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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

2006 OCT 10 P 2:58

Arizona Corporation Commission

DOCKETED

OCT 10 2006

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

AZ CORP COMMISSION  
DOCUMENT CONTROL

DOCKETED BY	YR
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<p>IN THE MATTER OF THE COMPLAINT OF BUREAU OF INDIAN AFFAIRS, UNITED STATES OF AMERICA, AGAINST MOHAVE ELECTRIC COOPERATIVE, INC. AS TO SERVICES TO THE HAVASUPAI AND HUALAPAI INDIAN RESERVATIONS.</p>	<p>DOCKET NO. E-01750A-05-0579</p> <p><b>REPLY TO BUREAU OF INDIAN AFFAIRS' RESPONSE TO MOHAVE ELECTRIC COOPERATIVE'S PROPOSED DISCOVERY PLAN (Requests for Procedural Order and Oral Argument)</b></p>
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Mohave Electric Cooperative, Inc. ("Mohave"), hereby replies to the Bureau of Indian Affairs' ("BIA") Response to Mohave Electric's Discovery Plan, which included a "general objection" to Mohave's first set of data requests and respectfully requests Administrative Law Judge Teena Wolfe summarily enter a Procedural Order requiring the BIA to respond to Mohave's first set of data requests and setting a time to hear and determine the discovery schedule for this matter.

An Order Compelling the BIA to Answer Is Warranted

The BIA's Response includes a general objection to Mohave's first set of data requests and cites two examples of what it claims demonstrates the data requests are "overbroad." The BIA's objection does not comply with the minimum requirements for objections and must be summarily rejected.

1 Any non-privileged matter relevant to the subject matter or reasonably  
2 calculated to lead to discovery of admissible evidence is discoverable. *See*, Rule 26(b),  
3 ARCP.<sup>1</sup> Rules 33 (interrogatories), 34 (requests for production) and 36 (admissions) are the  
4 civil court's equivalent to data requests. Under these Rules, the answering party is required to  
5 respond to each individual inquiry separately and completely.<sup>2</sup> The BIA's failure to  
6 individually respond to any specific data request propounded by Mohave, must be treated as a  
7 complete failure to respond, justifying the ALJ to enter any just order, including without  
8 limitation, taking the facts asserted in the interrogatory as established, refusing to allow the  
9 BIA to support or oppose the claims or defenses, striking out pleadings or parts thereof,  
10 staying the proceedings until the order is obeyed, dismissing the action or any part thereof,  
11 and/or rendering a judgment by default against the BIA. Rule 37(f), ACRP. Mohave, at this  
12 juncture, seeks only an order compelling a substantive response within a reasonable period of  
13 time (e.g., ten (10) days).

14 The Data Requests Are Not Overbroad

15 The BIA claims, without citing any specific data request, that MEC's data  
16 requests are overbroad. The assertion is baseless.

17 The "rules of discovery are to be broadly and liberally construed to facilitate  
18 identifying the issues, promote justice, provide a more efficient and speedy disposition of  
19 cases, avoid surprise, and prevent the trial of a lawsuit from becoming a 'guessing game'."  
20 *Cornet Stores v. Superior Court*, 108 Ariz. 84, 86, 492 P.2d 1191, 1193 (1972). "General  
21 objections, such as the objection that the interrogatories will require the party to conduct  
22

23 \_\_\_\_\_  
24 <sup>1</sup> Since the Commission is not bound by the traditional rules of evidence and has a policy of allowing  
25 the parties full and fair opportunity to secure discovery and submit its case in full, this judicial  
standard is actually overly restrictive for this proceeding.

<sup>2</sup> For example Rule 33(a) provides: "Each interrogatory shall be answered separately and fully in  
writing, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an  
answer.

1 research and compile data, or that they are unreasonably burdensome, oppressive, or  
2 vexatious, \*\*\* or that they are irrelevant and immaterial \*\*\* are insufficient. The burden of  
3 persuasion is on the objecting party to show that the discovery should not be answered." *Id.*,  
4 quoting 4 A Moore's Federal Practice (2d ed. 1971) 33.27, 33-151, 152.

5 The BIA's complaint is 16 pages seeking eleven (11) separate forms of relief,  
6 including, *inter alia*, imposing a general utility obligation on Mohave throughout a massive  
7 new service territory over Indian Reservations, challenging the fees and charges imposed by  
8 Mohave over an unspecified time period, and seeking to void Mohave's Board determination  
9 that certain of its property (the same property this Commission in Decision No. 53174  
10 determined "is not used and useful, will not be used and useful and was never intended to be  
11 used and useful in the provision of electric service to [Mohave's] ratepayers") was not  
12 necessary or useful in the performance of its duties to the public. These issues developed over  
13 more than a 25-year period and involve complex and unique factual and legal issues involving  
14 the inter-relationship between a federal agency (the BIA) performing a retail utility function  
15 under its trust obligation to two Indian Nations and a state regulated public service corporation  
16 (Mohave). The issues are far more complex than the BIA would have the Commission believe.

17 Some of the additional issues involved in this case include, but are not  
18 necessarily limited to:

- 19 1. The scope of the BIA's obligation to provide electric service to the  
20 Hualapai and Havasupai Reservations, prior to the 1981 contract, during  
21 the contract and now;
- 22 2. The ability of the BIA to represent and bind the Hualapai and Havasupai  
23 Nations in this proceeding;
- 24 3. The extent and nature of any policy to divest the BIA of obligations to the  
25 Hualapai and Havasupai Reservations and its members;

- 1 4. Whether the Commission has jurisdiction over all claims raised by the
- 2 BIA;
- 3 5. Whether the United States, any department or agency thereof or their
- 4 employees or agents have conspired to secure services and/or monies
- 5 from Mohave in a manner that gives rise to a cause of action before the
- 6 Commission;
- 7 6. The impact of the lien release from Rural Utilities Service;
- 8 7. Whether the BIA is estopped from asserting any or all of its claims;
- 9 8. Whether any individual recipient of power through the 70-mile
- 10 transmission line is an indispensable party to these proceedings; and
- 11 9. Whether, in the absence of an agency relationship with the BIA, Mohave
- 12 requires tribal authorization to provide retail or wholesale electric service
- 13 on the Hualapai and Havasupai Reservations.

14 Mohave's first set of data requests seek disclosure of facts, documents and admissions related  
15 to issues critical to the resolution of this matter.<sup>3</sup>

16 The Arizona Supreme Court, in *Natural Gas Service Co. v. Serv Yu*  
17 *Cooperative*, 70 Ariz. 235, 238, 219 P. 2d 324, 326 (1950), emphasized:

18 "A dedication by a corporation to public use is always a  
19 question of intention.

20 \* \* \* to be shown by the circumstances in each case. The  
21 facts govern. . . ."

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22 <sup>3</sup> For example, questions 1.0 through 1.11 go to the general issue of the scope of the BIA's utility  
23 function. Requests 1.12 through 1.14 and 1.22 seek information on the development of the BIA's  
24 current theory that MEC has assumed some general utility obligation to provide service to the  
25 Havasupai and Hualapai Reservations. Requests 1.15 through 1.22 seek reference to and copies of  
authorities authorizing Mohave to provide electric service to or on the Havasupai and Hualapai  
Reservations or to provide electric service to Indians and Indian Nations generally. Requests 1.24 –  
1.38 seek facts and documentation on specific contractual, policy and operational issues associated  
with the BIA's complaint. Request 1.39 is merely a recitation of ARCP, Rule 26.1, modified to  
accommodate this proceeding.

1                   The BIA is attempting to proceed to judgment without ever disclosing the facts  
2 and legal authorities that define its role and obligations as both a retail utility and as trustee to  
3 the Havasupai and Hualapai Nations. The BIA would have the Commission render a  
4 judgment in a vacuum, examining only the actions of Mohave, without regard to the actions  
5 and legal obligations of the BIA.<sup>4</sup> This Commission has made clear its unwillingness to  
6 render decisions on incomplete records.

7                   With this general background, Mohave turns to the three specific challenges  
8 made by the BIA to Mohave's first set of data requests. The BIA has the burden of  
9 demonstrating that any particular request is overbroad and unduly burdensome. The BIA has  
10 made no such showing with regard to any of Mohave's data requests.

11                   Information About Other BIA Utility Operations

12                   Under *Serv Yu* and its progeny, the extent to which the BIA holds itself out to  
13 the public, generally, as an electric provider is relevant to how the Commission should  
14 construe its role on the Hualapai and Havasupai Reservations. Yet the BIA attacks Mohave for  
15 requesting such information. Response at page 2. The fact that the BIA is actively engaged in  
16 the electric utility business in other places and the general nature of its operations is clearly  
17 relevant to the issues arising from the BIA Complaint. However, Mohave, at this juncture,  
18 requests the BIA merely "identify" all electric systems owned or operated by the BIA during  
19 the period relevant to the Complaint. (Request 1.7).<sup>5</sup> This question is targeted at determining  
20 to what extent the BIA has engaged in the utility business, both currently and in the past.

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23 <sup>4</sup> Mohave believes that without the agency authority encompassed by the prior Utility Contract with  
the BIA that Mohave lacks authority to transact utility business on either reservation.

24 <sup>5</sup> Request 1.11 also requires the BIA to identify electric providers with whom the BIA has had  
25 ~~arrangements to secure electric power during the period relevant to the Complaint, specifically~~  
identifying each arrangement a) to provide electricity for resale, b) to provide electricity for the  
benefit of Indian nations and c) to provide for delivery to other third parties. Mohave has a right to  
examine whether and to what degree its arrangement with the BIA may or may not have been unique.

1                   Data Relating Pre-Contract Operations

2                   The BIA also objects to Mohave's request to information on activities dating  
3 back to 1975. This date represents the five-year period prior to commencement of  
4 negotiations on the 1981 Utility Contract. Mohave is entitled to discover how the BIA was  
5 meeting its electric utility obligations to these two reservations, and elsewhere, prior to the  
6 execution of the 1981 Utility Contract so that it can better demonstrate the underlying purpose  
7 of the 1981 Utility Contract, the 1981 Utility Contract's impact on the BIA's operations, if any,  
8 and the impact of the termination of the 1981 Utility Contract.

9                   Depositions of Persons Familiar With SCIPP

10                  Finally, the BIA objects to Mohave's possible deposition of persons associated  
11 with the San Carlos Irrigation and Power Project. Again, the BIA makes the unsupported  
12 claim that such a request has no pertinent connection to the present dispute. The BIA is an  
13 agency of the United States. It can and does develop policies having application on a national,  
14 regional and local basis. The SCIPP is the only other BIA electric operation known to  
15 Mohave to exist in Arizona. Mohave has every right to compare and contrast the way the BIA  
16 operates the SCIPP with the manner in which the BIA handles electric operations on behalf of  
17 the Havasupai and Hualapai reservations.

18                  The BIA's Stated Intent to File a MSJ Does Not Justify Delaying Discovery

19                  The BIA claims that it will file a motion for summary judgment (MSJ) shortly.  
20 Certainly, the United States has the right to do so. However, the mere intent to file a MSJ  
21 does not suspend discovery or justify the BIA's failure to timely and fully respond to  
22 outstanding data requests. In fact, if a MSJ is filed, Mohave anticipates that a Rule 56(f)  
23 affidavit will be filed because Mohave has not been afforded a reasonable opportunity to  
24 conduct discovery. *See, Abernathy v. Smith*, 17 Ariz. App. 363, 498 P.2d 175 (1972) (noting  
25 that parties can utilize Rule 56(f) to secure a continuance of a MSJ in order to complete

1 discovery). The proper course, as reflected in Mohave's Proposed Discovery schedule, is to  
2 permit discovery to proceed and then to allow dispositive motions to be filed after discovery  
3 has been concluded.<sup>6</sup>

4           The Commission has consistently demonstrated its desire to ensure that the  
5 record is fully developed before making a dispositive ruling. As a result, motions for  
6 summary judgment are rarely granted. The Commission is known to require supplemental  
7 hearings when it believes a party has not had an opportunity to develop evidence both through  
8 discovery and hearing. For these reasons, Mohave believes the approach suggested by the  
9 BIA wastes resources and time.

10           The BIA Has Ignored Mohave's Offers to Confer

11           When Mohave propounded its initial data requests, its transmittal letter  
12 specifically requested responses within ten calendar days. It further indicated that it was  
13 willing to work with the BIA if this time was deemed unreasonably short. Finally, Mohave  
14 requested that the BIA contact its legal counsel, if it objected to any of the data requests. (A  
15 copy of the transmittal letter was previously submitted by the BIA.)

16           The BIA neither requested an extension of time, nor filed an objection within  
17 the ten calendar day time frame. When no response was received, Mohave made inquiry as to  
18 when a response would be forthcoming. The BIA merely indicated that no response was then  
19 due. Two follow-up attempts were made to initiate a dialogue regarding the overdue  
20 discovery to which the BIA made no response. Copies of the follow-up communications  
21 between counsel are attached.

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25 <sup>6</sup> Due to the BIA's failure to timely respond, the schedule proposed by Mohave will need to be  
adjusted somewhat.

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Conclusion

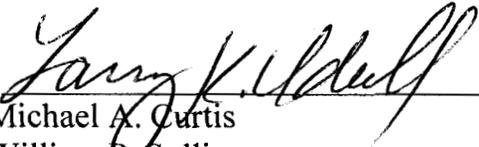
All of the data requests propounded by Mohave are relevant to the issues raised by the BIA's Complaint or are calculated to lead to the discovery of admissible evidence. The BIA has not set forth a single objection to a specific data request (a prerequisite to a proper objection). The general objections asserted are without merit and can be summarily rejected. There is also a need to set a discovery schedule.

WHEREFORE, Mohave respectfully requests entry of a Procedural Order:

1. Compelling the BIA to answer all of Mohave's initial requests fully and promptly (e.g., within ten days); and
2. Promptly setting a hearing to establish a discovery schedule in this matter.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of October, 2006.

CURTIS, GOODWIN, SULLIVAN,  
UDALL & SCHWAB, P.L.C.

By:   
Michael A. Curtis  
William P. Sullivan  
Larry K. Udall  
Nancy A. Mangone  
2712 North 7th Street  
Phoenix, Arizona 85006-1003  
Attorneys for Mohave Electric Cooperative, Inc.

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PROOF OF AND CERTIFICATE OF MAILING

I hereby certify that on this 10<sup>th</sup> day of October, 2006, I caused the foregoing document to be served on the Arizona Corporation Commission by delivering the original and thirteen (13) copies of the above to:

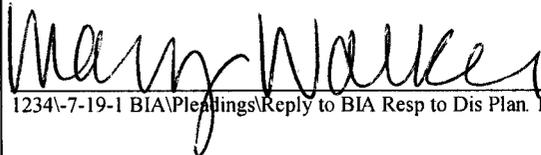
Docket Control Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

Copies of the foregoing hand delivered/mailed this 10<sup>th</sup> day of October, 2006 to:

Teena Wolfe, Esq.  
Administrative Law Judge, Hearing Division  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

Christopher Kempley, Chief Counsel  
Legal Division  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

Paul K. Charlton  
Mark J. Wenker  
U.S. Attorney's Office  
40 North Central, Suite 1200  
Phoenix, AZ 85004-4408  
Attorney for the BIA

  
1234\7-19-1 BIA\Pleadings\Reply to BIA Resp to Dis Plan. 101006

**Mary Walker**

**From:** Mary Walker  
**Sent:** Friday, September 29, 2006 3:39 PM  
**To:** 'Mark.Wenker@usdoj.gov'  
**Cc:** William Sullivan; Michael Curtis  
**Subject:** MEC/BIA

Mr. Wenker:

Mr. Sullivan asked that I contact you regarding the responses to the data requests that Mohave sent the BIA on September 13. According to our calculations, the responses to those data requests were due on September 25. As of today, we have not received any responses. MEC's Discovery Plan stated that the second data requests would be sent out on September 27. We have not sent the second data requests out yet as we were waiting for the responses to the first set of requests. While we realize that all of the information may not yet be gathered, we would appreciate any responses that you may have completed.

Mary Walker  
Assistant to William P. Sullivan and Nancy A. Mangone  
Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C.  
2712 North Seventh Street  
Phoenix, Arizona 85006-1003  
(602) 393-1700

**Mary Walker**

---

**From:** Wenker, Mark (USAAZ) [Mark.Wenker@usdoj.gov]  
**Sent:** Tuesday, October 03, 2006 10:09 AM  
**To:** Mary Walker  
**Subject:** RE: MEC/BIA

Mary

According to the administrative rules, the government's responses are not yet due. I'd be happy to reconsider if some rule or case law can be provided that indicates they were due on September 25.

Thanks.

Mark Wenker

---

**From:** Mary Walker [mailto:mwalker@cgsuslaw.com]  
**Sent:** Friday, September 29, 2006 3:39 PM  
**To:** Wenker, Mark (USAAZ)  
**Cc:** William Sullivan; Michael Curtis  
**Subject:** MEC/BIA

Mr. Wenker:

Mr. Sullivan asked that I contact you regarding the responses to the data requests that Mohave sent the BIA on September 13. According to our calculations, the responses to those data requests were due on September 25. As of today, we have not received any responses. MEC's Discovery Plan stated that the second data requests would be sent out on September 27. We have not sent the second data requests out yet as we were waiting for the responses to the first set of requests. While we realize that all of the information may not yet be gathered, we would appreciate any responses that you may have completed.

Mary Walker

Assistant to William P. Sullivan and Nancy A. Mangone

Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C.

2712 North Seventh Street

Phoenix, Arizona 85006-1003

(602) 393-1700

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10/10/2006

receives this e-mail in error or in response to a general request for the client's public records or for the client's electronic communications shall not read the contents and shall return it immediately to Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C. 2712 North Seventh Street, Phoenix, Arizona 85006-1003, phone (602) 393-1700 and facsimile (602) 393-1703.

THANK YOU FOR YOUR COOPERATION

**Mary Walker**

---

**From:** William Sullivan  
**Sent:** Tuesday, October 03, 2006 11:36 AM  
**To:** Mark Wenker  
**Subject:** BIA v MEC- ACC proceeding

Hi Mark,

We are in receipt of your response to my assistant's follow-up on the outstanding data requests that we e-mailed and mailed September 13, 2006. Please inform us immediately as to when the BIA intends to make its initial response to MEC's first set of data requests.

We understood the BIA wanted to move this matter along and therefore are surprised by your formal/litigation stance. As noted in our cover letter, the standard Commission practice is to require, by Procedural Order, responses to data requests within ten calendar days of receipt. We recognize that the the ALJ has not yet entered a Procedural Order establishing formal discovery procedures governing this matter. We were hopeful that the BIA would follow customary Commission practice prior to the issuance of a formal Procedural Order or, at a minimum, make a good faith effort to respond as soon as practicable. Our discovery proposal was premised on the BIA responding promptly. It now appears that the BIA has no such intent.

As noted in the earlier communication, the lack of BIA's responsiveness has already delayed MEC's second set of data requests. We are re-evaluating our proposed discovery time line and anticipate making a supplemental filing noting the lack of response to date, the need to lengthen the time lines and requesting entry of a formal Procedural Order governing response times, as soon as possible.

We would prefer to work out the response time issue, as well as the entire discovery time line informally and without the need of making additional filings with the Commission. Please call me at your earliest convenience to discuss these issues. I will be available until 2:00 today and then after 4:15. I also expect to be in the office tomorrow between 8:30 a.m. and 4:00 p.m. tomorrow.

Your professional courtesy and cooperation is appreciated.

William P. Sullivan  
Curtis, Goodwin, Sullivan,  
Udall & Schwab, PLC  
2712 N. Seventh Street  
Phoenix, Arizona 85006  
(602) 393-1700  
Facsimile (602) 393-1703

## Mary Walker

---

**From:** William Sullivan  
**Sent:** Wednesday, October 04, 2006 1:31 PM  
**To:** William Sullivan  
**Subject:** RE: BIA v MEC- ACC proceeding  
**Importance:** High

Mark,

Perhaps you missed my e-mail of yesterday (see below).

Please let me know when the BIA intends to file a response to MEC's first set of data requests.

We remain willing to discuss and attempt to resolve any issues with the discovery schedule we submitted and to establish mutually acceptable response periods. I am available now and should be in office until approximately 4 today.

Thanks,

Bill

---

**From:** William Sullivan  
**Sent:** Tuesday, October 03, 2006 11:36 AM  
**To:** Mark Wenker  
**Subject:** BIA v MEC- ACC proceeding

Hi Mark,

We are in receipt of your response to my assistant's follow-up on the outstanding data requests that we e-mailed and mailed September 13, 2006. Please inform us immediately as to when the BIA intends to make its initial response to MEC's first set of data requests.

We understood the BIA wanted to move this matter along and therefore are surprised by your formal/litigation stance. As noted in our cover letter, the standard Commission practice is to require, by Procedural Order, responses to data requests within ten calendar days of receipt. We recognize that the the ALJ has not yet entered a Procedural Order establishing formal discovery procedures governing this matter. We were hopeful that the BIA would follow customary Commission practice prior to the issuance of a formal Procedural Order or, at a minimum, make a good faith effort to respond as soon as practicable. Our discovery proposal was premised on the BIA responding promptly. It now appears that the BIA has no such intent.

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Your professional courtesy and cooperation is appreciated.

10/4/2006

William P. Sullivan  
Curtis, Goodwin, Sullivan,  
Udall & Schwab, PLC  
2712 N. Seventh Street  
Phoenix, Arizona 85006  
(602) 393-1700  
Facsimile (602) 393-1703