

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 KRISTIN K. MAYES  
CHAIRMAN

3 GARY PIERCE  
COMMISSIONER

4 SANDRA D. KENNEDY  
COMMISSIONER

5 PAUL NEWMAN  
COMMISSIONER

6 BOB STUMP  
COMMISSIONER

7  
8 IN THE MATTER OF THE APPLICATION OF  
9 SOLARCITY FOR A DETERMINATION  
10 THAT WHEN IT PROVIDES SOLAR  
11 SERVICE TO ARIZONA SCHOOLS,  
12 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

13 **RUCO'S CLOSING BRIEF**

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15 The Residential Utility Consumer Office ("RUCO") hereby submits its closing brief in the  
16 matter of the application of SolarCity ("SolarCity" or "Company") for a determination of whether  
17 it is acting as a public service corporation ("PSC") when it provides solar service to Arizona's  
18 schools, government or non-profit entities. For the following reasons, RUCO does not believe  
the Company is acting as a PSC when it provides service in this capacity.

19 **I. INTRODUCTION**

20 There is a lot at stake in this case - perhaps the future development of the solar industry  
21 in Arizona. Moreover, it has become apparent in this case that the Commission's decision  
22 here is likely to effect not only commercial solar service agreements ("SSA"), but commercial  
23 and residential lease agreements as well. While SSA's and leases are technically different  
24 ways to obtain solar service, the legal criteria that defines a public service corporation is the

1 same and it is reasonable to conclude that the Commission’s decision here will have the same  
2 application to solar leases.

3         The Arizona Constitution defines a “public service corporation” as a corporation, other  
4 than municipal, “engaged in furnishing . . . electricity for light, fuel, or power . . . .” Art. 15, § 2  
5 of the Arizona Constitution. Here, there have been several different legal arguments made on  
6 whether SolarCity is a PSC under the Constitution’s definition. It all boils down to the question  
7 of whether SolarCity is furnishing electricity. For the reasons set forth below, RUCO does not  
8 believe that SolarCity is furnishing electricity. RUCO further believes that the legal analysis  
9 ends if it is determined that the corporation does not fall within the Constitution’s definition of  
10 PSC. However, other parties have other points of view. Should the Commission be  
11 persuaded by Staff’s argument that the provision of solar service through the SSA’s meets the  
12 PSC definition, then the question becomes does SolarCity meet the eight *Serv-Yu*<sup>1</sup> factors?  
13 RUCO believes for the reasons set forth below that the SSAs do not meet the *Serv-Yu* factors  
14 either. Either way, by any legal interpretation SolarCity is not a PSC.

15         Such a finding is consistent with not only the Commission’s policy and goals regarding  
16 renewable energy but the goals and policies of every party in this proceeding including the  
17 Commission’s Staff. The goal and policy are simple – no one disputes the goal and policy - to  
18 proliferate, not hinder the growth of solar energy in Arizona. The evidence in this record is  
19 clear – a determination to regulate, even in its lightest form, will hinder the growth of the solar  
20 industry in Arizona. The Commission should not regulate the use of SSAs by third-party  
21 providers in any manner in Arizona.

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24 <sup>1</sup> *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 237-238, 219 P.2d 324, 325-326 (1950).

1 **II. SOLARCITY, AND THIRD-PARTY PROVIDERS LIKE SOLARCITY DO NOT MEET**  
2 **THE TEXTUAL DEFINITION OF A “PUBLIC SERVICE CORPORATION” UNDER ARTICLE**  
3 **15, § 2 OF THE ARIZONA CONSTITUTION.**

4 The Arizona Court of Appeals has made it clear that a PSC determination requires a  
5 two-step analysis. Southwest Transmission Cooperative, Inc. v. ACC., 213 Ariz. 427, 430, 142  
6 P. 3d 1240, 1243 (2007). First, it must be determined whether an entity satisfies the literal and  
7 textual definition of a public service corporation under Article 15, Section 2, of the Arizona  
8 Constitution. If the entity satisfies the definition, the analysis is complete. If not, the second  
9 part of the evaluation must consider whether the entity’s business and activity are such as to  
10 make its rates, charges, and methods of operations a matter of public concern, by considering  
11 the eight factors articulated in [Serv-Yu]. *Id.*

12 As set forth above, Article 15, Section 2 defines “public service corporation” as “*all*  
13 *corporations other than municipal engaged in furnishing gas, oil, or electricity for light fuel or*  
14 *power ... shall be deemed public service corporations.*” Even before one considers whether a  
15 business activity is a PSC under the Constitution’s definition, there is a general presumption  
16 that the business activity is not a PSC. “There is no presumption that a business activity is  
17 within regulation of corporation commission, and, on the contrary, presumption is that it is not.”  
18 Arizona Corp. Commission v. Continental Sec. Guards (App. 1967), 5 Ariz. App. 318, 426, P.  
19 2d 418 vacated 103 Ariz. 410, 443 P.2d 406.<sup>2</sup>

20 Under the SSA, SolarCity does not “furnish” electricity to the schools, non-profits or  
21 government institutions. SolarCity provides its customers with the financing, design,  
22 installation, operation and maintenance of a solar panel system on the customer’s property,

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24 <sup>2</sup> In this matter, the Arizona Supreme Court vacated the Court of Appeals ruling that found the Commission had jurisdiction.

1 the terms of which are described in the SSA. A-1 at 6. The electricity itself is never owned by  
2 SolarCity. RUCO-1 at 2. The electricity is not sold to the customer. Id. The electricity is  
3 owned by the customer from its inception. Id.

4 The SSA is simply a financing mechanism which allows the customer to take advantage  
5 of the significant tax and depreciation incentives without prohibitive up-front costs. A-1 at 6.  
6 The SSA is a creature of the IRS rules which require SSAs in order for third-party financiers to  
7 be able to utilize these credits. Id. Nowhere in the IRS rules, Commission rules, the SSAs or  
8 otherwise is it stated that the use of an SSA is for the purpose of allowing third-party financiers  
9 to “furnish” electricity to its customers. The SSA does, however, specifically provide for the  
10 finance, design, development and operation of solar panel systems. A-1, Exhibit 7, paragraph  
11 2.

12 Staff takes issue with the conclusion that the SSAs are financing agreements.  
13 According to Staff, the SSA is not a financing agreement because it does not include the  
14 payment of principal and interest with the goal of eventual ownership. S-1 at 11. Staff’s logic  
15 is flawed. There are many forms of financing agreements. Not all require the “goal of eventual  
16 ownership.” For example, it is undisputed that a car lease is a form of financing and the goal  
17 does not have to be ownership. Many people turn in their vehicles to the dealer after the term  
18 of the lease expires. Ownership may be an option, but it is not necessarily the goal for many  
19 people who lease cars. Likewise, an individual who applies for a home equity loan may use  
20 that loan for purposes other than eventual ownership.

21 Without the SSA (or other power purchase or solar-as-a-service arrangements) non-  
22 profits and other governmental entities could not take advantage of the tax and depreciation  
23 incentives. Id. In other words, non-profits and governmental entities are only able to take  
24 advantage of the incentives or “environmental attributes and incentives” (as they are referred

1 to in the SSA) through the SSA. The quid pro quo is the transfer of all the environmental  
2 attributes and incentives to the third-party installer. Id. While not the normal principal and  
3 interest payment financing plan, non-profits and governmental entities are financing the  
4 installation through the transfer of all the environmental incentives and attributes. A-1, Exhibit  
5 7 at page 2. The third-party installer is “paid” through this alternative type of financing  
6 arrangement. Without it, the third party installer would not be able to provide the service  
7 without the payment of up-front and other costs. The SSA is clearly a mode of financing that  
8 allows for the provision of the solar service.

9 Staff believes that the SSA’s were intentionally structured to be a contract for the sale of  
10 electricity. S-1 at 14. Staff’s conclusion is contrary to that of the majority of the other parties in  
11 this docket. Nonetheless, Staff’s conclusion, standing alone, does not necessitate a finding  
12 that SolarCity is acting as a PSC. The Commission must then consider the second part of the  
13 evaluation. Southwest Transmission Cooperative, Inc. v. ACC., 213 Ariz. 427, 430, 142 P. 3d  
14 1240, 1243 (2007). Under the second part of the evaluation the Commission must consider  
15 whether the entity’s business and activity are such as to make its rates, charges, and methods  
16 of operations a matter of public concern, by considering the eight factors articulated in [Serv-  
17 Yu]. Id.

18 **III. EVEN IF THE COMMISSION WERE TO CONCLUDE THAT SOLARCITY IS ACTING**  
19 **AS A PSC UNDER THE CONSTITUTIONAL DEFINITION, SOLARCITY IS NOT ACTING AS**  
20 **PSC UNDER THE *SERV-YU* FACTORS**

21 In *Serv-Yu*, the Arizona Supreme Court articulated eight factors to be considered in  
22 identifying those corporations “clothed with a public interest and subject to [the Commission’s]  
23 regulation because they are indispensable to large segments of our population.” *Natural Gas*  
24 *Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235,237-238,219 P.2d 324, 325-326 (1950). Those eight

1 factors, commonly referred to as the *Serv-Yu* factors are: 1) what the corporation actually  
2 does; 2) a dedication to public use; 3) the company's articles of incorporation, authorization,  
3 and purposes; 4) dealing with the service of a commodity in which the public has been  
4 generally held to have an interest; 5) monopolizing or intending to monopolize the territory with  
5 a public service commodity; 6) acceptance of substantially all requests for service; 7) service  
6 under contracts and reserving the right to discriminate is not always controlling; and 8) actual  
7 or potential competition with other corporations whose business is clothed with public interest.

8 *Id.*

9 While an analysis under *Serv-Yu* may be informative, it is difficult to understand exactly  
10 what the case stood for and what the results of such an analyses would mean. In *Serv-Yu* the  
11 Supreme Court on rehearing held that the plaintiff, Natural Gas Service Co. et al., whose  
12 purpose was to sell and distribute a commodity which the public had an interest, could not  
13 avoid public regulation by the manner in which it incorporated. *Id.* at 235, 219 P.2d. 324. In  
14 reaching its conclusion, the Supreme Court reasoned that in addition to the factors that were  
15 considered, the Court should have considered the eight factors set forth above. *Id.* at 237, 219  
16 P.2d. 325. The Court considered the eight factors, and relying on four of the factors,  
17 determined that the corporation in question was a PSC. *Id.* at 242, 219 P.2d. 329. In the  
18 end, it is unclear from the *Serv-Yu* case what factors are necessary to be considered a PSC  
19 and how much weight each factor should be given. For example, the third factor, articles of  
20 incorporation – the Court said that while the articles of incorporation authorizing the  
21 corporation to act as a public utility are not conclusive, the fact of such authorization may be  
22 considered in the determination of the ultimate question. *Id.* at 238, 219 P.2d. 326. It appears  
23 from the Arizona Supreme Court's perspective anyway, the finder of fact has a lot of discretion  
24 in using the *Serv-Yu* factors.

1           Nonetheless, the application of the *Serv-Yu* factors to the facts in the subject case does  
2 not support regulation.

3           Factor 1 - What the corporation does - According to SolarCity, SolarCity is a national  
4 leader in solar power system design, financing, installation, monitoring and related services. A-  
5 1 at 2. The Company claims that its mission is to help millions of homeowners, community  
6 organizations and businesses adopt solar power by lowering or eliminating the high upfront  
7 costs. *Id.* SolarCity provides a service that is not intended to be a substitute for a customer's  
8 regular electric service provider. Rather, the service is intended to offset a portion of a  
9 customer's load requirement with a renewable resource.

10           In no manner will SolarCity be providing an indispensable service to a large segment of  
11 the population. *Id.* at 11. Solar is a preferable form of energy, but is not meant to be a  
12 substitute. Solar power is not designed to offset 100 percent of a customer's load  
13 requirements. There has been no evidence in the record that even suggests that solar power  
14 will be indispensable to a large segment of the population in the foreseeable future.

15           In *Serv-Yu*, the Arizona Supreme Court held that "[a] corporation that serves such a  
16 substantial part of the public as to make its rates, charges, and methods of operation a matter  
17 of public concern, welfare, and interest subjects itself to regulation". *Serv-Yu Coop.*, 70 Ariz. at  
18 238, 219 P.2d at 326. SolarCity does not, nor is it anticipated that SolarCity will serve such a  
19 substantial portion of the public in a way that will make its rates a matter of public concern.  
20 Solar power at this point is an alternative to meet a portion of load. It is an optional service  
21 and the Company has limited SSA financing to a small segment of the population, on the basis  
22 of individually negotiated contracts. A-1 at 11.

23           Factor 2 - A dedication to public use - SolarCity has not dedicated its property to a  
24 public use. The dedication of property to a public use is always a question of intent. *Natural*

1 *Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 238,219 P.2d 324, 326, *Southwest*  
2 *Transmission Cooperative, Inc. v. ACC.*, 213 Ariz. 427, 433, 142 P. 3d 1243, 1245 (2007).

3 While proving intent is usually difficult, the Company in this case clearly states that it has no  
4 intention of dedicating private property for a public use. A-1 at 12.

5 Moreover, SolarCity's SSA agreement with the school is itself inconsistent with an entity  
6 that is dedicating its property to a public use. In *Serv-Yu*, the Supreme Court noted that it was  
7 "especially apropos" that:

8 \* \* \* Of course, if the service is rendered pursuant to contract or  
9 limited membership, it is difficult to hold that one has expressly held  
10 himself out as ready to serve the public generally. But the text does not  
11 require an express holding out. It may be done impliedly, as by wide  
12 solicitation and other factors. Keystone Warehousing Co. v. Public  
Service Commission, 105 Pa.Super. 267, 161 A. 891; Bingaman v.  
Public Serv. Comm. 105 Pa.Super. 272, 161 A. 892; Erb v. Public Serv.  
Comm., 93 Pa.Super. 421.

13 *Serv-Yu Coop.*, 70 Ariz. 235, 239,219 P.2d 324, 327. In this case, the service is provided  
14 through a contract, and there is no evidence of wide solicitation or other factors that would  
15 indicate the Commission is dealing with a public utility.

16 Factor 3 - Articles of incorporation, authorization and purpose - SolarCity was  
17 incorporated in Delaware. A-1, Exhibit A, page 2. Its purpose "... is to engage in any lawful  
18 act or activity for which corporations may be organized under the General Corporation Law of  
19 Delaware." Id. The articles of incorporation are not particularly insightful on the issue.  
20 However, nowhere does the articles of incorporation state or even suggest that the Company  
21 will act as a public utility in performing its duties.

22 Staff has a completely different perspective. Staff acknowledges that none of the  
23 incorporating documents it viewed explicitly state that Solar City's purpose is to conduct the  
24 business of a PSC. S-1 at 24. However, Staff notes that none of the language in the articles of

1 incorporation precludes SolarCity from being a PSC either. Id. The evidence, however,  
2 should weigh against regulation since nothing in the Company's incorporating documents  
3 suggest that its purpose is to be regulated and the presumption is against regulation. Arizona  
4 Corp. Commission v. Continental Sec. Guards (App. 1967), 5 Ariz. App. 318, 426, P. 2d 418  
5 vacated 103 Ariz. 410, 443 P.2d 406. The Company, and not the Commission, should decide  
6 the Company's purpose.

7 Factor 4 - Dealing with the service of a commodity in which the public has been  
8 generally held to have a public interest - RUCO agrees with the Company here. There is no  
9 question that the public has an interest in electricity and the provision of electricity. This is one  
10 of the reasons, if not the main reason why APS and TEP are PSCs. However, the Company  
11 draws an appropriate distinction between the commodity itself and the SSA arrangement. A-1  
12 at 13. The subject at issue is the SSA agreements and the provision of electricity is merely  
13 incidental to the SSA agreement. Id.

14 The Commission should be careful not to apply too expansive of a definition of PSC.  
15 The Arizona Supreme Court has made it clear that the scope of regulation is limited. To be a  
16 PSC:

17  
18 "It must be, as the courts express it, clothed with a public  
19 interest to the extent clearly contemplated by the law which subjects it  
20 to governmental control. Free enterprise and competition is the general  
21 rule.... Such invasion of private right cannot be allowed by implication  
22 or strained construction. It was never contemplated that the definition  
23 of public service corporations as defined by our constitution be so  
24 elastic as to fan out and include businesses in which the public might  
be incidentally interested\*\*\*."(emphasis ours) *General Alarm v.*  
*Underdown*, 76 Ariz. 235, 238, 262 P.2d 671, 673 as cited in *Arizona*  
*Corporation Commission v. Nicholson*, 108 Ariz. 317, 321, 497 P.2d  
815, 819.

1           The SSA's are mainly financing agreements whose purpose allows customers to  
2 finance a solar facility arrangement whereby only a portion of its electricity needs are met. The  
3 SSAs not only provide for the financing, the SSAs provide for the installation, design and  
4 service of the solar facility. The SSA is a package of services in which the public does not  
5 have an interest. The electricity generated from the solar facility is merely incidental to the  
6 package of services provided by the SSA.

7           This is an entirely different situation than the situation of the electric service provider  
8 ("ESP"). The ESP depends on common facilities that serve the public. There, the generation  
9 of electricity is clothed with the public interest. Moreover, the ESP provides service to meet all  
10 of its customer's needs, not just a portion, which is the case with the solar facilities.

11           The nature of the SSA arrangement is also different in that there is little need to protect  
12 the public. The SSA arrangement provides for the servicing of the solar equipment by the third  
13 party installer for the duration of the contract. A-1, Exhibit 7. The customer also pays the third  
14 party for the electricity that it uses. The third party only gets paid from the electricity that the  
15 customer purchases and therefore has an incentive to keep the solar equipment in good  
16 working order. There is no public interest that needs to be protected.

17           Nor is there a disparity in bargaining power which regulation could ameliorate. The  
18 electricity generated through the solar system is an alternative form of electricity and not  
19 designed to replace the ESP. At most, the SSAs will provide for only a portion of each  
20 customer's needs. The customer does not need electricity produced by the solar systems and  
21 if the customer chooses solar power, there are plenty of third party installers available to the  
22 customer to choose from.

23           In short, the purpose for regulation will not be fulfilled by the SSA arrangements.  
24 Moreover, the SSAs are not clothed with the public interest.

1 Factor 5 - Monopolizing or intending to monopolize the territory with a public service  
2 commodity - It is undisputed that SolarCity does not intend to monopolize a territory with a  
3 public service commodity. A-1 at 14, S-1 at 25. There is no evidence in the record to support  
4 the argument that SolarCity intends to monopolize its service territory. On the contrary, the  
5 uncontroverted evidence is that the Company does not intend to monopolize its service  
6 territory. Id.

7 Factor 6 - Acceptance of all requests for service - The evidence supports SolarCity's  
8 contention that it does not intend to accept every request for service. Id. At 14. According to  
9 Lyndon Rive, the Company's CEO, there are a number of reasons why the Company has not  
10 and will not accept every request for service. Some of the reasons the Company may not  
11 provide service include:

- 12 - the customer has insufficient roof space or ground space to mount a system;
- 13 - the potential site is not properly oriented to capture sunlight;
- 14 - zoning restrictions prohibit installation;
- 15 - there is inadequate infrastructure;
- 16 - installation would result in inadequate energy savings; and
- 17 - the customer has inadequate credit.

18 A-4, Direct Testimony of Lyndon Rive at 4.

19 Staff believes that SolarCity intends to offer its services broadly rather than on a narrow  
20 scope. S-1 at 27. While this may be true, it completely misses the point. The *Serv-Yu* criteria  
21 is specific – “Acceptance of substantially all requests for service.” *Serv-Yu* at 238, 219 P.2d  
22 327. The *Serv-Yu* criteria are not the scope upon which the service will be offered, but the  
23 acceptance of substantially the entire request for service.

24 Again, the evidence does not support this factor. Mr. Rive testified that SolarCity has  
turned down 91% of the requests for service within the last 21 months. A-5, Additional  
Testimony of Lyndon Rive at 8. Mr. Rive further testified that SolarCity “...only accepts a small

1 percentage of requests for service...” Id. There is no evidence in the record that supports the  
2 notion that SolarCity accepts a substantial portion of its requests for service.

3 Factor 7 - Service under contracts and reserving the right to discriminate is not always  
4 controlling - SSAs are service contracts and SolarCity will provide the equipment and services  
5 through these very specific and detailed contracts. While not necessarily controlling it is  
6 evidence under the facts and circumstances of this case that weighs against regulation.

7 Factor 8 - Actual or potential competition with other corporations whose business is  
8 clothed with public interest - SolarCity will not be competing with the ESPs because SolarCity  
9 will not be providing baseload electricity. Perhaps the best indicia of this is the fact that APS,  
10 the largest ESP in the state, does not object to SolarCity’s application. APS-1 at 2. APS  
11 recognizes the need for third party installers such as SolarCity. Id. at 3. APS also recognizes  
12 that rooftop solar photovoltaic (“PV”) systems have limited application and are unable to meet  
13 its customers full load requirements. Id. at 13.

14 According to APS:

15 “First, solar PV is an inflexible generation source that produces  
16 energy in a reasonably predictable and defined pattern throughout the  
17 course of the day. Absent the deployment of energy storage devices, the  
18 energy produced by solar PV systems cannot be shifted to better match  
19 customer energy consumption patterns, or to respond to unanticipated  
20 outages of other generation sources. Second, solar PV is an intermittent  
21 generation source. The energy production from solar PV systems will rise  
22 and fall in response to solar insolation and can be affected by passing  
23 clouds or monsoon storms. With respect to distribution planning,  
24 distribution facilities must be capable of serving the total load requirement  
customers will need, as well as the maximum amount customers may  
deliver to the grid.” Id.

Resource planning is a paramount concern to APS in planning to meet its load  
requirements, but solar PV will not eliminate the need for baseload electricity.

1           The nature of solar PV distinguishes it from the situation the Arizona Supreme Court  
2 addressed in *Trico Electric Cooperative, Inc. v. Arizona Corporation Commission*, 86 Ariz. 27,  
3 38-39, 330 P.2d 1046 (Ariz. 1959). In *Trico*, the Court held that regulation of Trico Electric  
4 Cooperative was necessary because it was in a position, in the distribution of electricity, to  
5 wage a competitive war with local utilities which could “result in undue waste by the duplication  
6 of lines or other competitive measures to the detriment of all consumers in the area affected.”  
7 *Id.* (“the threatened competitive war between Tucson Gas and Trico makes it imperative that  
8 Trico be subjected to the regulatory powers of the Commission.”)  
9 APS has made it clear that solar PV does not present the same type of concern because of  
10 solar’s limitations. SSA’s should not result in any ESP losing a customer.

11           In sum, an analysis under *Serv-Yu* favors a decision not to regulate SolarCity. Solar  
12 City will be providing SSA arrangements which is not an indispensable service; SolarCity will  
13 not dedicate its property to a public use; SolarCity’s Articles of Incorporation do not authorize it  
14 to act as a public utility; SolarCity’s SSA financing arrangement is not a commodity; SolarCity  
15 will not be asserting any monopoly rights over a public service commodity; SolarCity will not be  
16 accepting a substantial number of requests for service from the general public; SolarCity  
17 utilizes very specific detailed contracts for service; and SolarCity will not be competing with  
18 other existing PSCs. For the foregoing reasons, from a legal perspective SolarCity does not  
19 meet the definition of a PSC nor does SolarCity meet the factors under *Serv-Yu* to be  
20 considered a PSC.

1 **IV. SOLARCITY AND OTHER THIRD-PARTY INSTALLERS THAT UTILIZE SSA**  
2 **ARRANGEMENTS SHOULD NOT BE REGULATED BECAUSE OF THE UNINTENDED**  
3 **EFFECT OF IMPEDEING THE GROWTH OF THE SOLAR INDUSTRY AND ALSO FROM A**  
4 **PUBLIC POLICY PERSPECTIVE**

5 The question in this case is a legal question. For the reasons set forth above, the legal  
6 analysis supports a finding that SolarCity is not acting as a PSC. However, there is  
7 disagreement in the legal interpretation of the definition of PSC as applied to the facts and  
8 circumstances of this case. To the extent there is an ambiguity in the definition of PSC, it is  
9 well settled in Arizona that the Courts may look behind the words themselves in order to  
10 determine the intended effect. *Ward v. Stevens*, 86 Ariz. 224, 344 P.2d. 491 (1959),  
11 *Bussanich v. Douglas*, 152 Ariz. 447, 451, 733 P.2d 644, 647 (1986)

12 There is no party in this case that has argued or would even appear to advocate that the  
13 intended effect of the Constitution is to impede the development of the solar industry in  
14 Arizona. In fact, it appears the feeling is the opposite – that the Commission should do  
15 everything in its power to encourage the development of the solar industry.

16 The Commission has also made it clear that it intends, as a matter of policy, to  
17 encourage the development of the solar industry in Arizona. If the uncontroverted goal of the  
18 parties is the development of the solar industry in Arizona, then the most compelling policy  
19 reason against regulation is the evidence in the record that regulation of any kind will impede  
20 the development of the solar industry in Arizona.

21 According to the Company, “Regulation is likely to drive out numerous, if not all, solar  
22 providers from the State of Arizona. SolarCity’s profits and its investor’s returns would suffer  
23 causing them to look to other less expensive States for solar investment.” A-5, Direct  
24 testimony of Lyndon Rive at 5. The difficulty, according to Mr. Rive is the constraint on tax  
equity. Transcript at 104. Tax equity is the most valued aspect in the solar industry today. Id.

1 Tax equity financing is the ability of the lenders to monetize the tax credits that are available  
2 for the next eight years. Id. The returns on tax equity financing are very low and only banks  
3 and some insurance companies are willing to provide tax equity financing. As a result, tax  
4 equity financing is very scarce. Id.

5 The lenders that will provide tax equity financing are few and far between and given the  
6 low returns are not willing to take on any additional risk. Id. at 105. Regulation to any degree  
7 represents uncertainty, and prospective lenders will look elsewhere to lend where they know  
8 the final outcome. Id. Other states, where there is no regulation will be more “attractive” to  
9 lenders and Arizona and solar customers will be the losers. Id. at 765.

10 SSA arrangements are in the public interest for other reasons. SSA arrangements are  
11 preferable to a lease or purchase arrangement. The SSA arrangement requires no upfront  
12 costs. The SSA arrangement only requires payment from the customer for the amount of  
13 energy generated. A-5, Additional Testimony of Lyndon Rive at 7. With the lease, the  
14 customer usually pays a monthly fixed charge regardless of performance. Id. With the  
15 purchase the customer pays not only all of the upfront costs but bears all of the risks, whereas,  
16 the risk of loss with the SSA arrangements falls entirely on the provider. Id.

17 The risk of loss is the reason why the provider has the incentive to install a good  
18 working product. Id. Since the provider does not get paid if the equipment does not generate  
19 electricity the provider is encouraged to maintain the product in good working order. This  
20 encouragement also serves another important Commission policy objective-the proliferation of  
21 solar power generation. Since the installer is repaid based on the installation’s electrical  
22 output, the installer has a monetary incentive to install the system in order to promote the  
23 greatest amount of generation. Id. at 12. This is a motivation the installer does not necessarily  
24 have when it installs a system that is not financed through a SSA.

1           The Commission’s jurisdiction over the SSAs is not likely to serve or protect the public’s  
2 health and safety. There are numerous state and local laws and ordinances that provide the  
3 consumer this protection. Solar installers must comply with state law. The Arizona Consumer  
4 Fraud Act prohibits deceptive practices (See ARS §44-1522 et seq.). In addition to a private  
5 right of action under this Act, the consumer has the benefit of having the Attorney General  
6 bring a claim on his or her behalf and also seek monetary relief. RUCO-1 at 10.

7           There is little risk of physical or other harm to the consumer. State law already  
8 establishes standards for the selling and installing “solar energy devices”. Id. at 11. ARS §44-  
9 1762 requires at least a one or two-year warranty for certain parts. Id. An installer must meet  
10 standards established by the Registrar of Contractors and must be a licensed solar contractor  
11 under Title 32, chapter 10, article 4. Id. The installation must comply with any consumer  
12 protection rating and safety standards adopted by the Arizona Department of Commerce. Id.

13           These agencies are also in a better position to monitor and prevent any perceived harm  
14 to the public. These agencies are tasked with preventing certain types of harm and have the  
15 specific expertise to do the same. The Commission’s purpose is not meant to be duplicative of  
16 these other state agencies. For example the Registrar of Contractors Office (“ROC”) and local  
17 municipalities are in the best position to establish and enforce standards to preserve the  
18 structural integrity of rooftops when solar installations are placed on them. Id. To RUCO’s  
19 knowledge, the Commission’s Staff has no expertise or training to conduct such inspections.  
20 Id.

21           The Commission does not have the resources required to regulate the SSAs. Even  
22 “regulation light” will require the use of Commission resources. The Commission, like every  
23 other state agency, is under tremendous pressure given the State’s current economic deficit. It  
24 is public knowledge that rate cases are taking longer to process; extension requests are

1 becoming the norm, and not the exception. The number of large rate applications is increasing  
2 and overall resources are becoming more and more constrained. This is not the time for the  
3 Commission to burden its Staff with even more tasks when there is a strong case against  
4 regulation and the extra resources required to implement regulation.

5 Another policy consideration alluded to above is the decision to regulate will have the  
6 effect of selective regulation. The Commission does not regulate solar installers like SolarCity  
7 when they lease or sell (as opposed to finance) installations to customers. RUCO-1 at 12. If  
8 the Commission were to find it has jurisdiction over solar installers when customers choose to  
9 finance the installations (but not when customers purchase or lease them), the Commission's  
10 decision would result in oversight of some installations but not others. Id. Why should the  
11 manner of finance dictate whether a transaction is regulated or not? For public policy reasons,  
12 the Commission should not engage in selective enforcement.

13 Government regulation should serve a legitimate government purpose. Neither Staff  
14 nor any party has provided a legitimate purpose that would be served by regulation. In fact, the  
15 purpose of regulation in this case would not be legitimate, but contrary to the Commission's  
16 stated purpose of the proliferation of renewable resources. A light form of regulation would not  
17 serve a beneficial purpose. A CC&N that would automatically be rubber stamped is not  
18 legitimate government oversight. Additionally, keeping track of all the SSAs by having the  
19 individual entities regulated is illogical because it does not keep track of ALL DG installations  
20 (only those financed through SSAs) and the incumbent utilities are in a much better position to  
21 provide that information to the ACC.

22 Finally, it is sound public policy and in the public's interest for the customer to put  
23 excess green energy back on the grid. In one way, the Commission has asserted its  
24 jurisdiction over this type of transaction through its net metering Rule R14-2-1811. Id. at 13.

1 Through this Rule, utilities must file tariffs which set forth the conditions and price of those  
2 transactions. Id. In this situation, the customer is clearly furnishing the excess electricity that it  
3 owns to the utility for the public good. Id.

4 With excess electricity, the relationship is between the customer and the ESP. Id. The  
5 solar installer plays no role and has no interest in this transaction. Id. Therefore, the regulated  
6 activity is the furnishing of electricity from the customer to the utility. The sale of excess  
7 electricity generated from a DG installation is a regulated transaction. Id. The consumer is not  
8 able to negotiate terms, conditions and price with the utility for this transaction. The regulatory  
9 burden for compliance rests with the regulated utility, not the consumer. Id. But, the public  
10 enjoys the benefit of energy that was generated from the sun.

## 11 **V. CONCLUSION**

12 In conclusion RUCO believes that the SSA arrangement between SolarCity and its  
13 customers should not be regulated by the Commission. RUCO believes that the arrangement  
14 does not meet the textual definition of PSC. Nonetheless, the SSA arrangement does not  
15 meet the criteria set forth in *Serv-Yu*. Finally, it is not in the public interest to regulate the SSA  
16 arrangement.

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18 RESPECTFULLY SUBMITTED this 15th day of December, 2009.

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