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BEFORE THE ARIZONA CORPORATION COMMISSION

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11 IN THE MATTER OF THE APPLICATION OF
12 TUCSON ELECTRIC POWER COMPANY FOR
13 APPROVAL OF ITS 2016 RENEWABLE
ENERGY STANDARD IMPLEMENTATION
PLAN

DOCKET NO. E-01933A-15-0239

14 IN THE MATTER OF THE APPLICATION OF
15 TUCSON ELECTRIC POWER COMPANY FOR
16 THE ESTABLISHMENT OF JUST AND
17 REASONABLE RATES AND CHARGES
18 DESIGNED TO REALIZE A REASONABLE
19 RATE OF RETURN ON THE FAIR VALUE OF
20 THE PROPERTIES OF TUCSON ELECTRIC
POWER COMPANY DEVOTED TO ITS
OPERATIONS THROUGHOUT THE STATE OF
ARIZONA AND FOR RELATED APPROVALS

DOCKET NO. E-01933A-15-0322

POST-HEARING BRIEF OF ENERGY
FREEDOM COALITION OF
AMERICA

POST-HEARING BRIEF

OF ENERGY FREEDOM COALITION OF AMERICA

24 Arizona Corporation Commission

June 10, 2016

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1 Intervenor Energy Freedom Coalition of America (“EFCA”), through its undersigned
2 counsel, hereby submits its Post-Hearing Brief.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION**

5 Tucson Electric Power Company (“TEP”) seeks Commission approval of proposals that
6 would replace the competitive distributed generation (“DG”) solar market segment in Tucson with
7 a regulated, and likely monopolistic, rate-based, rate-of-return world for DG in TEP’s service
8 territory. In that world, most, if not all, DG solar facilities built within TEP’s service territory
9 would be provided by TEP directly or through vendors under TEP’s control.

10 As an interim measure that will open the door to this strategy, TEP is requesting that the
11 definition of “distributed generation” for purposes of the Renewable Energy Credit (“REC”) rules
12 be revised in a way to enable the classification of the centerpiece of its anticompetitive strategy—
13 its proposal to monopolize community solar—as DG, even though such generation is not
14 connected to a customer’s premises. This is no mere technical change as its propriety is
15 inextricably intertwined with the public interest questions raised by TEP’s broader proposals. For
16 that reason, this brief first addresses those issues, and then explains why TEP’s proposed re-
17 definition of “distributed generation” is not in the public interest.

18 TEP’s broader proposals seek to: (1) expand the TEP-Owned Residential Solar (“TORS”)
19 program; and (2) institute a Residential Community Solar (“RCS”) program that would give TEP
20 a monopoly in that segment because, under TEP’s RCS proposal, only TEP would be able to offer
21 community solar service to residential customers.

22 These proposals are not in the public interest because:

- 23
- 24 • They make no sense from a public interest perspective as they will impose
25 unwarranted additional costs on ratepayers;
 - 26 • They make economic sense to TEP only because they likely will exclude
27 competition in the DG solar segment;
 - 28 • They likely will have the effect of eliminating competition in DG solar, depriving
consumers of the benefits of competition, including lower prices, more choices, and
greater innovation;

- TEP's proposals do not provide any mechanism for third-party participation in community solar to provide consumers more choices, even though there is no legal or regulatory impediment to such an approach; and
- To the extent TEP's entry into community solar and broader expansion into residential rooftop solar could be beneficial, such entry and expansion can be accomplished via means less harmful to competition, namely, through a separate subsidiary subject to a Code of Conduct that would preserve competition and competitive choices for consumers.

Given these fundamental flaws, TEP has not met its burden of showing that the TORS and RCS proposals are in the public interest. And for those reasons, TEP has similarly failed to demonstrate "good cause" for waiving the requirements of the REST Rules that require the location of DG resources on a customer's premises. This conclusion is reinforced by the fact that, by granting waivers through 2017 with respect to TEP's 2016 and 2017 incremental residential DG requirements, the Commission has rendered moot any concerns regarding the need for TEP to establish an RCS-like program to meet its near-term residential DG carve-out compliance requirements.

Consequently, the Commission should: (1) reject TEP's proposals outright and avoid unnecessarily enmeshing their details in TEP's pending rate case; and (2) deny TEP's request for a waiver of REST Rule definitions that would re-classify electricity provided to customers under Rider R-17 as RECs that could be counted towards meeting TEP's residential DG obligations.

**II. THE TORS AND RCS PROGRAMS WERE DESIGNED WITH ONE PURPOSE—
THE ELIMINATION OF DG SOLAR COMPETITION**

The Commission approves a utility's REST Implementation Plan only if it is "in the public interest." See Order 748844, Conclusions of Law, ¶ 3. After extensive submissions and three days of hearings, TEP clearly has failed to meet this burden and TEP's proposed expansion of the TORS program and establishment of the RCS program must be rejected.

A. Competition Policy Should Inform the Public Interest Standard

Competition policy should inform the public interest analysis in circumstances such as this one where a proposal clearly threatens to undermine competition. This conclusion flows naturally from the consumer welfare benefits of competition, including lower prices, more choices, and

1 more innovation. Indeed, it remains the “public policy” of Arizona that “competitive markets shall
2 exist” in electric generation. A.R.S. § 44-202(B). Because TEP is a public service company
3 operating under a Certificate of Convenience and Necessity, questions regarding its activities are
4 not exclusively governed by considerations of competition, but preserving competition should
5 appropriately inform the Commission’s analysis in this instance. Various witnesses, including
6 TEP’s expert Mr. Yardley, acknowledged that the Commission should consider competitive
7 impact, among other things, when reviewing these proposals.¹

8 While the deficiencies of these programs render them infirm from a public interest
9 perspective, even before their likely impact on competition is taken into account, when the
10 likelihood that TEP will use these programs to extend its monopoly into DG solar is properly
11 considered, the conclusion is inescapable that these programs are not in the public interest.

12 **B. TEP’s TORs and RCS Programs Make No Sense But For Their Ability to**
13 **Eliminate Competition**

14 The true purpose of TEP’s proposals is readily apparent when one considers that they
15 cannot be justified on any ground other than TEP’s desire to monopolize the DG solar segment to
16 enable it to meet its REC requirements solely through its own offerings. TEP’s proposals will
17 create an actual cost shift to non-solar ratepayers; something that TEP claims to abhor in other
18 proceedings. And they will do so even though there is no dispute that TEP can meet its REC
19 requirements in the near term for little to no cost. Moreover, TEP’s proposals will do nothing to
20 promote energy efficiency. In fact, they are far more likely to encourage consumers to be less
21 efficient in their energy use. For these reasons alone, the proposals should be rejected.

22 The extended flat-rate Rider R-10 and Rider R-17 are not rational pricing policies for a
23 utility because, among other things, they improperly shift risks to non-solar ratepayers.²

24 Specifically, Rider R-10 and Rider R-17 offer:

- 25 • A flat-rate charge per kW of solar-equivalent capacity (R-10 at \$16.50; R-17 at \$17.50).
- 26 • A fixed contract (R-10 for 25 years unless the Commission orders a revision in such
27 pricing; R-17 for 10 years).

28 ¹ See Yardley Tr. Vol. II, at 275:15-276:8; see also Gray Responsive Test., S Ex. 2, at 1:26-2:2.

² Cicchetti Direct Test., EFCA Ex. 16, at 20:14-15.

- 1 • A plus or minus 15-percent range on total customer usage granting significant fixed
2 price control.
- 3 • A Commission-required “regulatory opt-out,” which permits a customer to terminate
4 participation in the TORS program without financial penalty if the Commission
5 subsequently requires revisions to its terms and conditions, with TEP removing the
6 rooftop systems at no cost to the customer.³

7 By guaranteeing extended fixed monthly electricity bills for consumers who stay within a
8 15-percent range of their prior energy usage, TEP is intentionally disregarding the risk that costs
9 will increase for which TEP’s ratepayers will be responsible.⁴ This inequity stems from the fact
10 that TEP’s proposed Riders improperly put investments directly into the rate base ensuring that
11 financing will come from existing, captive customers potentially for up to 25 years.⁵ Therefore,
12 while Rider customers would be locked into their contracts at fixed prices, an increase in TEP’s
13 costs would force all other TEP retail customers to pay more.⁶ Given that it is impossible to predict
14 cost fluctuations over such an extended horizon, no rational utility looking out for the best interests
15 of its ratepayers would incur such risks. Put differently, this construct only makes sense because
16 it will tend to destroy competition from third-party solar providers because, as discussed below,
17 no rational provider operating in a competitive environment could match these offerings without
18 taking on undue risk.

19 Moreover, as noted by Dr. Cicchetti, the pricing set forth in TEP’s proposed Riders is based
20 on regulatory and engineering fictions based on contrived assumptions of energy production and
21 storage.⁷ Tellingly, TEP cannot produce the calculations that support these prices and, thus, TEP
22 cannot assure the Commission that a TEP-installed residential solar system would actually match
23
24

25 ³ *Id.* at 9:2-17 (citing TEP 2015 REST Application at 8), 11:11-12:2 (citing A.A.C. Decision 74884, at 18:27-19:6,
26 December 31, 2014). Rider R-17, along with being available only to customers of third-party DG, differs slightly
27 from Rider R-10 offering no option for the customer to purchase the system and requires an early termination fee.
Id. at 11:13-15, 11:20-12:2.

⁴ *Id.* at 20:20:21:2.

⁵ See Cicchetti Tr. Vol. II, at 330:9-17, 421:17-25

⁶ See Cicchetti Direct Test., EFCA Ex. 16, at 20:21-21:2; see also Cicchetti Tr. Vol. II, at 334:9-24.

⁷ See Cicchetti Direct Test., EFCA Ex. 16, at 21:4-26.

1 the energy capacity for which a customer would be charged.⁸ That reality exacerbates the risk that
2 these programs will unacceptably shift costs and risks onto ratepayers

3 Furthermore, the Riders' structure will encourage customers to use more energy not less.
4 By its very nature, a flat-rate tariff with a fixed cost for energy based within a band of plus or
5 minus 15 percent (calculated annually) creates no incentives for users to manage their energy
6 requirements within the band, nor to shape their usage to reduce peak-period usage.⁹ On its face,
7 such a construct is fundamentally at odds (and discriminatorily so) with TEP's pending proposals
8 to adjust the tariff structure for third-party DG solar customers for the nominal purpose of
9 motivating load management and more efficient energy use. TEP's lead witness, Mr. Tilghman,
10 acknowledged that there is nothing in either the TORS or RCS program that sends any form of
11 price signal related to peak-hour demand and peak-hour usage.¹⁰ Despite this admission, he
12 weakly argues that there will be some customers who will try to reduce their bills by achieving a
13 greater than 15-percent decrease in usage.¹¹ This is simply wishful thinking. As Dr. DeRamus
14 points out, one of the compelling elements of the Riders' value proposition is that customers can
15 increase their household energy loads without concern that it will impact their electric bills.¹²
16 TEP's proposals should be rejected for these reasons alone.

17 This backdrop exposes the stark reality that Riders R-10 and R-17 make economic sense
18 only because of their manifest ability to destroy competition. As EFCA's experts explained, these
19 Riders are anticompetitive because they are pricing and tariff arrangements used to distort a
20 competitive segment.¹³ Dr. Cicchetti and Dr. DeRamus both testified that Riders R-10 and Rider
21 R-17 are intrinsic components of a strategy that only a regulated monopolist, relying on cross-
22 subsidies from captive customers, could provide.¹⁴ No third-party could economically provide or
23 compete with guaranteed pricing for up to 25 years because such a third-party would have to bear

24 ⁸ *Id.* at 21:6-13.

25 ⁹ *Id.* at 23:14-21.

26 ¹⁰ Tilghman Tr. Vol I, at 168:20-23.

27 ¹¹ See Tilghman Tr. Vol. I, at 168:2-11 (stating that customers have "an incentive on an annualized basis to reduce
28 their consumption, to achieve the plus or minus 15 percent.").

¹² See DeRamus Direct Test., EFCA Ex. 20, at 9:25-27; see also DeRamus Tr. Vol. III, at 572:6-13 (discussing the
fixed-rate billing as a "hugely compelling proposition" if a consumer has "additional people moving in" or "some
additional appliances").

¹³ Cicchetti Direct Test., EFCA Ex. 16, at 20:21-21:2, 22:16-19; see also DeRamus Tr. Vol III, at 525:9-14.

¹⁴ Cicchetti, Tr. Vol. II, at 364:18-365:3; see also DeRamus Direct Test., EFCA Ex. 20, at 11:6-12.

1 the inordinate risks of such a strategy, as opposed to merely passing them off on captive
2 ratepayers.¹⁵ As a result, the Riders' guarantees and pricing create serious competitive
3 disadvantages for third-party competitors and, as discussed more fully below; such distortions
4 likely will ultimately foreclose third-party participation from the market segment.¹⁶

5 TEP's dogged resistance to any modification to its anticompetitive proposals in this
6 proceeding is telling. Most telling is TEP's refusal to entertain the changes Staff proposed to the
7 plus or minus 15-percent band.¹⁷ As Mr. Tilghman weakly explained, TEP is opposed to such
8 changes because they would turn Rider R-10 (and R-17) into just a form of "budget-billing," which
9 is already available to TEP customers.¹⁸ What Mr. Tilghman declined to say is that if TEP's flat-
10 rate proposals were modified in this manner, their ability to eliminate competition would be
11 materially diluted. Put differently, without the ability to offer consumers fixed rates for all of their
12 electricity needs for up to 25 years, TEP's proposals will be much less effective at eliminating
13 competition from third-party DG solar. That is the real reason TEP fought Staff's proposal.

14 **C. TEP's Proposals Will Unnecessarily Burden Ratepayers**

15 The record includes additional evidence of the increased costs to ratepayers that these
16 programs will create. Mr. Beach, for example, provided the only study in the record demonstrating
17 the relative burdens that the rate-based TORS and RCS programs would impose on TEP ratepayers
18 compared to a scenario in which the same solar capacity was provided by a competitive third-party
19 solar system. These costs would amount to \$2.2 million per year, for 1,600 rooftop systems, and
20 5MW of RCS solar capacity.¹⁹ TEP witnesses tried unsuccessfully to refute elements of Mr.
21 Beach's analysis and, at the end of the day, Mr. Beach demonstrated that TEP's proposed programs
22 would impose a cost shift greater than the supposed cost shift related to third-party solar.²⁰

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25 ¹⁵ Cicchetti, Direct Test., EFCA Ex. 16, at 23:6.

26 ¹⁶ *Id.* at 20:3-5, 21:16-21; *see also* Cicchetti, Tr. Vol. II, at 335:10-13; *see also* DeRamus Direct Test., EFCA Ex. 20,
27 at 4:21-5:2.

28 ¹⁷ Gray Responsive Test., S Ex. 2, at 2:23-3:9 (recommending that instead of the 15-percent up or down band, "TEP
adjust the customer's charge each following year for any movement in the customer's average monthly usage higher
or lower in the previous year").

¹⁸ Tilghman Tr. Vol. I, at 205:9-206:2.

¹⁹ *See* Beach Tr. Vol. II, at 451:2-10.

²⁰ Beach Tr. Vol. II, at 441:11-451:11 (addressing TEP criticisms).

1 Dr. Cicchetti's analysis similarly shows that the cost shift associated with TEP's proposal
2 would be greater than the supposed cost shift related to third-party solar.²¹ According to Dr.
3 Cicchetti, for every dollar invested by a utility, a utility would typically require customers to pay
4 three dollars to cover the investment and associated costs.²² By placing residential solar
5 investments in the rate base, TEP will obligate its ratepayers to the three-dollar revenue
6 requirement for up to 25 years, a stark contrast from third-party DG solar that relies solely on third-
7 party or consumer financing.²³ Moreover, Dr. Cicchetti noted that TEP's proposal will impose
8 additional cost on TEP's ratepayers if (1) a TEP residential DG solar customer exceeds electricity
9 consumption within the 15-percent band, (2) TEP is required to increase rates on TEP DG solar
10 customers, or (3) a TEP subscriber's solar system is removed from his/her roof.²⁴ This testimony
11 reinforces the conclusion that these proposals are not in the public interest, and that they make no
12 rational sense except as a weapon to destroy competition.

13 TEP's shifting positions in this proceeding further buttress this conclusion. For example,
14 TEP claims that the cost shift from DG solar customers under its existing net metering tariff is 5
15 cents per kWh.²⁵ While it justifies its TORS and RCS proposals as an effort to ameliorate the
16 claimed ratepayer impact of third-party solar, TEP also admits that the TORS program would
17 impose a cost shift of 2 cents per kWh and the RCS program would impose a 1-cent per kWh cost
18 shift.²⁶ If implementation of these programs diverted customers from third-party providers to the
19 TEP programs, the programs' objective of reducing the supposed DG solar cost shift would at least
20 make logical sense (assuming one credited the supposed DG solar cost shift, which we do not).
21 However, to avoid the inescapable conclusion that these programs are designed to eliminate
22 competition, TEP denied that these programs would displace third-party solar in any meaningful
23 way at all.²⁷ But if TEP's protestations are to be taken at face value, then the proposed programs
24 clearly will impose an additional, not reduced, cost on ratepayers. And these costs are far greater

25 _____
26 ²¹ Cicchetti Direct Test., EFCA Ex. 16, at 6:5-9.

²² *Id.* at 16:1-9; *see also* Cicchetti, Tr. Vol. II, at 329:19-330:8.

²³ Cicchetti Direct Test., EFCA Ex. 16, at 16:20-25.

²⁴ *Id.* at 18:1-11.

²⁵ *See* Tilghman Tr. Vol. I, at 52:3-7.

²⁶ *See* Tilghman Tr. Vol. I, at 190:18-191:9.

²⁷ Tilghman Tr. Vol I, at 73:23-74:1.

1 than TEP contends, reinforcing the competitive advantage TEP will have via its cross-subsidized
2 DG offerings.

3 **D. TEP Cannot Exploit Its REST Obligations to Justify These Proposals**

4 TEP insists that, pursuant to its annual REST Implementation Plan, it is obligated to set
5 forth the methods by which it will meet its obligations, particularly those pertaining to the
6 residential DG carve-out.²⁸ TEP then claims that, because it no longer purchases/obtains title to
7 RECs associated with third-party systems, the only way it can assure itself of compliance is by
8 owning systems it wishes to have the Commission classify as residential DG, and then counting
9 the RECs from those systems toward its residential DG obligation.²⁹ However, Staff has
10 specifically stated that REST compliance should not factor into determining if TEP's proposals
11 are in the public interest.³⁰

12 Moreover, as the Commission's May 13 Order in this Docket clearly demonstrates, TEP's
13 claims are transparently false. As Staff acknowledges in its testimony, the Commission has
14 mandated a "most cost effective", *i.e.*, least-cost, approach to achieving REST compliance and
15 Staff takes TEP's proposal to task for abjectly failing this standard.³¹ In fact, in Order 75560, the
16 Commission expressly confirmed Staff's analysis that waivers can be granted, cost-free, based on
17 market activity generated by third-party solar:

18
19 During the Commission's Track and Record proceeding and subsequent REST
20 Rulemaking dockets, market activity was a commonly cited possible way for a
21 utility to demonstrate that the granting of a waiver is warranted. From the
22 information provided by TEP, Staff believes that it is highly likely TEP will need
23 a waiver of the 2016 increment of the residential DG portion of its REST
24 requirement and that the high level of market activity in the past and present is an
25 acceptable way to demonstrate the reasonableness of granting such a waiver. ...

26
27 Given the high level of non-incentivized market activity in TEP's service territory
28 in recent years and the lack of new RECs TEP is receiving for DG installations,

26 ²⁸ See Tilghman Tr. Vol. I, at 73:4-14.

27 ²⁹ Jones Direct Test., TEP Ex. 3, at Ex. A (2016 TEP REST Plan) at 2 ("[T]he Company no longer receives
Renewable Energy Credits ("REC") from customer-based installations."); *see also* Tilghman Tr. Vol. I, at 78:12-22.

28 ³⁰ See Gray Tr. Vol. III, at 580:14-19.

³¹ See Gray Direct Test., S Ex. 1, at 3:16-13 (programs must be "the most cost-effective means for addressing
compliance towards the REST rules").

1 Staff believes that there is a very high likelihood that TEP will need an additional
2 waiver for the calendar year 2017.

3 Order 75560, ¶¶ 20, 22. Based on those considerations, the Commission granted TEP waivers for
4 2016 and 2017. Further, Staff has concluded that, as of August 28, 2015, sufficient residential
5 solar capacity had been installed to satisfy TEP's residential DG requirements through 2020. *Id.*
6 at ¶ 18(c). As Staff indicated, because TEP can meet its REST requirements in various ways,
7 including by purchasing RECs from third parties, its current proposal is not cost-effective.³² The
8 patent superficiality of TEP's REC justification exposes its real intent—to eliminate competition
9 and ensure that, in the absence of market activity, it can still comply with its REC requirements.

10 **III. TEP'S PROPOSALS ARE NOT IN THE PUBLIC INTEREST BECAUSE THEY**
11 **WILL ELIMINATE COMPETITION**

12 **A. TEP's Proposals Threaten Competition in DG Solar, a Segment that is**
13 **Competitive**

14 As Dr. DeRamus demonstrates, the provision of residential DG solar is structurally
15 competitive. In fact, in his view, it exhibits none of the characteristics of a natural monopoly that
16 traditionally justifies the imposition of cost-of-service, rate-of-return regulation.³³ Residential DG
17 solar is provided by numerous third-party providers who sell, finance, or lease DG solar systems
18 and whose prices are not regulated.³⁴ Numerous vendors provide DG solar systems throughout
19 the United States, throughout Arizona, and within TEP's service territory.³⁵ In turn, the behavior
20 of this industry demonstrates competitive outcomes, with prices falling due to decreasing input
21 costs, and increased innovation in methods of financing solar systems that are expanding the
22 universe of customers who can take advantage of DG solar.³⁶ Contrary to Mr. Tilghman's claims,
23 the provision of DG solar systems within TEP's service territory is competitive.³⁷ Indeed, TEP's

24 ³² Gray Tr. Vol. III, at 580:14-581:6 (noting that seeking a waiver or purchasing RECs are two effective means of
25 achieving REST compliance); Gray Direct Test., S Ex. 1, at 4:6-17 (finding that TEP's proposal for REC
26 requirements are not "the most cost-effective means" for it to achieve compliance).

³³ See DeRamus Direct Test., EFCA Ex. 20, at 18:11-19:13, 21:4-15; see also DeRamus Tr. Vol. III, at 488:20-
490:21.

³⁴ DeRamus Tr. Vol. III, at 483:8-484:3.

³⁵ See DeRamus Direct Test., EFCA Ex. 20, at 16:7-10; see also DeRamus Tr. Vol. III, at 502:6-19.

³⁶ See generally DeRamus Direct Test., EFCA Ex. 20, at 17:1-18:8.

³⁷ See Tilghman Tr. Vol. I, at 66:19-67:3 (discussing the fact that Solar City has a 70% market share to imply that
the DG solar segment is not competitive). However, as Dr. DeRamus explained, a 70-percent share, assuming the

1 own economic witness admitted that the third-party DG solar segment in TEP's service territory
2 has no barriers to entry or exit that would indicate the absence of a competitive market structure.³⁸
3 In fact, due to this competition, the need for TEP to provide up-front incentives for consumers to
4 install DG solar has been eliminated and, in fact, the price TEP paid its customers for RECs has
5 declined from 10 cents a watt in or around 2012-2013, to zero thereafter.³⁹

6 As Dr. DeRamus explains, the fact that certain public policies have supported the growth
7 of DG solar has no bearing whatsoever on the conclusion that this industry is vigorously
8 competitive. For example, home construction is supported by tax incentives that reflect policy
9 decisions to promote home ownership. Yet, no one could credibly argue that residential
10 construction and the sale and resale of homes are not competitive businesses.⁴⁰ Federal policy
11 similarly supports the installation of solar resources through a recently extended investment tax
12 credit,⁴¹ and Arizona policy furthers such objectives through the Commission's rules establishing
13 renewable energy standards.⁴² But the existence of these incentives says nothing about whether
14 this business is competitive, and TEP's suggestion to the contrary is simply a red herring to distract
15 the Commission from TEP's efforts to extend its monopoly into DG solar.⁴³

16 **B. TEP Intends to Cross-Subsidize Its DG Solar Initiatives Via Its Regulated**
17 **Monopoly**

18 As Dr. DeRamus demonstrates, the extension of a monopoly utility's rate-based, rate-of-
19 return service offering into an existing structurally competitive industry is a prescription for the
20 elimination of competition in that industry.⁴⁴ TEP's proposals raise this precise concern, and for
21 that additional reason should be rejected as inconsistent with the public interest.⁴⁵

22 _____
23 accuracy of TEP's figures, says nothing about whether a market segment is functionally competitive. In this regard,
24 if a supplier is more efficient and garners a predominant share of the market segment, that outcome is
25 procompetitive, suggesting that the market segment is functionally competitive. *See* DeRamus Tr. Vol. III, at
26 523:15-525:7.

27 ³⁸ *See* Yardley Tr. Vol. II, at 262:20-25.

28 ³⁹ *See* Tilghman Tr. Vol. I, at 80:10-23; *see also* Gray Tr. Vol. III, at 630:24-631:9.

⁴⁰ *See* DeRamus Tr. Vol. III, at 549:1-11.

⁴¹ *See* I.R.C. § 48.

⁴² *See* Arizona Corporation Commission, <http://www.azcc.gov/divisions/utilities/electric/environmental.asp>.

⁴³ DeRamus Tr. Vol. III, at 549:10-550:19.

⁴⁴ *See generally* DeRamus Direct Test., EFCa Ex. 20, at 5:3-14; *see also* DeRamus, Tr. Vol. III, at 495:12-496:1
(finding that the TEP proposal "flies in the face [of] the basic principles of competitive markets").

⁴⁵ DeRamus, Tr. Vol. III, at 477:14-19.

1 TEP is proposing to enter a competitive market segment as a regulated monopolist.⁴⁶ As a
2 monopoly utility, TEP can leverage its distinct competitive advantages over third-party
3 competitors within the residential DG space.⁴⁷ And, as noted by Dr. DeRamus, TEP's proposal
4 relies on its monopoly utility position to cross-subsidize entry into the residential DG space by
5 offering a flat monthly fee for a DG customer's entire electricity needs for extended periods of
6 time, guaranteed fully by TEP's captive ratepayers.⁴⁸ Such an extended cross-subsidy could only
7 be implemented by a regulated monopolist that could pass the risks of such a construct off on its
8 rate base. By contrast, a non-monopolist, third-party provider could not possibly undertake such
9 risks putting them at a distinct competitive disadvantage.⁴⁹ Moreover, TEP's monopoly position
10 grants inherent informational advantages over third-party DG.⁵⁰ In particular, TEP has access to
11 customer-specific information as well as network transmission and distribution data.⁵¹ Without
12 shared access to this information, third-party competitors will not be able to effectively compete.⁵²
13 The Commission's Code of Conduct acknowledges that both cross-subsidization and preferential
14 access to information are inherently anticompetitive where a utility enters a market segment via a
15 competitive affiliate.⁵³ These concerns are even more apparent when the regulated monopolist is
16 entering the market segment. Even TEP's expert witness acknowledged that cross-subsidy
17 concerns apply when a regulated monopolist enters the market segment rather than providing the
18 service through a separate subsidiary.⁵⁴ Lastly, any claimed efficiencies achieved by TEP's entry
19 into a competitive market segment are, at best, purely short-term, cost-related efficiencies.⁵⁵ In
20 contrast, by limiting the ability of third-party DG to compete, TEP will undermine and eliminate

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23 ⁴⁶ *Id.* at 488:22-489:16 (further noting that this is not a "new issue" as regulated monopolies have attempted to enter competitive markets for 40 years).

24 ⁴⁷ *See* DeRamus Direct Test., EFCA Ex. 20, at 4:21-25.

25 ⁴⁸ *Id.* at 6:11-17; *see also* Cicchetti Tr. Vol II, at 345:19-346:4.

26 ⁴⁹ DeRamus Direct Test., EFCA Ex. 20, at 6:19-20; *see also* DeRamus Tr. Vol. III, at 499:18-500:8.

27 ⁵⁰ *Id.* at 489:19-490:13; *see also* Cicchetti Tr. Vol II, at 345:19-346:4.

28 ⁵¹ *See* DeRamus Direct Test., EFCA Ex. 20, at 11:16-21.

⁵² *Id.* at 12:16-24.

⁵³ A.A.C. R14-2-1616(B)(1)-(2).

⁵⁴ *See* Yardley Tr. Vol. II, at 279:12-280:1.

⁵⁵ DeRamus Direct Test., EFCA Ex. 20, at 13:3-23 (noting that TEP may only achieve static efficiencies such as "enabling under-utilized resources to generate incremental revenues, or by taking advantage of scale economies"). The current DG solar market segment has already achieved static efficiencies. *Id.*

1 the existing dynamic efficiencies that inevitably stem from competition, including third-party
2 investment and innovation.⁵⁶

3 TEP's entry will create an uneven playing field that will inevitably eliminate third-party
4 competition because of the inherent advantages that TEP would possess as a regulated monopolist:

5 By distorting the functioning of competition, TEP's proposal will limit the ability
6 of independent suppliers to participate in the market segment for residential DG
7 systems in TEP's service territory. In the absence of a level playing field,
8 independent suppliers have little or no incentive to enter or remain in a market
segment dominated by a utility with a monopoly franchise.⁵⁷

9 With TEP participating in the residential DG solar market segment, third-party DG will be
10 discouraged from further entry, investment, or innovation.⁵⁸ As a result, consumers will be
11 deprived of the benefits of competition—greater choice, higher quality, and lower prices—that
12 currently exist in the DG segment in TEP's service area.⁵⁹

13 Other parties to this proceeding acknowledged the competitive issues raised by TEP's
14 proposal. RUCO, for its part, testified that TEP's RCS proposal could stifle competition from
15 third-party DG solar.⁶⁰ RUCO further stated that it would not support TEP's proposals if they
16 eliminated competition in TEP's service territory.⁶¹ Staff also expressed competitive concerns
17 since TEP can offer "subsidized services that compete with third party service providers."⁶²

18 **C. TEP is Expressly Requesting a Monopoly in Community Solar**

19 The competitive concerns typically associated with a regulated monopolist entering a
20 competitive business are magnified considerably here because TEP is taking this strategy one step
21 further by requesting a monopoly in community solar. In doing so, it is clear that the true
22 centerpiece of TEP's strategy is the RCS program, as TEP can deploy and expand RCS much more
23 effectively than it can TORS in order to eliminate third-party DG solar going forward. Lest there

24 ⁵⁶ *Id.* (noting that the competitive DG solar industry has achieved "significant innovations" in a variety of areas).

25 ⁵⁷ *Id.* at 6:21-7:2.

26 ⁵⁸ *See id.* at 23:19-24.

27 ⁵⁹ *Id.* at 7:2-4; *see also* DeRamus Tr. Vol. III, at 495:11-496:1 (finding that competitive markets offer "innovation
..., improved services, and ultimately provide lower costs;" *see also* Huber Tr. Vol. III, at 656:4-8 (testifying that
consumers prefer more choices rather than less).

28 ⁶⁰ *See* Huber Tr. Vol. III, at 662:6-19.

⁶¹ *Id.* at 659:4-19.

⁶² *See* Gray Tr. Vol. III, at 593:1-595:19; *see also* Gray Direct Test., S Ex. 1, at 11:19-23.

1 be any doubt about the threat TEP's proposals pose to competition, it should be resolved by
2 considering the fact that, under TEP's proposals, only TEP can offer the less costly community
3 solar product that theoretically can be given to a far wider universe of consumers.

4 TEP desires a community solar monopoly to eliminate third-party DG solar—an outcome
5 that is neither in the public interest nor the interest of TEP ratepayers.⁶³ Given the opportunity to
6 provide a fuller explanation for its insistence on a community solar monopoly, TEP merely offered
7 that there are no tariffs on file that would permit third-party participation,⁶⁴ and TEP obviously has
8 no intention of proposing such a tariff voluntarily. But, as fully set forth in Section (III) (G) below,
9 there is no legal impediment to such a construct, and TEP has not suggested that there is one.

10 The evidence clearly demonstrated that TEP designed its monopoly RCS community solar
11 program under Rider R-17 to target customers who would be potential customers of third-party
12 solar providers: those eligible for net metering under TEP's Rider R-4. Limiting a community
13 solar offering—which theoretically could reach a far broader range of consumers—in this fashion
14 makes sense only if the true purpose of the program is the elimination of competition from third-
15 party solar.

16 TEP, tellingly, admits that there are multiple ways in which it could have offered a
17 residential community solar program, but made the decision to structure the program “to be very
18 similar” to the TORS program⁶⁵— a program which is inherently directed only at potential third-
19 party solar customers. Although RUCO and Staff both argued that the programs should be
20 extended beyond homeowners,⁶⁶ TEP maintained the narrow, purposefully exclusionary scope of
21 its proposal under the illusory justification that it provides the “most appropriate increment[al]”
22 step in expanding solar offerings.⁶⁷ In reality, the true purpose of the proposal is to monopolize
23 the market segment, and TEP concocted the concept of committing to a “service point” precisely
24 because that would have the effect of excluding renters and limiting the program exclusively to
25 consumers eligible for and potentially interested in third-party solar. RUCO recognized the

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27 ⁶³ Cicchetti Direct Test., EFCA Ex. 16, at 32:22-33:2; *see also* DeRamus Direct Test., EFCA Ex. 20, at 7:5-21.

⁶⁴ *See* Tilghman Tr. Vol. I, at 202:25-203:23.

⁶⁵ *See id.* at 139:14-23.

28 ⁶⁶ Huber Tr. Vol. III, at 652:19-653:16; *see also* Gray Tr. Vol. III, at 627:4-7.

⁶⁷ *See* Tilghman Tr. Vol. I, at 58:16-61:21.

1 contrived nature of TEP's position, testifying that there is no reason why the program should
2 exclude renters by being limited to a "service point."⁶⁸

3 TEP, nonetheless, attempted to justify its position by suggesting that it would be
4 burdensome from an accounting perspective to keep track of people as they cycle into and out of
5 the RCS program.⁶⁹ Once again, TEP offers a pretextual explanation to justify a limitation that is
6 really about excluding competition because such tracking would not be especially difficult. TEP
7 also claims that renters could obtain solar resources under its Bright Tucson Community Solar
8 ("BTCS") program—a program that was not designed for renters, and which TEP admits it has
9 not marketed since 2012.⁷⁰ In sum, TEP has no credible justification for limiting the RCS program
10 to potential customers of third-party solar. Once again, TEP's true objectives are exposed by the
11 fact that it has constructed this program in a way that makes little sense but for TEP's desire to use
12 it to eliminate third-party solar.

13 TEP's real objectives are further evidenced by its attempt to exploit the concept of
14 community solar to maintain its monopoly power. Through the RCS program, TEP conflates
15 community and utility-scale solar and, in doing so, TEP is attempting to obscure the traditional
16 purpose of community solar. Community solar is traditionally designed to provide members of
17 communities the ability to band together to provide electricity from a relatively small scale,
18 community-sponsored facility that is typically financed by the community itself, rather than
19 included in a utility's rate base and subject to cost recovery from all of the utility's captive retail
20 customers. TEP's effort to use its RCS program to redefine the meaning and purpose of
21 community solar is consistent with efforts by the investor-owned utility industry more generally
22 to rebrand utility participation in the renewable energy industry as participation by a member of
23 the "community."⁷¹ As Mr. Tilghman remarked in response to a question from the presiding
24 officer:

25 Q: So is there a difference between utility-scale solar and community scale solar?
26

27 ⁶⁸ See Huber Tr. Vol. III, at 645:6-13.

⁶⁹ Tilghman Tr. Vol. I, at 189:3-190:1.

28 ⁷⁰ *Id.* at 175:20-176:1.

⁷¹ DeRamus Tr. Vol II, at 486:1-25; see also EFCA Ex. 22.

1 A: It is in who is using the definition.⁷²

2 In contrast, true community solar involves groups of related individuals coming together,
3 individually or with the help of a sponsor, to obtain the benefits—and satisfaction—of obtaining a
4 portion of their electric energy needs from the sun, often via mechanisms such as “virtual net
5 metering” programs from facilities smaller than 1 MW, investing their own capital and incurring
6 the attendant financial risks.⁷³ Mr. Tilghman concedes that many industry participants delineate a
7 dividing line between utility scale and community scale, but admits that TEP now defines as
8 “community scale” any solar facility connected to its distribution grid, and “community solar” as
9 any such facility to which TEP attaches a community solar tariff, such as Rider R-17.⁷⁴ And, as
10 Mr. Tilghman admits, all but one of TEP’s utility-scale solar facilities are tied to TEP’s distribution
11 grid and, thus, come within TEP’s new community-scale solar definition.⁷⁵ Thus, through RCS,
12 TEP can quickly deploy considerable existing or additional utility-scale capacity to its redefined
13 “DG solar” programs, amplifying the rather obvious threat to competition that TEP’s RCS
14 monopoly will pose.

15 This threat is all the more problematic from a public interest perspective because the record
16 in this proceeding demonstrates that community solar is a rapidly emerging source of solar
17 energy.⁷⁶ Third-party participation is the essence of community solar, and the introduction of a
18 concept labeled “community solar” as a utility monopoly runs counter to that concept.⁷⁷ Moreover,
19 third-party participation has been authorized in states with vertically integrated utilities, including
20 Colorado and Minnesota.⁷⁸ Indeed, Mr. Tilghman cites Minnesota as a state with an active
21 community solar program, which permits the participation of third-parties.⁷⁹ Yet, TEP
22 deliberately, and without credible justification, has crafted this program to exclude third-party
23 participation. Both RUCO and Staff have joined EFCA in criticizing TEP for its failure to

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25 ⁷² Tilghman Tr. Vol. I, at 185:11-13.

⁷³ DeRamus Tr. Vol. III, at 478:15-25, 481:25-482:6.

⁷⁴ See Tilghman Tr. Vol. I, at 185:11-186:6.

⁷⁵ *Id.* at 127:15-27 (other than Willcox solar facility, “all of our solar, utility scale solar developments are tied to our distribution system”).

⁷⁶ See Gray Direct Test., S. Ex. 1, at 12:25-13:1.

⁷⁷ DeRamus Tr. Vol. III, at 483:1-18.

⁷⁸ *Id.* at 498:5-19; see generally EFCA Ex. 24.

⁷⁹ See Tilghman Tr. Vol. I, at 87:2-11.

1 accommodate third-party participation in community solar, further buttressing the conclusion that
2 this proposal cannot be approved in its current form.⁸⁰

3 **D. TEP's Responses to These Concerns Are Baseless**

4 TEP attempts to refute the contention that its proposals pose a dire threat to competition in
5 DG solar by making four basic assertions. First, TEP contends that EFCA's concerns about
6 competition are speculative. Second, TEP claims that the performance of third-party solar during
7 the TORS pilot belies EFCA's concerns. Third, TEP suggests that EFCA's concerns are overstated
8 because TEP does not really compete with third-party solar, as their business models are different.
9 Fourth, TEP contends that, should competitive issues materialize in the future, the Commission
10 can address those issues at that time. None of these arguments can withstand serious scrutiny, and
11 we address each in turn.

12 As an initial matter, TEP's contention that EFCA's concerns are speculative is hardly
13 surprising given the way TEP has employed TORS as a Trojan Horse since its inception. In
14 approving TEP's 600-home TORS project as part of TEP's 2015 REST Implementation Plan, the
15 Commission expressly denominated it "a unique pilot program" with respect to which "TEP should
16 form a voluntary, unpaid advisory committee that should advise the Company on a defined set of
17 research goals." Order 74884, ¶ 71. Yet, notwithstanding this clear direction, TEP ignored these
18 requirements, and its current proposed expansion of TORS is the latest manifestation of its broader
19 plans in DG solar.⁸¹ In this regard, in its response to a Staff Data Request, TEP admitted that it
20 intends to move beyond the proposed 1,000 expansion, with the objective of making the TORS
21 program open-ended.⁸² TEP has admitted that it intends to expand the TORS and RCS programs
22 as warranted by customer demand.⁸³ Given that no third-party provider could match TEP's
23 guarantees of long-term fixed monthly fee for all of a customer's electricity needs, it is reasonable
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25 ⁸⁰ See Huber Direct Test., RUCO Ex. 1, at 5:1-9; see also Gray Direct Test., S. Ex. 1, at 16:19-22, 17:9-20.

26 ⁸¹ Moreover, TEP clearly indicated that the TORS program was not designed as a research and development
27 program. See Tilghman Direct Test., TEP Ex. 1, at 10:23-10:27 ("The TORS program was not designed to be
28 primarily an R&D program. The Company created the program and the asserted tariff to be applicable to all
interested and qualified customers.").

⁸² Cicchetti Direct Test., EFCA Ex. 16, at 26:18-19 (citing TEP Response to STF 1.25).

⁸³ Yardley Tr. Vol. II, at 290:6-9; cf. Tilghman Direct Test., TEP Ex. 1, at 21:4-12 (admitting that the TEP "could
expand" RCS "to meet customer demand").

1 to anticipate that demand for TEP's programs will increase as demand for solar increases in TEP's
2 service territory.

3 Equally troubling is TEP's admission that, should the Commission approve Rider R-17,
4 TEP could simply "attach" a customer requesting service under it to any existing "community
5 scale" facility, immediately transforming the capacity in question into "residential community
6 solar." According to Mr. Tilghman:

7
8 Obviously we have, and I don't know the exact number, 100, 150 megawatts of
9 solar locally attached to our distribution system. To the extent that a residential
10 community scale program was attached to some of those facilities, whereas the
11 request was any residential customer participating in a program for that, then that
12 capacity would. So not all of the program -- or all the projects would not count for
13 residential, only those who have a program attached to it.

14 Q. And TEP would pick which ones of those to attach the program to?

15 A. It would -- yeah.⁸⁴

16 This ability to attach Rider R-17 to any facility leaves the scope of TEP's DG solar
17 programs virtually unlimited because they will be constrained only by the amount of solar capacity
18 needed to meet TEP's utility-scale DG requirements. Moreover, as Staff's Mr. Gray conceded,
19 there is nothing in the text of Rider R-17 that limits the RCS capacity to which it could be
20 attached.⁸⁵ In sum, TEP DG solar programs likely will have no limits other than the number of
21 customers willing to accept TEP's flat-rate offer.

22 TEP, nonetheless, suggests that if its proposals are approved, regulators could later
23 intervene to control their expansion.⁸⁶ But that ignores the obvious reality that once these programs
24 are approved, with the intrinsic and likely insurmountable advantages they will give TEP over
25 third-party competitors, momentum will be created that will inevitably lead to their expansion to
26 the detriment of competition. TEP, as noted, has not been shy about its intention to expand these
27 programs. And, as the Commission made clear in initially approving the TORS program, TEP

28 ⁸⁴ Tilghman Tr. Vol. I, at 128:9-128:21.
⁸⁵ See Gray Tr. Vol. III, at 634:13-25.
⁸⁶ See Yardley Tr. Vol. II, at 289:6-16.

1 will not need Commission approval for constructing generation facilities to meet consumer
2 demand.⁸⁷

3 In fact, TEP readily admitted that it could expand RCS beyond the scope set out in the
4 Commission Order simply by adding new generation and justifying it based on consumer demand
5 (which likely will be forthcoming since no third-party could possibly match TEP's flat-rate pricing
6 for the reasons stated above). Against this backdrop, a subsequent prudence review is unlikely to
7 constrain the growth of the program.⁸⁸ Moreover, such a review would be ill-equipped to address
8 the harm to competition from third-party solar providers that likely will have occurred already, as
9 competition withers while TEP seamlessly expands its programs going forward. For these reasons,
10 it is hard to see competition remaining vibrant in TEP's service territory if TEP receives permission
11 to move forward.

12 TEP sought to minimize this conclusion by noting that third-party solar has thrived in TEP's
13 service territory during the TORS pilot. But TEP's ineffective implementation of the TORS pilot
14 program—which has rendered TORS a competitive nullity to date⁸⁹—says little about the potential
15 competitive impact of TEP's expanded TORS program, let alone the much more extensive RCS
16 plan. As Dr. DeRamus demonstrated,⁹⁰ each prospective element of TEP's plans will simply “boil
17 the frog” that is now the third-party DG solar industry: 1,000 homes for the TORS expansion,
18 approximately 1,000 homes for the TEP-owned 5 MW facility, and 1,000 homes for the potential
19 5 MW PPA facility suggested in Mr. Tilghman's Rebuttal Testimony.⁹¹ This amounts to 3,000
20 homes, or 75% of the approximately 4,000 applications from the solar industry that TEP received
21 in 2015.⁹² And, as noted above, TEP readily admits that it plans to expand these numbers as
22 demand warrants. Indeed, TEP claims that if these proposals are approved, “the Company would
23 be able to meet and *sustain* residential DG compliance within 2-3 years.”⁹³ That is, TEP would be

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⁸⁷ Order 74884, Commission Discussion at ¶ 63.

25 ⁸⁸ See Tilghman Direct Test., TEP Ex. 1, at 21:4-12.

26 ⁸⁹ By the date of the hearing, approximately 150 rooftop systems had been installed, with another 100 or so under
construction or in development and, of course, RCS has not yet been approved. See Tilghman Tr. Vol. I, at 108:312.

27 ⁹⁰ See DeRamus Tr. Vol. III, at 509:20-511:21.

28 ⁹¹ Tilghman Rebuttal Test., TEP Ex. 2, at 16:16-27.

⁹² *Id.* at 11:4-6.

⁹³ Cicchetti Direct Test., EFCA Ex. 16, at 29:30-31 (quoting from TEP Response to Staff DR 1.42) (emphasis
added).

1 able to meet its REC obligations without any need for RECs from market activity from third-party
2 solar. In other words, TEP would extend its monopoly into DG solar.

3 TEP fares no better with its claim that TORS and RCS will not injure competition because
4 TEP and third-party solar do not truly compete because they offer different products and their
5 business models are distinct.⁹⁴ This argument makes no sense economically. From an economic
6 perspective, two products compete if they are substitutes for consumers. As Dr. DeRamus
7 explained, it would make no economic sense to suggest that taxi cabs and Uber do not compete
8 simply because they have different business models when consumers every day readily switch
9 between the two products.⁹⁵ The same logic applies to the competition that third-party solar clearly
10 provides to TEP and other utilities.⁹⁶ Tellingly, when pressed to actually articulate precisely why
11 TEP's DG solar products will not compete with third-party solar, Mr. Tilghman was forced to
12 acknowledge that the two products are incredibly similar.⁹⁷ In essence, Tilghman thus concedes
13 that third-party solar offerings are substitute products for the products offered by TEP.
14 Furthermore, TEP acknowledges in its 10-K form that it is, in fact, in competition with DG solar.⁹⁸

15 Lastly, TEP contends that the Commission can later address competition issues should they
16 materialize down the road. In this regard, Mr. Yardley⁹⁹ and Mr. Huber¹⁰⁰ expressed the opinion
17 that any anticompetitive effects associated with TEP's proposals could be mitigated by later
18 regulatory oversight and intervention. This kick-the-can-down-the-road approach overlooks the
19 stark reality that if third-party solar is effectively eliminated by TEP's actions, later regulatory
20 action will not be able to revitalize the market segment. Mr. Huber also expressed the view that
21 continued application of the "cost-parity" requirement contained in the Commission's Order
22 approving the TORS pilot could somehow provide "private sector discipline" to limit TEP's
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⁹⁴ Yardley Tr. Vol. II, at 321:14-25, 299:8-16; Tilghman Tr. Vol I, at 165:15.

⁹⁵ See DeRamus Tr. Vol. III, at 507:19-508:6.

⁹⁶ *Id.* at 508:7-10.

⁹⁷ Tilghman Tr. Vol. I, at 115:19-116:14.

⁹⁸ See DeRamus, Tr. Vol. III, at 506:14-23 (referencing TEP's 10-K).

⁹⁹ Yardley Tr. Vol. II, at 292:7-18.

¹⁰⁰ Huber Tr. Vol. III, at 682:3-17.

1 exclusionary conduct.¹⁰¹ But he could not explain how that principle would constrain the RCS
2 program should it be extended to new customers.¹⁰²

3 Dr. DeRamus rebuts these contentions by demonstrating the difficulty that antitrust
4 enforcers face when they are tasked with restoring competition to markets from which competition
5 has been excluded.¹⁰³ For this reason, the prudent course is to preserve competition now as
6 opposed to trying to fix it later when it might be too late. As Dr. DeRamus¹⁰⁴ and Dr. Cicchetti¹⁰⁵
7 both emphasized, the most effective remedy would be to require any TEP DG solar initiatives to
8 be conducted through a separate affiliate under the Commission-approved Code of Conduct
9 governing affiliate transactions and pursuant to a competitive Code of Conduct, as set out in current
10 Rule R-1616(B). This approach would avoid the anticompetitive harms associated with TEP's
11 cross-subsidized Rider R-10 and Rider R-17 proposals, while placing all DG solar providers on
12 the same footing with respect to access to customer and network information.

13 Further, a separate subsidiary requirement would create incentives to develop open
14 network management systems to interface with "smart inverters" on third-party systems, rather
15 than TEP's current efforts to develop a "closed" network management system (as part of its Ina
16 substation project) that communicates only with "smart inverters" installed as part of its TORS
17 program.¹⁰⁶

18 **E. Existing Commission Regulation Provides a Framework for the Establishment**
19 **of TEP Affiliates Providing Rooftop and/or Community Solar**

20 To the extent TEP's participation in DG solar is in the public interest, such participation
21 can be accomplished by means that are less restrictive to competition—to wit, through a separate
22 subsidiary subject to conduct limitations.

23 Consistent with Arizona's stated policy in favor of competitive markets for electric
24 generation, the Commission adopted Article 16 of its rules for the establishment of retail electric

25 ¹⁰¹ See *id.* at 665:1-21; 673:10-674:10.

26 ¹⁰² *Id.* at 656:15-657:14 (stating that he had no position on whether the cost parity rule should or should not be
applied to the RCS program).

27 ¹⁰³ DeRamus Tr. Vol. III, at 508:11-509:12 (discussing why antitrust authorities do not wait to "unscramble the
egg").

28 ¹⁰⁴ *Id.* at 555:9-22; see also DeRamus Direct Test., EFCA Ex. 20, at 14:25-30.

¹⁰⁵ Cicchetti Tr. Vol. II, at 338:16-340:1; see also Cicchetti Direct Test., EFCA Ex. 16, at 34:3-6.

¹⁰⁶ See DeRamus Direct Test., EFCA Ex. 20, at 25:23-26:10.

1 competition in Arizona. As part of that Article, it adopted Section R14-2-1616(A), which required
2 affected utilities to file a Code of Conduct designed to prevent anticompetitive conduct by a
3 regulated utility that offers competitive services through a separate affiliate. Section R14-2-
4 1616(B) then set out nine subject areas that were to be addressed by the Code.¹⁰⁷ While *Phelps*
5 *Dodge Corp. v. Ariz. Electric Power Co-op.* 207 Ariz. 95 (2004) (“*Phelps Dodge*”) s-1044(B),
6 struck down certain portions of the ACC rules regarding retail competition, it did not challenge
7 the basic proposition that retail competition remains the clearly articulated policy of the State of
8 Arizona. Moreover, *Phelps Dodge* expressly upheld as within the scope of the Commission’s
9 ratemaking power Section R14-2-1616(B) (requiring a utility to offer competitive services only
10 through a separate subsidiary) and the competition code provisions of Section R14-2-1616, leaving
11 those Rules in effect. 204 Ariz. at 117. *See* 204 Ariz. at 114-115 (appellants failed to demonstrate
12 that the requirements of Section R14-2-1616 were unreasonable),

13 Because the Commission has not developed new rules that would provide for the
14 certification of competitive Electric Service Providers, direct retail competition has not gone into
15 effect and, thus, Section R14-2-1616 has not been applied. Nevertheless, this Rule is still effective
16 and it represents the Commission’s considered judgment on how to precisely address the issues
17 that would arise should TEP be permitted to enter the DG solar segment beyond the initial TORS
18 pilot.

19 Dr. DeRamus explained why utilizing a separate subsidiary subject to a detailed Code of
20 Conduct, such as set forth in Section R14-2-1616(B), could enable TEP’s expansion into DG solar
21 while preserving competition.¹⁰⁸ Mr. Yardley acknowledged that concerns about cross-
22 subsidization by the monopolist will exist where, as here, a regulated monopolist proposes to enter
23 a competitive industry.¹⁰⁹ He also admitted that regulators might require the utility to disclose

24 ¹⁰⁷ The Code is required to address the following competitive issues: (1) prevention of cross-subsidization between
25 the utility and affiliate; (2) procedures to ensure affiliates do not have access to confidential utility information; (3)
26 guidelines to limit joint employment between the utility and affiliate; (4) guidelines to govern use of the utility’s
27 name or logo by the affiliate; (5) procedures to ensure the utility does not offer preferential treatment to the affiliate;
28 (6) the elimination of joint advertising, marketing, and sales between the utility and affiliate; (7) procedures
governing transactions between the utility and affiliate; (8) policies preventing the utility or affiliate from
representing that customers will receive better services from the affiliate as a result of the affiliation; and (9) all
complaints under the Code of Conduct are subject to an administrative hearing. *See* A.A.C. R14-2-1616(B)(1)-(9)

¹⁰⁸ *See* DeRamus Direct Test., EFCA Ex. 20, at 22:19-23:16.

¹⁰⁹ Yardley Tr. Vol. II, at 279:12-280:1.

1 certain information to protect against possible competitive distortions associated with information
2 asymmetries.¹¹⁰ Given the express policy of this state, and the expert testimony in this proceeding,
3 it is clearly in the public interest to require TEP to enter DG solar only through a separate
4 subsidiary that would be subject to a Code of Conduct addressing all of the issues set forth in
5 Section R14-2-1616(B).

6 Notably, TEP has already established such affiliates under a Commission-approved Code
7 of Conduct. In Order 75033, the Commission approved such an affiliate for UNS Energy
8 Corporation and subsidiaries, including TEP. In addition, Exhibit (1) to the Code is a list of TEP
9 affiliates, including Southwest Energy Solutions, Inc. Mr. Tilghman confirmed that that affiliate
10 was only conducting “low-voltage” electrical services,¹¹¹ which apparently includes back-up
11 generator services.¹¹²

12 **F. TEP’s Request to Waive the REST Customer-Premises Definition Should Be**
13 **Rejected**

14 To create an advance justification for the RCS program, TEP requests that the Commission
15 treat the definitions of “distributed generation,” “distributed solar electric generator,” and
16 “distributed renewable energy resources,” in Sections R14-2-1801 and R14-2-1802, *as if* the words
17 “or directly connected to the Company’s distribution system” had been added to those sections.
18 This revision would eliminate the requirement that DG resources be located on a customer’s
19 premises, laying the groundwork for the RCS program.

20 While not expressly denominating this as a waiver request, TEP acknowledges that it is
21 effectively requesting a waiver of the customer-premises limitation in the rules.¹¹³ Under Section
22 R14-2-1816(A), the Commission may grant waivers of REST rule requirements, but only for
23 “good cause.” The Commission’s April 6 Procedural Order stipulated that the issue on the table
24 is whether this material revision to the residential DG rules is in the public interest. TEP has failed
25 to satisfy these standards.

26
27 ¹¹⁰ *Id.* at 280:18-281:23.

¹¹¹ *See* Tilghman Tr. Vol. I, at 100:19-101:19 (discussing EFCA Ex. 4).

28 ¹¹² Cicchetti Responsive Test., EFCA Ex. 17, at 7 n.17.

¹¹³ Gray Direct Test., S Ex. 1, at 5:14-25.

1 As discussed above, the stated purpose of TEP's RCS proposal—the existence of which is
2 the only justification for TEP's waiver request—is to enable a TEP “community solar” monopoly
3 through rate-based assets. Though TEP's request technically affects only TEP's 2016 REST
4 Implementation Plan, granting it likely would enshrine this change for the duration of the RCS
5 program, which likely will extend well beyond 2016. A decision regarding such a material revision
6 to the rules should not be severed from the broader public interest issues raised by TEP's proposals,
7 particularly since TEP clearly intends to use its monopoly RCS offering to achieve ongoing
8 residential DG REST compliance.¹¹⁴

9 By addressing TEP's technical request in this proceeding without also grappling with the
10 broader issues raised by TEP's proposals, the Commission might effectively pre-determine, and
11 foreclose, appropriate consideration of those questions. In EFCA's view, it makes much more
12 sense to address the broader issues raised by TEP's proposals first, including the need to require
13 any TEP entry into DG solar to be effected through a separate subsidiary and, once those issues
14 are determined, this technical question can be properly addressed. TEP's position is that the
15 Commission should address its proposal and defer consideration of third-party participation in
16 community solar to some unspecified future date, and then only after some undefined “stakeholder
17 process.” This approach is patently inconsistent with the public interest. There can be no possible
18 basis to grant a waiver that could then be justified to approve the creation of a TEP-monopoly
19 community-solar offering that will threaten competition in DG solar on the supposition that the
20 resulting monopoly can be remedied in the future.

21 **G. Arizona Law Does Not Preclude Third-Party Participation in Community**
22 **Solar**

23 As directed at the close of the hearings, a key issue presented by TEP's RCS application is
24 whether there is any legal obstacle that would prevent TEP from proposing for Commission
25 approval tariffs that would provide a mechanism for third-party participation in community solar
26 where such participants would have customer-facing relationships, while not directly providing
27 retail competition in TEP's service territory. The clear answer is “no.”

28

¹¹⁴ Gray Tr. Vol. III, at 623:10-624:17 (acknowledging Commission likely would continue to grant waivers).

1 TEP, tellingly, admits that this question comes down to the creation of a tariff when it
2 contends that third parties cannot participate in community solar for the simple (and not especially
3 compelling) reason that TEP has not requested the creation of a tariff that would enable such
4 participation. Put differently, the Commission should not grant TEP a monopoly in community
5 solar simply because TEP deliberately avoided requesting a tariff to enable third-party
6 participation in community solar. The illusory nature of this justification is underscored by the
7 fact that as there currently is no tariff for RCS either.¹¹⁵

8 Against this backdrop, it is not EFCA's burden to articulate precisely how such a tariff
9 should be structured. That said, to cite one example, customer-facing third-party participation
10 could be enabled via transactions where TEP would obtain title to the electricity and deliver it to
11 customers. Such a tariff is already in place in APS service territory and known as AG-1. In Order
12 75322, the Commission described the AG-1 rate as "a buy-through rate for select industrial and
13 large commercial customers *intended to resemble* a competitive-type rate." Findings of Fact, ¶ 2
14 (emphasis added). Such "sleeving" arrangements could introduce meaningful competition for
15 customers, albeit without direct retail competition. Or it could be achieved through virtual net
16 metering arrangements that could be similarly structured.

17 **IV. CONCLUSIONS AND RECOMMENDATIONS**

18 For the reasons set out above, the Commission should take the following actions.

19 (1) Reject TEP's Application to expand its TORS program beyond the 600 homes
20 authorized in Order 74884 as not being in the public interest;

21 (2) Reject TEP's Application to establish the RCS program as not being in the public
22 interest and thereby remove consideration of proposed Rider R-17 from TEP's rate case; and

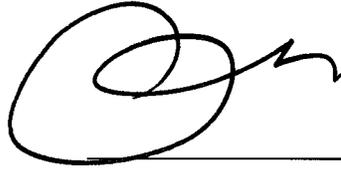
23 (3) Find that no good cause exists for granting a waiver of the definition of "distributed
24 generation" as contained in the Commission's REST Rules R14-2-1801(E), R-14-2-1801(G) and
25 R-14-2-1802(B).

26 //

27
28

¹¹⁵ Tilghman, Tr. Vol. I. Tr. 203:2-23.

1 **RESPECTFULLY SUBMITTED** this 10th day of June 2016.

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4 

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8
9
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