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BEFORE THE ARIZONA CORPORATION COMMISSION

MIKE GLEASON, CHAIRMAN
WILLIAM A. MUNDELL AZ CORP COMMISSION
JEFF HATCH-MILLER DOCUMENT CONTROL
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE COMPLAINT OF) DOCKET NO. E-01750A-05-0579
THE BUREAU OF INDIAN AFFAIRS,)
UNITED STATES OF AMERICA,) BUREAU OF INDIAN AFFAIRS' REPLY
AGAINST MOHAVE ELECTRIC) IN SUPPORT OF MOTION FOR PARTIAL
COOPERATIVE, INC. AS TO SERVICES) SUMMARY JUDGMENT
TO THE HAVASUPAI AND)
HUALAPAI INDIAN RESERVATIONS)

To prevent summary judgment from being granted, Mohave Electric Cooperative, Inc. ("MEC") had to demonstrate that there are disputed material facts. Ariz. R. Civ. Proc. 56(c)(2). MEC failed to do this in its opposition. The Bureau of Indian Affairs ("BIA") is entitled to partial summary judgment finding MEC violated ACC regulations when it failed to obtain ACC approval before it unilaterally transferred its 70 mile electric line to the BIA and the Hualapai and Havasupai Tribes (the "Electric Line").

I. MEC FAILED TO RAISE ANY FACTUAL ISSUES OR LEGAL ARGUMENTS THAT WOULD PRECLUDE SUMMARY JUDGMENT

Preliminarily, it must be noted that MEC failed to properly support many, if not most, of its factual assertions as is required in responding to a motion for summary judgment. MEC's failure in that regard is more fully addressed separately in the BIA's reply to MEC's response to the BIA's statement of facts. In addition to failing to properly support its opposition with admissible and relevant evidence, MEC has not raised any legal arguments that would preclude summary judgment.

A. The ACC's 1982 Decision Concerning MEC's Application for a Permanent Rate Increase is Irrelevant

MEC suggests that in 1982 the ACC made a prophetic, permanent and conclusive determination that the Electric Line, even 25 years later in 2007, would not be "necessary or useful

1 in the performance of [MEC's] duties to the public" as set forth in A.R.S. § 40-285. MEC is
2 wrong. In 1982, the ACC granted MEC's application for a rate increase (the "ACC 1982 Decision").
3 MEC SOF Exh. 5. In that decision, the ACC stated in passing that the Electric Line was not used or
4 useful to MEC's then-existing customers. Id. at p.8. The ACC 1982 Decision is irrelevant to the
5 claims at issue.

6 On January 7, 1982, MEC applied for a rate increase. MEC SOF Exh. 5, p. 1. At the time of
7 its application, MEC already had begun constructing the Electric Line but it was not yet operational.
8 See MEC SOF, p. 12, ¶ 26 (electric service on the Line commenced in February 1982). To finance
9 construction of the Line, MEC obtained a 2% loan from the Rural Electrification Administration (the
10 "Construction Loan"). BIA SOF ¶ 4. At the time of its rate application, MEC had paid interest on
11 the Construction Loan, but was not receiving any income from the Electric Line. MEC included
12 \$32,000 of interest paid on the Construction Loan in its rate application. MEC SOF Exh. 5, p. 8.
13 The ACC was concerned that this interest was included in MEC's TIER and that MEC's then-
14 existing customers would bear the cost of construction of the Electric Line even though it had not
15 generated any income. Id. The ACC recognized that the Electric Line, which was not operational at
16 the time of the application, was not useful to MEC's then-existing ratepayers and therefore logically
17 concluded that MEC's existing ratepayers should not pay an interest expense that would benefit
18 future new customers. Accordingly, the ACC excluded the \$32,000 of interest from the calculation
19 of TIER and MEC's allowable rate of return. Id. at p. 9.

20 The ACC 1982 Decision was merely a rate decision in which, among other things, the ACC
21 determined what costs and expenses should or should not be passed onto MEC's existing customers.
22 The ACC did not determine whether under A.R.S. § 40-285 the Electric Line was "necessary or
23 useful in the performance of [MEC's] duties to the public." That issue was not before the ACC.

24 Under A.R.S. § 40-285, MEC had to obtain an ACC order before it abandoned the Electric
25 Line. In order to abandon the Electric Line, MEC had to submit a specific request to the ACC
26 and show the past, present and future use of the Electric Line. AAC R 14-2-202(B) . MEC did not
27 do this in its January 1982 application for a rate increase. The ACC 1982 Decision is not a substitute
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1 for the procedural safeguards MEC had to follow before it abandoned the Electric Line and
2 abandoned its customers. The ACC 1982 Decision was not intended to, nor did it, address whether
3 the Electric Line would be necessary or useful to the customers who would eventually receive
4 electricity from the Line. Intuitively, the ACC could not have made a decision under A.R.S. § 40-
5 285 about the usefulness of the Electric Line before construction of the Line had been completed.

6 Situations change dramatically over time. What was the case 25 years ago, is not the case
7 today. When MEC filed its rate application, the Electric Line was not supplying electricity for
8 homes, a school, housing for teachers of that school, a jail, a medical clinic, etc. Today, the Electric
9 Line serves these purposes and others. Today, the Electric Line is vitally important to MEC's
10 customers (or former customers as MEC terminated service to them). MEC's reliance upon an old
11 rate case is misplaced. MEC should address facts as they exist today, not 25 years ago.

12 **B. The BIA is Not an Electric Utility. Congressionally-Authorized BIA Utilities,**
13 **such as the San Carlos Irrigation Project, are Irrelevant**

14 **1. The BIA and MEC did not enter into a wholesale contract**

15 MEC describes in great detail the bid process that led to MEC and the BIA entering into the
16 Contract. Opposition, pp. 3-8.¹ MEC claims the Contract is a wholesale agreement and, therefore,
17 the BIA is a utility. This ignores the fact that the Contract (BIA SOF Exh. 2) makes no mention of a
18 wholesale arrangement. In fact, the Contract required MEC to treat the BIA no differently than
19 MEC's other retail customers. BIA SOF Exh. 2, p. 00017; see also p. 00003, § 3(a). MEC also
20 conveniently ignores the fact that it always charged the BIA and the Hualapai Retail Customers
21 retail, not wholesale, rates. The Contract is not a wholesale agreement, and MEC can not use pre-
22 contract documentation to alter or change the terms of the Contract. Barron Bancshares, Inc. v.

23
24 ¹ Throughout MEC's lengthy and irrelevant recitation of the bid process, many of MEC's
25 alleged facts either are not supported by the cited exhibits or are not supported by any citations.
26 For instance, in response to a bid submitted by Citizens Electric, MEC claims the BIA requested
27 that Citizens submit a new bid for wholesale service like MEC and APS had. Opposition, p. 6,
28 Ins. 19-21. This allegation is not only flat-out wrong, but it is not supported by any citation.
The BIA did not request bids for wholesale power and MEC has failed to offer any evidence
establishing the fact that the BIA asked for wholesale bids.

1 United States, 366 F.3d 1360, 1376 (Fed. Cir. 2004). MEC contractually agreed to provide retail
2 service and it always charged retail electric rates.

3 **2. The Code of Federal Regulations is irrelevant and does not suggest the**
4 **BIA is an electric utility**

5 MEC also supports its assertion that the BIA is a utility with citations to the Code of Federal
6 Regulations, 25 CFR § 175, and comparisons to the San Carlos Irrigation Project. Opposition, p. 3.
7 Neither the Code of Federal Regulations nor the San Carlos Irrigation Project are relevant here.

8 The BIA can only do what it is authorized to do. See 25 U.S.C. § 13. Congress authorized
9 the Department of Interior² to establish the San Carlos Irrigation Project and to construct the
10 necessary infrastructure for the newly-formed utility. E.g., 43 Stat. 288 (1924).³ The San Carlos
11 Irrigation Project is now a licensed Arizona utility serving areas around Florence. See MEC SOF
12 Exh. 37. Congress has never authorized the BIA to establish a utility to serve the Hualapai and
13 Havasupai Reservations. Instead, to assist in bringing electricity to these tribal areas, the BIA
14 entered into the instant Contract with a licensed utility, MEC, to supply the electricity. MEC's
15 efforts to compare the BIA's activities in this case to establishment and operation of the
16 Congressionally-authorized San Carlos Irrigation Project is therefore misplaced and is "comparing
17 apples to oranges."

18 MEC's reliance upon the Code of Federal Regulations is similarly misplaced. In accordance
19 with Congressional authorization, the BIA devised rules and regulations for the operation of the San
20 Carlos Irrigation Project and the two other utilities that the BIA operates. 56 Fed. Reg. 15136 ("The
21 Bureau of Indian Affairs is revising regulations governing the electric power portion (utilities) of the
22 Colorado River, Flathead, and San Carlos Indian irrigation projects.") The administrative
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25 ² The BIA is an agency of the Department of Interior.

26 ³ Congress similarly authorized the establishment of the two other BIA utilities, Flathead
27 and Colorado River. E.g., 49 Stat. 1039 (1935); 54 Stat. 422 (1940); 62 Stat. 340 (1948).

1 regulations governing these three utilities are set forth in 25 CFR Parts 175, 176, 177. Id.⁴
2 Although these CFRs are expressly limited to the three specified utilities, MEC claims they apply to
3 what has happened on the Havasupai and Hualapai Reservations. MEC's reliance on the cited CFRs
4 is completely misplaced; they have nothing to do with BIA's activities on the two subject
5 reservations. If anything, the CFRs indicate that the BIA is not a utility in this present instance.
6 Because the Havasupai and Hualapai Reservations are not included within the scope of these CFRs,
7 the CFRs imply that the BIA does not have, and never had, authority to operate an electrical utility
8 on the two reservations.

9 MEC has not offered any pertinent legal authorities or any pertinent facts that would indicate
10 the BIA is a utility, or that it is authorized to be a utility, in the instant case

11 **C. MEC was Not the BIA's Agent**

12 MEC admits that it ignored various federal and state laws and regulations. By sleight of
13 hand, MEC attempts to shift its fault onto the BIA by claiming it was the BIA's agent and therefore
14 the BIA should be blamed for MEC's illicit activities. MEC was never the BIA's agent. Even
15 assuming, arguendo, that MEC was the BIA's agent, it does not mean MEC could then disregard and
16 ignore Arizona regulations governing electric utilities. As a licensed utility, all of MEC's actions are
17 subject to regulatory oversight, whether it acts as an agent or not. See A.R.S. § 40-202(A) & (L)
18 (ACC has jurisdiction over all actions taken by a public service corporations & public service
19 corporations always must comply with all ACC regulations).

20 At its essence, MEC argues that because it violated or ignored applicable laws and
21 regulations, MEC has proven that (1) it was an agent of the BIA and (2) it did not provide retail
22 electrical service to the Hualapai Retail Customers and to the BIA. That is silly. A lawbreaker can
23 not be rewarded for having broken or ignored the law. Yet that is what MEC contends.

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25 ⁴ MEC attached 25 CFR Part 175 to its opposition as Exhibit 2. The first page of that
26 Exhibit, under "Authority," lists citations to a number of congressional statutory enactments.
27 The cited authorities concern only the Colorado River, Flathead, and San Carlos irrigation
28 projects. This is further proof that MEC is relying upon federal regulations that have nothing
to do with the Havasupai and Hualapai Reservations.

1 Although MEC's agency argument is a red herring, the BIA will address it.

2 **1. MEC did not have actual authority**

3 MEC does not claim that it had actual authority to bind the BIA. That only makes sense as
4 nothing in the Contract expresses any intent whatsoever that MEC would be the BIA's agent. See
5 BIA SOF Exh. 2.

6 **2. MEC did not have apparent authority**

7 Instead of actual authority, MEC claims the BIA created an apparent or ostensible agency in
8 which MEC was authorized to act on the BIA's behalf and bind the BIA. Opposition, p. 8, ln. 15.
9 Neither the facts nor the law support MEC's claim.

10 **a. Apparent authority has no applicability to the United States**

11 Unlike private parties, the doctrine of apparent authority does not apply to the federal
12 government. Humlen v. United States, 49 Fed. Cl. 497, 503 (2001); United States v. Flemmi, 225
13 F.3d 78, 85 (1st Cir. 2000); Arakaki v. United States, 71 Fed. Cl. 509, 515 (2006). Treatises also
14 recognize that apparent authority does not apply to governments, including the United States. E.g.,
15 Restatement (3d) Agency § 2.03, cmt. g (although doctrine of actual authority applies to the
16 government, apparent authority does not).⁵ Therefore, MEC's apparent authority argument must be
17 rejected outright.

18 Even if, however, apparent authority is analyzed, MEC has not offered any admissible
19 evidence suggesting it would apply here.

20 **b. MEC has not offered admissible evidence of apparent authority**

21 Unlike actual authority (where a principal explicitly authorizes an agent to act on its behalf),
22 apparent authority arises when the principal creates an impression that the actor/agent is authorized
23 to act on the principal's behalf. It is defined as:

24 Apparent authority is the power held by an agent or other actor to affect a principal's
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26 ⁵ Arizona follows the Restatement of Agency. See e.g., Urias v. PCS Health Systems,
27 Inc., 211 Ariz. 81, 88, 118 P.3d 29, 36 (Ct. App. 2005); S Development Co. v. Pima Capital
Mgt. Co., 201 Ariz. 10, 20, 31 P.3d 123, 133 (Ct. App. 2001).

1 legal relations with third parties when a third party reasonably believes the actor has
2 authority to act on behalf of the principal and that belief is traceable to the principal's
3 manifestations.

4 Restatement (3d) Agency § 2.03. Thus,

5 [W]hen dealing with apparent authority, the emphasis shifts to the third party's
6 reliance on the acts of the alleged principal and the agent as opposed to any express or
7 implied grant by the principal. Consequently, in order to establish apparent authority
8 the record must reflect that the alleged principal not only represented another as his
agent, but that the person who relied on the manifestation was reasonably justified in
doing so under the facts of the case.

9 Reed v. Gershweir, 160 Ariz. 203, 205, 772 P.2d 26, 28 (Ct. App. 1989) (citing Koven v. Saberdyne
10 Systems, Inc., 128 Ariz. 318, 625 P.2d 907 (Ct. App.1980)).

11 Consequently, for apparent authority to apply here, MEC must offer evidence that a third
12 party (e.g., the Tribes) reasonably believed the actor (MEC) had the authority to act on behalf of the
13 principal (the BIA) as a result of the principal's (the BIA's) acts. Id.; Restatement (3d) Agency §
14 2.03. MEC has not offered a scintilla of evidence that (1) a third party believed MEC was the BIA's
15 agent; (2) the alleged belief was reasonable; or (3) the BIA caused the third party to have that belief.

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17 **I. No evidence that third parties believed MEC was the BIA's**
18 **agent**

19 "Reading between the lines," MEC seems to argue that because it failed to secure easements,
20 licenses and permits, the tribes and their members could have believed MEC was the BIA's agent.
21 Opposition, p. 9 - 11. This argument ignores the fact that it was MEC's sole obligation to obtain
22 necessary easements, approvals, licenses, permits and the like. See Contract, BIA SOF Exh. 2, at
23 00002 ("[Mohave] shall, at its expense, obtain all rights of way and easements necessary to permit it
24 to perform under this contract."); at 00012 ("Mohave shall obtain all necessary right-of-way."); and
25 at 00017 ("Mohave shall obtain ... all franchises, authorizations, permits, licenses, certificates of
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1 public convenience and necessity, right-of-way and orders ... to enable it to perform all of its
2 obligations hereunder.”). MEC suggests that because it breached its contractual obligations, it
3 therefore was the BIA’s agent and the BIA should now be precluded from pursuing administrative
4 remedies. That is illogical and it would reward MEC for its own impropriety.⁶

6 To establish apparent authority, MEC must offer admissible evidence that third parties
7 actually believed (not that they could have believed) that MEC was the BIA’s agent. See
8 Restatement (3d) Agency § 2.03; Reed, 160 Ariz. 203, 772 P.2d 26. In its opposition, MEC makes
9 the unsupported statement that the BIA “caused third persons to believe Mohave was the BIA’s agent
10 when providing electric service to retail customers on Reservation lands.” Opposition, p. 8, Ins. 13-
11 15. Who were these mysterious “third persons”? MEC fails to identify them. Where are any
12 affidavits from these “third persons” attesting to the fact that they believed MEC was the BIA’s
13 agent? MEC fails to provide any affidavits or other admissible evidence attesting to such beliefs.
14 This type of evidence must be presented in opposition to a motion for summary judgment. Despite
15 having six months to prepare its opposition, MEC has offered only conclusory and unsupported
16 “facts” that third parties could have believed MEC was the BIA’s agent. MEC has not offered
17 admissible evidence of actual beliefs.

20 In reality, the evidence indicates just the opposite of what MEC claims. The Hualapai Retail
21 Customers and the tribes knew they were dealing directly with MEC, not that they were dealing with
22 an agent of the BIA. For instance, before MEC was awarded the Contract, the Havasupai chairman,
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24 ⁶ Further, MEC’s contention that because it failed to obtain an “Indian trader” permit or
25 license it was the BIA’s agent (Opposition, p. 9-10) is wrong for several reasons. First and as
26 noted, it was MEC’s contractual responsibility to obtain whatever permits or licenses were
27 required. Second, the regulations MEC relies upon, 25 CFR Part 140, apply to those who reside
28 on reservations. 25 CFR § 140.3; see also 25 CFR §§ 140.13-.15. MEC does not reside on either
the Hualapai or Havasupai Reservations so its reliance upon 25 CFR Part 140 is misplaced.

1 Leon Rodgers, wrote to MEC and stated that the Tribe hoped that MEC, not the BIA, would provide
2 electricity:

3 I am asking, on behalf of the Havasupai tribe, that Mohave Electric Cooperative use
4 every means available to it to provide us with the commercial power that will assure
5 reliable, dependable and consistent use of all the facilities in our community.

6 MEC SOF Exh. 30. Likewise, in the Havasupai's resolution authorizing MEC to provide electricity
7 on its lands, the Tribe stated that MEC, not the BIA, would be their provider of electricity:

8 WHEREAS, the only feasible source [of electricity] at this time appears to be
9 Mohave Electric Cooperative, Inc.,

10 NOW, THEREFORE, BE IT RESOLVED that the Havasupai Tribal Council in
11 behalf of the Havasupai Tribe requests that Mohave Electric Cooperative provide
12 electrical power to the Havasupai reservation by means of a powerline built from the
13 Peach Springs area to Long Mesa, and

14 BE IT FURTHER RESOLVED that the Havasupai Tribal Council requests any and
15 all appropriate agencies assist Mohave Electric Cooperative in its efforts to make this
16 a reality.

17 Id. The Hualapai Tribe passed a similar resolution requesting that MEC, not the BIA, provide
18 electricity to the Tribe. See id. Before the BIA and MEC entered into the Contract, therefore, the
19 Tribes were looking to MEC, not the BIA, to provide electricity to the Tribes and their members. No
20 one believed MEC was the BIA's agent.

21 Similarly, after the BIA and MEC entered into the Contract and MEC began providing
22 electricity to the BIA and the Hualapai Retail Customers, third parties always dealt directly with
23 MEC. MEC provided service directly to the Hualapai Retail Customers, read their meters, answered
24 their services calls, and billed them directly. BIA SOF ¶ 7. The BIA was not involved in any of this.
25 The only evidence, therefore, suggests that third parties intended to deal directly with MEC, and in
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1 reality they always dealt directly with MEC, not the BIA.⁷

2 MEC has not offered any admissible evidence that third parties believed MEC was the BIA's
3 agent.

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5 **ii. No evidence that third parties' alleged beliefs were
6 reasonable or that the BIA caused those beliefs**

7 In addition to failing to provide admissible evidence that third parties believed MEC was the
8 BIA's agent, MEC also must provide evidence that those beliefs were reasonable. Reed v.
9 Gershweir, 160 Ariz. at 205, 772 P.2d at 28; Restatement (3d) Agency § 2.03. To determine whether
10 a third party's belief is reasonable, considerable weight is given to written statements by the principal
11 (the BIA) specifying what the alleged agent (MEC) is authorized to do. Restatement (3d) of Agency
12 § 2.03, cmt. d. MEC has failed to produce any BIA written documentation in which the BIA, for
13 instance, created the mistaken impression that MEC was authorized to act on the BIA's behalf.

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15 In short, apparent authority is inapplicable to the United States and, therefore, MEC's
16 argument should be disregarded outright. But even if apparent authority is analyzed, MEC has failed
17 to offer admissible evidence that it should apply here. MEC was not the BIA's agent.

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19 **D. A CC&N is Irrelevant**

20 MEC argues that because it failed to apply for an expansion of its certificated area to include
21 the Hualapai and Havasupai Reservations, it was free to abandon the Electric Line. Opposition, p.
22 11. This argument fails for several reasons.

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24 ⁷ MEC's apparent authority argument conveniently ignores the fact that the BIA itself
25 was MEC's retail customer. In order to prove MEC's apparent authority argument with regard
26 to the electricity MEC sold to the BIA, MEC would have to prove that due to the BIA's own
27 actions the BIA mistakenly believed that MEC was the BIA's agent when it entered into the
28 Contract and when it bought electricity from MEC. In other words, MEC must prove that the
BIA misled itself into believing MEC was its agent. That makes no sense and is yet another
reason why apparent authority does not apply. MEC was not the BIA's agent.

1 First and as discussed, MEC was contractually required to comply with all regulatory
2 obligations. Indeed, if any CC&Ns were needed, the Contract specifically stated that MEC had to
3 obtain them. BIA SOF Exh. 2, at 00017 (“Mohave shall obtain ... all ... certificates of public
4 convenience ...”) Moreover, under the statutes and regulations governing utilities, the utilities
5 themselves, not third parties like the BIA, are responsible for complying with the statutes and
6 regulations. If a CC&N was needed, then MEC had to obtain it. MEC can not be rewarded for
7 ignoring its contractual and regulatory obligations. Second, a CC&N was not even required for the
8 Electric Line. The area where the Electric Line runs is not otherwise served by any other electric
9 utility. See MEC SOF Exh. 37. A CC&N is not required where, like here, an electric utility extends
10 service “into territory ... not served by a public service corporation.” A.R.S. § 40-281(B).⁸ Finally,
11 MEC’s construction and ownership of the Electric Line pursuant to the Contract made the area
12 around the Line MEC’s “service territory.” A.R.S. § 40-201(22). Once MEC expanded its service
13 territory to include the area running along the Electric Line, it then had no right to abandon the
14 Electric Line and the retail customers served by the Line without ACC approval. The lack of a
15 CC&N is irrelevant.

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19 **E. The Extension from the Electric Line is Irrelevant**

20 MEC’s last argument is that the BIA constructed a 13 mile spur off the Electric Line and,
21 therefore, the BIA has accepted dominion and control of the Electric Line. Opposition, p. 18 - 19.
22 This is another argument that lacks merit for several reasons.
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25 ⁸ In 1968, the ACC recognized that MEC did not need a CC&N. See MEC SOF Exh.
26 26 (wherein ACC stated that even though the tribal area does not fall within an existing CC&N,
27 MEC could provide electricity under A.R.S. 40-281 if the tribal area is contiguous to MEC’s
28 current service area).

1 First, MEC admits that the spur was built after MEC unilaterally abandoned the Electric Line.
2 The BIA and the Tribes had no alternative but to assert some type of control over the Line; they did
3 not voluntarily assume control. They begged MEC to continue maintaining the Line, but MEC
4 ignored them. Were the BIA and the Tribes supposed to do nothing after MEC abandoned the
5 Electric Line? Should the BIA have not initiated or requested repairs to the Line when there were at
6 least nineteen outages on the Line between February 2006 and October 2006 (with more than half in
7 the summer) because MEC refused to maintain the Line? See BIA SOF ¶ 15. Second, the facts that
8 MEC relies upon are either inadmissible hearsay or are not supported by the cited authority. MEC
9 relies upon a November 2003 “final administrative draft” report prepared by Tetra Tech, Inc.
10 Opposition, p. 19, ln. 2. This report is filled with nothing but hearsay and it apparently is in draft
11 form. MEC SOF Exh. 48. The same holds true for MEC’s other cited authority. MEC SOF Exh.
12 49. MEC asserts that the BIA allowed this spur to be connected with the Electric Line. Opposition,
13 p. 19, ln. 3. To support this assertion, MEC relies upon BIA SOF ¶ 13. There, the BIA merely stated
14 the undisputed fact that MEC quit claimed the Electric Line to the BIA and the Tribes. BIA SOF ¶
15 13. MEC has not offered any admissible evidence that the BIA “actively participated in the planning
16 of this new line” (Opposition, p. 19, ln. 2) or that the BIA constructed the spur as MEC suggests.
17 MEC, as it has done throughout its opposition, relies upon inadmissible or non-existent evidence.

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22 MEC can not have it both ways. On the one hand, by improperly abandoning the Electric
23 Line MEC forced the Tribes and/or the BIA to assume responsibility for maintaining the Line. Yet
24 on the other hand, MEC now claims that by taking responsibility for maintenance of the Line, the
25 BIA has lost its right to pursue regulatory remedies concerning the Line. That logic, if accepted,
26 once again would reward MEC for its own improper conduct.
27

1 **II. THE BIA AND THE HUALAPAI RETAIL CUSTOMERS ARE ENTITLED TO THE**
2 **SAME PROTECTIONS THAT MEC'S OTHER CUSTOMERS ENJOY**

3 According to both the regulations governing electric utilities and the Contract, the BIA and
4 the Hualapai Retail Customers are entitled to receive the same protections afforded to MEC's other
5 customers.⁹ A.R.S. § 40-202(A) & (L); State v. Zaman, 190 Ariz. 208, 946 P.2d 459 (1997). In its
6 ACC filings, MEC recognized that the area served by the Electric Line is part of its service territory.
7 BIA SOF ¶ 12. This merely acknowledged Arizona law. MEC's "service territory" includes those
8 areas where it has contractually agreed to extend electric distribution facilities. A.R.S. § 40-201(22).
9 No one, not the BIA, not the ACC, nor anyone else, forced MEC to enter into the Contract. MEC
10 voluntarily entered into the Contract and, pursuant to the Contract MEC constructed the Electric
11 Line. MEC's service territory therefore now includes the areas surrounding the Electric Line and the
12 BIA and the Havasupai Retail Customers are entitled to all the protections that MEC's other retail
13 customers enjoy.

14 Moreover, the Contract required MEC to treat the BIA and those who obtained electricity
15 from MEC along the Electric Line no differently than MEC's other customers. The Contract stated:

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19 The electric services furnished under this Contract shall be subject to regulation in the
20 manner and to the extent prescribed by any federal, state or local regulatory
21 commission having jurisdiction over the supply of electric services to Mohave's
22 customers generally.

23 BIA SOF Exh. 2, p. 00017; see also p. 00003, § 3(a). The BIA and the Hualapai Retail Customers,

24 ⁹ MEC claims a 1975 ACC decision, decision no. 47107, stands for the undisputed
25 proposition that the ACC has no jurisdiction over electric facilities located on reservations.
26 Unlike this case, however, the tribe there opposed ACC jurisdiction on the reservation. Here,
27 neither the Hualapai Tribe nor the Havasupai Tribe have opposed ACC jurisdiction and, in fact,
28 they have both participated in settlement discussions initiated by the ACC and this Court. This
Court, in denying MEC's motion to dismiss, already rejected MEC's argument that the ACC
lacks jurisdiction here.

1 therefore, are afforded all the same regulatory protections that MEC's other customers enjoy.

2 With that in mind and with respect to MEC's other customers, would the ACC allow MEC
3 to:

- 4 • Discontinue electric service to an existing customer in Bullhead City, a
5 medical clinic, without ACC approval?
- 6 • Discontinue electric service to another existing customer, a school, without
7 ACC approval?
- 8 • Discontinue electric service to other existing customers, a jail and police
9 station, without ACC approval?
- 10 • Discontinue electric service to existing Bullhead City customers, residential
11 homes, without ACC approval?
- 12 • Abandon a line that provides electricity to a subdivision of existing customers
13 without ACC approval?
- 14 • Refuse to read electric meters of existing customers?
- 15 • Refuse to maintain and repair its electric lines that service existing customers?

16 If the answer is "no" to any of these questions, then MEC can not do the same thing to the BIA and
17 the Hualapai Retail Customers.

18 **III. THE BIA AND THE HUALAPAI RETAIL CUSTOMERS ARE MEC'S RETAIL**
19 **CUSTOMERS**

20 In the motion for partial summary judgment, the BIA set forth many facts proving that it and
21 the Hualapai Retail Customers are MEC's retail customers. The following are some of the facts that
22 MEC has not contested or refuted with admissible evidence:

- 24 • MEC included the costs of servicing the BIA in its retail rate filings with the
25 ACC.
- 26 • The ACC fully examined those costs and approved those retail rates for
27 service to the BIA.

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- MEC has never characterized its service to the BIA as wholesale.
- MEC has always charged the BIA a retail rate for electricity.
- The Hualapai Retail Customers purchased electricity directly from MEC for their own use and for these customers MEC billed them directly, read their meters, and answered service calls.
- The BIA uses electricity that MEC delivers over the Electric Line for its “own use” in the Havasupai Village (i.e., to operate a BIA school and related facilities; to operate government quarters for BIA teachers and law enforcement officers; to operate a BIA detention facility; and to operate a BIA maintenance building).
- The BIA’s “trade or business” is to expend federal appropriated funds for, among other things, the general support of Indians. To accomplish this in the instant case, the BIA contracted with MEC to have the Electric Line constructed so that electricity could be made available in the Havasupai Village.

According to the undisputed admissible facts, therefore, the Hualapai Retail Customers and the BIA must be considered MEC’s retail electric customers. A.R.S. § 40-201(21); 25 U.S.C. § 13.

IV. MEC FAILED TO OBTAIN REQUIRED ACC APPROVAL BEFORE ABANDONING THE ELECTRIC LINE

MEC could not abandon the Electric Line if it was “necessary or useful in the performance of [MEC’s] duties to the public” without first obtaining ACC approval. See A.R.S. § 40-285. MEC never obtained ACC approval, so the pertinent question is: was the Electric Line necessary or useful in the performance of MEC’s duties? The BIA submits that this is a rhetorical question as the Line undoubtedly was necessary or useful for MEC to meet its obligations. The Line provides electricity to homes, a medical clinic, a detention facility, a police station, a school, etc. BIA SOF ¶ 6.

The availability of a substitute service is the predominate factor in determining whether a utility’s line, plant or system is necessary or useful. Safford Chamber of Commerce v. Corp.

1 Comm'n, 303 P.2d 713 (Ariz. 1956); see also Arizona Corp. Comm'n v. Southern Pac. Co., 350
2 P.2d 765, 770 (Ariz. 1960) (allowing discontinuation of agent station where other transportation
3 facilities are available). In this case, the Electric Line is in a remote area and no other alternative
4 source of electricity is nearby. See MEC SOF Exh. 37. The Electric Line is the only source of
5 available electricity in the area; it accordingly has to be necessary or useful for MEC to satisfy its
6 regulatory duties.
7

8 **V. CONCLUSION**

9
10 MEC has not offered any legal arguments or admissible facts that would preclude summary
11 judgment to the BIA. MEC's disregard of its regulatory obligations needs to end. Summer is fast
12 approaching and, due to MEC's abandonment of the Electric Line, the Line is in disrepair. MEC
13 needs to immediately assume ownership and control of the Line. The BIA is entitled to partial
14 summary judgment as follows: (1) finding that the Hualapai Retail Customers and the BIA are
15 MEC's retail electric customers; (2) finding that MEC's service territory includes the area served by
16 the Electric Line; (3) voiding MEC's transfer of the Electric Line to the BIA and the Tribes; (4)
17 declaring that MEC owns the Line; (5) ordering MEC to operate and maintain the Line; and (6)
18 ordering that MEC relocate BIA's electric meter currently located at the beginning of the Line to its
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1 original location at the end of the Line.

2 Respectfully submitted this 16 day of April, 2007.

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6 

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