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BEFORE THE ARIZONA CORPORATION COMMISSION 19

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AZ CORP COMMISSION
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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.

DOCKET NO. E-01750A-05-0579

**RESPONSE TO BUREAU OF INDIAN
AFFAIRS' REQUEST FOR PROTECTIVE
ORDER; MOHAVE ELECTRIC
COOPERATIVE'S MOTIONS TO: COMPEL
DISCOVERY; ESTABLISH A DISCOVERY
SCHEDULE; AND SUSPEND TIME FOR
FILING RESPONSE TO THE BIA'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Arizona Corporation Commission

DOCKETED

OCT 30 2006

(Requests for Expedited Action)

DOCKETED BY

Mohave Electric Cooperative, Inc. ("Mohave") hereby responds to the Bureau of Indian Affairs' ("BIA") Motion for Protective Order and affirmatively moves for an order a) compelling the BIA to respond to Mohave's First Set of Data Requests and b) suspending the time for responding to the BIA's Motion for Partial Summary Judgment ("MSJ"). The Motion presents the same improper and inadequate "generalized" objections to Mohave's First Set of Data Requests as contained in the BIA's earlier Response to Mohave Electric's Discovery Plan. As demonstrated by Mohave's Reply to the earlier BIA Response (re: Discovery Plan), BIA (as the objecting party) has an affirmative burden to demonstrate the request is improper and warrants judicial intervention.

1 **The BIA's Motion is Baseless**

2 Mohave asks the Administrative Law Judge ("ALJ") to treat its earlier Reply
3 (re: Discovery Plan) as its response to the BIA's Motion for Protective Order.¹ As stated
4 therein:

5 The "rules of discovery are to be broadly and liberally construed
6 to facilitate identifying the issues, promote justice, provide a
7 more efficient and speedy disposition of cases, avoid surprise,
8 and prevent the trial of a lawsuit from becoming a 'guessing
9 game'." *Cornet Stores v. Superior Court*, 108 Ariz. 84, 86, 492
10 P.2d 1191, 1193 (1972). "General objections, such as the
11 objection that the interrogatories will require the party to conduct
12 research and compile data, or that they are unreasonably
burdensome, oppressive, or vexatious, *** or that they are
irrelevant and immaterial *** are insufficient. The burden of
persuasion is on the objecting party to show that the discovery
should not be answered." *Id.*, quoting 4 A Moore's Federal
Practice (2d ed. 1971) 33.27, 33-151, 152.

13 Reply (re: Discovery Plan) at pp. 2-3.

14 **An Order Compelling the BIA to Answer Is Warranted**

15 As with the BIA's earlier objections set forth in its Response to Mohave's
16 Proposed Discovery Plan, the BIA's Motion for Protection fails to comply with the minimum
17 requirements for objections and must be summarily rejected:

18 "Any non-privileged matter relevant to the subject matter or
19 reasonably calculated to lead to discovery of admissible evidence
20 is discoverable. See, Rule 26(b), ARCP.² Rules 33
21 (interrogatories), 34 (requests for production) and 36
(admissions) are the civil court's equivalent to data requests.
22 Under these Rules, the answering party is required to respond to
each individual inquiry separately and completely [citing Rule

23 _____
24 ¹ A courtesy copy of the Reply is included with the ALJ's copy for the ALJ's convenience.

25 ² Since the Commission is not bound by the traditional rules of evidence and has a policy of allowing
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.

1 33(a)]. The BIA's failure to individually respond to any specific
2 data request propounded by Mohave, must be treated as a
3 complete failure to respond, justifying the ALJ to enter any just
4 order, including without limitation, taking the facts asserted in the
5 interrogatory as established, refusing to allow the BIA to support
6 or oppose the claims or defenses, striking out pleadings or parts
7 thereof, staying the proceedings until the order is obeyed,
8 dismissing the action or any part thereof, and/or rendering a
9 judgment by default against the BIA. Rule 37(f), ARCP.
10 Mohave, at this juncture, seeks only an order compelling a
11 substantive response within a reasonable period of time (e.g., ten
12 (10) days)."

13 Reply (re: Discovery Plan) at p. 2 (*Emphasis in original*). The BIA's continued failure to
14 provide objections that meet the clear and unambiguous requirements of the ARCP constitutes
15 a failure to respond.

16 **No Presumptive Limits Apply**

17 The BIA asserts "A party has a presumptive limit of 40 interrogatories,
18 inclusive of sub-parts," citing Rule 33.1(a), ARCP. This Rule has no application to
19 Commission proceedings. The presumptive limit contained in the *Arizona Civil Rules of*
20 *Procedure* are predicated on parties having (and complying with) the independent affirmative
21 disclosure requirement established by Rule 26.1. The Comment to the 1991 amendment that
22 created the presumptive limit states:

23 "It is the Committee's belief that with the mandatory disclosure
24 under Rule 26.1 . . . adequate discovery can take place in the
25 vast majority of civil cases through the use of available uniform
interrogatories and the additional nonuniform interrogatories
allowed by the rule. . . . Refusing to agree to additional
interrogatories which are reasonable and necessary should
subject counsel to sanctions under Rule 16(f)." (Emphasis
added)

1 Since the Commission has never implemented Rule 26.1 disclosure
2 requirements in Complaint matters, the presumptive limit set forth in Rule 33.1(a), ARCP
3 clearly has no application here.

4 **Discovery Is Necessary**

5 The BIA claims “no discovery is necessary as all pertinent facts are
6 undisputed.” BIA Motion at p.1, l. 17. The BIA attempts to ensure that its version of the
7 facts cannot be disputed and placed in proper context by refusing to answer (or provide
8 specific objections to) Mohave’s reasonable data requests. In setting the rigorous standard for
9 granting motions for summary judgment (i.e., if a motion for directed verdict would be
10 granted at trial), the Arizona Supreme Court expressly assumes that “discovery is complete.”
11 *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000 (1991). Here, discovery has not
12 yet begun.
13

14 While certainly some material facts are undisputed (e.g., the BIA’s request that
15 Mohave construct a line and provide contractual service outside of Mohave’s CC&N), the
16 BIA’s MSJ fails to present all material facts to the issues raised by the MSJ (e.g., any fact that
17 deals with its obligation to serve the area or how the area received service prior to the
18 construction of the line or could have received service without the line) and mischaracterizes
19 other facts. For example, while acknowledging that the BIA used power received to provide
20 service to others, the BIA still claims Mohave provided “retail” service to the BIA and others.
21 Discovery is critical to develop the facts that support Mohave’s legal arguments. Mohave has
22 the right and need to explore, among other things: a) the nature and extent of how electricity
23 delivered through the 70-mile transmission line was actually used, b) the BIA’s obligations to
24 these two Indian Nations, c) how the BIA met this obligation before the 70-mile transmission
25 line was constructed, d) the options considered by the BIA to meet its obligations, and e)

1 options the BIA has failed to consider here, but has undertaken elsewhere. Mohave's First Set
2 of Data Requests make preliminary inquiry into these critical areas.³ Mohave cannot be
3 required to file a response to the pending MSJ, unless and until it is permitted to undertake
4 discovery and the BIA is compelled to provide complete responses thereto.

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

10 **The BIA Once Again Ignored Mohave's Offers to Confer**

11 Prior to filing its meritless Motion for Protective Order, the BIA inquired as to
12 whether Mohave would consider "reducing the number of requests and limiting their scope."
13 Copy of e-mail from M. Wenker attached as Exhibit A. Mohave responded the next work
14 day, expressing a willingness to meet and discuss discovery issues, but emphasizing that the
15 BIA has the burden of setting forth specific objections to specific data requests and that such
16 specificity was essential to enable the parties to meet and resolve discovery issues. Copy of e-
17 mail from W. Sullivan attached as Exhibit A. Rather than providing the specificity needed to
18 permit discussions to proceed (and as required by the Rules), the BIA filed its Motion for
19 Protective Order.

20 **Conclusion**

21 All of the data requests propounded by Mohave are relevant to the issues raised
22 by the BIA's Complaint and are calculated to lead to the discovery of admissible evidence.
23 The BIA has not set forth a single objection to a specific data request (a prerequisite to a
24

25 ³ The BIA's MSJ has raised new issues (e.g., allegations relating to rates, collection of depreciation and power outages) that also necessitate discovery before Mohave can provide a response to the MSJ.

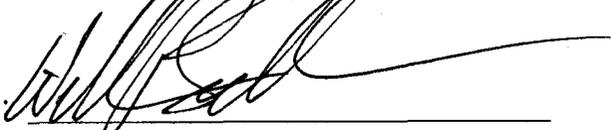
1 proper objection). The general objections asserted are without merit and can be summarily
2 rejected. There is also a need to set a discovery schedule and to suspend the time for
3 responding to the BIA's Motion for Partial Summary Judgment.

4 WHEREFORE, Mohave respectfully requests entry of a Procedural Order:

- 5 1. Denying BIA's request for a protective order;
- 6 2. Compelling the BIA to answer all of Mohave's initial requests fully and
7 promptly (e.g., within ten days);
- 8 3. Establishing a discovery schedule in this matter; and
- 9 4. Indefinitely suspending the time for Mohave to respond to the BIA's
10 Motion for Partial Summary Judgment.

11 RESPECTFULLY SUBMITTED this 30th day of October, 2006.

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

14 By: 
15 Michael A. Curtis
16 William P. Sullivan
17 Larry K. Udall
18 Nancy A. Mangone
19 2712 North 7th Street
20 Phoenix, Arizona 85006-1003
21 Attorneys for Mohave Electric Cooperative, Inc.

22 PROOF OF AND CERTIFICATE OF MAILING

23 I hereby certify that on this 30th day of October, 2006, I caused the
24 foregoing document to be served on the Arizona Corporation Commission by delivering the
25 original and thirteen (13) copies of the above to:

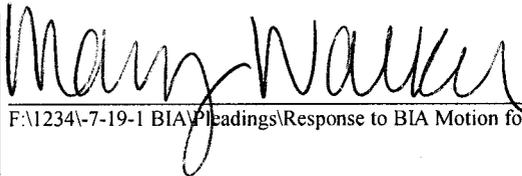
Docket Control Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

1 Copies of the foregoing hand delivered/mailed
2 this 28th day of October, 2006 to:

3 Teena Wolfe, Esq.
4 Administrative Law Judge, Hearing Division
5 Arizona Corporation Commission
6 1200 West Washington Street
7 Phoenix, Arizona 85007

8 Christopher Kempley, Chief Counsel
9 Legal Division
10 Arizona Corporation Commission
11 1200 West Washington Street
12 Phoenix, Arizona 85007

13 Paul K. Charlton
14 Mark J. Wenker
15 U.S. Attorney's Office
16 40 North Central, Suite 1200
17 Phoenix, AZ 85004-4408
18 Attorney for the BIA

19 

20 F:\1234\7-19-1 BIA Pleadings\Response to BIA Motion for Protective Order 103006.doc

21
22
23
24
25

EXHIBIT A

William Sullivan

From: William Sullivan
Sent: Monday, October 23, 2006 10:51 AM
To: 'Wenker, Mark (USAAZ)'
Cc: Michael Curtis
Subject: RE: BIA & Mohave

Mark,

I was out of the office Friday.

It is great to hear that the BIA is finally working on a response to the first set of discovery requests provided to you on September 13th. We had requested an initial response within ten (10) calendar days. We, of course, are open to discussing specific objections to specific data requests and will make a good faith effort to resolve such objections, keeping in mind that the BIA has the burden of sustaining the objection. As explained in our Oct. 10th Reply, any such objection must, at a minimum, identify the data request (and subpart where applicable) together with the specific objection the BIA claims applies to the specific data request.

We encourage you to re-read our Oct. 10th Reply in the context of your Oct 20th inquiry. It explains why such a general objection is inappropriate and also explains how the areas of inquiry included in our first set of data requests are relevant and may lead to admissible evidence. To continue to ask us to guess at which of the requests the BIA considers to be overly broad or beyond the scope of discovery is inappropriate. An objection must be specifically set forth before it can be evaluated. Without such specificity, it is impossible to meet and attempt to resolve an objection.

To our knowledge, the Commission rules of practice do not specify a generic limit on the number of data requests that can be made in a Commission matter. Nor are we aware of any Commission ruling applying the Arizona Rules of Civil Procedure as creating a generic limit.

If you have specific objections to specific data requests, please set them forth in writing so we can discuss them.

Yours truly,

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

From: Wenker, Mark (USAAZ) [mailto:Mark.Wenker@usdoj.gov]
Sent: Friday, October 20, 2006 11:44 AM
To: William Sullivan; Michael Curtis
Subject: BIA & Mohave

Mike and Bill

We've been preparing the BIA's response to Mohave's first set of discovery requests. It appears there

10/30/2006

are too many requests and some of the requests, particularly those concerning events unrelated to the 70-mile line, are overly broad or seek information beyond the scope of discovery.

Kindly let me know if Mohave will consider reducing the number of requests and limiting their scope.

Thank you.

Mark Wenker
United States Attorney's Office
40 N. Central Avenue #1200
Phoenix, Arizona 85004
(602) 514-7748 (P)
(602) 514-7760 (F)