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Submitted November 16, 2009

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation Regarding)	Docket No. 09-999-12
Third-Party Arrangements for Renewable)	
Energy Generation)	COMMENTS OF SALT LAKE
)	COUNTY TO THE NOTICE OF
)	INVESTIGATION AND
)	PROCEDURAL ORDER

Salt Lake County by and through its attorneys, Ballard Spahr, LLP, hereby submits its Comments in response to the notice from the Public Service Commission (the “Commission”), dated October 12, 2009, requesting comments or legal briefs from interested parties regarding whether third-party arrangements for renewable energy generation are subject to the Commission’s jurisdiction.

I. INTRODUCTION

Salt Lake County (the “County”) strongly encourages the Commission to adopt the position that third-party owners of renewable energy projects that provide power from that project to a single customer are exempt from the Commission’s jurisdiction. This is the correct interpretation of applicable statutes and case law, and will allow the County to move forward with its ambitious solar project and solar initiative since it allows power users to benefit indirectly from state and Federal tax benefits. This position is within the Commission’s jurisdiction, is consistent with Utah’s renewable energy policy, and comports with the statutory definition of a public utility, as well as Utah Supreme Court decisions interpreting these laws.

II. SALT LAKE COUNTY’S SOLAR PROJECT

Salt Lake County and Salt Lake City together have been designated as one of only 25 U.S. DOE Solar America Cities, which has resulted in substantial Federal technical and financial support for renewable energy research, planning and development. As part of the County’s 10 MW solar initiative, the County is in the advanced planning stages of developing a 800 kW photovoltaic solar project distributed on four County-owned facilities, including the Salt Palace and the Government Center (each of these being a “Project”). These Projects will enable the County to: (i) provide a hedge against rising energy costs, since the price paid by the customer is typically fixed or rises at a fixed rate for the life of the agreement, (ii) attract additional convention center business due to the “green” attributes of the building following the installation of the Project at the Salt Palace, and (iii) promote private investment in similar solar energy projects by other public and private entities, in addition to providing for reduced emissions and grid congestion.

To be financially viable, as the results of the financing study detailed below demonstrate, the Project will need to be structured with a third-party owner that could take advantage of state and Federal tax incentives. One example of this type of structure is described in Exhibit 1 below and typically involves a so-called “tax equity investor” that becomes an owner of the Project for tax purposes, which involves receiving the financial and tax benefits of the Project for a period of time.¹ The incentives available to such a tax equity investor include a Federal investment tax credit equal to 30 percent of the project cost, accelerated depreciation benefits and a state income tax credit equal to 10 percent of the project costs, up to \$50,000.

In the case of the Salt Palace, the Project would also be located in a low-income census tract that qualifies for additional favorable tax treatment and results in lower borrowing costs and decreased power costs.

III. UTAH RENEWABLE ENERGY POLICY

Utah renewable energy policy, though still evolving, has been clearly stated in terms of both legislative language and the policies put in place by the State Legislature in recent years. These policies provide support for the conclusion that the State desires to encourage the rapid deployment of renewable energy using innovative ownership, financing, and contractual models. Without assurance that third-parties making substantial investments in renewable energy will not be treated as public utilities, the legislature’s clear policy objectives encouraging renewable energy investment will be impeded. Ensuring that the

¹ Exhibit 1 describes one type of third-party ownership structure. Other currently popular structures include “inverted” pass-through project leases, and “partnership-flip” structures. Given the innovative nature of these arrangements, additional options may arise in the future.

third-party owners and developers of these projects are not inadvertently exposed to regulation as a public utility is consistent with that policy.

Utah recently enacted the following policies demonstrating its commitment to the development of renewable energy resources for residential, commercial and industrial applications and encouraging the involvement of public and private parties in the development of these resources:

- a renewable energy tax credit (Utah Code Ann. § 54-7-614), originally enacted in 2001, with amendments in 2007, providing substantial state tax benefits for systems that may be used to supply energy to a commercial unit, or for renewable energy systems operating as a commercial enterprise selling the energy. Building contractors constructing residential units (a third-party) may claim the credit on renewable energy property placed on residential properties.
- a renewable energy portfolio standard (Utah Code Ann. § 54-17-101 et seq.) was enacted in 2008, with the explicit objective of generating 20 percent of the electricity in Utah from renewable energy sources by 2025. This goal is dependent on the ability to cost-effectively generate renewable energy. Under the legislation, electricity produced using solar energy counts as 2.4 kWh toward meeting the standard.
- Legislation authorizing the Commission to develop a system to track renewable energy certificates (SB 99, enacted in March 2009, codified as Utah Code Ann. § 54-17-603).

Without the ability of private parties to take advantage of all the financial benefits available to renewable energy systems, the objective of the policies above will not be attainable. This is especially true for electricity consumers that are not taxpayers, including non-profit entities such as churches and other charities, public and private schools, and local governmental bodies.

Salt Lake County's evolving residential solar power program, which will encourage the adoption of on-site solar power generation by residential customers, benefitted from the Commission's recent order related to residential net metering policies. Just as the Commission's decision in that case reduced barriers and improved the incentives available for residential renewable energy systems, a decision by the Commission in this investigative docket determining that third-party ownership of solar projects does not subject the party to Commission regulation would reduce barriers and improve incentives for commercial, residential and industrial renewable energy projects.

IV. OVERVIEW OF UTAH LAW REGARDING THIRD-PARTY OWNERSHIP

The key question to be addressed by the Commission is whether an owner of a renewable energy system providing electricity from that system to a single, contractually arms' length third party is defined as a public utility under current statutory and case law. The several intertwined provisions of the statute defining a public utility must be read in the context of renewable energy policies defined by the legislature.

A. The Commission's Statutory Authority

It has become necessary in the past for the Commission to determine whether a technological or business innovation justifies a change or clarification to the treatment of an entity involved in those innovations. In this case, the recent innovation of third-party

ownership of distributed generation renewable energy resources does not obviously fit in long-established regulated public utility categories and requires Commission interpretation. The Commission has sufficient authority to make such a determination.

If a third-party owner of a renewable energy system is determined not to be a public utility, it would fall outside the jurisdiction of the Commission, since the Commission has statutory authority to “supervise and regulate every public utility” in the state of Utah. (Utah Code Ann. § 54-4-1 (2009)), but has “no inherent regulatory powers and can only assert those which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it.” (Williams v. Pub. Serv. Comm’n of Utah, 754 P.2d 41, at 50 (Utah 1988), *citing* Basin Flying Serv. v. Pub. Serv. Comm’n, 531 P.2d 1303, 1305 (Utah 1975)).

In making the determination as to whether a third-party owner would be considered a public utility, and thus whether such an entity is within the Commission’s jurisdiction, the Commission’s decisions must be “rationally based” and will be “set aside only if they are imposed arbitrarily or capriciously or are beyond the tolerable limits of reason.” (See Williams v. Pub. Serv. Comm’n of Utah, 754 P.2d 41, at 50 (Utah 1988)); *see also* Utah Dept. of Admin. Serv. v. Pub Serv. Comm’n of Utah, 658 P.2d 601, 608 (Utah 1983)). This standard is distinguished from the broad deference granted by Utah courts to the Commission’s decisions on “matters of basic fact.” Williams, 754 P.2d at 50.

The Commission has exercised its authority in the past to regulate new technologies that were not specifically enumerated in statutory language, and then ceased doing so when conditions and circumstances changed (See, e.g., Williams, 754 P.2d at 43-44, 54 (holding that the Commission was justified in refusing to exercise jurisdiction over

one-way wireless paging services)). When the Federal Communications Commission (“FCC”) deregulated radio frequencies used in paging operations, the Commission decided that it could no longer exercise jurisdiction over one-way paging services, even though it had previously done so. *Id.* at 44. Following the FCC’s actions, Utah enacted Utah Code Ann. § 54-8b-3 (1986), which allowed but did not require the Commission “to exempt certain sectors of the communications industry from regulation.” *Id.* After the Commission maintained its position that it could not exercise jurisdiction, the Supreme Court of Utah upheld the Commission’s decisions. *Id.* at 54-55.

The innovations and advances in the case of third-party financing for solar renewable energy projects similarly come from Federal law and the financial markets encouraging third-party ownership of renewable energy systems, and the numerous state laws encouraging renewable energy development in Utah. Just as those regulatory and legislative changes reflected in the Williams case above resulted in determining that the circumstances required the Commission to refuse to exercise jurisdiction, the innovations, advances, and Federal and state policies related to third-party financing justify the same conclusion in this case. The Commission is empowered and granted substantial deference in making this determination and facilitating the successful implementation of Utah’s renewable energy policy by Utah’s public utilities and leveraging the investment and involvement of other parties that will be necessary to reach those objectives.

B. Statutory Definition of Public Utility

If an entity is determined not to be a public utility under Utah law, the Commission has no jurisdiction over the entity and the entity would not be subject to Commission rules. The statutory definition of a public utility is found in Utah Code Ann. §

54-2-1, and involves an interconnection of three defined terms: (i) electrical corporation, (ii) independent energy producer, and (iii) public utility. Each term is defined separately but must be read in the context of the entire section, as well as within the context of the state’s policy objectives.

An electrical corporation is defined as an entity “owning, controlling, operating, or managing any electric plant, or in any way furnishing electric power **for public service** or to its consumers or members for domestic, commercial, or industrial use, within this state” but excludes independent energy producers. (Utah Code Ann. § 54-2-1(7)). This definition applies to power suppliers selling to broad groups of consumers.

An independent energy producer is an entity that owns, operates, controls or manages an independent power production facility, which includes renewable energy facilities. (Utah Code Ann. § 54-2-1(13-14)). The statute therefore draws a clear distinction between an electrical corporation and an independent energy producer that does not serve the public generally. Additionally, the statute specifies that an independent energy producer may be regulated as a public utility if it provides service to “the public generally” or furnishes “electricity to any member² or consumers within the state” and receives compensation or payment for doing so. (Utah Code Ann. § 54-2-1(16(b)(ii))). These provisions reiterate that an independent energy producer may be treated as a public utility if it is functioning in practice like an electrical corporation.

The statute defines a public utility to include “every . . . electrical corporation . . . , and independent energy producer not described in Subsection 16(d), where the service

² Members are irrelevant to the current discussion since members would only apply in cases of cooperatives or similar organizations not discussed here.

is performed for, or the commodity delivered to, **the public generally**, or in the case of a gas corporation or electrical corporation where the gas or electricity is sold or furnished to any member or consumers within the state for domestic, commercial, or industrial use.” (Utah Code Ann. § 54-2-1(16)(a)). This provision essentially restates the criteria for the previous two definitions, emphasizing the requirement that power be provided either to the public generally or sold to consumers generally.

Even if an independent energy producer is providing electrical services to the public generally, or to consumers in the state, however, it will still be exempt from Commission jurisdiction if it meets certain other conditions. These conditions include: (i) selling power to state-owned facilities, which County-owned buildings could be construed to be, (ii) selling power to an electrical corporation or other wholesale purchaser, which is not applicable in most third-party ownership cases, and (iii) providing power to an entity controlled by or which controls or is affiliated with the independent energy producer or a user located on property managed by the independent energy producer, and the real property is contiguous to real property owned or controlled by the independent energy producer. (Utah Code Ann. § 54-2-1(16(d)(i)-(iii))). Depending on the nature of the relationship between the customer and the third-party owner, specific third-party owners may be specifically exempt under this provision, but that would not apply in every case.

It is not, however, necessary to consider the special exceptions described in Utah Code Ann. § 54-2-1(16(d)(i)-(iii)), however, since these apply even if the independent energy producer is providing electrical power to the public generally. Reading the statute in its entirety, and in the context of the historical interpretation described below, it is clear that in defining the jurisdiction of the Commission with respect to providers of electricity, the

word consumer is always referred to in the **plural** (as opposed to the singular “member” used in relation to a cooperative, or the use of the singular term “consumer,” used in the definition of a “gas corporation” in Utah Code Ann. § 54-2-1(9)). The legislative intent and purpose of these intertwined provisions appear to be to prevent an energy provider from avoiding regulation as a public utility even though it may be operating as a public utility in practice. It is not consistent with the rest of the statute to construe these provisions to prevent a single party from facilitating the development of a distributed generation system on a single customer’s premises.

Utah courts have never held that a bilateral “private contract[]” or “private business” may be converted into or considered to be a public utility by this Commission. Furthermore, the requirements imposed on a public utility in the context of a third-party bilateral contract with a single customer would be inapplicable. Regulating the terms of a single bilateral contract and requiring such an entity to comply with a renewable portfolio standard, accounting and rate requirements would also not be logical. Additionally, it would be counter-productive to the intent of other policies such as the renewable portfolio standard, since the output from such a regulated utility would not be available for other public utilities under the Commission’s jurisdiction to use in meeting their renewable generation obligations.

Adding to the conclusion that treatment of a third-party owner as a public utility this case is inappropriate is the fact that in a typical third-party service agreement, the customer generally has a purchase option beginning after the tax benefits have run, usually in the sixth year of the agreement. If the option is exercised, the property would be transferred to the customer at that time. If the original owner is treated as a regulated utility

by virtue of the single power generating property, would the regulation cease when the system is transferred to the customer, or would the customer be liable for the public utility obligations at that point? It appears that such a result was never contemplated by the legislature, and it is inconceivable that the legislative intent of Utah Code Ann. § 54-2-1 was to impose public utility regulation on a primarily financial arrangement enabling a single party (especially a non-tax paying party) to offset its own power use, resulting in lower grid congestion, less system demand, and cleaner air.

A third-party owner of solar power equipment providing power from that equipment to a single utility customer is therefore not a public utility under Utah law, because it would not qualify as an electrical corporation, is not an independent energy producer that serves the public or multiple customers, and does not otherwise serve the public generally as required by the definition of a public utility.

C. Judicial Interpretation Supports Exemption of Third-party Ownership Model

We are not aware of any recent Utah Supreme Court cases interpreting Utah Code Ann. § 54-2-1 in its current form. We must therefore refer to past decisions, principles and inferences made by past courts in evaluating how the Commission and the courts have interpreted the definition of a public utility in the state of Utah and apply those principles to the current statute. The test consistently used by the Utah Supreme Court in determining whether an entity falls within the description of a public utility has been to focus on the word “public.”

In Medic-Call, Inc. v. Pub. Serv. Comm’n, 470 P.2d 258 (Utah 1970), the Supreme Court of Utah cited a long line of consistently interpreted cases highlighting the essential requirement that an entity must serve the general public to be regulated as a

“public” utility. Id. at 259-61. The court stated that “[n]o one may successfully contend that it is competent for the Legislature to regulate and control in such respect a mere private business or to declare a private business to be public service or a public utility” and that a governmental body may not by “fiat or edict, or by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility. . . .” Id. at 259-60. In the case of a third-party owner of a renewable energy project, primarily for purposes of obtaining financing and maximizing tax benefits, the arrangement between the parties is that of a private contractual arrangement between two parties.

In further clarifying the meaning of the term “public,” Medic-Call continued by explaining that “a utility must act toward all members of the public impartially, and treat all alike. . . since the term ‘public utility’ precludes the idea of service which is private in its nature and is not to be obtained by the public.” Id. at 259. Eight years later, the Supreme Court of Utah reiterated the test set forth in Medic-Call for whether an enterprise is a public utility: “The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.” Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856, 860 n.2 (Utah 1978) (citing Medic-Call, 470 P.2d at 275). In Holmgren, the class of individuals consisted of 1,600 people with rights to access and use water and the provider of the water sought classification as a public utility. Id. at 858-9. The Court refused to classify the provider as a public utility since the services were available only to a limited group of customers. Id. at 860. Similarly, in Salt Lake County, the third-party

ownership arrangement is in fact limited to serving particular individuals, typically a single customer, rather than the public or even any class of the public.

Therefore, applying both the statutory requirements described above and the test as elaborated by the Supreme Court of Utah, a third-party owner of a renewable energy facility serving a single customer would not meet the definition of a public utility in the state of Utah. This conclusion is consistent with the purpose of the statute governing public utility jurisdiction and the statutes encouraging renewable energy development.

V. FINANCIAL IMPACT ON THE COUNTY OF THIRD-PARTY OWNERSHIP

In the summer and fall of 2008, the County contracted with Zions Bank, Ballard Spahr and Energy Investor Advisors (“EIA”) to develop a financial model to compare the costs of various financing, ownership and tax structuring methods on the costs to the County of a commercial-scale solar energy project. In every case that allowed for third-party ownership, the costs were lower than in any of the cases that required that the County maintain ownership. The highest-cost alternative, County ownership of the project financed with tax exempt bonds, was 130% more expensive than the lowest-cost alternative allowing third-party ownership and multiple tax benefits (\$0.23 v. \$0.10/kWh). Due to additional tax changes since the study was conducted,³ lower cost financing tools are currently available and the costs of solar power equipment have declined dramatically, so the results if re-run today would be even more dramatic in favor of the systems owned by third-parties.

³ Since the study, Federal tax law allows projects utilizing investment tax credits to also use tax-exempt or other subsidized energy financing tools. Previously the tax incentives were reduced if such financing was used.

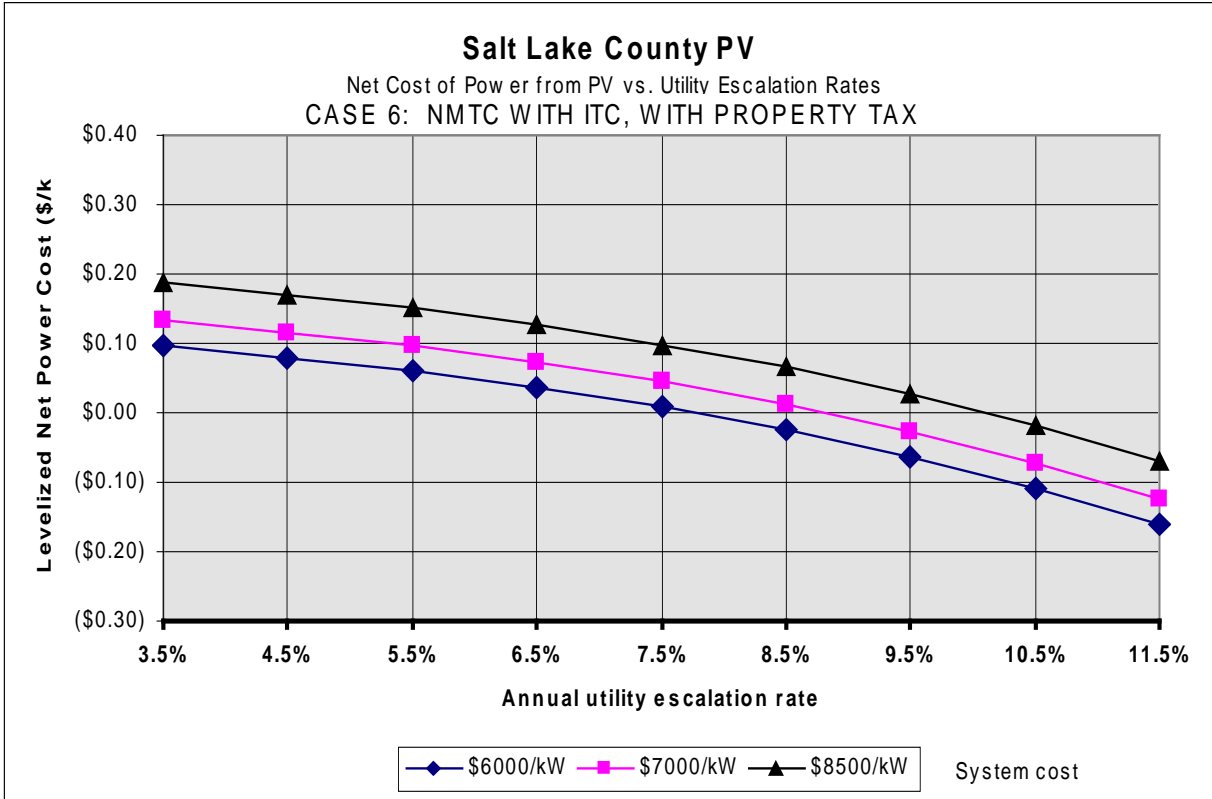
Comparison of Power Costs Resulting from Financing / Ownership Structures

Financing Options	Ownership and Construction Costs Assumptions			
	Ownership	Base Case** (\$8.50 / watt)	Lower-cost \$7.00 / watt	Lowest-cost \$6.00 / watt
Clean Renewable Energy Bonds	County	\$0.29 / kWh	\$0.22 / kWh	\$0.17 / kWh
Tax-exempt financing	County	\$0.38	\$0.29	\$0.23
Private owner with Investment Tax Credit	Third-party (service agreement)	\$0.23	\$0.17	\$0.13
NMTC without Investment Tax Credit (3.75% debt)	County	\$0.29	\$0.22	\$0.17
Project with New Markets Tax Credit and Investment Tax Credit (e.g. Salt Palace)	Third-party (service agreement)	\$0.19	\$0.13	\$0.10

*These costs represent the additional levelized net costs of power per kilowatt-hour over the expected life of the system (above current electricity costs), incorporating the value of future carbon credits, costs of personal property taxes, the value of solar RECs (a value of zero is assumed for Utah solar RECs because Utah currently has no mandatory RECs market), a 10% state renewable corporate tax credit capped at \$50,000, and power cost savings, assuming that utility rates increase at 3.5% per year.

**At a cost of \$6.00 per installed watt, installing a 1 MW system would cost roughly \$6 million.

This model assumes that the alternative to obtaining solar power is to purchase electricity from Rocky Mountain Power. The projected future growth rates of utility costs therefore have a substantial impact on whether solar power costs will be higher or lower than anticipated utility prices, since solar power has no fuel costs and fixed capital costs. As the chart below demonstrates, if future rate increases average 7.5% for the life of the system rather than the 3.5% that was used in the model's calculations, for the lowest cost case, there is essentially no additional cost over the life of the system to install solar power compared to the cost of power currently provided by Rocky Mountain Power.



In addition to the technical and financing studies, the County is prepared to issue a request for proposals as soon as the County determines what the financing and contractual specifications of the Project will be. The key component of the Project that is still uncertain is the ownership, tax and financing structures that will be available to Project developers and/or owners. These factors directly and dramatically impact the total costs to the County of the Project. The Commission can thus play a critical role in clarifying the state of third-party ownership roles, and establish a workable policy encouraging renewable energy at no or very low cost to the state.

While the leasing of renewable energy equipment from a third party may avoid some of the potential challenges discussed herein, the County is unable to lease the solar equipment at issue in its Project. Because of Federal tax rules, the County, and any

other non-taxpayer such as a church, charity, or school is unable to enter into a lease for property that is qualified to receive a Federal investment tax credit (*see* Internal Revenue Code § 50(b)(3); Treasury Regulations § 1.48-1(j)).

VI. COUNTY SUCCESS IN LEVERAGING FEDERAL FUNDS

The County has aggressively sought to leverage its commitment to the Project by seeking and successfully obtaining substantial Federal funding. The County plans to draw from two funding sources to complete the Project. The U.S. Department of Energy (“DOE”) recently granted the County specific grant funding of \$618,417 for the solar installation. However, these funds require the County to provide matching funding to the project. The County received special permission from the DOE to use funds generated through third-party ownership as the source of the matching funds. If it is determined that third-party ownership is not allowed for this Project, the County will not have sufficient funding to provide its required match, which could result in the grant being revoked. In addition, the County will be receiving an Energy Efficiency Conservation Block Grant from the DOE totaling \$1,200,000. These funds were also authorized to be spent on the Project, which was designed using a third-party ownership structure. The County will have a limited time to expend both of these funds, and the combination of these two funding sources is critical for the completion of this solar project. Furthermore, without resolution of the ownership issue, the County will be unable to develop future projects due to its inability to take advantage of Federal and state tax benefits.

VII. THIRD-PARTY OWNERSHIP TREATMENT IN THE REGION

Each state in the region that has considered the third-party ownership issue in the context of renewable energy facilities has determined that such entities will not be

regulated as public utilities. The action taken by each state in the region that has recently addressed this issue is as follows:

- A. **Nevada** – in November 2008, the Public Utilities Commission of Nevada issued an order allowing third-party owners to be exempt from jurisdiction under the Public Utilities Commission of Nevada. (*See* Order issued Nov. 26, 2008 by the Public Utilities Commission of Nevada under Docket Nos. 07-06024; 07-06027).

- B. **Oregon** – under a declaratory ruling issued in July 2008, the Public Utility Commission of Oregon allowed Honeywell International, Inc. and Honeywell Global Finance, LLC to finance, build, own and operate solar photovoltaic facilities on utility customer’s property and to provide power to those customers through energy services agreements without being regulated as a public utility or electricity service supplier. (*See* Order No. 08-388, Entered July 31, 2008, DR 40).

- C. **Colorado** – To encourage solar energy projects in Colorado, Xcel Energy Colorado has waived its right as a monopoly electricity provider as part of the solar REC contract with third-party system owners. To add long-term assurance to the right of third-party owners to develop solar projects in Colorado, in the Spring of 2009, the state enacted legislation exempting third-party ownership of such projects on customer sites from regulation as a public utility. (*See* the Renewable Energy Financing Act of 2009 (Colorado S.B. 51); *also see* Decision No. C09-0930, Docket No. 09R-618E, In the Matter of the Emergency Rules Amending the Commission’s Renewable Energy Standard Rules, 4 CCR 723-3-3650 through 3665, August 26, 2009).
- D. **Arizona** – in a recent decision, the Arizona Corporation Commission approved a solar services agreement in which SolarCity, a private solar developer, will construct, own, operate and maintain solar photovoltaic panels on two high schools in the Scottsdale, Arizona area. The schools will receive the electrical output of the systems during the course of the agreement. (*See* Order re: In the Matter of SolarCity Corporation for a Determination that When it Provides Solar Service to Arizona Schools, Governments, and Non-profit Entities it is Not Acting as a Public Service Corporation Pursuant to Art. 15, Section 2 of the Arizona Constitution, Docket No. E-20690A-09-0346, Decision No. 71277, Sept. 17, 2009).

- E. **California** – allows third-party ownership of systems under California Solar Initiative. California leads the nation in installed solar capacity, with 530 MW of installed grid-tied PV capacity at the end of 2008. (*See* California Solar Initiative Program Handbook, California Public Utilities Commission, July 2009, at 16-17; US Solar Industry Year in Review 2008, Solar Energy Industries Association; *see also* Cal. Pub. Util. Code § 218; 2868).

VIII. CONCLUSION

For the foregoing reasons, the Commission should clarify that renewable energy power generation systems owned by third-parties do not fall under the jurisdiction of the Commission if the power from such a system is provided to a single customer.

RESPECTFULLY SUBMITTED this 16th day of November, 2009.

SALT LAKE COUNTY

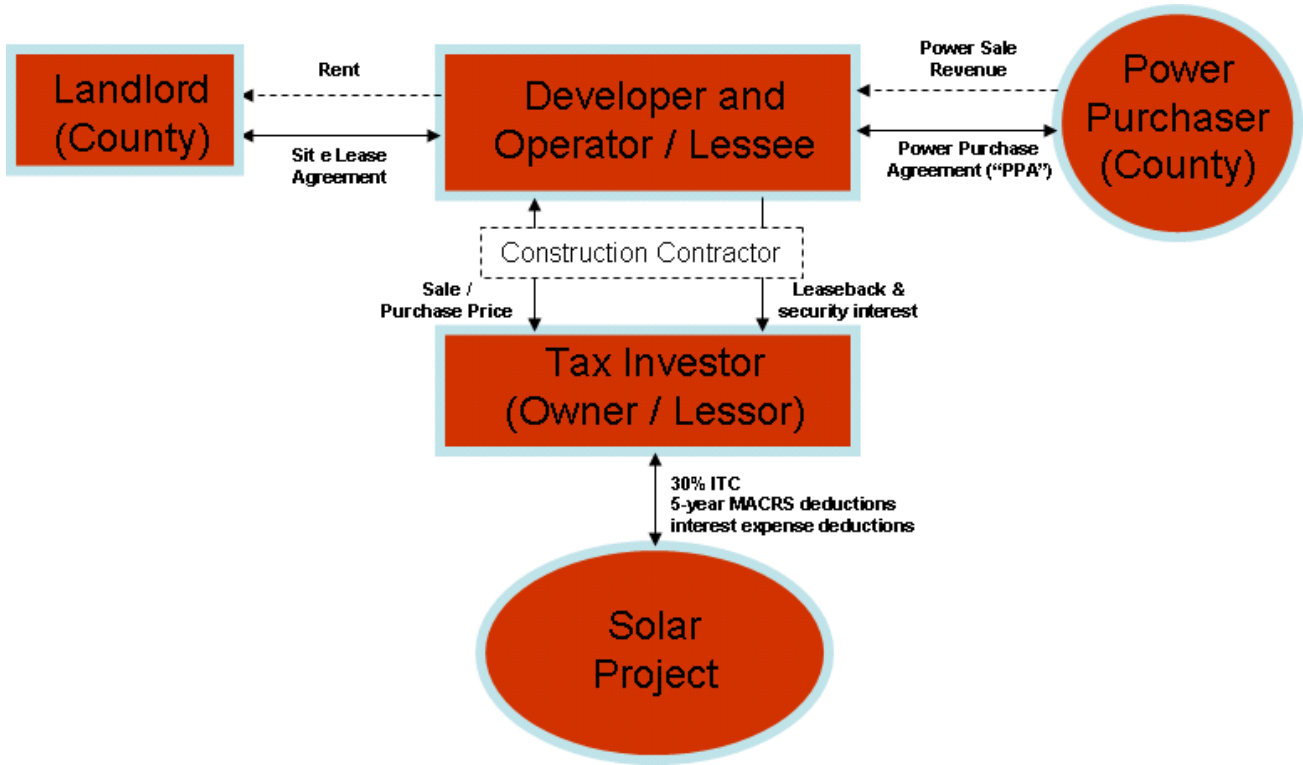
By: _____

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EXHIBIT 1:

Example of a Typical Third-Party Ownership Structure



CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2009, an original, five (5) true and correct copies, and an electronic copy of the foregoing **COMMENTS OF SALT LAKE COUNTY REGARDING INVESTIGATIVE DOCKET NO. 09-999-12** were hand-delivered to:

Ms. Julie Orchard
Commission Secretary
Public Service Commission of Utah
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
jorchard@utah.gov
