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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

Arizona Corporation Commission

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JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
BARRY WONG

AUG -4 2006

AZ CORP COMMISSION
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IN THE MATTER OF THE COMPLAINT OF THE BUREAU OF INDIAN AFFAIRS, UNITED STATES OF AMERICA, AGAINST MOHAVE ELECTRIC COOPERATIVE, INC. AS TO SERVICES TO THE HAVASUPAI AND HUALAPAI INDIAN RESERVATIONS..

DOCKET NO. E-01750A-05-0579

PROCEDURAL ORDER

BY THE COMMISSION:

On August 10, 2005, the Bureau of Indian Affairs, United States of America, ("BIA" or "Complainant") filed the above-captioned Complaint against Mohave Electric Cooperative, Inc. ("Mohave" or "Respondent") with the Arizona Corporation Commission ("Commission").

In its Complaint, the BIA requests that the Commission enter an order declaring that Mohave shall not transfer or abandon a certain power line which the BIA alleges is part of Mohave's electrical distribution facilities, or the easement for the power line right-of-way; that the power line is part of Mohave's service territory; that the BIA is a retail customer of Mohave for receipt of electricity and electrical distribution service over the power line; that Mohave's point of delivery of electricity and electrical distribution services to the BIA is the line side of the Long Mesa Transformer; that Mohave shall place a meter on the power line on the line side of the Long Mesa Transformer for the determination of the electricity used by the BIA; that Mohave shall cease charging the BIA for electricity and electrical distribution service of that portion of the power line costs allegedly attributable to Mohave's approximately fourteen customers rather than attributable to the BIA as the BIA alleges; Mohave shall continue to provide electricity and electrical distribution service at Long Mesa to the BIA under a 1982 contract between the BIA and Mohave; Mohave shall continue to operate, maintain, repair and replace the power line as needed; Mohave's alleged attempted quitclaim

1 of Mohave's Nelson – Long Mesa power line and Mohave's easement for the right-of-way to the BIA
2 and the Havasupai Tribe and Hualapai Tribe is in violation of A.R.S. § 40-285; Mohave shall provide
3 restitution for past BIA expenditures concerning the maintenance and upkeep of the power line as
4 well as past BIA payments for electricity and electrical distribution service for the approximately
5 fourteen non-BIA customers utilizing the power line as the BIA alleges; and granting the BIA such
6 additional and further relief as is appropriate under the circumstances.

7 On October 6, 2005, Mohave filed an Answer and Motion to Dismiss the Complaint.

8 On October 21, the BIA filed its Opposition to Mohave's Motion to Dismiss.

9 By Procedural Order issued October 24, 2005, a Pre-Hearing Conference was scheduled to
10 commence on November 17, 2005 for the purpose of taking oral argument on the legal issues raised
11 in Mohave's Motion to Dismiss and the BIA's Opposition thereto.
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13 On November 1, 2005, Mohave filed a Reply to the BIA's Opposition to the Motion to
14 Dismiss.

15 On November 10, 2005, Mohave filed a Motion to Continue the Pre-Hearing Conference Date
16 for Oral Argument on Mohave's Motion to Dismiss.

17 On November 14, 2005, by Procedural Order, Mohave's Motion to Continue was granted, and
18 a Procedural Conference was set for the November 17, 2005 date instead.
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20 The Procedural Conference was held as scheduled on November 17, 2005. Complainant BIA,
21 Respondent Mohave, and Staff entered appearances through counsel and discussed available dates for
22 scheduling the continuation of the Pre-Hearing Conference for taking oral argument.
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24 By Procedural Order issued November 17, 2006, the Pre-Hearing Conference for taking oral
25 argument was rescheduled to commence on December 13, 2005.
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1 On December 12, 2005, Mohave filed a Motion to Continue and Hold Proceedings in
2 Abeyance Pending Ruling by Arizona State Court.¹ Mohave requested in the Motion that the
3 Commission refrain from making any ruling on the Complaint prior to a final declaratory ruling on
4 Mohave's December 9, 2005 state court filing. In the Motion, Mohave stated that it would
5 voluntarily continue to provide service at its Nelson Substation to the BIA at the Commission-
6 approved rate in the interim period, and that in the event of an emergency posing an imminent and
7 substantial endangerment to the public health, safety and welfare, Mohave agrees to respond to such
8 emergency, provided the BIA pays the cost of such response.
9

10 On December 13, 2005, the Pre-Hearing Conference for taking oral argument on the Motion,
11 Opposition and Reply convened as scheduled. Appearances were entered by counsel for
12 Complainant, Respondent and Staff. During the Pre-Hearing Conference, oral argument was taken
13 from the parties on the issues raised in the Motion to Dismiss, Opposition to the Motion to Dismiss,
14 and Reply to the Opposition to the Motion to Dismiss, with the exception of the issue regarding the
15 1982 contract, because that issue was pending in Superior Court on that date. Complainant and
16 Respondent argued in support of their positions. Staff did not take a position on the merits of the
17 Complaint.
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19 On February 10, 2006, Mohave filed a Notice of Removal of State Declaratory Judgment
20 Action to the U.S. District Court. In the Notice, Mohave renewed its request that the Commission
21 refrain from making any ruling on the Complaint.
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23 On May 10, 2006, the BIA filed a Notice of Dismissal of Mohave Electric's Declaratory
24 Judgment Complaint. In its Notice, the BIA stated that the federal district court to which Mohave's
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27 ¹ On December 9, 2005, Mohave made a filing in Arizona Superior Court for Maricopa County seeking a declaratory
28 ruling on the validity of a 1982 contract between BIA and Mohave regarding the provision of electric service to the
Hualapai and Havasupai Indian reservations.

1 declaratory judgment request had been removed dismissed the declaratory judgment action.² The
2 BIA stated that the underlying basis for Mohave's request to stay this administrative action pending
3 resolution of a separate state declaratory judgment action no longer exists, and asked that Mohave's
4 request be denied.

5 The declaratory judgment action filed by Mohave was been removed to federal court and has
6 subsequently been dismissed for lack of subject matter jurisdiction. Therefore, there is no longer a
7 reason to hold these proceedings in abeyance.

8
9 **Mohave's Motion to Dismiss BIA's Complaint**

10 Mohave's Motion to Dismiss requests that the Commission summarily dismiss the Complaint
11 pursuant to A.A.C. R14-3-101(A), A.A.C. R14-3-106(H), and A.R.C.P. 12(B)(6) for lack of
12 jurisdiction, failure to join indispensable parties, improper forum, and failure to state a claim upon
13 which relief can be granted.

14 Mohave argues that the Commission has no authority to regulate Mohave's activities on
15 Indian lands because the Havasupai and Hualapai tribes have sovereign authority within their
16 reservations. Mohave also argues that the BIA has failed to join the Havasupai and Hualapai tribes in
17 this proceeding, and that they are indispensable parties under A.R.C.P. 19, such that a just resolution
18 of the Complaint cannot be achieved without their joinder; and that the Commission is not
19 empowered to hear simple contract disputes.

20
21 Mohave asserts that even if the Commission has jurisdiction to hear this matter, no set of facts
22 can substantiate or support the allegations of the Complaint. According to Mohave, there is no
23 contract between the parties as a matter of law. Mohave also believes that there is no factual support
24 for the BIA's claim that Mohave violated A.R.S. § 40-285, because, according to Mohave, the power
25 line at issue in the Complaint is not used and useful to Mohave's members, and prior Commission
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² The United States District Court for the District of Arizona granted the BIA's motion to dismiss the action for lack of subject matter jurisdiction, finding the BIA's claim of sovereign immunity applicable.

1 approval of a transfer or abandonment of the power line is not required. Mohave cites Commission
2 Decision No. 53174 (August 11, 1982) as support for this position.

3 **The BIA's Opposition to Mohave's Motion to Dismiss**

4 The BIA asserts that Mohave's arguments for dismissal lack merit and the Motion to Dismiss
5 should be denied.

6 The BIA argues that the Commission has jurisdiction to grant the requested relief pursuant to
7 several Arizona statutes and Commission regulations,³ and that Commission jurisdiction over
8 Mohave is all that is required for the Commission to order Mohave to perform the actions the BIA
9 believes are required by applicable law and regulation. The BIA asserts that Mohave contractually
10 agreed to the Commission's jurisdiction, and that the power line at issue in the Complaint is located
11 within Mohave's service territory under A.R.S. § 40-201.22.
12

13 The BIA disagrees with Mohave's assertion that the Havasupai Tribe and the Hualapai Tribe
14 are indispensable parties in this case, arguing that tribes are not indispensable parties in actions
15 brought by the United States to protect tribal interests.⁴ The BIA argues that the case cited by
16 Mohave in support of its assertion that the Havasupai Tribe and the Hualapai Tribe are indispensable
17 parties⁵ is not controlling in this case, because it involved a determination of the rights and powers of
18 the Indian Nation to consent to electric service on the reservation, and such a determination is not at
19 issue here, where the Havasupai Tribe and the Hualapai Tribe passed tribal resolutions giving
20 Mohave easements for rights-of-way across their lands for the power line.⁶ The BIA states that while
21 the Havasupai Tribe and the Hualapai Tribe are not indispensable parties, if the Commission
22 determines otherwise, it would request that time be permitted to allow them to intervene.
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25 _____
26 ³ The BIA cites A.R.S. § 40-201, 40-202, 40-209, 40-321, 40-361, 40-285, and 30-806; A.A.C. R14-2-201, R14-2-
202(B), R14-2-208, R14-2-209, R14-2-210.

27 ⁴ citing *Nevada v. United States*, 463 U.S. 110, 135 (1983) and *Heckman v. United States*, 224 U.S. 413, 434 (1911).

28 ⁵ *Niagara v. Anderson*, 258 A.C.2d 958, 685 N.Y.S.2d 502 (Sup. Ct. N.Y. App. 1999).

1 In response to Mohave's claim that that the Commission is not empowered to hear simple
2 contract disputes, the BIA argues that while the 1982 contract is implicated in the Complaint, this
3 case is primarily a regulatory case, and the Commission has primary jurisdiction to grant the
4 requested relief.

5 **Mohave's Reply to the BIA's Opposition to Mohave's Motion to Dismiss**

6 In its Reply, Mohave asserts that the statutory authority cited by the BIA does not support the
7 Complaint; that the Commission has no jurisdiction over Indian lands because the Commission has
8 no jurisdiction over wholesale power transactions within the external boundaries of Indian
9 reservations; that the dispute underlying the Complaint is a contract dispute over which the
10 Commission has no jurisdiction; and also that the language of the 1982 contract does not confer
11 jurisdiction on the Commission.
12

13 Mohave maintains its position that the Complaint should be dismissed for lack of jurisdiction,
14 but asserts that if the Commission finds it does have jurisdiction, the Complaint must be dismissed
15 with prejudice based on Mohave's position that the 1982 contract between Mohave and the BIA no
16 longer exists. Mohave continues to argue that based on Decision No. 53174, no facts can substantiate
17 or support the BIA's claim that Mohave violated A.R.S. § 40-285. Mohave reiterates its assertions
18 that the BIA and the members of the Havasupai Tribe and Hualapai Tribe have suffered no
19 compensable harm; that Mohave has no independent legal right or duty to serve the territory in
20 question; and that the Commission has no authority to order Mohave to provide such service.
21

22 **Conclusion**

23
24 A motion to dismiss should not be granted unless it appears certain that a plaintiff would be
25 entitled to no relief under any state of facts which is susceptible to proof under the claim stated.⁷ All
26

27 ⁶ Paragraph 15 of the Complaint alleges that the BIA granted Mohave easements for the right-of-way along prescribed
28 routes along the Hualapai and Havasupai reservations to construct, install, operate and maintain electrical distribution
lines. In its Answer, Mohave admits the allegations in Paragraph 15 of the Complaint.

⁷ *San Manuel Copper Corporation v. Redmond*, 8 Ariz. App. 214, 445 P.2d 162 (App. 1968).

1 factual allegations made in the Complaint must be taken as true for purposes of deciding Mohave's
2 Motion to Dismiss.

3 Based on a review of the BIA's Complaint, Mohave's Answer and Motion to Dismiss the
4 Complaint, Mohave's Reply to the BIA's Opposition to the Motion to Dismiss, and the oral
5 arguments presented by the parties, we cannot find at this time that the BIA would be entitled to no
6 relief under any state of facts which is susceptible to proof under the claim stated. This matter should
7 therefore proceed to a hearing on the merits of each party's respective case.

8
9 We find convincing Complainant's argument that tribes are not indispensable parties in
10 actions brought by the United States to protect tribal interests, and therefore will not require the
11 Havasupai Tribe and Hualapai Tribe to be joined as parties to this proceeding.

12 IT IS THEREFORE ORDERED that Respondent Mohave Electric Cooperative, Inc.'s
13 October 6, 2005 request for summary dismissal of the Complaint pursuant to A.A.C. R14-3-101(A),
14 A.A.C. R14-3-106(H), and A.R.C.P. 12(B)(6) for lack of jurisdiction, failure to join indispensable
15 parties, improper forum, and failure to state a claim upon which relief can be granted is hereby
16 denied.
17

18 IT IS FURTHER ORDERED that a **Pre-Hearing Conference** is hereby scheduled to
19 commence on **September 7, 2006, at 2:00 p.m.**, or as soon as practical thereafter, at the
20 Commission's offices, 1200 W. Washington, Phoenix, Arizona.

21 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113 - Unauthorized
22 Communications) remains in effect.

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1 IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive
2 any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

3 DATED this 4th day of August, 2006.

4
5 
6 TEENA WOLFE
ADMINISTRATIVE LAW JUDGE

7 Copies of the foregoing mailed/delivered
8 this 1st day of August, 2006 to:

9 Michael A. Curtis, Larry K. Udall, and
10 Nancy A. Mangone
CURTIS, GOODWIN, SULLIVAN
11 UDALL & SCHWAB, P.L.C.
12 2712 N. 7th Street
Phoenix, Arizona 85006-1090
13 Attorneys for Mohave Electric Cooperative,
Inc.

Christopher Kempley, Chief Counsel
Keith Layton, Attorney
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

14 Paul K. Charlton
15 Mark J. Wenker
U S ATTORNEY'S OFFICE
16 40 N. Central, Suite 1200
Phoenix, Arizona 85004-4408
17 Attorneys for the Havasupai and Hualapai
18 Nations

Ernest Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007
ARIZONA REPORTING SERVICE, INC.
2627 N. Third Street, Ste. Three
Phoenix, Arizona 85004-1104

19 By: 
20 Molly Johnson
Secretary to Teena Wolfe