNSE believe that the Commission is the most
 14 appropriate forum to establish policies, procedures and standards that address such disputes. They
 15 claim that without Commission jurisdiction over providers such as SolarCity, customers and
 16 incumbent providers would have no regulatory agency to govern SolarCity's actions and would have
 17 redress only in the courts.

18 SRP argues that there is no legal support for the argument by WRA that the public interest is
 19 not served by regulating SolarCity because solar power is somehow different than electricity
 20 generated by other means. In addition, SRP argues that the premise that the SSAs should not be
 21 regulated because solar panel leases or outright purchases are not regulated does not overcome the
 22 dictates of the Constitution. SRP asserts that the law needs to draw a line somewhere between
 23 regulation and non-regulation and that in the 1912 Constitution, the line was drawn between
 24 companies providing electric service to others and individuals providing electric service for their
 25 private use. SRP suggests that if SolarCity wants to avoid the regulation mandated by the
 26

27 ¹³³ *Id.* at 23.

28 ¹³⁴ Staff cited A.A.C. R14-2-203(A) and(C), and R14-2-208(B).

¹³⁵ Tr. at 368.

1 Constitution, it can engage in the sale of systems.¹³⁶

2 **b. Analysis**

3 The fourth *Serv-Yu* factor looks at whether the activity deals with the service of a commodity
4 in which the public has been held generally to have an interest. Article 15, Section 2 of the Arizona
5 Constitution deems electricity to be a commodity in which the public has an interest.¹³⁷ While we
6 find that electrons produced from a coal plant and a solar system are indistinguishable from a physical
7 standpoint, under the circumstances of this case, the electricity produced under an SSA for schools,
8 government and other non-profit entities is not sufficiently essential for it to be characterized as a
9 commodity in which the public has an interest. The evidence in the record demonstrates that
10 SolarCity's SSAs never surpass 50 percent of the total connected load of the schools served by
11 SolarCity, and the schools, governmental entities and non-profits that utilize SSAs would never be
12 completely disconnected from the grid under the terms of the SSA. We also take note that SSAs do
13 not use the transmission grid.

14 Additionally, we agree with SolarCity that the ramifications of a cessation of SolarCity's
15 service to one of its customers are a far cry from those associated with a shut-down in utility service
16 by a regulated electric company such as APS. In the first example, the customer would continue to
17 benefit from electric service from the provider of last resort – the regulated utility that is providing the
18 majority of the customer's electricity to begin with. In the latter instance, hundreds of thousands if not
19 millions of customers would be left without any electricity whatsoever. Schools, government, and
20 other non-profit entities who sign up for service under a SolarCity SSA do so entirely voluntarily; they
21 are not captive customers, and may elect to own their own solar systems, or simply not to take service
22 from SolarCity under an SSA, choosing to have all of their electricity needs met by the incumbent
23 utility.

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28 ¹³⁶ SRP Opening Brief at 16.

¹³⁷ See also *SWTC*, 213 Ariz. at 433, 142 P.3d at 1246.

1 We are analyzing this Serv-Yu factor in light of the facts of this case; however there may be
 2 circumstances where our analysis of this factor may well find that this prong of the ServYu test has
 3 been met.^{138,}

4 **5. Serv-Yu Factor 5: Monopolizing or intending to monopolize.**

5 **a. Parties' Arguments**

6 SolarCity states it cannot and will not act as a monopoly. SolarCity notes that it was one of
 7 four companies to win under the latest RFP with the Scottsdale Schools and that it only won an award
 8 to serve 5 of the 90 schools.¹³⁹ SolarCity argues that one does not become a monopoly by serving
 9 one customer. SolarCity claims that this factor was uncontested at the hearing and that even Staff
 10 conceded that this factor weighs in favor of SolarCity and against regulation.¹⁴⁰ SolarCity agrees
 11 with Staff's argument that monopoly status is not controlling, but continues to believe the weight of
 12 this factor supports no regulation. SolarCity distinguishes the evolution of competition in the
 13 telecommunications industry, where the competition evolved from monopolies, to the circumstances
 14 of the solar industry, where there has never been a monopoly.¹⁴¹ Furthermore, SolarCity argues, it is
 15 not appropriate to use an imaginary future pattern concerning SolarCity's potential to argue that the
 16 Commission must extend its regulatory authority. In addition, SolarCity argues that contrary to
 17 suggestions from TEP and UNSE, the test of a monopoly is not related to how easy it is to replace the
 18 purchased goods.¹⁴²

19 RUCO argues that it is undisputed that SolarCity does not intend to monopolize a territory
 20 with a public service commodity and that there is no evidence to support a conclusion that SolarCity
 21 intends to monopolize its service territory.

22 WRA states that one of the fundamental reasons for regulating the sale of electricity to retail
 23 consumers is that sellers have been considered to be "natural monopolies." WRA states that in this
 24 case, there are multiple companies marketing and supplying distributed generation from renewable
 25

26 ¹³⁸ 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.

27 ¹³⁹ Tr. at 137, 139, 534.

¹⁴⁰ Ex S-1 at 26.

¹⁴¹ SolarCity Reply Brief at 10.

28 ¹⁴² SolarCity Reply Brief at 31, (citing TEP/UNSE Opening Brief at 7).

1 energy resources, none of which are in a position to monopolize the Arizona market. WRA believes
 2 that claims about lack of customer options mischaracterize SolarCity's position because a large
 3 number of bidders transforms the buyer/seller relationship, and there is no evidence that SolarCity's
 4 customers are incapable of negotiating mutually beneficial contractual arrangements.¹⁴³

5 SunPower argues there is no need to regulate SolarCity's SSAs to prevent uncontrolled
 6 monopoly power, extraction of unjust and unreasonable rates, or the recovery of costs in a
 7 discriminatory manner. SunPower asserts that there is no evidence that SolarCity intends to
 8 monopolize the territory in which it seeks to do business or that SolarCity is in fact monopolizing the
 9 service territory. SunPower states that SolarCity does not have a market position that would allow it
 10 to extract unjust and unreasonable rates, as illustrated by the number of proposals that the Scottsdale
 11 Unified School District received in response to its RFP. Indeed, SunPower notes competition led to
 12 SolarCity is reducing the price under the SSA that was the subject of Track One in this proceeding.¹⁴⁴

13 Staff states that although there may have been a time when a monopoly market structure was a
 14 hallmark of public utility status, that time has passed, and points to the telecommunications industry
 15 as an example. Staff claims that in *Mountain State Telephone & Telegraph Co. v. Arizona Corp.*
 16 *Comm'n*, the Arizona Court of Appeals found that the power to regulate public service corporations is
 17 derived from their status as corporations performing a public service, not from any monopoly status.
 18 ¹⁴⁵ Furthermore, Staff believes that a monopoly (at least among the most lucrative customers) is a
 19 possible outcome of SolarCity's expressed desire to do as much business as possible. Staff claims the
 20 *Serv-Yu* court implicitly recognized that the potential for a competitor to attract the most desirable
 21 customers (referred to as "cherry-picking") is a factor that may weigh in favor of determining that a
 22 competitor is a public service corporation.¹⁴⁶

23 Staff states that a utility's duties under its "obligation to serve" are not always identical to the
 24 duties of a "provider of last resort." For a monopoly utility, Staff asserts, the obligations are co-
 25 extensive, as the nature of public utility service requires that there be a designated provider of last

26 _____
 27 ¹⁴³ WRA Reply Brief at 7.

¹⁴⁴ SunPower Opening Brief at 13.

¹⁴⁵ 132 Ariz. 109, 114-15, 644 P.2d 263, 268-69 (App. 1982) ("*Mountain States*").

¹⁴⁶ Staff cites *Serv-Yu*, 70 Ariz. at 242, 219 P.2d at 328-29.

1 resort to ensure continuous and reliable service to the public. With the advent of competition and
2 alternative providers, Staff asserts, the situation became more complicated. Staff argues that even if
3 SolarCity is not designated a “provider of last resort,” that does not mean that it is not a public service
4 corporation. Staff agrees with TEP and UNSE that one must consider whether the customer really
5 has an alternative if it is not receiving satisfactory service.¹⁴⁷

6 TEP and UNSE believe that one of the concerns raised by this factor is whether the customer
7 has an alternative if it is not receiving satisfactory service. TEP and UNSE claim that once the solar
8 facilities are installed, the customer has no other realistic option for solar electricity for an extended
9 period of time, possibly forever, because it is expensive and impractical to remove the facilities so
10 that another provider can step in to provide the solar electricity. Thus, they assert, a customer cannot
11 easily switch to a competitive alternative if there are service issues. As a consequence, TEP and
12 UNSE argue that increased consumer protection and a forum for dispute resolution, as can be
13 provided through Commission oversight, will be important as this industry grows and involves more
14 and varied end-user customers.

15 SRP argues that the existence or non-existence of market power is not relevant to the
16 constitutional definition of a public service corporation. SRP argues that SolarCity points to no case
17 where any court found that a business was not subject to regulation because it did not intend to
18 provide monopoly service. SRP believes that the argument that an intent to monopolize is relevant
19 defies logic because under such argument it would exclude both regulating a competitive electric
20 service provider, no matter how large, and the generation portion of the business of incumbent.¹⁴⁸

21 **b. Analysis**

22 The fifth *Serv-Yu* factor looks at whether SolarCity is a monopoly or intends to monopolize a
23 territory. Existence of a traditional monopoly may be one indication that there is a need to regulate
24 an entity that is providing an essential public commodity, but is not determinative of whether the
25 entity is a public service corporation. The Arizona Constitution is silent as to the concept of
26 “regulated monopoly.” The CC&N is a legislative creation. The power to regulate derives from the

27
28 ¹⁴⁷ Staff Reply Brief at 11,(referring to TEP/UNSE Initial Brief at 7).

¹⁴⁸ SRP Opening Brief at 15.

1 status of the corporation performing a public service, not from the fact that the corporation is a
 2 regulated monopoly.¹⁴⁹ Thus, while monopoly status may provide strong argument for regulation, the
 3 absence of monopoly status or power does not indicate lack of a public interest. In this case, this
 4 factor is not helpful in the determination of whether SolarCity is supplying a public commodity.

5 SolarCity is not a monopoly and does not have market power and competes for business, at
 6 least with the schools and governmental entities, through an RFP process. Thus, the need to regulate
 7 rates is not the same as with the traditional monopolistic utility service.

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

18 **6. *Serv-Yu* Factor 6: Acceptance of substantially all requests for service.**

19 **a. Parties' Arguments**

20 SolarCity argues that there is no evidence in the record to suggest that it accepts "substantially
 21 all requests for service" and that the evidence in the record refutes any such claim. SolarCity's CEO
 22 testified that the Company fails to close on over 91 percent of the requests it receives for service for
 23 many reasons, including that it is not able to provide the service for technical reasons or loses the
 24 opportunity to serve.¹⁵⁰ In addition, SolarCity cites testimony that due to the RFP process, SolarCity
 25 cannot directly receive or accept any requests for service from schools or governmental agencies and
 26 must compete with others.¹⁵¹ In response to the suggestion that SolarCity is not dissimilar to an

27 ¹⁴⁹ See *Mountain States*, 132 Ariz. at 114-15, 644 P.2d at 268-69.

28 ¹⁵⁰ Ex A-4 at Q 23.

¹⁵¹ Tr. at 531.

1 incumbent utility when it makes the decision to serve a customer, SolarCity argues that nothing in the
 2 record supports an incumbent's use of its discretion not to serve a customer. Furthermore, SolarCity
 3 argues, no customer has the right to demand service from Solar City.

4 RUCO asserts that the evidence supports SolarCity's contention that it does not intend to
 5 accept every request for service. SolarCity gave several reasons why it might not provide service: the
 6 customer has insufficient space to mount a system; the potential site is not properly oriented to
 7 capture the sunlight; zoning restrictions prohibit installation; there is inadequate infrastructure;
 8 installation would result in inadequate energy savings; and the customer has inadequate credit.¹⁵²

9 RUCO asserts that the argument that SolarCity intends to offer its services broadly misses the point
 10 because RUCO claims, the *Serv-Yu* criteria specifically require acceptance of substantially all
 11 requests for service.¹⁵³ RUCO asserts that the *Serv-Yu* criteria do not focus on the "scope upon which
 12 the service will be offered," but on the acceptance of substantially all requests for service.

13 WRA asserts that SolarCity is not obligated to serve all potential customers and that not every
 14 potential consumer is a suitable candidate for an SSA. In this case, WRA believes that the school
 15 districts, governmental agencies and other tax-exempt entities are capable of comparing options for
 16 distributed energy resources and that there is no reason to suppose they need regulatory assistance in
 17 bargaining with competing sellers, any more than they need assistance in bargaining with other
 18 vendors.

19 SunPower agrees with SolarCity's position on this factor and asserts that the record indicates
 20 that (1) the array of services offered by SolarCity are customized to the customer, and (2) a
 21 prospective customer and the related host site must satisfy a number of screening criteria before a
 22 given request for service is feasible. Thus, SunPower argues, there is no evidence to support a
 23 determination that SolarCity accepts substantially all requests for service.

24 Staff asserts that *Serv-Yu* held that a business may be "so far affected with a public interest
 25 that it is subject to regulation . . . even though the public does not have the right to demand and
 26 receive service."¹⁵⁴ Staff argues that regardless of the right of the public to demand and receive

27 ¹⁵² Ex A-4 at 4.

28 ¹⁵³ RUCO cites *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 327.

¹⁵⁴ Staff cites *Serv-Yu*, 70 Ariz. at 242, 219 P.2d at 328.

1 service in a particular instance, the question whether a business enterprise constitutes a public service
 2 corporation is determined by the nature of the operations, and each case must stand upon its particular
 3 facts. Staff states that the evidence is clear that SolarCity does not intend to turn away customers who
 4 can be served, and that the Company intends to serve an identifiable subset (*i.e.* those who meet its
 5 criteria for service).¹⁵⁵ Staff states that most courts recognize that to meet this factor, all that is
 6 necessary is a holding out to even a small segment of the public.¹⁵⁶

7 TEP and UNSE state that SolarCity broadly markets its distributed solar electricity
 8 arrangements, and does not limit its service to any particular segment of the market. TEP and UNSE
 9 acknowledge that SolarCity may choose not to serve a particular customer if there are credit issues,
 10 facility constraints or other factors, but, they argue that such limitations are not dissimilar from an
 11 incumbent utility's requiring deposits from customers or being unable to provide service to a
 12 potential customer due to a remote location.

13 b. Analysis

14 The sixth *Serv-Yu* factor looks at whether SolarCity accepts essentially all requests for
 15 service. When dealing with school districts and governmental entities, SolarCity participates in an
 16 RFP process. While SolarCity competes vigorously for business in this sector, in a recent RFP with
 17 the schools districts, SolarCity received only a portion of the contract.¹⁵⁷ Because SolarCity is only
 18 one of several SSA providers and must compete vigorously for a share of the market, this factor is an
 19 indication that SolarCity's SSA activities do not demonstrate the characteristic of a public service
 20 corporation that it accepts most, if not all requests for service.

21 7. *Serv-Yu* Factor 7: Service under contracts.

22 a. Parties' Arguments

23 SolarCity argues that the *Serv-Yu* court found that providing services under a contract is a
 24 factor supporting the conclusion that an entity is not a public service corporation.¹⁵⁸ SolarCity asserts
 25 that it provides its services pursuant to an extremely detailed and specific agreement that is negotiated
 26

27 ¹⁵⁵ Tr. at 271; Ex A-4 at ¶ 23.

¹⁵⁶ Staff citers *SWTC*, 213 Ariz. at 432-33, 142 P.2d at 1245-46.

¹⁵⁷ Tr. at 137.

¹⁵⁸ *Serv-Yu*, 70 Ariz. at 239, 219 P.2d at 327.

1 with each customer.¹⁵⁹

2 RUCO states that, in this case, the service is provided through a detailed contract, and there is
3 no evidence of wide solicitation or other factors that would indicate the Commission is dealing with a
4 public utility.

5 Staff asserts that SolarCity's provision of service pursuant to contract does not preclude the
6 conclusion that SolarCity is a public service corporation. Staff states that if entering into contracts
7 with customers would control the determination of whether an entity is a public service corporation, it
8 would be an easy way of evading the law.¹⁶⁰ Staff notes that many public service corporations
9 provide some services under contract or have tariffs that allow Individual Cost Basis ("ICB")
10 treatment and pricing.¹⁶¹

11 TEP and UNSE also note that there are public service corporations, particularly in the
12 telecommunications sector, that provide service under tariffs that allow ICB treatment depending on
13 the specific circumstances of the customer.

14 **b. Analysis**

15 The seventh factor looks at providing service pursuant to contract and reserving the right to
16 discriminate. In *Serv-Yu*, the Court held that entering into private contracts is not controlling,
17 because allowing use of contracts with customers to control the determination whether an owner is a
18 public service corporation, would provide an easy way to evade the law.¹⁶² The *Serv-Yu* Court also
19 stated:

20 [I]f the service is rendered pursuant to contract or limited membership, it
21 is difficult to hold that one has expressly held himself out as ready to
22 serve the public generally. But the text does not require an express
23 holding out. It may be done impliedly, as by wide solicitation and other
24 factors.¹⁶³

25 SolarCity provides its SSA services through a highly detailed and individually tailored
26 contract. The nature of the SSA arrangement necessitates individualized pricing, as the specific size
27 and capabilities of the solar panels affect the economies of scale of production and the cost of each

28 ¹⁵⁹ Tr. at 1239.

¹⁶⁰ Staff cited *Serv-Yu*, 70 Ariz. at 240, 219 P.2d at 327.

¹⁶¹ Staff Reply Brief at 11.

¹⁶² *Serv-Yu*, 70 Ariz. at 240, 219 P.2d at 327.

¹⁶³ *Serv-Yu*, 70 Ariz. at 239, 219 P.2d at 327.

1 kWh produced. Notably, SolarCity employs contracts for every instance where it provides its
 2 services unlike public utilities which primarily utilize tariffs and selectively use contracts.

3 The *Serv-Yu* Court recognized that rendering of services pursuant to contract weighed against
 4 finding that an entity was a public service corporation. The fact that SolarCity employs individualized
 5 contracts rather than open tariffs to provide service tends to support SolarCity's position that it does
 6 not possess one of the traditional attributes of a public service corporation. However, this factor alone
 7 is not determinative of our inquiry in light of the broad business solicitation of SolarCity."

8 **8. *Serv-Yu* Factor 8: Competition with other public service corporations.**

9 **a. Parties' Arguments**

10 SolarCity argues that the evidence shows that SSA providers do not compete with public
 11 service corporations. SolarCity points to APS witness testimony that APS views solar providers, like
 12 SolarCity, as partners who are essential for the implementation of the distributed energy requirements
 13 of the REST Rules.¹⁶⁴ Furthermore, SolarCity argues, the services that it provides via its SSAs are not
 14 the same services provided by incumbent utilities, and other jurisdictions consider the solar industry
 15 to be complementary to, and not competitive with, public service corporations.

16 SolarCity argues that contentions by Staff and TEP and UNSE that SolarCity will be in direct
 17 competition with the incumbent utilities are not supported by the record. SolarCity claims that Staff
 18 ignores the Commission's own REST Rules, which require utilities to utilize distributed generation,
 19 and recent amendments to utilities' Renewable Energy Implementation Plans, which forbid the
 20 utilities from counting any utility-owned projects toward the distributed requirements. SolarCity
 21 claims that there is no evidence in the record that any utility in the state offers the services that
 22 SolarCity provides.

23 RUCO argues that SolarCity will not be competing with ESPs because it will not be providing
 24 base load electricity. RUCO believes that the best indicia that SolarCity is not in competition with
 25 the incumbent utilities is APS' support for the application and its recognition that rooftop solar PV
 26 systems have limited application and are unable to meet its customers' full load requirements.¹⁶⁵

27 _____
 28 ¹⁶⁴ Ex APS-1 at 3-4; Tr. at 640; Tr. at 644.

¹⁶⁵ Ex APS-1 at 13.

1 RUCO notes that the nature of solar PV is different from the situation the Arizona Supreme
2 Court addressed in *Trico*,¹⁶⁶ in which the Court found that the threatened competitive war between
3 Tucson Gas and Trico made it imperative that Trico be subject to the regulatory powers of the
4 Commission. RUCO asserts that solar PV does not present the same kind of concern because of
5 solar's limitations and because SSAs would not result in any ESP losing a customer.

6 WRA states that there is no evidence that "competition might lead to abuse detrimental to the
7 public interest" that could be remedied by rate regulation.¹⁶⁷ Moreover, WRA states, the Commission
8 has either promoted or accepted competition among energy and telecommunications public service
9 corporations, so this factor is an anachronism.¹⁶⁸

10 SunPower asserts that the evidentiary record does not support a determination that SolarCity's
11 activities would lead to wasteful competition with Arizona's electric utilities. SunPower notes that of
12 the electric utilities that intervened in this proceeding, APS, TEP and UNSE and SRP, only APS
13 provided evidence through the testimony of Ms. Lockwood. Ms. Lockwood testified that APS did
14 not perceive SolarCity's services to be in actual or potential competition with APS to its detriment.
15 SunPower notes that APS believes that solar service providers perform an important role in the
16 development and deployment of renewable distributed generation.¹⁶⁹

17 Staff argues that provision of electric service under the SolarCity SSAs places SolarCity in
18 direct competition with the incumbent electric utilities and that a corporation that will compete with,
19 and take business away from, public utilities should be under similar regulatory restriction.¹⁷⁰
20 Otherwise, Staff claims, corporations could operate in competition with bona fide utilities and thereby
21 isolate portions of the public network from public regulation and oversight. Staff also believes that it
22 would be inconsistent with Arizona law, and be unfair, not to regulate an SSA arrangement provided
23 by SolarCity when an SSA arrangement provided by an incumbent would be regulated.

24 TEP and UNSE argue that SolarCity competes directly with similarly situated solar energy
25 companies and the incumbent utilities for the provision of electricity and that the electricity provided

26 ¹⁶⁶ *Trico Electric Cooperative, Inc. v Arizona Corp Comm'n*, 86 Ariz. 27, 38-39, 339 P.2d 1046 (Ariz. 1959) ("*Trico*").

27 ¹⁶⁷ WRA relies on a concept from *Trico*, 86 Ariz. at 35, 339 P.2d at 1052.

28 ¹⁶⁸ WRA Opening Brief at 8.

¹⁶⁹ SunPower Initial Brief at 10.

¹⁷⁰ Staff cites *Serv-Yu*, 70 Ariz. at 241, 219 P.2d at 328.

1 by the SolarCity facilities is intended to offset the electricity provided by the incumbent utility.

2 **b. Analysis**

3 The last *Serv-Yu* factor focuses on competition with other public service corporations. The
 4 concern under this factor is that entities that take business away from public service utilities should be
 5 under like regulatory restrictions if effective governmental supervision is to be maintained.¹⁷¹ Solar
 6 providers displace power sales by incumbent utilities, although the current limitations of solar power
 7 generation mean that the utility will continue to serve a portion of SolarCity's customers' load. This
 8 continued relationship between the utility and SolarCity is critical as it affords the Commission and
 9 utility an opportunity to structure rate designs which ensure these customers contribute to fixed
 10 system costs and expenses. If SolarCity's services were broadly directed at severing this
 11 utility/customer relationship, this would weigh in favor of concluding that SolarCity was in
 12 competition with public service corporations and was itself a public service corporation.

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

18 **D. Conclusions Concerning *Serv-Yu* Factors**

19 The issue in this proceeding is ultimately whether SolarCity's SSA business and activity are
 20 "clothed with a public interest" such that government intervention or regulation is necessary to
 21 preserve a service that is indispensable to the population and to ensure adequate service at fair rates
 22 when there is disparity in bargaining power.¹⁷² The *Serv-Yu* factors are only guidelines. Not all of
 23 the *Serv-Yu* factors need be present to find a public service corporation, and not all of the *Serv-Yu*
 24 factors may have the same relevance they once did. In determining if a business is engaged in selling
 25 and distributing a commodity in which the public as a whole has an interest, it is less helpful to
 26 examine each factor in isolation, and more useful to examine how the individual factors inter-relate to

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 28 ¹⁷¹ See *Serv-Yu*, 70 Ariz. at 241, 219 P.2d at 328.

¹⁷² *SWTC*, 213 Ariz. at 432, 142 P.3d at 1245.

1 form a picture of what the entity actually does and whether its activities are clothed with the public
2 interest.

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

9 **V. The Public Interest and Proposed Regulatory Response**

10 In addition to their analyses under the Arizona Constitution and case law, many of the parties
11 to this proceeding provide public policy arguments for, or against, regulation of SSA providers.

12 **A. Positions of the Parties**

13 Staff asserts that an appropriate degree of regulation could be balanced with the competitive
14 nature of the SSA provider industry.¹⁷³ Staff explains that because SolarCity did not apply for a
15 CC&N, Staff did not evaluate whether the Commission should grant a CC&N in this proceeding and
16 did not evaluate the specific regulatory oversight that would be reasonable in these circumstances.
17 Instead, Staff identified certain features that may be appropriate in a light-handed regulatory regime.

18 Based on the record in this case, Staff recommends that only "light" regulation is necessary at
19 this time. Staff envisions a streamlined process encompassing: (1) registration (a streamlined
20 CC&N); (2) the filing of PPAs or SSAs with Staff; (3) the filing of annual reports; and (4) the
21 applicant's being subject to Commission complaint jurisdiction.

22 Staff believes that there are benefits of regulation beyond the setting of monopoly rates and
23 that regulation would promote the public interest by ensuring adequate and reliable electric service
24 from SSA providers.¹⁷⁴ Staff argues that the SSA provision that customers only pay SolarCity if the
25 unit produces electricity is not a substitute for the protections of regulation, which would obligate the

26 _____
27 ¹⁷³ Staff cautions, however, that notwithstanding Staff's view that appropriate regulation could be structured so as to be
light-handed, the degree to which regulation allegedly inconveniences an industry is not a sound basis to determine
whether an entity is a public service corporation.

28 ¹⁷⁴ Staff Initial Brief at 27.

1 utility to provide adequate and reliable service. Staff believes that the consequences of an SSA
 2 system failure are significant even if the incumbent utility will be able to provide the power the
 3 customer requires. Staff's witness Irvine testified to this point:

4 There was presumably a period of time when the world lived without
 5 distributed generation and the incumbent utilities could provide absent
 6 distributed generation. But I would want to point out again for the
 7 record that in the macro sense, and I would like to go back to the
 8 example where a school enters into an SSA and has an expectation for
 9 receiving energy at a given price for a long period of time and then
 makes financial decisions based on that expectation, I think in that area,
 especially if you ask that teacher who gets let go because suddenly the
 school couldn't afford them because they could no longer get the SSA
 cost energy if the SSA provider stopped providing.¹⁷⁵

10 Further, Staff states that even those who are not customers of SolarCity will be impacted by
 11 the provision of electric service through SSAs. Staff is concerned that without regulation there
 12 would be no enforceable obligation to provide adequate service, which could lead to increased costs
 13 for the incumbent ratepayers. Staff states that when solar panels do not work properly, the incumbent
 14 would be responsible for providing back-up power, and the incumbent's ratepayers would be
 15 responsible for any resulting costs. In addition, Staff notes, the existence of SSA providers will
 16 require incumbents to undertake specific planning activities to ensure the reliability of the grid, and
 17 these costs would also be borne by the incumbents' ratepayers. Finally, Staff notes the growth of
 18 SSAs could present challenges to the incumbents related to forecasting. Staff argues that in the
 19 absence of regulation over the industry, the Commission has limited means to require SSA providers
 20 to provide forecasting and other information. Staff believes that using the incumbent's
 21 interconnection agreement as a means to obtain forecasting information is imperfect because it is
 22 indirect.¹⁷⁶ Furthermore, Staff argues that the ability to monitor the proliferation of SSA systems
 23 through the various REST implementation plans used by incumbent utilities does not account for the
 24 possibility that eventually SSA projects may be financially viable without the need for REST rebates.

25 Staff asserts that another benefit of regulating SSA providers is that the Commission will be
 26 able to monitor the developing market in order to promote a level playing field among the various

27 _____
 28 ¹⁷⁵ Tr. at 1243-44.

¹⁷⁶ Staff Initial Brief at 30.

1 competitors. Staff argues that it is highly conceivable that competition with incumbent utilities for
2 SSA service could produce an unbalanced market because the incumbent utility might exert undue
3 market influence.¹⁷⁷ Staff asserts that regulating SSA arrangements could prove instrumental to
4 developing this segment of the industry in a manner that is consistent with the public interest.
5 Although the Commission may address market power through its regulation of the incumbents, Staff
6 believes a lack of regulation over the SSA providers could affect the degree to which the Commission
7 could regulate the incumbents' provision of similar services.¹⁷⁸

8 Staff asserts that regulating SSA providers would create health and safety benefits and that the
9 proliferation of SSA providers may lead to unforeseeable issues.¹⁷⁹ In addition, Staff argues that
10 finding SSA providers are subject to Commission jurisdiction would make it possible for the
11 Commission's Consumer Services Section to assist SSA customers with complaint issues. Staff is
12 concerned that the typical residential customer may not have the same degree of sophistication as do
13 school districts or governmental entities and may not have easy access to professional analytical
14 resources. Staff believes that the Commission's Consumer Services Section is easily accessible to
15 customers and that some customers might forego pursuing disputes against utilities if their only
16 avenue of relief were the courts.¹⁸⁰

17 Staff believes that assertions that "regulation light" is either impossible or unlawful are
18 undermined by the Commission's successful regulation of the telecommunications industry under
19 rules and principles that are uniquely appropriate for that industry. Staff does not suggest, however,
20 that the telecommunications regulatory model should be adopted for the solar electric industry.

21 Staff argues that the "no-regulation" parties fail to recognize that the *Phelps Dodge*¹⁸¹
22 decision not only allows the Commission to set a range of rates, but affirms that the Commission has
23 discretion to adopt various approaches to fulfill its functions. Staff argues that the critics also fail to
24 realize that there is more than one model of regulation utilized by the Commission and that the
25

26 ¹⁷⁷ Tr. at 977.

27 ¹⁷⁸ Staff cites *Mountain States*, 132 Ariz. at 115, 644 P.2d at 269.

28 ¹⁷⁹ Tr. at 720-21.

¹⁸⁰ Staff Initial Brief at 33.

¹⁸¹ *Phelps Dodge*, 207 Ariz. at 109, 84 P.3d at 587.

1 Commission has discretion to adapt regulations to the circumstances at hand.¹⁸² Staff further argues
 2 that regulation does not create uncertainty, but can create a well-managed, well-codified, clear route
 3 to understanding the return on investment.

4 Staff also believes that this “light” form of regulation would not burden SolarCity, but would
 5 allow the Commission to oversee the development of this nascent industry.¹⁸³ Staff maintains that
 6 concern that regulation would “inconvenience” the industry is not a valid factor in determining if
 7 SolarCity is a public service corporation which must be determined as a matter of law.¹⁸⁴

8 SRP argues that there is no legal support for the notion that the Commission can pick and
 9 chose what it wants to define as a public service corporation and then change its mind based upon the
 10 circumstances. SRP agrees that the Commission has great discretion, not over the constitutional
 11 definition, but how it regulates.

12 SRP argues that the public interest would be served by Commission oversight. SRP believes
 13 that there are many aspects of SolarCity’s business that would benefit from Commission oversight
 14 and consumer protection, asserting that Commission oversight would: (1) ensure accurate cost
 15 comparisons with current rates; (2) ensure the clarity of pricing terms; (3) ensure the accuracy of
 16 advertising statements; and 4) provide a forum for dispute resolution.¹⁸⁵

17 SRP believes that Commission oversight can be flexible depending on the needs and
 18 circumstances of the situation. SRP advocates a rulemaking process as a future step. SRP believes
 19 that in the interim, the Commission should regulate SolarCity consistent with the purposes of the
 20 Constitution, including its discretion in determining just and reasonable rates and the weight to be
 21 given to fair value.¹⁸⁶

22 SRP suggests the following framework for a light-handed CC&N process:

- 23 1. A single entity would make an application to the Commission, on a form provided
 24 by the Commission and the services of an attorney would not be needed to complete
 and file the form.
- 25 2. The form would generally describe the services to be provided.

26 ¹⁸² Staff Reply Brief at 13,

¹⁸³ Staff Initial Brief at 26.

27 ¹⁸⁴ Staff Reply Brief at 13.

¹⁸⁵ SRP Reply Brief at 8-9.

28 ¹⁸⁶ SRP cites *Phelps Dodge*, 207 Ariz. at 106, 83 P.3d at 584; *Simms v. Round Valley Light & Power Company*, 13 P.U.R.3d 456, 80 Ariz. 145, 294 P.2d 378 (1956).

3. The form would state approximate values of the property to be installed (without disclosing competitive information).
4. The form would state a range of prices and services to be offered to customers and assert that the prices will be a reasonable reflection of the value of the plant devoted to service.
5. Based on the information provided, the Commission would issue a solar CC&N, which would allow the applicant to serve as the general partner for any entity providing service under a "solar services agreement."
6. Once the CC&N is granted, the applicant would provide a copy of each contract to the Commission on a confidential basis, and if the Commission does not formally object, the contract would be deemed approved without further action.
7. The solar industry would pay reasonable fees to cover the costs of the Commission's efforts.
8. The Commission would work to develop standardized disclosures to assure customer understanding.

TEP and UNSE argue that there are substantial benefits from regulation and that Commission oversight would: (1) ensure the continuity of the operation and maintenance of the system; (2) ensure that SolarCity is properly calculating the electricity produced by the system and the bills for that electricity; (3) ensure that there are appropriate customer service and consumer protection; and (4) ensure that there is an efficient and qualified forum for the resolution of customer complaints. TEP and UNSE state that these needs extend beyond the initial installation of the solar system and that the Commission is the appropriate entity with authority under the Constitution, and with the expertise, to oversee and regulate such activities. TEP and UNSE argue the clear public benefits that would arise from Commission regulation and oversight confirm that SolarCity's business and activities are sufficiently clothed with a public interest to make its rates, charges and operations a matter of public concern.¹⁸⁷

SolarCity argues that good public policy requires a determination that SolarCity is not a public service corporation. SolarCity notes that in the *SWTC* case, the Court of Appeals held that the purpose behind regulating public service corporations is "to preserve those services indispensable to the population and to ensure adequate service at fair rates where the disparity in bargaining power between the service provider and the utility ratepayer is such that government intervention on behalf of the ratepayer is necessary."¹⁸⁸ SolarCity states that because SSAs and distributed solar generation are not indispensable services (since the customer can receive all necessary power from the incumbent

¹⁸⁷ TEP/UNSE Reply Brief at 6.

¹⁸⁸ *SWTC*, 213 Ariz. at 432, 142 P.3d at 1245.

1 utility) and because the record reflects no disparity in bargaining power that calls for government
2 intervention, there is no valid policy reason for the Commission to regulate SSA providers as public
3 service corporations.

4 SolarCity claims that the purposes of the regulation that other parties advocate in this
5 proceeding are not compelling or are already adequately addressed through existing regulations.
6 SolarCity argues that regulating SSA providers is not needed to assure a "fair and level playing field"
7 among competitors and could unfairly advantage existing public service corporations. SolarCity
8 claims that regulating SSA providers would strengthen the existing public service corporations and
9 allow them to use their hold on the market to directly solicit customers for SSA services. SolarCity
10 notes that none of the solar providers participating as intervenors or who made public comments
11 expressed concern about competing with regulated affiliates of public service corporations. SolarCity
12 believes that competition with affiliates of public service corporations would exist whether SSA
13 providers are regulated or not.¹⁸⁹

14 SolarCity argues that, contrary to Staff's contention, the Commission is not needed to assure
15 ongoing provision of service, and the public would not be harmed if a distributed generation system
16 goes off line. In response to Staff's expressed concern that the schools rely on the solar system for
17 budgeting purposes, SolarCity asserts that Staff does not explain why such a scenario requires
18 Commission regulation any more than any other school vendor contract requires regulation.¹⁹⁰
19 SolarCity believes that the need to regulate utilities does not derive from budgeting inconvenience,
20 but from massive economic damage and real danger to the public health and well-being from a
21 widespread failure of electric service.

22 SolarCity argues that regulation of SSA providers will not benefit the regulation of the
23 incumbent utilities' rates. SolarCity notes that Staff expressed concern at the hearing that widespread
24 adoption of distributed generation solar systems will result in lost revenue and stranded costs for the
25 incumbent utilities, resulting in higher rates.¹⁹¹ SolarCity states that even if this were true, it is a
26 concern that relates to distributed generation in general, not to a particular method of adoption like an

27 ¹⁸⁹ SolarCity Initial Brief at 18-19.

28 ¹⁹⁰ SolarCity Reply Brief at 16.

¹⁹¹ Tr. at 978.

1 SSA. SolarCity asserts that when the Commission adopted the REST Rules, including the desired
2 amount of distributed generation, the potential for stranded costs was, or should have been,
3 considered. SolarCity believes that stranded costs should be addressed via existing ratemaking
4 procedures.¹⁹² SolarCity argues that Staff's concerns about stranded costs are overstated because the
5 majority of solar installations are customer-owned or leased. According to SolarCity, regulating
6 SSAs will not result in incumbent utilities receiving sufficient information to avoid stranded costs
7 from the proliferation of distributed generation, as SSAs comprise only a portion of distributed
8 generation projects.

9 In addition, SolarCity asserts that regulation is not necessary to improve public safety or the
10 grid. SolarCity asserts that the testimony clearly shows that solar installers are already subject to
11 numerous safety regulations, including National Electric Code standards, local building code
12 standards, the Commission's Interconnection Rules and utility interconnection standards and
13 agreements.¹⁹³ SolarCity also notes that A.R.S. § 32-1170.02 requires all solar contractors to be
14 licensed by the Registrar of Contractors ("ROC"), which has multiple remedies for violations.
15 SolarCity notes further that, in addition to bringing a complaint before the ROC, consumers can bring
16 complaints in the court system and with the Attorney General.¹⁹⁴ SolarCity claims that Staff fails to
17 provide evidence why these outlets for consumer complaints are inadequate. Furthermore, SolarCity
18 suggests that giving SSA customers the opportunity to complain to the Commission, but not giving
19 that opportunity to owners or lessees of similar systems, could create consumer confusion.

20 SolarCity states that the Commission already has authority to regulate the method and
21 standards for interconnecting a PV system and that all safety concerns can be addressed through the
22 current framework. SolarCity notes that in Decision No. 68674 (June 28, 2007), the Commission
23 adopted a modified version of the Public Utility Regulatory Policy Act ("PURPA") standard on
24 interconnection, to be used on an interim basis until the Commission could adopt interconnection
25 rules, and argues that the adopted Interconnection Document protects both the public and the grid.
26 Furthermore, SolarCity asserts that Staff was unable to point to any safety consideration or standard

27 ¹⁹² Tr. at 1024-25.

¹⁹³ Ex A-4; Tr. at 360, 364-65.

28 ¹⁹⁴ Tr. at 916-20.

1 that the current rules do not adequately address.¹⁹⁵ SolarCity states that if the Commission becomes
2 aware at a future date of a safety consideration that needs to be addressed, Staff could correct the
3 situation by modifying the Interconnection Rules. SolarCity claims that customers are actually more
4 protected under the SSA arrangement than under an unregulated purchase of solar facilities because
5 with an SSA, the solar provider only gets paid if the system is operational. SolarCity believes that
6 this financial motivation will ensure that a system does not violate interconnection standards.

7 SolarCity argues that regulation would stifle competition and thwart the solar industry in
8 Arizona, resulting in higher prices for consumers. SolarCity notes that the Commission has gone to
9 great lengths to set a regulatory and policy framework to increase the adoption of distributed solar
10 power in Arizona by establishing the REST Rules, Interconnection Standards, and Net Metering
11 Rules. SolarCity believes that regulation will create uncertainty that will deter investors from the
12 Arizona market.¹⁹⁶ According to SolarCity, the limited pool of solar investors coupled with any level
13 of uncertainty or regulation of SSA providers, will divert the limited pool of capital to other markets.
14 SolarCity believes it is important to consider that without third-party investors, Arizona utilities will
15 not be able to meet their REST standards, pointing to APS' testimony that approximately 65 percent
16 of its commercial solar reservations are predicated on SSA financing and that without SSAs APS
17 would not be able to meet its REST requirements.¹⁹⁷ SolarCity believes it would be a perverse result
18 for the Commission to set REST requirements with one hand and then prevent utilities from meeting
19 those requirements with the other.

20 SolarCity believes that even "light-handed" regulation would stifle the industry without
21 producing a benefit. SolarCity argues that at the very least, regulation of a public service corporation
22 requires determining fair value and requires the Commission to set just and reasonable rates.¹⁹⁸ The
23 Company interprets this to mean that the Commission would be required to regulate the very core of
24 an SSA, the price to the consumer, making it impossible for a third-party investor to rely on the
25 income stream from the SSA. SolarCity claims that if the value of the income stream could be

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27 ¹⁹⁵ Tr. at 1210, 1279.

¹⁹⁶ Tr. at 389-90, 290-92, 448-51, 755-56.

¹⁹⁷ Tr. at 640-41.

¹⁹⁸ SolarCity cites *Phelps Dodge*, 207 Ariz. at 104, 83 P.3d at 582.

1 modified by the Commission, investors would take their money elsewhere.¹⁹⁹

2 SolarCity states that its request is limited to schools, non-profits and governmental entities
3 because that class of solar users has no economically viable way to implement solar installations
4 without SSAs. Although SolarCity believes that the identity of the host as a school, non-profit or
5 governmental entity adds strength to the argument that SSAs are primarily financing tools, Solar City
6 supports an Order that would expand the ruling to cover all solar users.

7 SolarCity also states that if the facts change in the future, the Commission could reconsider
8 SolarCity's public service corporation status at that time. SolarCity asserts that Arizona case law
9 clearly states that public service corporation status is dependent upon an analysis of the current facts
10 and not at some future point.²⁰⁰

11 RUCO argues that SolarCity and other third-party installers that utilize SSA arrangements
12 should not be regulated because it would impede the growth of the solar industry and because sound
13 public policy disfavors regulation in this situation. RUCO argues that to the extent there is any
14 ambiguity in the definition of public service corporation, the courts may look behind the words
15 themselves to determine the intended effect.²⁰¹ RUCO advocates that if development of the solar
16 industry in Arizona is a goal, then the most compelling reason against regulation is the evidence in
17 the record that regulation of any kind will impede that development.²⁰² RUCO cites testimony that
18 regulation is likely to drive out numerous, if not all, solar providers due to the limited pool of tax
19 equity financiers.²⁰³ RUCO asserts that because the returns on tax equity financing are low, lenders
20 want to avoid any additional risk, and any sort of regulation represents uncertainty that will cause
21 prospective lenders to look elsewhere.²⁰⁴

22 RUCO also claims that SSAs are in the public interest because they can be preferable to leases
23 or purchase arrangements, as they require no up-front cost to the customer, and they only require
24

25 ¹⁹⁹ Tr. at 449.

26 ²⁰⁰ SolarCity cites *Sw. Gas*, 169 Ariz. at 285, 818 P.2d at 720.

27 ²⁰¹ RUCO cites *Ward v. Stevens*, 86 Ariz. 224, 344 P.2d 491 (1959); and *Bussanich v. Douglas*, 152 Ariz. 447, 451 P.2d
644 (1986).

28 ²⁰² RUCO Closing Brief at 14.

²⁰³ Tr. at 104.

²⁰⁴ Tr. at 105.

1 payment for the amount of energy produced.²⁰⁵ RUCO believes that because the SSA arrangement
2 encourages providers to maintain the panels in good working order, they encourage the proliferation
3 of solar power generation.

4 Furthermore, RUCO argues that the Commission's exercise of jurisdiction over the SSAs is
5 not likely to serve or protect the public health and safety. Like SolarCity, RUCO notes that there are
6 numerous state and local laws and ordinances that provide consumer protection. RUCO claims that
7 there is little risk of physical or other harm to the consumer, as state law already establishes standards
8 for the selling and installing of "solar energy devices."²⁰⁶ RUCO also states that other state agencies,
9 such as the ROC, the Department of Commerce and the Attorney General, are in a better position to
10 monitor and prevent perceived harm to the public, as they are tasked with preventing consumer harm
11 and have specific expertise. RUCO believes that the ROC and local municipalities are in the best
12 position to establish and enforce standards to preserve the structural integrity of rooftops with solar
13 installations. RUCO further claims that the Commission does not have the resources to regulate SSAs
14 even under "regulation light."

15 RUCO also argues that regulating SSAs would constitute selective regulation which is
16 contrary to good public policy, as the Commission does not regulate solar installers when they lease
17 or sell solar facilities to customers,²⁰⁷ and questions why the manner of financing the facilities should
18 dictate whether the transaction is subject to Commission oversight. RUCO believes that regulation
19 should serve a legitimate government purpose and asserts that no party in this case has provided a
20 legitimate purpose that would be served by regulation. RUCO also sees no beneficial purpose to a
21 "light" form of regulation, as a CC&N application that would automatically be approved is not
22 legitimate government oversight. Furthermore, RUCO sees no benefit in keeping track of SSAs,
23 because tracking SSAs alone would not include all distributed generation installations, and incumbent
24 utilities are in the best position to provide information on distributed generation to the Commission.

25 RUCO argues that it is sound public policy and in the public interest for customers to put
26 excess green energy back on the grid and that the Commission has asserted its jurisdiction over this

27 ²⁰⁵ Ex A-5 at 7.

28 ²⁰⁶ Ex RUCO-1 at 11.

²⁰⁷ *Id.* at 12.

1 type of transaction under the net metering rule, R14-2-1811.²⁰⁸ With respect to any excess electricity,
2 RUCO believes the relationship is between the customer and the ESP, and the solar installer plays no
3 role and has no interest in the transaction. Therefore, RUCO argues, the only regulated activity in this
4 context is the furnishing of electricity from the customer to the utility.

5 RUCO states that although it takes ratepayer protection seriously, regulation is not always
6 necessary and may be counterproductive.²⁰⁹ RUCO believes that Staff's concerns are unfounded
7 because the SSA's requirement that the customer pays only for the energy produced means that
8 SolarCity has no incentive to breach the contract. Also, RUCO points out that in the event of a
9 malfunction, the customer still receives service from the incumbent utility. RUCO argues that to the
10 extent there are benefits to regulation here, they are relatively insignificant, duplicative, and
11 outweighed by the potential harm to the proliferation of the solar industry in Arizona.

12 WRA believes that the rationale expressed in this case for regulating solar providers is weak.
13 WRA argues that giving consumers the ability to file complaints with the Commission is not a reason
14 for regulation, particularly because PV systems have been around for a long time without a
15 documented history of complaints. WRA asserts that in the event complaints arise, the Attorney
16 General's Office is charged with enforcement of Arizona's consumer fraud statutes, and the ROC is
17 available to process complaints regarding the installation of PV systems.

18 Likewise, WRA believes that the possibility of stranded costs from the proliferation of PV
19 systems is not a good reason for regulating solar providers. WRA states that while there may be an
20 impact on utilities from decreased energy consumption, all energy efficiency measures cause the
21 same concerns, and any stranded costs can be addressed when setting rates for incumbent utilities.

22 WRA believes that there is no reason to conclude that it would be bad for utility companies to
23 provide the same products and services as SolarCity or other solar providers through an unregulated
24 affiliated. Furthermore, WRA states that the Commission could set standards of conduct for
25 incumbent utilities to avoid cross-subsidization.

26 WRA noted that electric safety is governed by regulated interconnection agreements and by
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28 ²⁰⁸ *Id.* at 13.

²⁰⁹ RUCO Reply Brief at 9.

1 local building codes and that it is highly unlikely that the Commission would inspect electric work
2 done by solar contractors.

3 In response to the suggestion in this case that some form of “light-handed” regulation would
4 be applied to solar providers, WRA believes that the minimum constitutional requirements would
5 subvert a system of light-handed regulation. WRA notes that courts have previously rejected
6 Commission regulations allowing the competitive market to set rates by approving a broad range of
7 rates, finding it to be an abdication of the Commission’s mandatory duty under the Constitution and
8 the requirement that approved rates be linked in some way to the fair value of the utility’s property
9 dedicated to public service.²¹⁰

10 WRA believes that the evidence in this case indicates that even light regulation would make
11 Arizona unattractive for solar investors. Furthermore, WRA questions the point of SRP’s proposed
12 form of regulation, as it would allow the company to set its own rates with no substantive review.

13 SunPower argues that the “benefits” of regulation asserted in this proceeding are illusory and
14 not a lawful substitute for the required demonstration of a need for regulation, which must be actual,
15 and not conjectural. SunPower argues that the evidentiary record does not provide probative support
16 for the hypothetical concerns.

17 SunPower argues that a “fair and level playing field among competitors” is not the purpose of
18 the public policy for a “regulated monopoly.” SunPower argues that Staff’s concerns that SSA
19 providers competing with incumbent utilities could result in an unbalanced market are misplaced
20 because the market is already competitive. SunPower asserts that Staff’s concern should be focused
21 on regulating the incumbent utilities and their affiliates rather than the potential victims.²¹¹

22 SunPower notes that Staff acknowledged that “stranded costs” may arise from Demand Side
23 Management and Energy Efficiency policies as well as a customer’s purchase or lease of distributed
24 solar generation facilities.²¹² SunPower agrees with others that Staff’s concerns about stranded costs
25 can be addressed by the Commission in a future rate case. SunPower also agrees that most, if not all,
26 of Staff’s concerns about the “safety” benefits of regulation are adequately addressed through the

27 ²¹⁰ WRA cites *Phelps Dodge*, 207 Ariz. 95, 83 P. 3d 573.

28 ²¹¹ SunPower Reply Brief at 8.

²¹² Tr. at 1084-85.

1 Commission's Interconnection and Net Metering regulations, and ROC regulations.²¹³ SunPower
2 asserts that there is no probative evidence of customer complaints or information exchange problems
3 and that Staff did not demonstrate that the Commission or Staff is uniquely qualified to evaluate and
4 resolve such complaints. SunPower suggests that the Arizona ROC is best suited for that purpose
5 under a regulatory scheme that already exists.

6 Finally, SunPower argues that there are potential negative ramifications that could result from
7 regulating solar service providers. SunPower provided testimony from Mr. Irvin and Mr. Fox about
8 the essential role that third-party financing entities play in the development and deployment of
9 distributed solar generation systems. Mr. Irvin testified that investors in the projects would not
10 understand "light regulation" as it has been discussed in this proceeding because it is an undefined
11 term, and Mr. Fox testified that the issue is one of risk and uncertainty, which hamper the financing
12 of projects.²¹⁴

13 **B. Conclusions**

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

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

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27
28 ²¹³ SunPower Initial Brief at 22.

²¹⁴ Tr. at 448-51.

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

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

27 * * * * *

28 Having considered the entire record herein and being fully advised in the premises, the

1 Commission finds, concludes, and orders that:

2 **FINDINGS OF FACT**

3 1. On July 2, 2009, SolarCity filed with the Commission an Application seeking a
4 determination that SolarCity is not acting as a public service corporation pursuant to Article 15,
5 Section 2 of the Arizona Constitution when it provides solar services to Arizona schools,
6 governments, and non-profit entities by means of an SSA.

7 2. The Application requested expedited consideration so that two specific SSAs with the
8 Scottsdale Unified School District could be finalized, and the solar facilities installed, before the end
9 of 2009, to take advantage of expiring tax incentives.

10 3. By Procedural Order dated July 22, 2009, a Two Track procedure was established,
11 with Track One including the Commission's evaluation of the SSAs under the criteria used to
12 analyze special contracts; and Track Two, involving the evaluation of the Application under the
13 criteria applying to an adjudication.

14 4. Intervention was granted to RUCO, SRP, APS, TEP and UNSE, Navopache, Freeport-
15 McMoRan and AECC, MEC, SSVEC, WRA, SunPower, SunRun, and a number of School Districts.

16 5. In Track One, the two Scottsdale Unified School District SSAs were approved in
17 Decision No. 71277 (September 17, 2009), and modified as to the rates, on December 23, 2009, in
18 Decision No. 71443.

19 6. On August 24, 2009, SolarCity filed direct testimony from Lyndon Rive, SolarCity's
20 CEO; Ben Tarbell, its Director of Products, and David Peterson, the Assistant Superintendent for
21 Operations for the Scottsdale Unified School District.

22 7. On September 30, 2009, WRA filed the testimony of David Berry, its Senior Policy
23 Advisor; RUCO filed the testimony of its Director, Jodi Jerich; APS filed the testimony of Barbara
24 Lockwood, its Director of Renewable Energy; SunPower filed the testimony of H.M. Irvin III,
25 Managing Director of Structured Finance, and Kevin Fox, partner in the law firm of Keyes & Fox,
26 LLP who testified as a representative of the IREC; and Staff filed the testimony of Steve Irvine.

27 8. On October 13, 2009, SolarCity filed the additional testimony of Mr. Rive and Mr.
28 Peterson.

1 9. On October 14, 2009, the Commission began the Track Two evidentiary hearing,
2 which required six days, and concluded on November 9, 2009.

3 10. On December 14, 2009, SunPower filed its Initial Brief on December 15, 2009,
4 SunRun filed a Joinder in SunPower's Initial Brief.

5 11. On December 15, 2009, SolarCity, Staff, RUCO, AECC, TEP and UNSE, and WRA
6 filed Initial Closing Briefs.

7 12. On January 15, 2010, SolarCity, Staff, RUCO, SunPower, WRA, SRP and TEP and
8 UNSE filed Reply Briefs. The same date, SSVEC filed Reply Comments indicating it supports the
9 positions set forth in the Initial Closing Brief of TEP and UNSE, and SunRun filed a Joinder in
10 SunPower's Reply Brief.

11 13. SolarCity is a full-service solar power company that provides design, financing,
12 installation, and monitoring services to residential and commercial customers by means of sales and
13 lease arrangements and SSAs. It provides its customers with "grid-tied" PV solar systems, which
14 provide a portion of the customers' overall electricity needs, and the customer must remain connected
15 to the utility grid.

16 14. SolarCity utilizes SSAs to provide its services to school districts, governmental
17 entities and non-profits. An SSA is a contractual third-party financing arrangement that allows
18 SolarCity and a third-party investor to finance, install, own, operate and maintain a solar PV system
19 on the customer's premises with no up-front expense to the customer. Under the SSA, SolarCity and
20 the investors own the PV system.

21 15. SolarCity designed the SSAs to allow SolarCity and investors to capitalize on
22 available federal tax incentives. Under the terms of a typical SSA, the customer gives SolarCity
23 access to the customer's property to install the solar panel system, and SolarCity arranges the
24 financing, and designs, installs, operates and maintains the system. The customer has no up-front
25 costs, and under the terms of the SSA, is the "owner" of all electricity produced by the system.

26 16. Pursuant to the SSA, SolarCity retains ownership and "use" of the system as defined in
27 the federal tax code, in order for SolarCity to capitalize on the available tax incentives that the
28 customer is not able to utilize because of its governmental or non-profit status.

1 17. The customer pays SolarCity a variable amount each month based upon the kWh
2 production of the solar equipment.

3 18. SolarCity structured the SSAs as a sale of electricity to enable SolarCity to take
4 advantage of federal tax incentives that would be unavailable if SolarCity did not retain ownership
5 and “use” of each solar PV system.

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

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

12 21. There is a public interest in safe and reliable electric service, which includes a well-
13 functioning public grid.

14 22. There is a public interest in promoting the use of renewable distributed generation.

15 23. Renewable distributed generation is an important and growing component of safe and
16 reliable electric service and of a well-functioning public electric grid.

17 24. The Commission makes no finding in this Order regarding the SSA arrangements’
18 compliance with federal tax code requirements in general or with the eligibility criteria to receive
19 federal tax incentives related to solar energy.

20 25. Article 15, § 3 of the Arizona Constitution provides the Commission with “full power”
21 to make “classifications,” and “reasonable rules, regulations, and orders” to govern the transaction of
22 business by public service corporations and for the convenience, comfort, safety, and health of the
23 public.

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

CONCLUSIONS OF LAW

27
28 1. When SolarCity provides services to schools, government or other non-profit entities

1 pursuant to an SSA, as described herein, it is not acting as a public service corporation.

2 2. Notice of the proceeding was provided in accordance with the law.

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

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

13 5. Based on the facts of this case, SolarCity is not acting as a public service corporation
14 when it provides electric service to schools, governmental entities or non-profits, specifically limited
15 to such an individual customer serving only a single premises of that customer, pursuant to an SSA
16 arrangement as described herein.

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ORDER

IT IS THEREFORE ORDERED that when SolarCity Corporation provides services to a school, government, or non-profit entity, specifically limited to such an individual customer serving only a single premises of that customer, pursuant to a Solar Services Agreement as described herein, SolarCity Corporation is not acting as a public service corporation.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

		
CHAIRMAN	COMMISSIONER	
		
COMMISSIONER	COMMISSIONER	COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 12th day of July, 2010.


ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

SOLARCITY CORPORATION

E-20690A-09-0346

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