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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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MIKE GLEASON, CHAIRMAN  
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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

**MOHAVE ELECTRIC COOPERATIVE,  
INC.'S RESPONSE TO BUREAU OF  
INDIAN AFFAIRS MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

**(Oral Argument Requested)**

Mohave Electric Cooperative, Inc. ("Mohave") hereby responds to the Bureau of Indian Affairs' ("BIA") Motion for Partial Summary Judgment and respectfully requests the Arizona Corporation Commission ("ACC") deny same for the reasons that disputed material facts exist and the BIA is not entitled to summary judgment as a matter of law. Mohave attaches hereto and incorporates herein by this reference its separate Statement of Disputed Facts and Additional Material Facts in Support of Mohave's Response to the BIA's Motion for Partial Summary Judgment.

**I. STANDARD OF REVIEW**

The BIA's Motion for Partial Summary Judgment may be granted only if, after completing discovery, the BIA, based on the record, would be entitled to a directed verdict at trial. The BIA must meet its burden of proof and demonstrate that Mohave's claims and defenses have so little probative value, given the quantum of evidence required, that

1 reasonable people could not agree with Mohave.<sup>1</sup> The evidence of Mohave, the non-movant,  
2 is to be taken as true and all justifiable inferences are to be drawn in its favor. *Id.* Summary  
3 judgment must not be used as a substitute for trial even if the judge believes the moving party  
4 will probably win or should win at trial. *Id.*<sup>2</sup> As demonstrated herein, BIA has not met this  
5 heavy burden and summary judgment must be denied.

6           Specifically, the BIA cannot prove that Mohave extended “retail” service to the  
7 BIA and others on the Reservations. The facts demonstrate that power was provided to the  
8 BIA in its utility capacity for resale and that provision of electricity to Tribal, Interior and four  
9 (4) individual accounts by Mohave was pursuant to contract and as agent for the BIA.  
10 Further, the ACC, by Decision No. 53174 (**MEC SOF Exh. 5**), expressly determined that the  
11 70-mile line is a “transmission line dedicated to serving the Hualapai Indian Reservation” and  
12 “**is not** used and useful, **will not be** used and useful and **was never intended to be** used and  
13 useful in the provision of electric service to” Mohave’s members/ratepayers. (Emphasis in  
14 original) p.8, lines 24-27.<sup>3</sup> This is consistent with the Commission’s lack of jurisdiction over  
15 the facilities located on Indian Reservations, as recognized by case law and ACC Decision No.  
16 47107, dated July 6, 1975 (wherein the ACC found electrical facilities owned by a regulated  
17 public service corporation located on the Papago Reservation were “not subject to the  
18 jurisdiction of the Arizona Corporation Commission.”). These precedents still have the full  
19 force and effect of law in Arizona and are controlling. The 70-mile transmission line and its  
20 appurtenances are not, will not be and were never intended to be necessary or useful in the  
21 performance by Mohave of its duties to the public Mohave is certificated to serve. The BIA’s

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24 <sup>1</sup> *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

25 <sup>2</sup> Citing *Cox v. English-American Underwriters*, 245 F.2d 330, 333 (9<sup>th</sup> Cir. 1957).

<sup>3</sup> A.R.S. § § 40-201(11) and (12) defines “Electric transmission facilities” as “all property so classified . . . by the Arizona corporation commission.” “Electric transmission service” includes “the transmission of electricity to retail electric customers or to electric distribution facilities. . .”

1 Complaint and pending Motion constitute an impermissible collateral attack on the prior  
2 decisions of the Commission.<sup>4</sup>

3 **II. THE BIA IS AN ELECTRIC UTILITY, NOT A RETAIL**  
4 **CUSTOMER;<sup>5</sup> MOHAVE AGREED TO CONSTRUCT FACILITIES**  
5 **NECESSARY TO PROVIDE THE BIA WHOLESALE ELECTRIC**  
6 **SERVICE, BOTH AT LONG MESA AND AT INDIVIDUAL**  
7 **CONNECTIONS.**

8 Under federal law, the BIA, not Mohave, was the electric utility serving the  
9 Indian Nations. 25 C.F.R. § 175.1 defines “Electric power utility or Utility” as “that program  
10 administered by the Bureau of Indian Affairs which provides for the marketing of electric  
11 power or energy.” The BIA operates electric utility systems on Indian Nations throughout the  
12 United States. Attached hereto as **Exhibit 2**; 25 C.F.R. § 175 (Indian Electric Power  
13 Utilities). It owns and operates three electric utilities meeting retail loads on and off Indian  
14 reservations in Arizona alone. They are the San Carlos Irrigation Power Division, the  
15 Colorado River Power Division and the Havasupai Power Division.<sup>6</sup> **MEC SOF Exh 50.**

16 In 1968, the BIA evaluated its options to provide utility service to the Supai  
17 Canyon. **MEC SOF Exh. 8.** After evaluating whether to secure service from Arizona Public  
18 Service or Mohave, the BIA selected the least expensive option and started its own utility  
19 system using on-site diesel generation. **MEC SOF Exh. 34.**

20 By 1976, the BIA’s electric system serving the Havasupai Reservation and  
21 Frazier Well area of the Hualapai Reservation was composed of the following:

22 <sup>4</sup> *Arizona Public Service Co. v. Southern Union Gas Co. (1954)*, 76 Ariz. 373, 265 P.2d 435 (1954).

23 <sup>5</sup> Since 2004, both the Havasupai and Hualapai Tribes have held federal power allocations for use on their  
Reservations. 67 FR 145, 49019 – 21 (Attached hereto as **Exhibit 1.**)

24 <sup>6</sup> As of 1996, the Colorado River Agency Electric System had 3,125 customers and served 432 square miles  
25 and the San Carlos Indian Irrigation Project had 2,000 customers and served 1,200 square miles, including land  
on the Gila River Indian Reservation, the San Carlos Apache Indian reservation and off-reservation lands in  
portions of Pima, Gila and Pinal Counties. The 1996 Draft Final Report on Tribal Authority Process Case  
Studies: The Conversion Of On-Reservation Electric Utilities To Tribal Ownership Operation, **MEC SOF Exh.**  
**50.**

1 "The Havasupai Indian Reservation is presently served by a diesel  
2 electric generating plant with 1300 KVA peak load capacity.  
3 Generation is 2400 volts, three phase delta, with transformation to  
4 240/4160 wye volts. The generating plant is located at the rim of  
5 Grand Canyon, overlooking the Havasupai Reservation. The  
6 distribution facilities consist of overhead lines insulated for 25 KV to  
7 a riser pole in the Canyon floor. Distribution in the Canyon consists  
8 of 3-1/C25 KV XLPE concentric neutral underground cables with  
9 single phase radial feeders. At the present time, all loads are served  
10 at 120/240 volts from single phase pad mount transformers. The  
11 entire system is operated at 2400/4160 wye volts.

12 The power transformer at the generating plant is rated at 1000 KVA  
13 with a dual primary rate 2400 volts delta, 14.4, 24.9 KV grounded  
14 wye; secondary 2400/4160 wye volts.

15 Installations on the Hualapai Reservation in the Frazier Wells area  
16 consist of two single phase generators rated 8 KW, and 25 KW for  
17 use during the summer months. The Hilltop area at the end of Supai  
18 road is served by an 8 KW single phase generator. There are no  
19 other electrical installations in the area to be served."

20 RFQ # N-446, June 8, 1976 (MEC SOF Exh. 10).

21 The RFQ also provided the following Load Data:

22	1975-1976	Peak load-winter (Supai)	500 KVA
23	1975-1977	Peak load-winter (Supai)	650 KVA
24	1985	Peak load-winter (est.)(Supai)	1000 KVA
25		Peak load-summer 1975 (Supai)	150 KVA
		Peak load-summer 1985(Supai)	300 KVA
		Frazier Wells-winter 1975*	50 KVA
		Frazier Wells-summer 1975*	100 KVA

\*Includes well pumping presently using LPG.

26 A. The BIA Requested Proposals To Assist The BIA In Its Provision  
27 Of Utility Service To The Havasupai And Hualapai Indians.

28 Having characterized the system as "old, unreliable and prone to breakdowns,"

29 MEC SOF Exh. 34, the BIA solicited proposals to assist it in providing electric service to the  
30 Hualapai and Havasupai Nations more reliably. *Id.*, MEC SOF Exh. 30, 31, 32 and 33.

1 Mohave, Arizona Public Service Company and Citizens Utilities Company all s ubmitted  
2 proposals. *Id.*

3 **1. Mohave's Response.**

4 In response to the BIA's RFQ #N-446, *Mohave proposed to enter into a*  
5 *"wholesale power agreement" with the BIA* and to construct a transmission line through the  
6 Hualapai Reservation and then to Long Mesa on the Havasupai Reservation. (MEC SOF Exh.  
7 30.) The proposal was made to help address the BIA's need for a more dependable power  
8 supply for the utility the BIA already owned and operated. *Id.* Under Mohave's proposal, if  
9 the BIA did not advance funds for the construction of the transmission line, the BIA would  
10 pay a power and energy charge (based on a somewhat modified Schedule "L", Mohave's rate  
11 for large commercial customers), plus a Facility Charge of \$15,833 per month. The monthly  
12 Facility Charge decreased if the BIA paid all or part of the construction costs. *Id.*

13 **2. APS's Response.**

14 APS offered to provide service "*under the terms of an APS wholesale power*  
15 *agreement,*" similar to the arrangements it had recently reached with the BIA for the San  
16 Carlos Indian Irrigation Project and the Colorado River Indian Irrigation Project. (MEC SOF  
17 Exh. 31.) APS made it clear that the agreement would be subject to the jurisdiction of the  
18 Federal Energy Regulatory Commission.<sup>7</sup>

19 APS proposed to construct 77 miles of 69 KV line to Long Mesa, 13 miles of 12  
20 KV line into the Hualapai Reservation to bring electricity to the Frazier Well area, a substation  
21 for the Frazier Well area and a larger one for the Supai area, plus other facilities for an  
22 estimated cost of \$1,507,400. The BIA would provide all construction funds as a non-

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<sup>7</sup> Since Mohave is a cooperative with RUS liens and mortgages, Mohave's wholesale agreement was not subject to FERC jurisdiction over rates and charges.

1 refundable contribution. In addition to a rate for power and energy, APS proposed a \$6,000  
2 monthly facilities charge. *Id.*

### 3                   **3.       Citizens' Response.**

4                   Citizens initially proposed to supply "*electric utility service directly to the*  
5 *individual meters on the Reservation, rather than providing primary power at a single*  
6 *delivery point on the line side of Long Mesa power transformer.*" **MEC SOF Exh. 32.**

7 Citizens further initially proposed that the BIA pay the actual cost of construction of a single  
8 circuit, 3 phase, 24.9 KV transmission line, 66 miles in length; a single circuit, 3 phase, 12 KV  
9 distribution line, 30 miles in length, and substation facilities 12-24.9 KV, 2.5 MVA capacity  
10 for an estimated cost of \$1,000,000. The BIA would transfer ownership of all the existing  
11 distribution facilities into Havasupai Village to Citizens at no cost to Citizens. Emphasizing  
12 that Citizens projected revenues from the sale of energy at rates on file with the ACC "are not  
13 sufficient to carry the cost of operation, maintenance, depreciation, property taxes and other  
14 costs which will be incurred by Citizens," Citizens proposed to charge the BIA \$105,000  
15 annually on top of charging the individual metered customers their filed rates. The minimum  
16 guarantee was subject to adjustment to reflect changes in taxes and other direct costs  
17 associated with the facilities. The funds paid by the BIA to construct the line would be subject  
18 to refund to the extent revenues in excess of the required minimums were generated. *Id.*

19                   The BIA immediately rejected the concept of turning over its entire utility  
20 function to Citizens and requested Citizens provide a revised proposal for wholesale service  
21 similar to the proposals made by Mohave and APS. A week later Citizens submitted its  
22 revised proposal. (**MEC SOF Exh. 33.**) Under Citizens' revised proposal, facilities on the  
23 load side of the Long Mesa delivery point would remain under the jurisdiction of the BIA and  
24 Citizens would advance funds for construction of the required facilities. Energy usage would  
25 be billed at a negotiated rate, subject to adjustment, and a minimum annual guarantee of

1 \$380,000 (vs. the \$105,000 in Citizens original proposal). Citizens indicated that if an ACC  
2 approved retail rate was used as the negotiated contract energy rate, 20% of the amounts  
3 received from energy billings would be subtracted from the minimum annual guarantee. *Id.*

4 **B. Mohave's 1976 Wholesale Proposal Was Ultimately Accepted**

5 Five years later, the BIA accepted Mohave's proposal to provide wholesale  
6 service via the "Negotiated Electric Utility Contract." By Addendum No. 1, Mohave agreed  
7 "to Contract with the United States of America . . . ("Government") to supply electric energy  
8 to existing and future residential and commercial installations on the Hualapai and Havasupai  
9 Indian Reservations. . . The electrical service fee is to be paid by the U.S. Bureau of Indian  
10 Affairs, Department of the Interior." Exh. 2 to BIA SOF, 00008 (*Emphasis added*). The  
11 power and energy provided by Mohave under the Contract at Long Mesa was then distributed,  
12 metered and billed by the BIA to BIA facilities, Tribe facilities and individual tribal members.  
13 **MEC SOF Exh. 11 and 13.**<sup>8</sup>

14 The Contract, however, was not limited to delivery of power to the BIA at the  
15 line side of the Long Mesa Power transformer. The Contract also expressly provided for  
16 electrical service in two additional ways: (1) "the Government to serve the Hualapai  
17 Reservation by means of other interconnects and line extensions which shall be constructed  
18 for the U.S. Government by separate agreement with Mohave, upon such terms that provide to  
19 Mohave its total investment required to make such an extension;" and (2) Mohave "to serve  
20 the Hualapai Indian Reservation upon its own arrangements from the" 70-mile transmission  
21 line. Exh. 2 to BIA SOF, 00008 and 00016.<sup>9</sup> The BIA relied on the second option, directing

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23 <sup>8</sup> A.R.S. § 40-201(21) defines "Retail electric customer" as "a person who purchases electricity for that  
24 person's own use, including use in that person's trade or business, and not for resale, redistribution or  
retransmission." (*Emphasis added.*) The BIA, as a utility reselling power to others, is not a "retail electric  
customer."

25 <sup>9</sup> In the latter case, Mohave agreed to "credit a one-time charge of \$50.00 per connected kVA installed capacity,  
but not less than \$500.00, to the Government." The Government retained the option to waive all or any  
portion of the credit (**Exh. 2 to BIA SOF, 00016**), which it sometimes waived. **MEC SOF Exh. 43 and 44.**

1 the Tribes, tribal members and others to make arrangements directly with Mohave for electric  
2 service. MEC SOF Exh. 43 and 44.

3 To enable Mohave to provide direct service under the Contract, the Government  
4 granted Mohave "free of any rental or similar charge, but subject to the limitations specified in  
5 this contract, a revocable permit to enter the Service Location<sup>10</sup> for any proper purpose under  
6 this contract including use of site or sites agreed upon by the parties hereto for the installation,  
7 operation, and maintenance of the facilities of" Mohave. Exh. 2 to BIA SOF, 00002.

8 **III. MOHAVE ACTED ON BEHALF OF THE BIA IN RENDERING**  
9 **SERVICE UNDER THE CONTRACT, INCLUDING WHEN**  
10 **SERVICING THE TRIBES AND TRIBAL MEMBERS DIRECTLY.**

11 As indicated above, the Contract provided Mohave with authority to make  
12 arrangements directly with individual customers on behalf of the BIA. Even if the Contract  
13 had not so provided, the BIA, in allowing Mohave to connect services to the 70-mile  
14 transmission line, intentionally or ostensibly caused third persons to believe Mohave was the  
15 BIA's agent when providing electric service to retail customers on Reservation lands, thereby  
16 creating an apparent or ostensible agency.<sup>11</sup>

17 The Arizona Court of Appeals has held that "apparent" or ostensible authority  
18 may be defined as "that authority which principal knowingly or negligently holds his agent  
19 out as possessing, or permits him to assume, under such circumstances as to estop principal  
20 from denying its existence."<sup>12</sup> The record reflects that the BIA required the Tribes and  
21 individual Tribal members to deal directly with Mohave, and to make arrangements for  
22 service from the 70-mile transmission line as provided under the Contract. Mohave had no  
23 authority to provide electric service on the Reservations but for the Contract. The Tribes and  
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25 <sup>10</sup> Defined as the Hualapai and Havasupai Indian Reservations, Exh. 2 to BIA SOF, 00001.

<sup>11</sup> *Canyon State Cannery, Inc. v. Hooks*, 74 Ariz. 70, 73, 243 P.2d 1023, 1026 (1952).

<sup>12</sup> *Reed v. Gershweir*, 160 Ariz. 203, 772 P.2d 26 (1989).

1 its members in receiving energy from Mohave are reasonably justified in holding the BIA  
2 ultimately responsible for continuing to provide such service after the Contract terminates.<sup>13</sup>  
3 The agency relationship between Mohave and BIA is evidenced by: (1) the BIA's failure to  
4 require Mohave to secure any authority, other than the Contract, before directing the Tribes  
5 and individual Tribal members to Mohave to make arrangements to receive power from the  
6 70-mile transmission line; (2) the BIA's failure to require Mohave to secure individual  
7 easements for facilities serving the Tribes or Tribal member individual connections; and (3)  
8 the BIA's recent use of the 70-mile transmission line to serve the Bar Four area of the  
9 Havasupai Reservation from a new 13.6 mile line constructed and interconnected after  
10 Mohave abandoned and tendered the facilities to the BIA.

11 A. Mohave Never Secured A License, Permit Or Certificate Of  
12 Convenience Of Necessity Authorizing Mohave To, Independently,  
13 Render Retail Utility Service On The Reservations.

14 Mohave never sought or received a license or other authorization from the  
15 Hualapai, the Havasupai, the Commissioner of Indian Affairs or the ACC to engage in the  
16 retail utility business on the Reservations. According to federal law, "[A]ny person desiring to  
17 trade with the Indians on any reservation may, upon establishing the fact to the satisfaction of  
18 the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be  
19 permitted to do so under such rules and regulations as the Commissioner of Indian Affairs  
20 may prescribe."<sup>14</sup> Persons or firms who provide goods and services on an Indian Reservation  
21 without having obtained a license to do so may be subject to forfeiture of their merchandise  
22 and may be subject to civil penalties.<sup>15</sup>

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24 <sup>13</sup> The 13 "retail" customers are composed of six (6) Hualapai Tribal Council accounts, three (3) additional Interior  
25 accounts, including the Recloser at mile post 32, the Arizona Telephone transmitting tower, two (2) pump accounts and a  
cabin. Thirteen customers are an insufficient "public" to subject the utility to the ACC's jurisdiction under the *Natural Gas  
Serv. Co. v. Serv-Yu C-op.*, 70 Ariz. 235, 219 P.2d 324 (1950) and its progeny.

<sup>14</sup> See, 25 C.F.R. §140.1

<sup>15</sup> See e.g., 25 C.F.R. §§ 140.3 and 140.13

1           These "Indian trader" regulations are long-standing and far-reaching. They are  
2 described as "comprehensive," "detailed" and "all-inclusive" by the U.S. Supreme Court.<sup>16</sup>  
3 In fact, the U.S. Supreme Court found that "[T]hese apparently all-inclusive regulations and  
4 the statutes authorizing them would seem in themselves sufficient to show that Congress has  
5 taken the business of Indian trading on reservations so fully in hand that no room remains for  
6 state laws imposing additional burdens upon traders."<sup>17</sup> This Congressional mandate  
7 prevented states from taxing federally-licensed Indian traders on their sales to reservation  
8 Indians within a reservation's boundaries.

9           Given these regulations and Congress' intent to have the Commissioner of  
10 Indian Affairs be the sole power and authority for appointing Indian traders, it is indeed  
11 significant and telling that Mohave was not required by the BIA to obtain a trader license to  
12 provide electricity to the Tribes or Tribal members on the reservation. The BIA's treatment  
13 of Mohave demonstrates that the BIA believed no additional authority beyond the Contract  
14 was necessary before Mohave could provide goods and services on the Reservation. The BIA  
15 acted as if Mohave was an extension of itself. This "agent" relationship eliminated the  
16 requirement for Mohave to secure separate approval to conduct business on the Reservations.

17           Similarly, neither the Hualapai Nation nor the Havasupai Nation required  
18 Mohave to acquire any Tribal license, permit or other authorization to provide electric service  
19 on their Reservations.<sup>18</sup> They too viewed Mohave as the agent of the BIA in providing  
20 electricity to the Tribes and Tribal members under the Contract. Nor was Mohave required to  
21 obtain individual easements or rights-of-way for facilities (line extensions and service drops)  
22 installed to serve individual accounts.

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24 <sup>16</sup> See, *Warren Trading Post Co. v. Arizona State Tax Comm.*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165  
(1965).

25 <sup>17</sup> *Id.*, 380 U.S. at 690.

<sup>18</sup> The BIA, with the required consent of the appropriate Tribe, granted two 50-foot wide easements. However, the easements only encompassed the 70-mile transmission line and not extensions therefrom.

1           While the ACC has no authority over tribal lands or to authorize Mohave to  
2 provide utility service to tribal lands,<sup>19</sup> the ACC does have authority over Mohave to the  
3 extent Mohave is performing its public function as a public service corporation. The Contract  
4 specifically recognized the ACC's authority to set rates and charges applicable under the  
5 Contract. **Exh. 2** to BIA SOF, 00003.

6           As a public service corporation, Mohave is required to obtain from the ACC a  
7 certificate of public convenience and necessity ("CC&N") before beginning construction of a  
8 line, plant, service or system or any extension thereof.<sup>20</sup> However, recognizing the facility  
9 was a "transmission line dedicated to serving the Hualapai Indian Reservation" not serving  
10 and not intended to ever serve Mohave's member/ratepayers, Mohave did not seek and the  
11 ACC did not require Mohave to secure a CC&N before constructing the transmission line or  
12 rendering service under the Contract on the Reservations.<sup>21</sup> Had Mohave needed a CC&N to  
13 construct the transmission line or to render service on the Reservations, the ACC undoubtedly  
14 would have required Mohave to file an application before authorizing the underlying  
15 financing. In order to secure the CC&N, Mohave would have had to demonstrate that Mohave  
16 "has received the required consent, franchise or permit of the proper county, city and county,  
17 municipal or other public authority."<sup>22</sup> As discussed herein, Mohave was not a licensed Indian  
18 Trader, had no Tribal license to conduct utility business on either Reservation and had no  
19 easements encompassing individual services. Therefore, while the Contract provided  
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21 <sup>19</sup> See, 25 C.F.R. § 1.4(a)&(b); *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493  
22 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 611 (1997); *Burlington Northern*  
23 *R. Co. v. Red Wolf*, 196 F.3d 1059 (9<sup>th</sup> Cir. 1999); *Big Horn County Electric Co-op., Inc. v. Adams*, 219 F.3d  
24 944 (9<sup>th</sup> Cir. 2000); and ACC Decision No. 47107, July 6, 1975 (wherein the Commission found that assets  
25 owned by a public service corporation (TRICO Electric Cooperative, Inc.) located on the Papago Indian  
Reservation, were "not subject to the jurisdiction of the Arizona Corporation Commission." Finding of Fact 2).

<sup>20</sup> A.R.S. § 40-281.A. The BIA confuses the concept of "service area" (which grants no rights and creates no obligations) with "certificated area" (which reflects the area the utility is granted a monopoly and has an obligation to render service to the public).

<sup>21</sup> Decision No. 53174 at 8.

<sup>22</sup> A.R.S. § 40-282.B

1 sufficient authority to act as the BIA's agent, it was insufficient authority for Mohave to  
2 secure a CC&N to provide "retail" utility service on the Reservations.

3 **B. Mohave Never Obtained Easements Or Right-Of-Way From The**  
4 **Tribes, Individual Tribal Members Or The BIA For Individual**  
5 **Connections**

6 The Federal government controls easements and rights-of-way on Indian trust  
7 lands. The Secretary of the Interior must consent to any highway, powerline, or oil and gas  
8 pipeline running across trust land,<sup>23</sup> and the Secretary must approve all contracts and  
9 agreements regulating the same.<sup>24</sup> The law requires that for any encumbrance on Indian land  
10 for more than seven (7) years, the Secretary of Interior must approve it or it is a trespass.

11 Federal law also requires that the Secretary obtain the consent of the individual  
12 owners of tribal lands or of the Tribe before granting a right-of-way to an applicant.  
13 Specifically, 25 C.F.R. §169.3(a) provides that "[N]o right-of-way shall be granted over and  
14 across any tribal land . . . without the prior written consent of the tribe," while 25 C.F.R.  
15 §169.3(b) provides that "no right-of-way shall be granted over and across any individually  
16 owned lands . . . without the prior written consent of the owner or owners of such lands and  
17 the approval of the Secretary."

18 In this case, the two, 50-foot wide easements granted by the Tribes were  
19 approved by the BIA. These easements, however, encompassed only the construction and use  
20 of the 70-mile transmission line. The Tribes did not waive their right to exercise dominion  
21 and control over the real property within the easements (e.g., the Hualapai Tribe taxed the  
22 Line).<sup>25</sup> Nor did these easements purport to grant rights beyond their fifty-foot width.

23 See, 25 C.F.R. §§ 311-18.

24 See, 25 C.F.R.. § 81.

25 Cf., *Big Horn County Electric Co-op. Inc. v. Adams*, 219 F.3d 944 (2000) holding utility property within easements are not subject to taxation by the Tribe.

1           The BIA has not presented admissible evidence demonstrating that the Tribes or  
2 any individual tribal member was asked to provide or did indeed grant an easement for the  
3 facilities used to interconnect properties to the 70-mile transmission line. In the absence of  
4 such evidence and drawing all inferences in favor of Mohave, as required when considering a  
5 Motion for Summary Judgment, it is reasonable to conclude that the BIA and the Tribes  
6 allowed the interconnections to occur without requiring Mohave to secure independent  
7 easements ostensibly because Mohave had the authority to take these actions under the  
8 Contract on behalf of the BIA. Otherwise, Federal law and regulations mandated Mohave  
9 secure additional easements for each individual service metered and billed by Mohave.

10           In summary, Mohave had no right, independent of the Contract, to provide  
11 electricity on the Reservations. Mohave was acting under the color or umbrella of the BIA's  
12 federal mandate and obligation to provide electricity to Indian peoples. The BIA undertook  
13 the utility obligation to serve the Havasupai and Hualapai Reservations in 1968. The Contract  
14 allowed the BIA to provide enhanced utility service to the area, through a more dependable  
15 source of electricity delivered by Mohave to and on behalf of the BIA, both at Long Mesa (for  
16 resale by the BIA) and by direct connection.

17           Had Mohave been a retail provider of utility service, as now asserted by the  
18 BIA, Federal law and regulations required Mohave to secure additional licenses, certificates  
19 and easements. The BIA, the Tribes and the ACC did not require Mohave to secure these  
20 predicates to providing retail service because Mohave was not operating as provider of retail  
21 electric service. The BIA cannot now contend that Mohave was operating as a retail provider  
22 to the public, when for over 20 years, it did not enforce the Federal laws and regulations that  
23 applied had Mohave been operating as a retail provider of electric service on the Reservations.  
24 Mohave was acting solely under the color of the BIA's powers as provided for in the Contract  
25 and not independently as a provider of retail electric service.

1           **IV. THE FACILITIES CONSTRUCTED TO SERVE BIA'S**  
2           **CONTRACTUAL LOAD WERE NOT NECESSARY OR USEFUL IN**  
3           **THE PERFORMANCE OF MOHAVE'S DUTIES TO THE PUBLIC**  
4           **WHEN THEY WERE ABANDONED IN 2002; NO COMMISSION**  
5           **CONSENT WAS REQUIRED.**

6           Property which is not necessary or useful in the performance of a public service  
7           corporation's "duties to the public" is subject to sale, lease or other disposition without  
8           consent of the ACC. A.R.S. § 40-285(C). Arizona courts recognize:

9           The above language clearly indicates that the legislature did not  
10          intend to require Commission approval every time a public service  
11          corporation disposes of property. These sections only require a  
12          public service corporation to obtain permission when it disposes of  
13          property that is 'necessary or useful in the performance of [its]  
14          duties to the public.' Subsection C specifically authorizes  
15          dispositions if the property is 'not necessary or useful in the  
16          [corporation's] performance of its duties to the public.' To impose a  
17          requirement of Commission approval in every case of property  
18          disposal would read out of the statute the modifying phrase in  
19          subsection C. This we cannot do. In interpreting statutes, we attempt  
20          to avoid rendering any of the statutory language superfluous, void,  
21          contradictory, or insignificant.<sup>26</sup>

22          In enacting A.R.S. § 40-285, the legislature intended "to prevent a utility from  
23          disposing of resources devoted to providing its utility service, thereby 'looting' its facilities  
24          and impairing its service to the public."<sup>27</sup> "The qualifying 'necessary or useful' language is to  
25          protect public service corporations from the expense of administrative proceedings when  
26          disposing of useless or unnecessary property. Subsection C allows them to initially determine  
27          whether a given piece of property is necessary or useful."<sup>28</sup>

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28          <sup>26</sup> *Babe Investments v. Arizona Corp. Com'n*, 189 Ariz. 147, 151, 939 P.2d 425, 429 (App. 1997) (upholding  
29          the ACC's determination that a railroad's abandonment of a siding was not void for failure to secure prior ACC  
30          consent).

31          <sup>27</sup> *American Cable Television, Inc. v. Arizona Public Service*, 143 Ariz. 273, 277, 693 P.2d 928, 932 (App.  
32          1983) and *Arizona Public Service Co. v. Mountain States Tel & Tel Co.*, 149 Ariz. 239, 242, 717 P.2d 918, 921  
33          (App. 1985).

34          <sup>28</sup> *Babe Investments v. Arizona Corp. Com'n*, 189 Ariz. at 151.

1                   A.     Mohave Has No “Duty” to Perform Unauthorized Activities

2                   The “duty” of a public service corporation to provide utility services “to the  
3 public” is premised on the corporation having been granted a franchise (a CC&N in Arizona),  
4 rather than providing service under a contract. Mohave does not hold a CC&N to serve the  
5 area receiving power from the 70-mile transmission line. It is also premised on the plaintiff  
6 making a clear showing that it has a right to the service demanded, that there is no other  
7 adequate remedy for providing such service and that the reasonable rules and regulations of  
8 the corporation have been complied with by the party seeking the electric service.<sup>29</sup>

9                   As a matter of law, there is no absolute duty on a utility to serve the public by  
10 extending its lines over short distances in order to serve customers who are not otherwise  
11 entitled to service.<sup>30</sup> In fact, the Arizona Supreme Court has defined a public service  
12 corporation’s right to expand its certificated area without prior Commission approval very  
13 narrowly, permitting a utility only to unilaterally expand its CC&N on into territory actually  
14 touching the utility’s existing certificated area.<sup>31</sup> Mohave’s extension of its facilities  
15 approximately 70 miles to Long Mesa, its delivery of power to and for the BIA was never  
16 authorized by a CC&N. All such activities by Mohave were performed without the requisite  
17 legal authority under Arizona law. Without a legal right to serve the public, Mohave was not  
18 engaging in a “public use” and did not need Commission consent to abandon the facilities it  
19 had been using to conduct unauthorized business.<sup>32</sup> Since Mohave does not hold a CC&N to  
20 serve the area, Mohave cannot be compelled to serve at Long Mesa or the Frazier Well area.

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22  
23 <sup>29</sup> See, 52 Am. Jur. 2d Mandamus §80 (2005).

24 <sup>30</sup> See, *Jordan v. Clarke-Washington Electric Membership Corp.*, 262 Ala. 581, 80 So.2d 527 (S.Ct. Ala. 1955).

25 <sup>31</sup> *Electrical District No. 2 v. Ariz. Corp. Com’n*, 155 Ariz. 252, 745 P.2d 1383 (1987) (construing A.R.S. §40-281(B)).

<sup>32</sup> *City of Oakland v. El Dorado Terminal Co.*, 41 Cal. App.2d 320, 106 P.2d 1000 (Cal.App. 1 Dist. 1940)(holding that a public utility that was operating without a CC&N was not engaging in a public use).

1 The relief sought by the BIA's motion improperly seeks to have the Commission compel  
2 Mohave to perform an illegal act, relief which the Commission is without authority to grant.<sup>33</sup>

3 **B. Courts Balance The Equities In Determining Whether Electric Utility**  
4 **Companies Are Required To Extend Or Continue Service To**  
5 **Proposed Or Existing Customers.**<sup>34</sup>

6 Broad as is the power of regulation, the State does not enjoy the  
7 freedom of an owner. The fact that the [utility's] property is devoted  
8 to a public use on certain terms does not justify the requirement that  
9 it shall be devoted to other public purposes, or to the same use on  
10 other terms, or the imposition of restrictions that are not reasonably  
11 concerned with the proper conduct of the business according to the  
12 undertaking which the [utility] has expressly or impliedly assumed."  
13 (citations *omitted*) (brackets in original).<sup>35</sup>

14 In vacating a Commission decision denying a railroad's request to discontinue  
15 an agency station in Tombstone, the Arizona Supreme Court held: "The convenience and  
16 necessity required are those of the public and not of an individual or individuals."<sup>36</sup> The Court  
17 strongly cautioned that "it is to be remembered that, under our system of public control of  
18 rates and service, the general public, speaking broadly, loses in cost what it gains in service.  
19 So the [utility], in resisting demands for uneconomic service, really represents the true  
20 interests of the general public."<sup>37</sup> The continuance of utility service may be required where  
21 necessity is shown, but is not justified where the necessity is that of individuals rather than of  
22 the public.<sup>38</sup>

23 In the present matter, the Commission had clearly and unequivocally declared  
24 that the transmission line is not, will not be and was never intended to be used and useful in  
25

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23 <sup>33</sup> Mohave does not have the BIA and private easements required.

24 <sup>34</sup> *Jordan v. Clarke-Washington Electric Membership Corp.*, at 262 Ala. 584, 80 So.2d at 529.

24 <sup>35</sup> *U.S. West Communications, Inc. v. Arizona Corp Com'n*, 197 Ariz. 16, 21, 3 P.3d 936, 941 (App. 1999).

24 <sup>36</sup> *Arizona Corp. Com'n v. Southern Pacific Co.*, 87 Ariz. 310, 315, 350 P.2d 765, 769 (1960).

25 <sup>37</sup> *Id.*, 87 Ariz. At 317, 350 P.2d at 771.

25 <sup>38</sup> *See also*, 73B C.J.S. Public Utilities § 8 (2005) and *State ex rel. Utilities Comm'n. v. Southern Ry. Co.*, 254 N.C. 73, 118 S.E.2d 21 (1961).

1 the provision of electric service to Mohave's ratepayers.<sup>39</sup> This Decision has never been  
2 amended or vacated by the Commission. Mohave had a right to rely on the Decision in  
3 abandoning the transmission line and ancillary facilities once the Contract terminated by its  
4 own terms.

5 If Decision No. 53174 and the foregoing authorities were not already  
6 dispositive, then it would be necessary to balance: (a) Mohave's assumption of limited duties  
7 under a now expired Contract and the significant costs the BIA proposes to place on Mohave  
8 and its member/ratepayers in perpetuity by requiring Mohave to pay for operating,  
9 maintaining and replacing these facilities, on the one hand, against; (b) the BIA's pre-existing  
10 and on-going fiduciary, utility and financial obligations to provide utility service to these  
11 Reservations, the Tribes and to individual end users, on the other hand. The issue is which  
12 utility (the BIA or Mohave) should and will shoulder the on-going costs of operation,  
13 maintenance and replacement of the abandoned facilities. In either case, the end users will  
14 continue to be provided power.

15 The intent of the parties in 1981, as unambiguously expressed in the Contract,  
16 was for the BIA to pay 100% of these costs. At the end of the Contract, Mohave was to leave  
17 and if the facilities were to be removed, the BIA was to pay for their removal. Without a  
18 contract in place, the only way for the parties' original intent to be realized is for the BIA to  
19 assume possession and direct responsibility for the 70-mile transmission line and appurtenant  
20 facilities. Mohave's abandonment of the facilities and tender to the BIA, at no cost, was, and  
21 remains, consistent with the intent of the Contract and consistent with Arizona law.

22 The BIA is, and always has been the utility responsible for providing electric  
23 service to the Havasupai Reservation and the Frazier Wells area of the Hualapai Reservation.  
24

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25 <sup>39</sup> Decision No. 53174, p.8, lines 24-27.

1 Thus, even using the BIA's measure that "the availability of a substitute service for the public  
2 is the predominate factor in determining whether a utility's line, plant or system is necessary  
3 or useful," Mohave had every right to abandon its facilities, especially where it  
4 simultaneously tendered the facilities at no cost via Quit Claim Deed to the BIA (the  
5 alternative provider).

6 Whether the abandoned facilities were necessary or useful in the performance by  
7 Mohave of its duties to the public is a mixed question of law and fact. Certainly, the BIA has  
8 not carried its heavy burden of presenting undisputed material facts, supported by admissible  
9 evidence, that mandate a grant of summary judgment in its favor as a matter of law. If  
10 anything, the facts and law support dismissing the Complaint and granting Mohave summary  
11 judgment.<sup>40</sup>

12 **V. BIA HAS ACCEPTED THE FACILITIES BY ASSERTING**  
13 **DOMINION AND CONTROL OVER THEM**

14 A public service corporation also owes no duty to the "public" to continue  
15 providing service when a public utility transfers its public utility property, the new owner  
16 assumes the duty of carrying on the public utility service to which property had been  
17 dedicated.<sup>41</sup>

18 **A. After Mohave Abandoned The Facilities, BIA Interconnected**  
19 **A 13.6 Mile Line And Commenced Serving The Bar Four**  
20 **Area, An Area Not Previously Receiving Electricity.**

21 The Bar Four area is being actively developed in recognition that the Supai  
22 Village has reached its housing capacity. **MEC SOF Exh. 49.** In September 2003, two  
23 months after Mohave's Board resolved to abandon the 70-mile transmission line and a month  
24 after the BIA received notification of the line's abandonment, construction commenced on a

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25 <sup>40</sup> Mohave incorporates herein its Motion to Dismiss and Reply dated October 5, 2005 and November 1, 2005.

1 new 13.6 mile line to bring electricity to the Bar Four area for the first time. **MEC SOF Exh.**  
2 **48 and 49.** The BIA actively participated in the planning of this new line. *Id.* The BIA  
3 allowed the new line to be interconnected to the 70-mile transmission line after Mohave  
4 tendered the line to the BIA by quit claim deed. BIA SOF 13.

5 These actions, coupled with the BIA's continued use and maintenance of the  
6 line since its abandonment by Mohave, constitute the exercise of dominion and control over  
7 the transmission line. The BIA cannot now repudiate the transfer. <sup>42</sup>

## 8 VI. CONCLUSION

9 The BIA was and remains the utility responsible for serving retail customers on  
10 the Havasupai Reservation and the BIA recently expanded that obligation to include Bar Four  
11 area. The BIA was and remains the utility responsible for serving retail customers in the  
12 Frazier Well area of the Havasupai Reservation and elsewhere along the 70-mile transmission  
13 line. The BIA markets and resells power received from Mohave, thereby excluding it from  
14 the statutory definition of "retail electric customer."

15 Moreover, Mohave has none of the Federal, Tribal or State authorizations that  
16 are pre-conditions to it providing retail electric service on Indian reservations. Without such  
17 authorizations, Mohave could not and cannot legally provide retail electric service, "trade" or  
18 otherwise conduct business on the Reservations, except as agent for the BIA. All service  
19 rendered by Mohave over the years was rendered as envisioned by the Contract and as agent  
20 for the BIA, the recognized utility for the area.

21 Prior to abandoning any facilities, the Contract and obligations associated  
22 therewith had expired. The delivery point had been moved to the Nelson substation. Rates

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24 <sup>41</sup> See, *North Little Rock Water Co. v. Waterworks Comm'n. of the City of Little Rock*, 199 Ark. 773, 136  
25 S.W.2d 194 (1940) and *State v. Bullock*, 78 Fla. 321, 82 So. 866, 8 A.L.R. 232 (1919), *aff'd*. 254 U.S. 513, 41  
S. Ct. 193, 65 L. Ed. 380 (1921).

<sup>42</sup> *Tway v. Southern Methodist Hospital*, 48 Ariz. 490, 62 P.2d 1318 (1936).

1 were altered to the standard Schedule "L" rates and the Facilities Charge stopped being  
2 collected. All accounts were informed to look to the BIA (the utility responsible for serving  
3 the area) for service. Mohave then duly abandoned the facilities and tendered them, at no  
4 cost, via Quit Claim Deed to the BIA (the utility responsible for serving the area). While the  
5 BIA orally declined to accept the facilities, it has subsequently continuously exercised  
6 dominion and control over the facilities. Its affirmative actions belie its protestations.

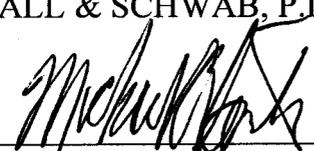
7           The BIA has cited no authority or other basis by which the ACC can or should  
8 order MEC to operate and maintain a line that Mohave has abandoned, tendered to the BIA  
9 and over which the BIA has exercised dominion and control. The BIA ceased paying Mohave  
10 a Facilities Charge, including the O&M portion thereof, in 1998. Nor has the BIA provided  
11 any legal authority which requires Mohave to relocate its meter. Mohave is delivering power  
12 at the Nelson substation location and it should be metered at that point.

13           As the moving party, the BIA must demonstrate that the undisputed material  
14 facts entitle it to judgment as a matter of law. The BIA has failed to meet its burden and is  
15 not entitled to partial summary judgment. Material facts are contested. The law and the facts  
16 simply do not support the BIA's positions. Mohave therefore requests this Court deny BIA's  
17 Motion for Partial Summary Judgment.

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1 RESPECTFULLY SUBMITTED this 26th day of March, 2007.

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

4 By:   
5

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13  
14 PROOF OF AND CERTIFICATE OF MAILING

15 I hereby certify that on this 26<sup>th</sup> day of March, 2007, I caused the foregoing  
16 document to be served on the Arizona Corporation Commission by delivering the original and  
17 thirteen (13) copies of the above to:

18 Docket Control Division  
19 ARIZONA CORPORATION COMMISSION  
20 1200 West Washington Street  
21 Phoenix, Arizona 85007

22 Copies of the foregoing hand delivered/mailed  
23 this 26<sup>th</sup> day of March, 2007 to:

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

Christopher Kempley, Chief Counsel  
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# MEC EXHIBIT 1

for public inspection. This filing may also be viewed on the web at <http://www.ferc.gov> using the "RIMS" link—select "Docket #" and follow the instructions (call 202-208-2222 for assistance). A copy is also available for inspection and reproduction at the address in item g above.

n. *Scoping Process*: Scoping is intended to advise all parties regarding the proposed scope of the EA and to seek additional information pertinent to this analysis. The Commission intends to prepare one Environmental Assessment (EA) for the Enterprise Mill Project and Sibley Mill Project in accordance with the National Environmental Policy Act. The EA will consider both site-specific and cumulative environmental impacts and reasonable alternatives to the proposed action. Should substantive comments requiring reanalysis be received on the NEPA document, we would consider preparing a subsequent NEPA document.

At this time, the Commission staff does not anticipate holding formal public or agency scoping meetings near the project site. Instead, staff will conduct paper scoping.

A Scoping Document (SD) outlining the subject areas to be addressed in the EA were distributed to the parties on the Commission's mailing list. Copies of the SD may be viewed on the web at <http://www.ferc.gov> using the "RIMS" link, select "Docket #" and follow the instructions (call 202-208-2222 for assistance).

As part of scoping the staff will: (1) Summarize the environmental issues tentatively identified for analysis in the EA; (2) solicit from comments all available information, especially quantifiable data, on the resources at issue; (3) encourage comments from experts and the public on issues that should be analyzed in the EA, including viewpoints in opposition to, or in support of, the staff's preliminary views; (4) determine the resource issues to be addressed in the EA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis.

Consequently, interested entities are requested to file with the Commission any data and information concerning environmental resources and land uses in the project area and the subject project's impacts to the aforementioned.

O. The preliminary schedule for preparing the subject EA is as follows:

Milestone	Target date
Issue Scoping Document 1 (Paper Scoping).	July/August 2002.
Additional Information (if needed).	October 2002.
Issue Acceptance Letter.	October 2002.
Issue Notice of Ready for Environmental Analysis.	December 2002.
Deadline for Filing Agency Recommendations.	February 2003.
Issue Notice of availability of EA.	April 2003.
Public Comments on EA Du.	May 2003.
Initiate 10(j) Process Ready for Commission decision on the application.	June 2003. September 2003.

Linwood A. Watson, Jr.,

Deputy Secretary.

[FR Doc. 02-19039 Filed 7-26-02; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Western Area Power Administration

#### Post-2004 Resource Pool-Salt Lake City Area Integrated Projects

**AGENCY:** Western Area Power Administration, DOE.

**ACTION:** Notice of adjustment to final allocations.

**SUMMARY:** The Western Area Power Administration (Western), a Federal power marketing agency of the Department of Energy (DOE), announces an adjustment to its Salt Lake City Area Integrated Projects (SLCA/IP) Post-2004 Resource Pool Final Allocation of Power developed under the requirements of Subpart C—Power Marketing Initiative of the Energy Planning and Management Program (Program) Final Rule. Final allocations were published in the *Federal Register* on February 4, 2002. Information received since then has made it necessary to revise the allocations.

Adjusted final allocations are published to indicate Western's decisions prior to beginning the contractual phase of the allocation process. Firm electric service contracts, negotiated between Western and allottees, will permit delivery of power allocations from the October 2004 billing period through the September 2024 billing period.

**DATES:** The Adjusted Post-2004 Resource Pool Final Allocation of Power will become effective August 28, 2002,

and will remain in effect through September 30, 2024.

**ADDRESSES:** All documents developed or retained by Western in developing the adjusted final allocations are available for inspection and copying at the CRSP Management Center, 150 East Social Hall Avenue, Suite 300, Salt Lake City, UT 84111.

**SUPPLEMENTARY INFORMATION:** Western published Final Post-2004 Resource Pool Allocation Procedures (Procedures) in the *Federal Register* (64 FR 48825, September 8, 1999) to implement Subpart C—Power Marketing Initiative of the Program's Final Rule (10 CFR part 905), published in the *Federal Register* (60 FR 54151, October 20, 1995). The Program, developed in part to implement Section 114 of the Energy Policy Act of 1992, became effective on November 20, 1995. The goal of the Program is to require planning and efficient electric energy use by Western's long-term firm power customers and to extend Western's firm power resource commitments. One aspect of the Program is to establish project-specific power resource pools and allocate power from these pools to new preference customers.

The Procedures, in conjunction with the Post-1989 Marketing Plan (51 FR 4844, February 7, 1986), establish the framework for allocating power from the SLCA/IP Post-2004 Power Pool.

Proposed allocations were published in the *Federal Register* (66 FR 31910, June 13, 2001). Public information/comment forums concerning the proposed allocations were held August 10, 15, 16, 21, and October 4, 2001. The public comment period closed October 11, 2001.

Final allocations were published in the *Federal Register* (67 FR 5113, February 4, 2002). Information received by Western since that date has indicated that misinterpretation of data by Western made it necessary to adjust these allocations.

#### I. Reason for Adjustment

Following publication of the final allocations, Western received information indicating that because of errors made in evaluating the data used to calculate the final allocations, three tribes' allocations were incorrect. Western has stated in the criteria that it would be consistent in determining the allocations of all tribes. It is necessary to adjust the allocations to correct these errors. The first of these is the San Carlos Apache Tribe (San Carlos). The San Carlos Apache Reservation is served by three utilities. Only one of these utilities currently receives Federal

power that is used to serve the reservation. In calculating the allocation for San Carlos, the percentage of Federal power received by this utility was applied to San Carlos's total load. The result of this calculation was that San Carlos received a smaller allocation than it should have.

The second adjustment made was to the allocation of the Yavapai Prescott Tribe. The non-residential load information submitted with the Applicant Profile Data by Yavapai Prescott was misinterpreted resulting in only two commercial accounts being identified as tribally-owned and thus eligible for an allocation. However, a number of other tribal businesses, administrative offices, and eligible loads should have been included. These loads have been identified, and an adjustment made to Yavapai Prescott's allocation.

The third allottee to identify a problem was the Tohono O'odham Utility Authority (TOUA). TOUA is a tribal utility which currently receives an allocation of Federal power. The information available to Western and used to determine the percentage of

TOUA's load served by its present Federal allocation was shown to be incorrect. This resulted in TOUA receiving a lower level of service in 2004 than other tribes. TOUA's allocation was adjusted by using the correct percentage of current Federal power in the calculations.

To maintain consistency in its treatment of all tribes Western believes it is necessary to make these corrections. Since the entire resource pool has been allocated, any adjustment to an allocation results in all of the allocations being changed. The result of these adjustments is that other tribes' allocations are reduced slightly from the previously published amounts. With these adjustments, the tribes' SLCA/IP allocations, combined with existing and future Western hydropower benefits, were reduced slightly to approximately 55.2 percent of eligible load in the Summer season and 57.2 percent in the Winter season based on the adjusted seasonal energy data submitted by each tribe.

Another result of recalculating the allocations is that the Kiabab Paiute

Tribe (Kiabab) will not receive an allocation. The utility which serves Kiabab receives a greater portion of its power supply through its allocation than Western is able to provide to the Tribes.

## II. Final Power Allocation

Since the proposed allocations were published in June 2001 and subsequently in February 2002, tribes have had sufficient time to review the allocations and point out any inconsistencies with the criteria. The following final power allocations are made in accordance with the Procedures. All of the allocations are subject to the execution of a firm electric service contract in accordance with the Procedures. Western will proceed to offer firm electric service contracts to the tribes receiving allocations in the amounts shown below.

The adjusted final allocations for Indian tribes and organizations are shown in this table.

### SALT LAKE CITY AREA PROJECTS POST-2004 POWER POOL FINAL ALLOCATIONS

Tribe	Summer energy (kWh)	Winter energy (kWh)	Summer CROD (kW)	Winter CROD (kW)
Alamo Navajo Chapter	399,824	453,518	184	196
Canoncito Navajo Chapter	292,937	335,242	135	145
Cocopah Indian Tribe	2,779,230	2,454,829	1,281	1,058
Colorado River Indian Tribes	12,969,838	8,747,829	5,978	3,772
Confederated Tribes of the Goshute Reservation	84,952	144,200	39	62
Duckwater Shoshone Tribe	149,225	156,069	69	67
Ely Shoshone Tribe	168,395	299,306	78	129
Fort Mojave Indian Tribe	612,855	631,886	282	272
Ft. McDowell Mojave-Apache Indian Community	5,089,153	5,263,924	2,346	2,270
Gila River Indian Community	30,202,512	30,918,295	13,920	13,330
Havasupai Tribe	432,433	548,898	199	237
Hopi Tribe	5,892,469	6,517,369	2,716	2,810
Hualapai Tribe	1,357,114	1,411,736	625	609
Jicarilla Apache Tribe	1,257,753	1,703,852	580	735
Las Vegas Paiute Tribe	1,563,305	1,213,043	721	523
Mescalero Apache Tribe	2,116,562	2,295,175	976	990
Nambe Pueblo	126,990	151,509	59	65
Navajo Tribal Utility Authority	45,155,581	56,535,996	20,812	24,375
Paiute Indian Tribe of Utah	343,334	357,388	158	154
Pascua Yaqui Tribe	2,864,577	2,393,821	1,320	1,032
Picuris Pueblo	164,296	51,199	76	22
Pueblo De Cochiti	401,422	520,585	185	224
Pueblo of Acoma	911,224	950,635	420	410
Pueblo of Isleta	2,381,563	2,572,647	1,098	1,109
Pueblo of Jemez	464,155	613,561	214	265
Pueblo of Laguna	1,610,018	1,745,884	742	753
Pueblo of Pojoaque	451,379	628,599	208	271
Pueblo of San Felipe	711,597	977,634	328	422
Pueblo of San Ildefonso	136,791	148,335	63	64
Pueblo of San Juan	647,460	702,893	298	303
Pueblo of Sandia	2,045,141	1,894,685	943	817
Pueblo of Santa Clara	463,973	613,363	214	264
Pueblo of Santo Domingo	980,004	1,016,679	452	438
Pueblo of Taos	480,420	787,815	221	340
Pueblo of Tesuque	1,361,547	1,387,845	628	598
Pueblo of Zia	148,471	196,276	68	85
Pueblo of Zuni	2,212,186	2,748,632	1,020	1,185
Quechan Indian Tribe	1,095,632	1,691,226	505	729

## SALT LAKE CITY AREA PROJECTS POST-2004 POWER POOL FINAL ALLOCATIONS—Continued

Tribe	Summer energy (kWh)	Winter energy (kWh)	Summer CROD (kW)	Winter CROD (kW)
Ramah Navajo Chapter .....	650,681	954,717	300	412
Salt River Pima-Maricopa Indian Community .....	35,026,125	31,034,316	16,144	13,380
San Carlos Apache Tribe .....	9,008,264	8,766,824	4,152	3,780
Santa Ana Pueblo .....	997,747	950,995	460	410
Skull Valley Band of Goshute Indians .....	33,098	34,336	15	15
Southern Ute Indian Tribe .....	2,435,344	2,723,333	1,122	1,174
Tohono O'odham Utility Authority .....	2,270,947	7,060,054	1,047	3,044
Tonto Apache Tribe .....	829,541	810,134	382	349
Ute Indian Tribe .....	991,484	1,596,382	457	688
Ute Mountain Ute Tribe .....	1,034,236	1,177,682	477	508
White Mountain Apache Tribe .....	12,632,129	13,914,290	5,822	5,999
Wind River Reservation .....	1,050,627	1,138,890	484	491
Yavapai Apache Nation .....	4,106,724	3,399,015	1,893	1,465
Yavapai Prescott Indian Tribe .....	1,589,784	1,867,486	733	805
Yomba Shoshone Tribe .....	68,129	70,678	31	30
Total .....	203,251,178	217,281,509	93,679	93,680

#### IV. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-621, requires Federal agencies to perform a regulatory flexibility analysis if a final rule is likely to have a significant economic impact on a substantial number of small entities and there is a legal requirement to issue a general notice of proposed rulemaking. Western has determined that this action does not require a regulatory flexibility analysis since it is a rulemaking of particular applicability involving rates or services applicable to public property.

#### V. Environmental Compliance

Western has completed an environmental impact statement on the Program, pursuant to the National Environmental Policy Act of 1969 (NEPA). The Record of Decision was published in the **Federal Register** (60 FR 53181, October 12, 1995). Western's NEPA review assured all environmental effects related to these procedures have been analyzed.

#### VI. Determination 12866

DOE has determined that this is not a significant regulatory action because it does not meet the criteria of Executive Order 12866, 58 FR 51735. Western has an exemption from centralized regulatory review under Executive Order 12866; accordingly, this notice requires no clearance by the Office of Management and Budget.

#### VII. Small Business Regulatory Enforcement Fairness Act

Western has determined that this rule is exempt from congressional notification requirements under 5 U.S.C. 801 because the action is a rulemaking

of particular applicability relating to rates or services and involves matters of procedure.

Dated: July 5, 2002.  
**Michael S. Hacskaylo**,  
 Administrator.  
 [FR Doc. 02-19070 Filed 7-26-02; 8:45 am]  
 BILLING CODE 6450-01-P

#### ENVIRONMENTAL PROTECTION AGENCY

[FRL-7251-3]

#### Agency Information Collection Activities: Proposed Collection; Comment Request; National Waste Minimization Partnership Program; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; correction.

**SUMMARY:** The EPA published a document in the **Federal Register** of June 21, 2002, concerning a proposed information collection request for the National Waste Minimization Partnership Program.

**FOR FURTHER INFORMATION CONTACT:** Newman Smith, 703-308-8757.

**SUPPLEMENTARY INFORMATION:** The EPA published a document in the **Federal Register** of June 21, 2002, (67 FR 42251), in FR Doc. 02-15725. This document corrects the docket number in the **ADDRESSES** section in the second and third column of page 42251 to read "RCRA-2002-0022"; and also corrects the docket address in the second column to read: RCRA Docket Information Center, Office of Solid Waste (5305G) U.S. Environmental

Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.

Dated: July 19, 2002.  
**Elizabeth Cotsworth**,  
 Director, Office of Solid Waste.  
 [FR Doc. 02-19106 Filed 7-26-02; 8:45 am]  
 BILLING CODE 6560-50-P

#### ENVIRONMENTAL PROTECTION AGENCY

[Petition IV-2001-2; FRL-7252-1]

#### Clean Air Act Operating Permit Program; Petition for Objection to State Operating Permit for Dougherty County Landfill, Flemming/Gaissert Road Facility, Albany (Dougherty County), GA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final order on petition to object to a state operating permit.

**SUMMARY:** Pursuant to Clean Air Act section 505(b)(2) and 40 CFR 70.8(d), the EPA Administrator signed an order, dated July 3, 2002, denying a petition to object to a state operating permit issued by the Georgia Environmental Protection Division (EPD) to Dougherty County Landfill, Flemming/Gaissert Road Facility (Dougherty) located in Albany, Dougherty County, Georgia. This order constitutes final action on the petition submitted by the Georgia Center for Law in the Public Interest (GCLPI or Petitioner) on behalf of the Sierra Club. Pursuant to section 505(b)(2) of the Clean Air Act (the Act) any person may seek judicial review in the United States Court of Appeals for the appropriate circuit within 60 days of this document under section 307 of the Act.

# MEC EXHIBIT 2

**PART 175—INDIAN ELECTRIC  
POWER UTILITIES**

**Subpart A—General Provisions**

- Sec.  
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Rates and Revenues**

- 175.10 Revenues collected from power operations.  
175.11 Procedures for setting service fees.  
175.12 Procedures for adjusting electric power rates except for adjustments due to changes in the cost of purchased power or energy.  
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**Subpart C—Utility Service Administration**

- 175.20 Gratuities.  
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175.22 Requirements for receiving electrical service.  
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**Subpart D—Billing, Payments, and  
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- 175.30 Billing.  
175.31 Methods and terms of payment.  
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**Subpart E—System Extensions and  
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- 175.40 Financing of extensions and upgrades.

**Subpart F—Rights-of-Way**

- 175.50 Obtaining rights-of-way.  
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**Subpart G—Appeals**

- 175.60 Appeals to the area director.  
175.61 Appeals to the Interior Board of Indian Appeals.  
175.62 Utility actions pending the appeal process.

AUTHORITY: 5 U.S.C. 301; sec. 2, 49 Stat. 1039-1040; 54 Stat. 422; sec. 5, 43 Stat. 475-476; 45 Stat. 210-211; and sec. 7, 62 Stat. 273.

SOURCE: 56 FR 15136, Apr. 15, 1991, unless otherwise noted.

**Subpart A—General Provisions**

**§ 175.1 Definitions.**

*Appellant* means any person who files an appeal under this part.

*Area Director* means the Bureau of Indian Affairs official in charge of a designated Bureau of Indian Affairs Area, or an authorized delegate.

*Customer* means any individual, business, or government entity which is provided, or which seeks to have provided, services of the utility.

*Customer service* means the assistance or service provided to customers, other than the actual delivery of electric power or energy, including but not limited to such items as: Line extension, system upgrade, meter testing, connections or disconnection, special meter-reading, or other assistance or service as provided in the operations manual.

*Electric power utility or Utility* means that program administered by the Bureau of Indian Affairs which provides for the marketing of electric power or energy.

*Electric service* means the delivery of electric energy or power by the utility to the point of delivery pursuant to a service agreement or special contract. The requirements for such delivery are set forth in the operations manual.

*Officer-in-Charge* means the individual designated by the Area Director as the official having day-to-day authority and responsibility for administering the utility, consistent with this part.

*Operations manual* means the utility's written compilation of its procedures and practices which govern service provided by the utility.

*Power rates* means the charges established in a rate schedule(s) for electric service provided to a customer.

*Service* means electric service and customer service provided by the utility.

*Service agreement* means the written form provided by the utility which constitutes a binding agreement between the customer and the utility for service except for service provided under a special contract.

*Service fees* means the charge for providing administrative or customer

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## § 175.10

service to customers, prospective customers, and other entities having business relationships with the utility.

*Special contract* means a written agreement between the utility and a customer for special conditions of service. A special contract may include, but is not limited to, such items as: Street or area lights, traffic lights, telephone booths, irrigation pumping, unmetered services, system extensions and extended payment agreements.

*Utility office(s)* means the current or future facility or facilities of the utility which are used for conducting general business with customers.

### § 175.2 Purpose.

The purpose of this part is to regulate the electric power utilities administered by the Bureau of Indian Affairs.

### § 175.3 Compliance.

All utility customers and the utilities are bound by the rule in this part.

### § 175.4 Authority of area director.

The Area Director may delegate authority under this part to the Officer-in-Charge except for the authority to set rates as described in §§ 175.10 through 175.13.

### § 175.5 Operations manual.

(a) The Area Director shall establish an operations manual for the administration of the utility, consistent with this part and all applicable laws and regulations. The Area Director shall amend the operations manual as needed.

(b) The public shall be notified by the Area Director of a proposed action to establish or amend the operations manual. Notices of the proposed action shall be published in local newspaper(s) of general circulation, posted at the utility office(s), and provided by such other means, if any, as determined by the Area Director. The notice shall contain: A brief description of the proposed action; the effective date; the name, address, and telephone number for addressing comments and inquiries; and the period of time in which comments will be received. Notices shall be published and posted at least 30 days before the scheduled effective date of

the operations manual, or amendments thereto.

(c) After giving consideration to all comments received, the Area Director shall establish or amend the operations manual, as appropriate. A notice of the Area Director's decision and the basis for the decision shall be published and posted in the same manner as the previous notices.

### § 175.6 Information collection.

The information collection requirements contained in § 175.22 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1076-0021. This information is being collected to provide electric power service to customers. Response to this request is "required to obtain a benefit." Public reporting for this information collection is estimated to average .5 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any other aspect of this information collection to the Bureau of Indian Affairs, Information Collection Clearance Officer, room 337-SIB, 1849 C Street, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs, Project 1076-0021, Office of Management and Budget, Washington, DC 20502.

## Subpart B—Service Fees, Electric Power Rates and Revenues

### § 175.10 Revenues collected from power operations.

The Area Director shall set service fees and electric power rates in accordance with the procedures in §§ 175.11 and 175.12 to generate power revenue.

(a) *Revenues.* Revenues collected from power operations shall be administered for the following purposes, as provided in the Act of August 7, 1946 (60 Stat. 895), as amended by the Act of August 31, 1951 (65 Stat. 254):

(1) Payment of the expenses of operating and maintaining the utility;

(2) Creation and maintenance of reserve Funds to be available for making repairs and replacements to, defraying

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emergency expenses for, and insuring continuous operation of the utility;

(3) Amortization, in accordance with repayment provisions of the applicable statutes or contracts, of construction costs allocated to be returned from power revenues; and

(4) Payment of other expenses and obligations chargeable to power revenues to the extent required or permitted by law.

(b) *Rate and fee reviews.* Rates and fees shall be reviewed at least annually to determine if project revenues are sufficient to meet the requirements set forth in paragraph (a) of this section. The review process shall be as prescribed by the Area Director.

**§ 175.11 Procedures for setting service fees.**

The Area Director shall establish, and amend as needed, service fees to cover the expense of customer service. Service fees shall be set by unilateral action of the Area Director and remain in effect until amended by the Area Director pursuant to this section. At least 30 days prior to the effective date, a schedule of the service fees, together with the effective date, shall be published in local newspaper(s) of general circulation and posted in the utility office(s). The Area Director's decision shall be final for the Department of the Interior.

**§ 175.12 Procedures for adjusting electric power rates except for adjustments due to changes in the cost of purchased power or energy.**

Except for adjustments to rates due to changes in the cost of purchased power or energy, the Area Director shall adjust electric power rates according to the following procedures:

(a) Whenever the review described in §175.10(b) of this part indicates that an adjustment in rates may be necessary for reasons other than a change in cost of purchased power or energy, the Area Director shall direct further studies to determine whether a rate adjustment is necessary and, if indicated, prepare rate schedules.

(b) Upon completion of the rate studies, and where a rate adjustment has been determined necessary, the Area

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Director shall conduct public information meetings as follows:

(1) Notices of public meetings shall be published in local newspapers of general circulation, posted at the utility office(s), and provided by such other means, if any, as determined by the Area Director. The notice shall provide: The date, time, and place of the scheduled meeting; a brief description of the action; the name, the address, and the telephone number for addressing comments and inquiries; and the period of time in which comments will be received. Notices shall be published and posted at least 15 days before the scheduled date of the meeting.

(2) Written and oral statements shall be received at the public meetings. The record of the public meeting shall remain open for the filing of written statements for five days following the meeting.

(c) After giving consideration to all written and oral statements, the Area Director shall make a decision about a rate adjustment. A notice of the Area Director's decision, the basis for the decision, and the adjusted rate schedule(s), if any, shall be published and posted in the same manner as the previous notices of public meetings.

(d) Rates shall remain in effect until further adjustments are approved by the Area Director pursuant to this part.

**§ 175.13 Procedures for adjusting electric power rates to reflect changes in the cost of purchased power or energy.**

Whenever the cost of purchased power or energy changes, the effect of the change on the cost of service shall be determined and the Area Director shall adjust the power rates accordingly. Rate adjustments due to the change in cost of purchased power or energy shall become effective upon the unilateral action of the Area Director and shall remain in effect until amended by the Area Director pursuant to this section. A notice of the rate adjustment, the basis for the adjustment, the rate schedule(s) shall be published and posted in the same manner as described in §175.12(c) of this part. The Area Director's decision shall be final for the Department of the Interior.

**Subpart C—Utility Service Administration**

**§ 175.20 Gratuities.**

All employees of the utility are forbidden to accept from a customer any personal compensation or gratuity rendered related to employment by the utility.

**§ 175.21 Discontinuance of service.**

Failure of customer(s) to comply with utility requirements as set forth in this part and the operations manual may result in discontinuance of service. The procedure(s) for discontinuance of service shall be set forth in the operations manual.

**§ 175.22 Requirements for receiving electrical service.**

In addition to the other requirements of this part, the customer, in order to receive electrical service, shall enter into a written service agreement or special contract for electrical power services.

**§ 175.23 Customer responsibilities.**

The customer(s) of a utility subject to this part shall:

- (a) Comply with the National Electrical Manufacturers Association Standards and/or the National Electrical Code of the National Board of Fire Underwriters for Electric Wiring and Apparatus as they apply to the installation and operation of customer-owned equipment;
- (b) Be responsible for payment of all financial obligations resulting from receiving utility service;
- (c) Comply with additional requirements as further defined in the operations manual;
- (d) Not operate or handle the utility's facilities without the express permission of the utility;
- (e) Not allow the unauthorized-use of electricity; and
- (f) Not install or utilize equipment which will adversely affect the utility system or other customers of the utility.

**§ 175.24 Utility responsibilities.**

A utility subject to this part shall:

- (a) Endeavor to provide safe and reliable energy to its customers. The spe-

cific types of service and limitations shall be further defined in the operations manual;

(b) Construct and operate facilities in accordance with accepted industry practice;

(c) Exercise reasonable care in protecting customer-owned equipment and property;

(d) Comply with additional requirements as further defined in the operations manual;

(e) Read meters or authorize the customer(s) to read meters at intervals prescribed in the operations manual, service agreement, or special contract, except in those situations where the meter cannot be read due to conditions described in the operations manual;

(f) Not operate or handle customer-owned equipment without the express permission of the customer, except to eliminate what, in the judgment of the utility, is an unsafe condition; and

(g) Not allow the unauthorized use of electricity.

**Subpart D—Billing, Payments, and Collections**

**§175.30 Billing.**

(a) *Metered customers.* The utility shall render bills at monthly intervals unless otherwise provided in special contracts. Bills shall be based on the applicable rate schedule(s). Unless otherwise determined, the amount of energy and/or power demand used by the customer shall be as determined from the register on the utility's meter at the customer's point of delivery. A reasonable estimate of the amount of energy and/or power demand may be made by the utility in the event a meter is found with the seal broken, the utility's meter fails, utility personnel are unable to obtain actual meter registrations, or as otherwise agreed by the customer and the utility. Estimates shall be based on the pattern of the customer's prior consumption, or on an estimate of the customer's electric load where no billing history exists.

(b) *Unmetered customers.* Bills shall be determined and rendered as provided in the customer's special contract.