

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

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CHAIRMAN

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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 REPLY BRIEF**

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15 The Residential Utility Consumer Office ("RUCO") hereby submits its reply 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 through solar service agreements ("SSAs"). For the
19 following reasons, RUCO maintains that the Company is not acting as a PSC when it provides
20 service in this capacity.

21 **I. STAFF, SRP AND TEP'S ARGUMENTS NOTWITHSTANDING, SOLARCITY, AND**
22 **THIRD-PARTY PROVIDERS LIKE SOLARCITY, DO NOT MEET THE TEXTUAL**
DEFINITION OF A "PUBLIC SERVICE CORPORATION" UNDER ARTICLE 15, § 2 OF THE
ARIZONA CONSTITUTION.

23 There continues to be disagreement on this issue. The Commission's Staff ("Staff"),
24 Salt River Project ("SRP") and Tucson Electric Power ("TEP") maintain that SolarCity is a PSC

1 under the plain language of the Arizona Constitution. Staff’s Closing Brief (“Staff Brief”) at 4,
2 SRP’s Closing Brief (“SRP Brief”) at 1. The arguments set forth by both Staff and SRP, while
3 interesting, are misplaced. Moreover, controlling case law demands that there be a
4 presumption against regulation. Arizona Corp. Commission v. Continental Sec. Guards (App.
5 1967), 5 Ariz. App. 318, 426, P. 2d 418 vacated 103 Ariz. 410, 443 P.2d 406.¹ The
6 Commission should not find that SolarCity is acting as a PSC.

7 Staff, SRP and TEP believe that SolarCity is furnishing its customers with electricity.
8 Staff likens SolarCity to the *Southwest Transmission*² case insofar as the possession of the
9 electricity produced is transferred to the customer. Staff Brief at 6. Staff distinguishes the
10 *Williams*³ case where the company in *Williams* retained possession of the commodity in
11 question (water) and the commodity in question was not the actual product being provided
12 (heat). *Id.* Neither situation is representative of SolarCity’s application, but if a comparison to
13 the present case had to be made, of the two, the *Williams* case is closer.

14 In *Williams*, the Arizona Supreme Court noted:

15 The word “furnish” is defined by Webster as “to provide or supply
16 with what is needed, useful or desirable.” Webster’s Third New
17 International Dictionary, Unabridged. It connotes a transfer of
possession. There is, in *Kallof*’ supplying water for heating or cooling
purposes, no contemplated transfer of possession.

18 *Williams v. Pipe Trades Industry Program of Arizona*, 100 Ariz. 14, 20, 409 P.2d 720, 724
19 (1966, Emphasis Added). Herein lays the gist of Staff’s argument, that “... there is a transfer
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23 ¹ In this matter, the Arizona Supreme Court vacated the Court of Appeals ruling that found the Commission had
jurisdiction.

24 ² *Southwest Transmission Cooperative, Inc. v. ACC.*, 213 Ariz. 427, 430, 142 P. 3d 1240, 1243 (2007).

³ *Williams v. Pipe Trades Industry Program of Arizona*, 100 Ariz. 14, 20, 409 P.2d 720, 726 (1966).

1 of possession that takes place. There has to be.” Staff’s Brief at 8. Staff’s conclusion is
2 misguided. There certainly does not have to be a transfer of possession. The Supreme Court
3 determined that there was no contemplated transfer of possession in the *Williams* case. For
4 other reasons discussed below there is no transfer of possession in SolarCity’s situation.

5 The SSA is simply a financing mechanism which allows SolarCity’s customer to take
6 advantage of significant tax and depreciation incentives without prohibitive up-front costs. A-1
7 at 6. SolarCity provides its customers with the financing, design, installation, operation and
8 maintenance of a solar panel system on the customer’s property, the terms of which are
9 described in the SSA. A-1 at 6. The electricity itself is never owned or even possessed by
10 SolarCity. RUCO-1 at 2. The electricity is not transferred or sold to the customer. *Id.* The
11 electricity is generated on the customer’s rooftop. The electricity is owned and possessed by
12 the customer from its inception. *Id.* Hence, like the case in *Williams*, but for different reasons,
13 “there is no contemplated transfer of possession.”

14 Staff argues that establishing the point when title to the electricity passes in the SSA is
15 simply an “apparent attempt to defeat Commission jurisdiction” and was intentionally included
16 in the SSA for this purpose. Staff Brief at 8-9. The establishment of who has title to the
17 electricity that is generated from financed installation and when the customer gains title is
18 clearly an important and defining legal provision of a Solar Service Agreement. Staff has
19 chosen the Desert Mountain SSA to make its point. *Id.* at 8. Yet Staff has presented no
20 evidence that shows the “meeting of the minds” between SolarCity and Desert Mountain was
21 to defeat the Commission’s jurisdiction, and not to establish when title transfers as the
22 agreement provides – a material and obvious legal consideration of a legal contract. Such
23 bald conclusions are unpersuasive and should be disregarded by the Commission.

1 Even if the intent of the SSA is to defeat Commission jurisdiction as Staff alludes to, and
2 even if there is an appropriate legal basis for the provision, which there clearly is, then there is
3 no harm. It is neither SolarCity, nor Desert Mountain for that matter that decides whether the
4 Commission has jurisdiction – it is the Commission. If nothing else, *Serv-Yu* has made it clear
5 that the issue of whether or not to regulate should be decided on a case-by-case basis and the
6 intent of the parties is a paramount consideration.

7 SRP argues that the Constitutional definition of a PSC should be given a broad
8 definition based on several interpretations including the intent of Framers of the Arizona
9 Constitution. SRP Brief at 4- 13. TEP also argues for a broader interpretation. TEP Brief at 5.
10 SRP suggests that based on Oklahoma’s constitution, a 1917 US Supreme Court case, and
11 the 1913 code, the Commission should give the PSC definition a broad, almost umbrella like
12 application. SRP at 5-6. As even SRP admits, the era upon which SRP basis its
13 interpretation was a time of “...robber barons, big corporations, and unbridled power. The
14 resultant populist movement sought to place limits on what was viewed as a major threat to the
15 lifestyles of workers and farmers.” SRP Brief at 3. But there is nothing in the Constitution, the
16 cases, or any code which suggests that any entity that deals in electricity or other commodity
17 no matter what the circumstances is a PSC. In fact as the Court of Appeals noted, the
18 presumption is against regulation. *Arizona Corp. Commission v. Continental Sec. Guards,*
19 *supra*. Moreover, the Arizona Supreme Court has made it clear that the Commission cannot
20 interpret the definition too broadly:

21
22 We conclude that neither the Constitution nor the statutes give
23 the Corporation Commission the unlimited power to issue certificates of
24 public convenience and necessity. There is no authority to certificate an
individual or a corporation ‘in furnishing, for profit, hot or cold air or
steam for heating or cooling purposes.’ Nor can the words ‘gas’ and

1 'water' as used in Article 15, § 2 be so strained and distorted out of their
2 normal context as to embrace the proposed uses.

3 Williams v. Pipe Trades Industry Program of Arizona, 100 Ariz. 14, 21, 409 P.2d 720, 727
4 (1966).

5 The reality is that times have changed since Arizona's Constitutional Convention.
6 Perhaps that is why the Arizona Courts frequently acknowledge that this determination must
7 be made on a case by case basis. The Arizona Supreme Court in *Serv-Yu* and the Arizona
8 Court of Appeals in *Southwest Transmission* confirmed that there are factors other than the
9 textual definition that need to be considered when determining if an entity is a PSC. *Serv-Yu*,
10 70 Ariz. at 237-238, 219 P. 2d. at 325-326, *Southwest Transmission*, 213 AZ. at 430, 142 P.3d
11 at 1243. The application of these considerations further supports a balanced interpretation
12 and not an overly-broad interpretation.

13 SRP's reliance on a 1917 U.S. Supreme Court case fails to reconcile how Arizona
14 courts have interpreted the meaning of "public service corporation" since the 1910
15 Constitutional Convention and Arizona's subsequent 1913 Code. The relevant provision of the
16 cited Supreme Court case states: "This construction of the Arizona Constitution by the district
17 court is in harmony with the contemporaneous construction by the (1913) Public Service
18 Corporation Act enacted at the first session of the legislature in the absence of an authoritative
19 decision of the Arizona Supreme Court to the contrary, this legislative construction,ought
20 not to be set aside by this court." (Van Dyke v. Geary, 44 U.S. 39, 37 S.Ct. 483 (1917)).

21 As discussed at length at hearing and in closing briefs, since 1917, Arizona courts have,
22 indeed, issued several controlling opinions regarding the scope of the constitution and
23
24

1 Commission jurisdiction. It is these cases which require: (1) a presumption against regulation⁴;
2 (2) a prohibition against an unfettered power to issue CC&Ns⁵; (3) a declaration that
3 “furnishinig” requires a transfer of possession⁶; and (4) that even when a corporation meets the
4 textual definition of a PSC, jurisdiction shall be denied if the public interest requires it⁷.

5 The application of the *Serv-Yu* factors here does not support a PSC finding even if the
6 Commission were to conclude that SolarCity meets the textual definition.

7
8 **II. EVEN IF THE COMMISSION WERE TO CONCLUDE THAT SOLARCITY IS ACTING**
9 **AS A PSC UNDER THE CONSTITUTIONAL DEFINITION, SOLARCITY IS NOT ACTING AS**
10 **PSC UNDER THE *SERV-YU* FACTORS.**

11 Staff and SRP appear to dismiss from the PSC inquiry the *Serv-Yu* factors. Perhaps
12 that is because the factors favor the position that regulating SolarCity would not be in the
13 public interest. SRP suggests that a *Serv-Yu* analysis on a case by case basis would be
14 unconstitutional. SRP Brief at 13-14. TEP does not go so far. TEP Brief at 5-9. However, no
15 court in Arizona or elsewhere has reached that conclusion. To the contrary, the courts in
16 Arizona still consider the factors in their analysis.

17 RUCO shares in SRP’s frustration with the decision but for different reasons. RUCO
18 does not challenge the Commission’s ability to consider the *Serv-Yu* factors. RUCO is in a
19 quandary as to what the *Serv-Yu* case stands for, and how exactly those eight factors should
20 be applied by the Commission. Transcript at 845. RUCO believes, however, that there is
21 some wisdom to considering these factors - the *Serv-Yu* factors, beyond a strict textual
22 application of the Constitution and recognizes that *Serv-Yu* is controlling case law that cannot

23 ⁴ *Arizona Corp. Commission v. Continental Sec. Guards* (App. 1967), 5 Ariz. App. 318, 426, P. 2d 418
vacated 103 Ariz. 410, 443 P.2d 406

24 ⁵ *Williams v. Pipe Trades Industry Program of Arizona*, 100 Ariz. 14, 20, 409 P.2d 720, 726 (1966).

⁶ *Williams* at 20, 409 p.2d 720, 724

⁷ *Serv-Yu*, at 237-238, 219 P.2d. at 325-326

1 be ignored. Id. The Arizona Court of Appeals has confirmed that consideration of the *Serv-Yu*
2 factors is necessary:

3 Merely meeting the textual definition, however, does not establish an
4 entity as a “public service corporation.” *Sw. Gas*, 169 Ariz. at 286, 818
5 P.2d at 721. To be a “public service corporation,” an entity’s “business
6 and activities must be such as to make its rates, charges and methods
7 of operation, a matter of public concern, clothed with a public interest to
8 the extent contemplated by law which subjects it to governmental
9 control-its business must be of such a nature that competition might
10 lead to abuse detrimental to the public interest.” *Trico Elec. Coop., Inc.*
11 *v. Corp. Comm’n*, 86 Ariz. 27, 34-35, 339 P.2d 1046, 1052 (1959)
12 (citing *Gen. Alarm, Inc. v. Underdown*, 76 Ariz. 235, 262 P.2d 671
13 (1953)).

9 •••••

10 The fact that an entity may incidentally provide a public commodity is
11 not sufficient to subject it to regulation, it must be in the business of
12 providing a public service. *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818;
13 *Gen. Alarm*, 76 Ariz. at 239, 262 P.2d at 673. In *Serv-Yu*, the Arizona
14 Supreme Court articulated eight factors to be considered in identifying
15 those corporations “ ‘clothed with a public interest’ and subject to
16 regulation because they are ‘indispensable to large segments of our
17 population.’ ” *Sw. Gas*, 169 Ariz. at 286, 818 P.2d at 721 Those eight
18 factors are:

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

1 *Id.* at 286, 818 P.2d at 721; *Serv-Yu*, 70 Ariz. at 237-38, 219 P.2d at
2 325-26. The *Serv-Yu* factors act as guidelines for analysis, and we are
3 not required to find all eight factors to conclude that a company is a
4 public service corporation. *Sw. Gas*, 169 Ariz. at 287, 818 P.2d at 722.

5 *Southwest Transmission*, 213 AZ. at 431-432, 142 P.3d at 1244-1245.

6 The Commission should consider the *Serv-Yu* factors as guidelines in considering
7 whether SolarCity is a PSC. *Id.* Even TEP agrees as much. TEP Brief at 5. The Commission
8 should not distinguish or dismiss those factors as SRP and Staff seem to suggest. Staff's
9 analysis of the *Serv-Yu* factors seems to distinguish many of the factors by arguing that they
10 do not need to be applied in order to find a PSC. For example, according to Staff, the fact that
11 SolarCity's articles of incorporation do not state that it shall operate as a PSC or that there is
12 no other statement of authorization or purpose is of little significance since corporate entity's
13 statements about their authorization could be made for the purpose of avoiding regulation.
14 Staff Brief at 17. The fact that there is no evidence that SolarCity is holding itself out as a
15 monopoly or intends to monopolize the market is not determinative because there are cases in
16 Arizona where the Courts have held that the existence of a monopoly is not necessary in the
17 determination⁸. Staff Brief at 19-20. Nor, according to Staff, is it determinative that a business
18 accepts substantially all requests for service. *Id.* at 21. Nor is it determinative that the fact that
19 SolarCity provides service under contracts a controlling factor. *Id.* at 22.

20 To truly use the *Serv-Yu* factors as guidelines the Commission should not disregard the
21 simple meaning or apply unequal weight to the *Serv-Yu* factors. To do so would pretty much
22 dismiss the *Serv-Yu* analysis, which is not only legally inappropriate but would be clearly

23 ⁸ Staff, however, relies on *Arizona Water Co. v. Ariz. Corp. Comm'n.*, 161 Ariz. 389, 391, 778 P.2d. 1285, 1287
24 (App. 1989) on the factor of public dedication. Staff quotes from that decision where the Court noted: "We
conclude that the well owners did not intend to dedicate their well to public use and did not monopolize or intend
to monopolize water service in the area. *Serv-Yu*, 70 Ariz. At 239-240, 219 P.2d. at 327." Staff Brief at 15.

1 results driven. The application of the *Serv-Yu* factors does not support a PSC finding for the
2 reasons set forth in RUCO's Closing Brief. See RUCO's Brief at pages 7-13.

3
4 **III. IN THE ABSENCE OF COMMISSION REGULATION THE PUBLIC IS STILL PROTECTED EVEN BY A DETERMINATION THAT SOLARCITY IS NOT A PSC.**

5 Staff highlights the benefits of regulation – in particular the enforceable obligation of
6 reliable service that results from regulation. Staff Brief at 27. Staff argues that in the absence
7 of regulation entities engaged in the private sector may choose to discontinue operations and
8 simply breach their contract for service. *Id.* The Commission should apply common sense
9 when considering this argument.

10 RUCO takes the protection of ratepayer's interests and the assurance of safe and
11 reliable service very seriously – it is RUCO's job. The benefit of regulation is alluring,
12 frequently necessary, but not absolute. There are situations where regulation would not be the
13 best choice and in fact counterproductive. RUCO believes that the evidence and the reality is
14 that such a situation exists here.

15 Staff's concern is unfounded for several reasons. At the risk of being repetitive, the
16 SSA arrangement only requires payment from the customer based on the amount of energy
17 generated. A-5, Additional Testimony of Lyndon Rive at 7. With the lease, the customer
18 usually pays a monthly fixed charge regardless of performance. *Id.* What is the incentive for
19 Solar City to breach the contract? Solar City would not get paid and would have to absorb
20 litigation costs. The nature of the SSA provides adequate protection to the ratepayer.

21 The risk of loss is the reason why the provider has the incentive to install a good
22 working product. *Id.* Since the provider does not get paid if the equipment does not generate
23 electricity the provider is encouraged to maintain the product in good working order. This
24 encouragement also serves another important Commission policy objective-the proliferation of

1 solar power generation which benefits all ratepayers, not just the ratepayers who choose solar
2 service. Since the installer is repaid based on the installation's electrical output, the installer
3 has a monetary incentive to install the system in order to promote the greatest amount of
4 generation. Id. at 12. This is a motivation the installer does not necessarily have when it
5 installs a system that is not financed through a SSA. An added guarantee of reliable service is
6 the ratepayer still can obtain all of his/her electric service through his/her ESP should the solar
7 equipment malfunction. Again, Staff's concern here is not only unfounded but
8 counterproductive to the ratepayer's best interests.

9 The Commission's jurisdiction over the SSAs is not likely to serve or protect the public's
10 health and safety. This argument, as well as other public interest arguments are developed
11 more fully in RUCO's Closing Brief and will not be repeated here. RUCO Brief at 15 – 18. The
12 point is not to refute each and every one of Staff's public interest arguments. Rather, the point
13 is to show that the normal benefits and reasons for regulation are not applicable here. And to
14 the extent there are benefits to regulation here, they are relatively insignificant, are duplicative
15 and are far outweighed by the potential harm that is likely to result to the proliferation of the
16 solar industry in Arizona if the Commission regulates.

17 That potential harm is contrary to all of the party's interests in this docket. SolarCity's
18 CEO, Lyndon Rive testified that regulation is likely to "drive out" some if not all of the solar
19 providers from Arizona. A-5, Direct testimony of Lyndon Rive at 5. Regulation represents
20 uncertainty to lenders who are scarce to begin with. Id. Why would one of these lenders
21 prefer to lend in Arizona when it can lend in most other states and not have to worry about the
22 uncertainty associated with regulation? This uncertainty and its negative effect on the growth
23 of distributed solar power has been reiterated by other solar related entities before this
24

1 Commission. See The Application for a Declaratory Order by the Solar Alliance, Docket No. E-
2 20633A-08-0513 at 3.

3 Finally, in order to regulate, the Commission must be able to identify a legitimate and
4 non-duplicative public policy for regulation. There has been no legitimate reason set forth for
5 regulation. In fact, all the suggestions were duplicative at best (e.g. a forum for grievances or
6 a central repository for information on installers in Arizona.)

7 The development of the solar industry is still in its infancy in Arizona. Arizona, perhaps
8 more than any state in the nation, is the best candidate for solar power given the amount of
9 sunshine in this state. It does not make sense to impede and perhaps stifle the development of
10 the industry for what arguably amounts to the benefits of regulation here. Whether SolarCity is
11 a PSC and subject to regulation is clearly the call of this Commission and for the arguments
12 set forth herein, the Commission should not regulate SolarCity.

13 **IV. CONCLUSION**

14 In conclusion RUCO believes that the SSA arrangement between SolarCity and its
15 customers should not be regulated by the Commission.
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18 RESPECTFULLY SUBMITTED this 15th day of January, 2010.
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21 _____
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