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**BEFORE THE ARIZONA CORPORATION COMMISSION**

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

**RESPONDENT MOHAVE  
ELECTRIC COOPERATIVE,  
INC.'S POST-HEARING BRIEF**

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Respondent Mohave Electric Cooperative, Inc. ("Mohave") hereby submits its post-hearing brief. Mohave requests that the Arizona Corporation Commission (the "Commission") deny the relief requested by Complainant Bureau of Indian Affairs ("BIA") and find that: (i) the contract has terminated between the BIA and Mohave, (ii) the 70-mile line ("Line") from Mohave's Nelson substation to Long Mesa is a transmission line rather than a distribution line under the facts in this record, (iii) Mohave properly abandoned and quitclaimed the Line to the BIA and the Tribes, and (iv) Mohave is not responsible for costs associated with the abandoned Line, including operation and maintenance costs.

As part of this post-hearing brief, Mohave incorporates its prior briefs filed in this docket, the Stipulated Statement of Facts and Issues in Dispute ("Stip."), the transcript of

1 testimony presented during the hearing on November 18-20, 2008 (“Tr.”), and the exhibits  
2 admitted during the hearing.

### 3 **SUMMARY OF MOHAVE’S POSITION**

4  
5 The federal government, through the BIA, assumed elaborate control of the provision  
6 of electrical service to the Havasupai and Hualapai reservations decades ago. This BIA  
7 obligation is consistent with the fiduciary trust relationship existing between the federal  
8 government and Indian tribes. Mohave, on the other hand, is an Arizona non-profit  
9 electrical cooperative operating pursuant to a Certificate of Convenience and Necessity  
10 (“CCN”) granted by the Commission. Mohave’s duties and obligations are to those  
11 customers within its CCN area consistent with Arizona law. Mohave does not have the  
12 authority to operate on tribal lands without necessary consents, permits, easements, or other  
13 grants of permission.  
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16 By its complaint, the BIA is attempting to turn these relationships on their head by  
17 requesting that a state entity, the Commission, mandate that a state public service  
18 corporation, Mohave, provide electrical power on Indian lands outside of Mohave’s CCN  
19 area to the BIA so that the BIA can provide retail electrical service to tribal members on  
20 Indian lands. The BIA seeks this relief without a contract in place with Mohave, and  
21 without Mohave having the necessary consents, permits or easements to provide such  
22 service on reservation lands. The BIA’s complaint is an effort to shift its own duty and  
23 responsibility, in a state forum without jurisdiction over reservation lands, to members of a  
24 non-profit cooperative located for the most part more than a hundred miles away, who  
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1 should not be forced to bear the expense and responsibilities for duties and expenses that  
2 belong by law to the BIA.

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6		
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15		
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17		
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19		
20		
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22		
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24		
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26		
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28		

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6 A. The Commission Lacks Jurisdiction to Hear This Complaint by a 30  
7 Federal Agency Over Activities Outside of Mohave's CCN and  
8 On Indian Lands.

9 B. The Federal Government, Particularly the BIA, Has the Primary 34  
10 Responsibility to Ensure That the Tribes Receive Electrical  
11 Service, and Should Not Be Allowed to Shift that Obligation to  
12 Mohave.

13 C. For Prudential Reasons, the Commission Should Decline to Hear 37  
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15 Trust Relationship with the Tribes.

16 II. The October 1981 Contract Between Mohave and BIA Expired in 1992 39  
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24 B. The 70-Mile Line Has Always Functioned as a Transmission Line 45  
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27 IV. Mohave's Provision of Electrical Power to Isolated Users Along the Line 46  
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2		
3		
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5		
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7

8 **FACTUAL BACKGROUND**

- 9 **I. Prior to Formation of a Contract between Mohave and the BIA in October 1981, the Havasupai Became Dependant on Electrical Power Provided by the BIA.**
- 10
- 11 **A. The BIA Used Generators to Provide Power to the Supai Village in the 1960s and 1970s.**
- 12

13 The BIA is an executive agency of the United States of America and part of the

14 Department of the Interior. Stip. ¶ 2. The Snyder Act, 25 U.S.C. § 13, provides that the

15 BIA “shall direct, supervise, and expend” money for the “general support and civilization”

16 of Indians, including the federally recognized Havasupai and Hualapai tribes. *Id.* As part of

17 its obligations under the Snyder Act, the BIA owns and operates electrical utilities providing

18 retail electric service on Indian reservations, including two in Arizona (the San Carlos

19 Irrigation Project Power Division and the Colorado River Irrigation Project Power Division)

20 and the Flathead Irrigation Project Power Division in Montana. *Id.*, ¶ 4; Tr. 179-80). The

21 BIA has also promulgated regulations specifically relating to Indian Electric Power Utilities.

22 *See* 25 C.F.R. § 175 (2007), Ex. R-9; *see also* Tr. 414. As stated in the regulations, “The

23 purpose of this part is to regulate the electric power utilities administered by the Bureau of

24 Indian Affairs.” 25 C.F.R. § 175.2.

25

26

27

28

1           Supai is an isolated village in the Grand Canyon on the Havasupai reservation. The  
2 BIA began providing electrical power to Supai in 1965 by means of gas-powered  
3 generators. Stip. ¶ 3. In 1971, the BIA switched to diesel generators which the BIA owned  
4 and operated at Long Mesa on the rim of the Grand Canyon. Electrical lines operated by the  
5 BIA then carried the power into the Canyon. *Id.* The Havasupai Tribe became increasingly  
6 dependent on the electricity supplied by the BIA. *Id.*, ¶ 6. By 1976, the BIA and/or  
7 Hualapai Tribe also operated electrical generators on the neighboring Hualapai reservation.  
8 *Id.*, ¶ 8; *see also* Tr. 179-80 (Mr. Williams acknowledges use of generators prior to 1981  
9 contract).

12           **B. The BIA Issued an RFQ for the Provision of Electrical Power to the  
13 Havasupai and Hualapai Reservations.**

14           In the 1970s, the BIA studied and evaluated various alternatives for continuing its  
15 provision of electricity for the Havasupai and Hualapai reservations, including expanding  
16 the existing generators or arranging for the construction of a proposed 70-mile power line to  
17 Long Mesa. Stip., ¶ 9. In June 1976, the BIA issued an Request for Quotation (“RFQ”) for  
18 the provision of electrical power to the Havasupai and Hualapai reservations. *Id.*, ¶ 10; Ex.  
19 R-2, Tab 2. The RFQ sought a proposal to install “transmission and/or distribution  
20 electrical facilities” to carry power to the Long Mesa “generating plant [which is currently]  
21 located at the rim of the Grand Canyon, overlooking the Havasupai Reservation.” Ex. R-2,  
22 Tab 2. The RFQ described the transformers at the Long Mesa plant which lowered the  
23 transmission voltage so that it could be distributed to Supai over BIA lines, and stated that  
24 the “point of interconnection between the utility’s facilities and the [BIA] will be the line  
25 side of the Long Mesa power transformer.” *Id.* The RFQ also stated that power would be  
26  
27  
28

1 needed for “future installations” on the reservations and that the electrical utility would also  
2 need to coordinate with the telephone provider in the area. *Id.*

3  
4 Three electrical providers responded to the RFQ, including Mohave, a non-profit  
5 electrical cooperative, Arizona Public Service Company (“APS”), and Citizens Utilities  
6 Company (“Citizens”). Stip., ¶¶ 10-11. Mohave and APS submitted proposals for a  
7 “wholesale power agreement” with the BIA. *See* Mohave’s Statement of Facts in Response  
8 to BIA’s Motion for Partial Summary Judgment, Ex. 30 and 31. In contrast, Citizens  
9 submitted a proposal to provide retail service “directly to the individual meters on the  
10 Reservation.” *Id.*, Ex. 32. The BIA rejected Citizens’ proposal and required Citizens to  
11 submit a new proposal to deliver wholesale power to Long Mesa rather than provide retail  
12 service to individual meters. *Id.*, Ex. 33.

13  
14  
15 **C. Mohave Sought and Received Permission to Borrow Funds for the**  
16 **Construction of the Transmission Line to Long Mesa.**

17 The BIA ultimately decided to contract with Mohave rather than APS or Citizens for  
18 construction of the Line to Long Mesa. Stip., ¶ 13. In October 1980, prior to entering into a  
19 contract, Mohave sought permission from the Commission to borrow \$1.6 million from the  
20 Rural Electrification Administration (“REA”) for construction of the proposed Line. *Id.*, ¶  
21 14. The Commission approved the loan, stating that it would “be used for construction of an  
22 electric line extension from [Mohave’s] certified area across a portion of the Hualapai and  
23 Havasupai Indian Reservation” in order “to supply electric energy to serve existing and  
24 future residential and commercial installations on the Hualapai and Havasupai Indian  
25 reservations.” Decision No. 51491 (Oct. 22, 1980), Ex. R-2, Tab 5. Although the  
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28

1 Commission recognized that the proposed Line would extend outside of Mohave's CCN  
2 area, the Commission did not require Mohave to seek an extension of its CCN.

3  
4 The BIA has argued that use of the phrase "distribution line" in the REA application  
5 is dispositive on the question of whether the Line was in fact a distribution line rather than a  
6 transmission line. However, the phrase instead reflects that the Line was built to carry  
7 electrical power at the relatively low voltage of 24.9 kV—a voltage that, in normal urban  
8 settings, is typically more consistent with a distribution as opposed to a transmission line.  
9  
10 In any case, the Commission's finding in Decision No. 53174 that the Line was a  
11 transmission line supersedes the inexact use of the terminology in a the earlier REA  
12 application (See Section II(C), below).

13  
14 **D. Mohave and the BIA Entered Into a Contract for the Construction of the  
15 Line and the Provision of Electrical Power.**

16 On approximately October 1, 1981, Mohave entered into Negotiated Electrical Utility  
17 Contract No. GS-OOS-67021 (the "Contract") with the United States of America through  
18 the General Services Administration on behalf of the BIA to construct the 70-mile Line  
19 from Mohave's existing Nelson Substation to Long Mesa and to supply electrical power up  
20 to 1500 kW for use on the Havasupai and Hualapai Reservations. Stip., ¶ 13; Ex. R-2, Tab  
21

22 3. The Contract included the following provisions:

- 23
- 24 • The point of delivery would be the line side of the Long Mesa Power Transformer.  
25 Ex. R-2, Tab 3 at 00001. The Contract also referred to the delivery point as "the  
26 Government substation." *Id.* at 00009.
  - 27 • Power would be delivered and metered at 24.9 kV. *Id.* at 00001
  - 28 • The Contract would have a term of 10 years from when Mohave first made power  
available, which was agreed to be no later than April 1, 1982. *Id.* The BIA also had  
the option to renew the Contract for two additional 10-year periods. *Id.* at 00014.

- 1 • The Contract ambiguously referred to the Line as both a “transmission line” and a  
2 “distribution line.” *Id.* at 00008, 00010.
- 3 • Mohave would provide the funding to construct the Line, which would be owned by  
4 Mohave. *Id.* at 00011, 00013.
- 5 • The Contract required the BIA to pay a monthly “facilities charge” which included  
6 components related to (a) the cost of construction of the line, (b) state and local taxes,  
7 (c) operation and maintenance costs, and (d) depreciation. *Id.* at 00013-14. In  
8 addition, the Contract required the BIA to pay for the cost of the power under  
9 Mohave’s Rate Schedule “L” (Large Power). *Id.* at 00015.
- 10 • The BIA agreed that Mohave would serve the Hualapai reservation “upon its own  
11 arrangements” from the Line “provided that contemplated system capacities are not  
12 unreasonably exceeded.” *Id.* at 00016.
- 13 • Mohave would coordinate, “where appropriate,” with the Arizona Telephone  
14 Company, which provided service to the area. *Id.* at 00013.
- 15 • If the BIA failed to renew the Contract, the BIA was required to pay Mohave for the  
16 “undepreciated value” of the Line, “plus facility removal costs, less salvage value.”  
17 *Id.* at 00014.

18 The Contract also provided that Mohave would obtain the necessary rights of way for  
19 the Line, and Mohave did so. *Stip.*, ¶ 15. The BIA granted Mohave a 50-foot wide  
20 easement across the Hualapai reservation for the Line for a term of 30 years, expiring in  
21 January 2012. *Ex. R-2, Tab 4.* Mohave also received a 50-foot wide, 30-year easement  
22 across the Havasupai Reservation for the Line, expiring in December 2014. *Id.* However,  
23 as to the private Boquillas Ranch property, which lies between the Hualapai and Havasupai  
24 reservations and across which the Line was to pass, Mohave received only a 25-year  
25 easement, which expired in September 2005. *Ex. R-2, Tab 19, Boquillas Easement at 2.*  
26 Thus, at this date, post-termination of the Contract and abandonment of the Line, Mohave  
27 has no authority to operate an electrical line in the gap between the Hualapai and Havasupai  
28 reservations, and in a very few years (assuming the easements have not been abandoned

1 already by Mohave) will have no permission whatsoever to operate the Line on those  
2 reservations. The 50-foot easements for the Line were consistent with its use as a  
3 transmission line, unlike distribution lines, which usually have easements only 20 feet wide.  
4

5 Tr. 238-39.

6 **II. During the 1982 to 1992 Period, Mohave Provided the BIA with Electrical**  
7 **Power Under the Contract.**

8 **A. Mohave Constructed the Line and Began Providing Electrical Power to**  
9 **the BIA.**

10 Pursuant to the Contract, Mohave constructed the Line by late 1981 and energized it  
11 in early 1982. Stip., ¶ 16. Mohave sent the BIA its first invoice -- which included the  
12 facilities charge covering construction costs, taxes, operations and maintenance costs, and  
13 depreciation -- on approximately April 8, 1982. See Ex. C-4, Tab 4 (including a facilities  
14 charge totaling more than \$16,000). Mohave did not seek a CCN extension related to  
15 construction of the Line or the provision of power to the BIA, relying instead on the  
16 Contract with the BIA and the easements received for the Line. Nor did the Commission  
17 require Mohave to seek or receive a CCN extension.  
18

19  
20 The BIA used the power provided to the Long Mesa transformers site for BIA  
21 facilities in Supai, as well as for the retail distribution of power to tribal members living in  
22 the village. Stip., ¶ 19. As the BIA's witness Leonard Gold conceded, Mohave delivered  
23 bulk power to the BIA at the rim of the Canyon, which power the BIA then distributed on a  
24 retail basis to tribal members. Tr. 71. The BIA resold the power to users in Supai, set the  
25 rates, read the meters, billed customers for their usage, and arranged for any repairs. Tr.  
26 184. BIA witness James Walker testified that the BIA delivered retail power to  
27  
28

1 approximately 200 metered accounts, or approximately 600 to 700 residents, in Supai. Tr.  
2 153.

3 At the time of construction (and until approximately 1992), the design of the  
4 substation at the Long Mesa end of the Line conformed to the Contract. There were  
5 transformers in a metal shed at the BIA's Long Mesa facilities, as described in the Contract,  
6 and Mohave built the Line to deliver power to those transformers, where a meter existed.  
7 Tr. 247-48, 268-70, 380. The arrangement conformed to the "Government substation"  
8 described in the Contract. Tr. 254; Ex. R-2, Tab 3 at 00009. Sometime after entering into  
9 the Contract, and without consulting Mohave, the BIA removed the generators that had  
10 existed at Long Mesa for the prior decades. Tr. 169, 247-57; Ex. R-2 at 12-13. Thus, the  
11 BIA by its own actions removed its potential source of back-up support or emergency power  
12 if outages were to occur, the Line were to fail, or the Contract were to be terminated.  
13  
14  
15

16 Unlike a distribution line that typically follows a roadway, the 70-mile Line crosses  
17 remote and isolated territory and often diverges sharply from the winding Indian Route 18  
18 road into the Hualapai Hilltop trailhead to Supai. Tr. 106-07; Tr. 237-38; *see also* Ex. R-2,  
19 Tab 7 (photos). Also unlike a distribution line, the Line contains only one recloser, located  
20 roughly in the middle of the line, which allows isolation of any outages. Tr. 236-38, 377-  
21 78. The remoteness of the Line also makes it difficult to repair and maintain the line. For  
22 example, a Mohave repairman from Kingman responding to a service call would first need  
23 to drive the hour from Kingman to Peach Springs, then an additional 15-20 minutes to the  
24 Mohave's Nelson Substation, and then follow the Line along its 70-mile length from Nelson  
25 to Long Mesa. Tr. 239.  
26  
27  
28

1           **B. Mohave Provided Electrical Service to Twelve Accounts Along the Line at**  
2           **the Request of the BIA and/or the Tribes, and as Their Agent.**

3           During the term of the Contract, Mohave began serving a small number of individual  
4 accounts along the 70-mile Line. Stip. ¶ 34. The Contract itself mentioned “coordination”  
5 with the telephone provider, R-2, Tab 4 at 00013, and provided that Mohave could serve the  
6 Hualapai reservation from the Line. *Id.* at 00016. In 1981-83, the Hualapai Tribe requested  
7 that the BIA ensure that Mohave provide electrical service to tribal properties from the Line  
8 to areas on the Hualapai reservation including Frazier Wells, the Youth Camp and the  
9 Thornton Fire Tower. *See* Ex. R-1; *see also* Tr. 101-05. Mohave did not request additional  
10 authority to serve these individual accounts along the Line from the Commission, or seek a  
11 CCN extension, because Mohave believed it was acting solely as the agent of the BIA under  
12 the Contract and the easements received for the Line in providing service to these accounts.<sup>1</sup>  
13 Tr. 301 (Longtin Testimony); Ex. R-2 at 14-15.  
14  
15

16           As of mid-2003, there were 12 individual accounts along the Line in addition to the  
17 primary BIA meter at Long Mesa, consisting of the following:  
18

- 19           • Two additional BIA accounts, including a fire tower and a radio repeater tower;  
20           • Six accounts in the name of the Hualapai Tribal Council, including pumps, wells and  
21           a youth camp;  
22

23  
24           <sup>1</sup> Questions arose during the hearing as to whether Mohave should have sought  
25 a “borderline agreement” to serve the twelve accounts along the Line. Tr. 48-49, 363.  
26 However, the Contract with the BIA basically functioned as a borderline agreement to allow  
27 Mohave to serve accounts on the reservation. After the Contract expired, Mohave tried to  
28 negotiate a new contract with the BIA and, when it became clear that a new contract was not  
on the horizon, Mohave abandoned the Line, although it continued to provide power at the  
Nelson Substation that eventually serviced these accounts.

- 1 • An account for the telephone tower near the rim of the Canyon on the Havasupai  
2 reservation;
- 3 • An account at the Boquillas Ranch between the Hualapai and Havasupai  
4 reservations;
- 5 • An account in the name of W.C. Bravo on the Hualapai reservation; and
- 6 • An account in the name of Cesspooch for a cabin on Nelson Road, also on the  
7 Hualapai reservation.  
8

9  
10 See Stip., ¶ 34; Ex. R-2, Tab 18; Ex. C-3 at 8-9; Tr. 153 (Walker Testimony). Given the 70-  
11 mile length of the Line, this amounted to approximately one account every 5.8 miles, a  
12 sharp contrast with the approximately 200 accounts billed by the BIA in Supai. Tr. 153  
13 (Walker testimony). Prior to 2003, Mohave sent individual bills to the twelve accounts  
14 along the Line as BIA's agent. Tr. 357.

15  
16 Most of these individual accounts involved wells, towers and communications  
17 facilities, rather than residences. James Walker testified that only three of the accounts (the  
18 Boquillas, Bravo and Cesspooch accounts) had people living at them year-round. Tr. 153-  
19 54. While Mr. Walker could not estimate the number of individuals living at those three  
20 accounts, he admitted that the vast majority of individuals receiving electrical power  
21 through Line received such power from the BIA in Supai, where there are 600 to 700  
22 residents, rather than along the Line itself.<sup>2</sup> *Id.*

23  
24  
25  
26 <sup>2</sup> Two of the twelve accounts receiving service from the 70-mile Line (the  
27 Cesspooch account and one of the Hualapai Tribal accounts) are located within Mohave's  
28 CCN. Until approximately 2002, these two accounts were served by means of an  
underbuild which then turned east to serve the Grand Canyon Caverns area, also within  
Mohave's CCN. In approximately 2002, a new line was constructed to serve the Grand

1           **C. Mohave Filed a Rate Application That Resulted in Commission Decision**  
2           **No. 53174 in August 1982, Characterizing the Line as a Transmission**  
3           **Line.**

4           In January 1982, shortly before the Line began serving the BIA, Mohave filed a rate  
5 application to reflect the Line operation as well as other factors. *See* Decision No. 53174  
6 (August 11, 1982), Ex. R-2, Tab 6 at 1. Because of Mohave's construction plans, Mohave  
7 and the Commission Staff used a non-historical test year of 1982 and a December 1982 rate  
8 base. *Id.* at 4. Although Mohave had initially included some costs related to the Line in its  
9 rate base, the Commission rejected inclusion of the costs, finding that the Line was a  
10 "transmission line" which did not benefit Mohave's ratepayers, rather than a distribution  
11 line. *Id.* at 8. The Commission specifically held that the Line "is not used and useful, will  
12 not be used and useful and was never intended to be used and useful in the provision of  
13

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14  
15  
16 Canyon Caverns area, and the two accounts were moved to the 70-mile Line, which was  
17 subsequently abandoned. Tr. 54-55, 366-68. Following the hearing in this matter, Mohave  
18 requested permission from the Hualapai Tribe to construct new facilities to serve those two  
19 accounts without reliance on the abandoned 70-mile Line. Mohave's Post- Hearing  
20 Supplement to Record, Longtin 2/13/09 Affidavit, at ¶¶ 2-4 and attached exhibits. These  
21 requests clearly and unambiguously informed both the Hualapai Tribe *and* the BIA of  
22 Mohave's intentions to serve these customers through a new line, and sought all necessary  
23 consents and permissions of any nature to build the line. *Id.* The Hualapai Tribe gave  
24 Mohave a signed easement and a letter from its Tribal Vice Chairman on tribal letterhead  
25 granting the request, and never indicated that any other consents, permits or easements of  
26 any nature were required. *Id.* However, when Mohave went upon the tribal lands—within  
27 its CCN area granted by this Commission and with the tribal easement in hand—its  
28 employees were harassed and threatened and ordered to leave the reservation under penalty  
of arrest. *Id.* at ¶¶ 4-8. This conduct underscores the impropriety and unfairness of the  
BIA's requested relief—on one hand it insists that a state-regulated utility indefinitely  
operate and maintain a distribution line far outside of its CCN area on tribal lands, but on  
the other hand it allows the utility's employees to be put in personal danger on pretextual  
grounds and seemingly is doing everything it can to make it as difficult as possible for the  
utility to operate on the reservation, all the while mocking the authority of a CCN granted  
by the Commission.

1 electric service to [Mohave's] ratepayers." *Id.* (emphasis in original). Thus, the  
2 Commission approved segregating all expenses and revenues associated with the Line and  
3 excluding them from the calculation of Mohave's rates. *Id.* at 8-9.  
4

5 As with Decision No. 51491, the Commission in Decision No. 53174 did not require  
6 Mohave to seek an extension of its CCN area related to the Line. Indeed, because the  
7 Commission characterized the Line as a transmission line that did not serve Mohave's  
8 ratepayers, rather than a distribution line, there was no grounds for seeking an extension of  
9 Mohave's CCN area on that basis.  
10

11 **D. The Line Was Treated on a Standalone Basis During Mohave's 1990 Rate**  
12 **Application.**

13 In September 1989, Mohave filed another rate case. *See* Decision No. 57172 (Nov.  
14 29, 1990). As required by the Commission's prior Decision No. 53174, Mohave segregated  
15 all costs and expenses associated with the Line and the BIA contract in its 1989 cost of  
16 service study. Neidlinger Supp. Testimony at 4. This prevented a result in which Mohave's  
17 other customers would be required to subsidize the BIA. *Id.* Mohave's percentage rate of  
18 return on the Contract with the BIA in 1989 was only 6.98%, lower than the percentage rate  
19 of return for many other Mohave customer classes. *Id.* at 4-5.  
20  
21

22 Moreover, this percentage rate of return was based on the BIA paying *both* the  
23 facilities charge under the Contract *and* power usage charges under the Large Commercial  
24 and Industrial ("LC&I") Rate. *Id.* at 5. The LC&I Rate did not recover any of the costs  
25 associated with the Line, and "if the Facilities Charge had not been collected during the test  
26 year, the LC&I Rate alone would have been insufficient to cover the costs to [Mohave] of  
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1 providing the BIA service.” *Id.* at 6. Mohave has not filed for a subsequent rate increase,  
2 and thus still charges its customers the rates set in the November 1990 decision.

3  
4 As will be discussed *infra*, the BIA subsequently allowed the Contract to lapse and  
5 ceased paying the facilities charge. Thus, the current billings to the BIA under the LC&I  
6 rate are not recovering any of the additional costs associated with the Line. *Id.* at 6. BIA  
7 witness Leonard Gold conceded that his testimony about the alleged revenue stream to  
8 Mohave based on the Line in 1989 assumed that Mohave was continuing to bill for, and the  
9 BIA was continuing to pay, the facilities charge. Tr. 115-19. Without payment of the  
10 facilities charge, the revenues would be considerably lower. Tr. 120-24.

11  
12 **E. The BIA Paid Off the Construction Costs Related to the Line and**  
13 **Eliminated the Substation at Long Mesa, but Then Failed to Renew the**  
14 **Contract.**

15 Although the BIA had been paying off a portion of the construction costs related to  
16 the Line on a monthly basis by way of the facilities charge, the BIA decided in  
17 approximately March 1991 to pay off the remaining portion of the construction costs. *See*  
18 Ex. R-2, Ex. 8 (indicating a pay off of \$923,243.92 on March 27, 1991); *see also* Tr. 233-  
19 34; Stip., ¶ 24. The BIA ceased paying the construction cost portion of the facilities charge  
20 in 1991, but continued paying the portion of the facilities charge related to operations and  
21 maintenance, taxes, and depreciation for approximately the next six years, until 1997.

22  
23  
24 With the initial ten year period of the Contract set to expire on April 1, 1992, Mohave  
25 requested that the BIA “provide Mohave with your intentions towards the renewal options”  
26 by letter dated March 17, 1992. Stip., ¶ 25; Ex. R-2, Tab 9. Mohave further wrote the BIA:  
27 “Due to the very limited time before the current contact expires, we would appreciate  
28

1 receiving a written response prior to March 31, 1992.” *Id.* The BIA failed to respond to this  
2 letter in any way, and in fact said nothing to Mohave at that time about exercising its  
3 renewal option.  
4

5 Also around 1992, the BIA made a number of changes to its facilities at Long Mesa,  
6 removing the transformers and constructing an underground system in Supai. Although a  
7 meter remained at Long Mesa, 24.9 kV lines continued down into the canyon where they  
8 connected to the BIA’s underground system. The BIA then stepped down the voltage for  
9 retail use in the Supai village, with transformers at each location. *See* Tr. 247-57 (Longtin  
10 testimony); *see also* Tr. 169 (Walker testimony).  
11

12 **III. Following the BIA’s Failure to Renew the Contract in 1992 and Continuing into**  
13 **1997, Mohave Continued to Provide the BIA with Electrical Power on a Month-**  
14 **to-Month Basis While Seeking to Negotiate a New Contract.**

15 **A. Despite the Expiration of the Contract in 1992, Mohave Continued in**  
16 **Good Faith to Provide Electrical Power to the BIA on a Month-to-Month**  
17 **Basis.**

18 Following the termination of the Contract in April 1992, Mohave continued to  
19 provide electrical power to the BIA on a month-to-month basis while trying to negotiate a  
20 new arrangement. Mohave also continued to charge the BIA the contract rate for the  
21 electrical power, as well as the portions of the facilities charge related to operations and  
22 maintenance, taxes and depreciation. *Stip.*, ¶ 23; Tr. 287. Mohave also continued to repair  
23 the Line without seeking reimbursement from the BIA because the BIA was continuing to  
24 pay the portion of the facilities charge covering operating and maintenance expense.  
25 Mohave did not seek to discontinue service to either the BIA or the individual accounts  
26 along the Line, nor did it remove the Line as it had a right to do under the Contract.  
27  
28

1 As Mr. Longtin testified, “We [Mohave] didn’t just shut it off and abandon it then.  
2 We were trying to work with the BIA.” Tr. 302. “We carried on our duties as we had  
3 during the contract.” *Id.* at 303. As Mr. Longtin explained, “We were good old boys in the  
4 sense that we didn’t shut it off. The contract says at the end of the contract that we should  
5 tear the line out and it’s gone. And, I guess, we could have done that, but we didn’t. We  
6 tried to go on with another contract.” Tr. 353.  
7

8 **B. Despite Numerous Attempts, the Parties Failed to Negotiate a New**  
9 **Contract.**

10 Mohave’s efforts to enter into a new long term contract with the BIA after March  
11 1992 failed to result in any agreement. Stip., ¶ 25. For example, in April 1993, more than a  
12 year after the Contract expired, the BIA wrote Mohave acknowledging that “The term of  
13 this contract was for ten years and has since expired.” Ex. R-2, Tab 10<sup>3</sup>. However, the BIA  
14 also purported to exercise a “right of renewal” and “to re-negotiate and amend the existing  
15 contract.” *Id.* Internally, the BIA admitted in December 1994 that “We are approaching a  
16 fourth year without a contact for the services [provided by Mohave] as defined in the  
17 contract documents” and that the BIA needed “to negotiate a new contract.” Stip., ¶ 26.  
18

19  
20 Mohave continued to ask the BIA about its intentions. In June 1995, Mohave again  
21 wrote the BIA, stating that the BIA needed to clarify its position on whether the BIA wanted  
22 a new contract:  
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26 \_\_\_\_\_  
27 <sup>3</sup> The BIA then also instituted an audit of Mohave’s charges during the initial ten-  
28 year contract term, which was ultimately resolved by the voluntary dismissal of Court of  
Claim Case No. 99-242C in January, 2003.

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According to Mohave's records and Mohave's understanding of the contract, the contract expired on April 1, 1992. The BIA clearly declined to exercise the renewal option as was required by the agreement.

Mohave now requests the intentions of the BIA regarding the old contract and the existing service. Does the BIA now wish to discuss a new contract, since the old contract has obviously expired, or is the intent of the BIA for Mohave to cease to provide service, which was an aspect provided for in the old contract?

Stip., ¶ 27; Ex. R-2, Tab 11. The BIA never directly responded to this letter from Mohave, and Mohave continued to supply electrical power on a month-to-month basis.

Finally, in June 1996, Mohave notified the BIA that Mohave could no longer continue the situation, including Mohave's ownership and maintenance of the line, without a long-term contract with the BIA:

We have carefully reviewed many aspects of the expired contract and of the service itself. . . . The review of all aspects has resulted in a determination that continuing with this service as it currently exists is not in the best interests of the members of Mohave Electric. *We intend to transfer ownership of this line to the BIA. This transfer will require the relocation of the metering equipment [from] the present location near the Grand Canyon to a location near or at the Nelson Substation.*

We request that you arrange for your representative to contact Mohave's Engineering Department in order to commence activities which will culminate in the orderly transfer of facilities . . . .

Stip., ¶ 28; Ex. R-2, Tab 12 (emphasis added). As with the prior communications from Mohave, the BIA failed to respond.

...  
...

1 **IV. In 1997, Recognizing that the Prior Contract Had Expired and that the BIA**  
2 **Was Refusing to Enter Into a New Contract, Mohave Moved the Meter Off the**  
3 **Hualapai Reservation, but Continued to Provide Power on a Month-to-Month**  
4 **Basis.**

5 **A. Mohave Moved the Meter Off Tribal Lands, Stopped Billing the**  
6 **Contractual Facilities Charge, and Credited the BIA for Usage Billed to**  
7 **Other Meters.**

8 In approximately March 1997, as it had notified the BIA it would do in prior letters,  
9 Mohave moved its metering equipment from Long Mesa to the Nelson substation and began  
10 metering electricity supplied through the Line at the Nelson substation. Stip., ¶ 29. Because  
11 the Contract had terminated, Mohave ceased billing the BIA the facilities charge authorized  
12 by the terminated Contract. Stip. ¶ 23; Tr. 186-87. Without the facilities charge, Mohave  
13 no longer received any reimbursement for any maintenance or repair costs related to the  
14 Line. Thus, Mohave voluntarily bore all the maintenance and repair costs associated with  
15 the Line from approximately March 1997 until the abandonment in July 2003. Mohave  
16 continued to bill the BIA for the power delivered to and used by the BIA at Mohave's LC&I  
17 rate. Ex. C-4 at 7 and Tab 5.

18 Although Mohave moved the BIA's meter to the Nelson substation in March 1997  
19 and billed from that location, Mohave also attempted during this period to read the meters  
20 related to the twelve individual accounts along the line and to credit the BIA for that usage  
21 by other accounts. Stip. ¶ 30. Thus, in July 1998, Mohave issued the BIA a large initial  
22 credit of \$6,257.92 for "usage billed to other meters" during the period from March 1997 to  
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1 July 1998. Ex. C-4, Tab 6. Thereafter and continuing through September 2003, Mohave  
2 issued the BIA monthly credits for “usage billed to other meters.”<sup>4</sup> *Id.*

3 **B. WAPA Was Willing to Assist a Sister Federal Agency and Oversee**  
4 **Maintenance if the BIA Agreed to Pay, but BIA Refused.**

5 Concerned about the future of the Line, Mohave contacted the Western Area Power  
6 Administration (“WAPA”) in July 2001 to discuss the concept of WAPA taking over the  
7 Line. *Stip.*, ¶ 31. WAPA is a federal agency and part of the Department of Energy. Hine  
8 Testimony at 2. WAPA has entered into over 30 contracts with the BIA related to the  
9 provision of electric power on Indian reservations, including repair and maintenance of  
10 electrical lines. *Id.* at 2-6 and Ex. TH-1 through TH-32. A federal directive requires that  
11 WAPA cooperate with other federal agencies and lend assistance to the BIA in matters  
12 affecting electrical power to Indian Tribes, *see* Ex. R-6 (Hine Testimony) at 8, and WAPA  
13 has clear authority to enter into a maintenance and repair contract with the BIA, a sister  
14 agency. *Tr.* 398.

15  
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17  
18 Two meetings involving WAPA, Mohave and the BIA occurred in 2001, at which  
19 time WAPA expressed a willingness to take over maintenance and repair of the Line. *Tr.*  
20 393, Hine Testimony at 8. WAPA only asked that the BIA reimburse WAPA for the cost of  
21 such maintenance and repairs. Despite having agreed in 1982 to pay Mohave a monthly

22  
23 <sup>4</sup> Although the BIA’s witness James Williams contended that the average credit  
24 during this more than 78-month period from March 1997 to September 2003 was \$377.25  
25 per month, Ex. C-4 at 8-9, he was unable at the hearing to produce any calculations  
26 supporting this figure. *Tr.* 187-88. Mohave no longer has records for that historical period,  
27 but estimates that it issued the BIA credits totaling \$27,178, for an average monthly credit  
28 of \$348. This estimate is based on totaling the billing records in evidence in this matter.  
*See* Chart of Credits, attached at Exhibit A. Moreover, the BIA has offered no evidence that  
the average monthly credit for the 1997-2003 period has any applicability to later periods.

1 facilities charge that included the cost of operating and maintaining the Line, the BIA  
2 steadfastly refused to pay any costs associated with the Line; therefore, the BIA and WAPA  
3 did not enter into an interagency agreement related to the Line. Hine Testimony at 9-10, Tr.  
4 394-95.  
5

6 **C. The BIA Then Suddenly Contended that the October 1981 Contract Was**  
7 **Still In Effect, and Even Purported to Renew It for a 2002-2012 Term.**

8 Although the BIA had failed to renew the old Contract when it expired in April 1992,  
9 and likewise failed to negotiate a new contract, on March 6, 2002, the BIA suddenly  
10 purported to extend the old Contract “for a ten year period from April 1, 2002 through  
11 March 31, 2012.” Stip., ¶ 32; Ex. R-2, Tab 13. Although Mohave had not charged the BIA  
12 the facilities charge since moving the meter in March 1997, the BIA disputed that it was  
13 required to pay any facilities charge, including reimbursement for operation and  
14 maintenance of Line.<sup>5</sup> *Id.* The BIA reserved any potential claims for past billings,  
15 demanded that Mohave return its metering equipment to “the line side of the Long Mesa  
16 Transformer” (even though the BIA took the position during the hearing that no transformer  
17 existed at Long Mesa), and disputed Mohave’s calculation of any credit for the accounts  
18 along the Line. *Id.* The BIA also attached what it described as a “Unilateral Modification”  
19 of the old Contract’s terms and conditions. *Id.*  
20  
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23 Mohave responded on March 20, 2002, stating that the old Contract had “expired on  
24 its own terms in 1992” when the BIA did not seek a renewal and refused to consider any  
25

26 \_\_\_\_\_  
27 <sup>5</sup> This contrasts with Leonard Gold’s supplemental testimony in which he  
28 contends that the BIA is now willing to continue paying the facilities charge. *See* Gold’s  
Supplemental Testimony of January 16, 2009 at 10, ll. 25-26.

1 extension, and the Contract could not be renewed or extended ten years later, in 2002. Stip.,  
2 ¶ 33; R-2, Tab 14. Mohave confirmed that it had provided service on a month-to-month  
3 basis since termination of old Contract in 1992, and that it was still willing to negotiate a  
4 new contract. *Id.* The BIA did not respond.  
5

6 **V. In 2003, Mohave Gave Up Waiting, Recognized That the 70-Mile Line Was Not**  
7 **Used and Useful to Mohave’s Members, and Therefore Quitclaimed the Line to**  
8 **the BIA and the Tribes.**

9 **A. Mohave’s Board Resolved to Dispose of the Line and Mohave Noticed the**  
10 **Abandonment and Executed a Quitclaim Deed.**

11 On June 26, 2003, Mohave’s Board of Directors approved a resolution to abandon  
12 the 70-mile Line and quitclaim it to the BIA and the tribes, as Mohave had previously  
13 notified those parties that it would do if the BIA did not act. *See* R-2, Tab 15. Mohave’s  
14 Board noted that the old Contract with the BIA for the sale of power at wholesale had  
15 expired in 1992, that the BIA had subsequently refused to pay for overhead, maintenance  
16 and repairs on the Line, that the Line extended outside of Mohave’s CCN area and traversed  
17 two Indian reservations, and that the Line had no value to Mohave’s members but might  
18 have some value to the BIA or the tribes. *Id.* Mohave’s Board further recognized that, but  
19 for the expired Contract, Mohave had no right to provide retail service on the reservations  
20 and outside its CCN area. *Id.*  
21  
22

23 The Board therefore resolved that the Line was not necessary or useful to Mohave’s  
24 members or in performance of Mohave’s duties to the public and that any retail customer  
25 receiving service through the Line should be “transferred to the BIA which is authorized to  
26 operate on Indian nation lands.” *Id.* The Board further resolved to communicate these  
27 concerns to the Commission:  
28

1 FURTHER RESOLVED, that Management communicate to the Arizona Corporation  
2 Commission the fact first that this wholesale service is for the BIA re-delivery  
3 outside the service area of the Cooperative, and that second, the 30,000 members of  
4 the Cooperative are threatened with imposition of unfair economic burden and shift  
5 of expense by the Federal Government of a trust responsibility owed by the BIA to  
6 the Indians and that the BIA intends to impose this Federal expense burden on the  
7 backs of the 30,000 members of the Cooperative.

8 *Id.*; see also Tr. 353 (testimony on decision to abandon the Line).

9 On July 22, 2003, Mohave prepared and executed a Notice of Quitclaim and  
10 Abandonment of the Line and the three easements (Havasupai, Hualapai and Boquillas) to  
11 the BIA, the Hualapai Tribe and the Havasupai Tribe “as their respective interests may be  
12 established.” Stip., ¶ 35; R-2, Tab 16. Mohave also abandoned and quitclaimed the twelve  
13 service drops along the Line. *Id.*; see also R-2, Tabs 17 (letters to individual accounts) and  
14 18 (August 7, 2003 letter with list of accounts). In letters dated September 2 and 12, 2003,  
15 the BIA refused to accept the quitclaim and abandonment. See R-2, Tabs 19 and 20; Stip.,  
16 ¶¶ 35-39.

17 There was no interruption of service following the quitclaim and abandonment. Tr.  
18 166; Ex. R-2 at 10, 15-16. Rather, Mohave continued to provide electrical power to the BIA  
19 at Mohave’s Nelson substation at Mohave’s LC&I rate. Stip. ¶ 36; Ex. R-2 at 10, 15-16.  
20 Mohave is willing to continue providing that power to the BIA at the Nelson substation, so  
21 long as BIA pays for it. Ex. R-2 at 10, 15-16.

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24 **B. Mohave Stopped Reading the Meters of Individual Accounts Along the  
25 Line and Stopped Crediting the BIA for Their Usage.**

26 Following the quitclaim and abandonment of the Line, Mohave stopped reading the  
27 meters of the twelve accounts along the Line and stopped issuing the BIA any credit for the  
28 usage by those meters. Ex. R-2 at 10. However, electrical power continued to flow to those

1 accounts and none of the individual accounts has gone without power. Tr. 166. Moreover,  
2 the twelve accounts certainly received notice of the change in their service. Two of the  
3 accounts were in the name of the BIA, while six more accounts were in the name of the  
4 Hualapai Tribal Council – both of which clearly received notice from Mohave. Mohave  
5 also sent out individual letters to the twelve accounts. Ex. R-2, Tab 17. Any electrical  
6 power used by the accounts was included in the bills Mohave sent the BIA based on meter  
7 readings for the Line at the Nelson substation.<sup>6</sup>  
8  
9

10 The BIA has disputed Mohave's treatment of the twelve accounts and its decision to  
11 cease reading the meters for the accounts. However, the BIA has acknowledged that it  
12 could read the meters along the line related to those accounts and bill the users of the  
13 electrical power if the BIA chose to do so – as the BIA already does in providing retail  
14 electric service to all of the residents of Supai. Tr. 156-57 (Walker testimony), 185  
15 (Williams testimony). The BIA has also conceded that it could disconnect non-paying  
16 accounts along the Line if it chose to do so. Tr. 167.  
17  
18

19 **C. Mohave Ceased Repair and Maintenance of the Line Unless Reimbursed**  
20 **by the BIA.**

21 Consistent with Mohave's quitclaim and abandonment of the Line, Mohave has  
22 ceased to perform repair and maintenance on the Line unless requested to do so by the BIA.<sup>7</sup>  
23

24 <sup>6</sup> Because neither the BIA nor Mohave has read the meters for the twelve  
25 accounts since Mohave abandoned and quitclaimed the 70-mile line, meters and service  
26 drops in mid-2003, it is impossible to reconstruct the amount of electricity they used.

27 <sup>7</sup> Mr. Walker testified that the BIA has paid \$125,851.33 for repairs and  
28 maintenance of the 70 mile Line during the period of 2004-2008. Walker Testimony, C-3 at  
7. Approximately \$90,000.00 of that amount was paid to Mohave, with the rest paid to  
Unisource. *Id.*, Tab 2. Mohave does not dispute the amount paid by BIA, but it does

1 Tr. 162-64; Ex. R-2 at 10. Because the Line traverses two Indian reservations, Mohave has  
2 insisted on receiving explicit permission from the BIA for entry upon Indian lands, as well  
3 as a commitment by the BIA to pay for the cost of the repairs or maintenance. Ex. R-2 at  
4 10. Otherwise, Mohave would not receive any reimbursement for costs expended on the  
5 Line which Mohave no longer owns. The BIA has admitted that it is capable of hiring its  
6 own staff to perform repairs or maintenance, or contracting with third parties, concerning  
7 the Line, much as it does for repairs and maintenance to the electrical line and facilities in  
8 Supai. Tr. 158.  
9

10  
11 The BIA has complained of alleged delays in Mohave's response to service or repair  
12 calls by the BIA. Tr. 164, 173-75. However, the BIA concedes that portions of the 70-mile  
13 Line are a long way from Mohave's CCN area. Tr. 175 (Mr. Walker admits "It would be a  
14 time delay for everybody, yes."). Tom Longtin explained the inherent problems of Mohave  
15 performing any repairs to the Line, including the hour's drive from Kingman to Peach  
16 Springs, the additional 15 to 20 minute drive to the Nelson Substation, and then the lengthy  
17 process of trying to find and repair any problems on the 70-mile Line. Tr. 239-41. Mr.  
18 Longtin also explained that the large majority of problems arising with the Line involve the  
19 weather, not lack of maintenance or vandalism, and thus occur at the same time that Mohave  
20 is busy repairing its own lines within its CCN area. *Id.*  
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27 dispute that Mohave is liable for repairs or maintenance of a Line which Mohave has  
28 abandoned to the BIA.

1           **D.     The Havasupai Tribe Commenced and Completed Construction of a 13**  
2           **Mile Spur Line.**

3           In approximately October 2003, after Mohave's abandonment and quitclaim of the  
4 Line, the Havasupai Tribe began construction of a 13.5 mile spur (the "Spur") from the Line  
5 to the Bar Four area on the Havasupai reservation. Stip., ¶ 40. The Havasupai completed  
6 construction on the Spur in approximately May 2004, out of a concern to "use[] the HUD  
7 money before we lost it." Tr. 228. Mohave had no engineering oversight related to the Spur  
8 and specifically refused to become involved in its construction, consistently stating that the  
9 entire Spur lay outside Mohave's CCN area and was not part of Mohave's system. Tr. 227.  
10

11           The Spur lies completely within the right of way for Indian Route 18, and the BIA  
12 authorized and permitted its construction within the right of way. Tr. 208-09, 219-21.  
13 According to Mr. Philip Entz, who oversaw construction of the Spur, "It's a BIA road so I  
14 needed to have the permission from the BIA to put [the Spur] in the right of way." Tr. 222.  
15 Mr. Entz further testified that he "assumed" Mohave would be providing electrical service  
16 through the Spur to the Bar Four area, even though Mohave had no technical or engineering  
17 input over the Spur and specifically refused to approve or oversee construction of the Spur  
18 in any way. Tr. 215.  
19

20           Mr. Entz was initially uncertain as to whether the Spur had in fact been energized.  
21 Tr. 29, 205-07. However, Mr. Walker and Mr. Williams confirmed that the Spur was fully  
22 energized and operational, and in fact was serving a radio repeater tower at the Bar Four  
23 area owned and operated by the Havasupai Tribe. Tr. 29, 172, 190-91, 205-07. Mohave  
24 had no knowledge about the operational status of the Spur, and did not know it had been  
25 energized until the BIA's witnesses admitted that fact at the hearing. Tr. 385-86.  
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**E. Mohave, APS and UNS Electric Entered Into an Operations Protocol Related to Repairs on the Line.**

In November 2007, at the suggestion of members of the Commission, Mohave entered into an Operations Protocol with APS and UNS Electric, Inc. (“UNS”) concerning repairs and other assistance to the BIA related to the Line. *See* R-2, Tab 21. Under the Operations Protocol, when repair work is needed on the Line, the BIA first contacts Mohave to perform the work. If Mohave is unable to respond, the BIA then contacts UNS. If UNS is unable to respond, the BIA then contacts APS. In each case, the participating utility requires that the BIA reimburse it for the costs incurred. *Id.* By means of the Operations Protocol, the BIA has the resources of three utilities available, and the participating utilities are made aware of which other utilities have already been contacted.

As of the current date, outages have been addressed and the BIA has compensated the participating utilities for their repair work. While the BIA has complained about alleged “delays” in repairs to the Line, Mr. Walker was unable to identify any alleged delay after Mohave entered into the Operations Protocol in 2007. Tr. 165. Thus, the Operations Protocol has apparently resolved any concerns about outages and “delayed” repairs to the Line -- so long as the BIA agrees to reimburse the responding utility for the work performed.

...  
...

ARGUMENT

**I. The Commission Should Not Hear the BIA’s Complaint for Both Jurisdictional and Prudential Reasons.**

**A. The Commission Lacks Jurisdiction to Hear This Complaint by a Federal Agency Over Activities Outside of Mohave’s CCN and On Indian Lands.**

This dispute involves a unique situation: a federal agency, the BIA, requests that a state entity, the Commission, require that a non-profit electrical cooperative provide electrical power outside of its CCN, on two Indian reservations, and without a contract with the BIA, so that the BIA can provide retail electrical service to tribal members on the reservations. In this particular factual context, Mohave submits that the Commission lacks jurisdiction to grant the relief sought by the BIA.

Indian tribes are “unique aggregations possessing attributes of sovereignty over both their members and their territory.” *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (9<sup>th</sup> Cir. 2008)(quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)); *see also United States v. Enas*, 255 F.3d 662, 666 (9<sup>th</sup> Cir. 2001)(“the tribes are autonomous sovereigns”). In general, Indian tribes possess sovereign immunity in both federal and state court, absent some waiver or congressional abrogation. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9<sup>th</sup> Cir. 2008); *Burlington Northern & Santa Fe Railway Co. v. Vaughn*, 509 F.3d 1085, 1091 (9<sup>th</sup> Cir. 2007); *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9<sup>th</sup> Cir. 2004); *Lineen v. Gila River Indian Community*, 276 F.3d 489, 492 (9<sup>th</sup> Cir. 2002); *Filer v. Tohono O’odham Nation Gaming Enterprise*, 212 Ariz. 167, 170, 129 P.3d 78, 181 (App. 2006).

1 State regulation of Indians and Indian land is barred by both federal preemption and  
2 by tribal sovereignty. See *Blunk v. Arizona Department of Transportation*, 177 F.3d 879,  
3 881-82 (9<sup>th</sup> Cir. 1999). In *Central Machinery Company v. Arizona State Tax Commission*,  
4 448 U.S. 160 (1980), the Supreme Court held that comprehensive federal legislation,  
5 including the licensing of Indian traders, preempted Arizona's attempt to impose a  
6 transaction tax on a sale of farm equipment on the Gila River Reservation, even though the  
7 seller was not a licensed Indian trader:  
8

9  
10 *It is irrelevant that appellant is not a licensed Indian trader. . . . It is the existence of*  
11 *the Indian trader statutes, then, and not their administration, that preempts the field*  
12 *of transactions with Indians occurring on reservations. . . . Since the transaction in*  
13 *the present case is governed by the Indian trader statutes, federal law pre-empts the*  
14 *asserted state tax.*

15 448 U.S. at 164-66 (emphasis added); see also *Bryan v. Itasca County, Minnesota*, 426 U.S.  
16 373, 376 (1976)(state could not impose property tax on Indians on reservation);  
17 *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 173 (1973)(state could not  
18 impose income tax on Navajo Indian on reservation). As stated by the Supreme Court, "the  
19 policy of leaving Indians free from state jurisdiction and control is deeply rooted in the  
20 Nation's history." *McClanahan*, 411 U.S. at 168. Thus, Arizona courts cannot exercise  
21 civil jurisdiction over a lawsuit brought by a non-Indian against an Indian when the cause of  
22 action arose on the Indian reservation. *Williams v. Lee*, 358 U.S. 217, 223 (1959); see also  
23 *id.* at 220 ("Congress has also acted consistently on the assumption that the States have no  
24 power to regulate the affairs of Indians on a reservation").  
25

26 The Commission has also recognized that it has no jurisdiction over electrical  
27 facilities on tribal lands. See *In re TRICO Electric Company*, Decision No. 47107 (July 6,  
28

1 1973). In the *TRICO* decision, the electric utility owned certain electrical facilities on the  
2 Papago Reservation, which the utility had used to sell electrical power on the reservation.  
3 *Id.*, ¶ 4. The Commission recognized that it lacked jurisdiction over electrical facilities on  
4 the reservation, *id.*, ¶ 2, and that TRICO could transfer the facilities to the Papago Tribe  
5 because “The facilities to be transferred are not used and useful TRICO and their transfer  
6 will not impair TRICO’s ability to provide service to customers within TRICO’s certified  
7 area.” *Id.*, Conclusions of Law, ¶ 1.  
8

9  
10 While the Commission may generally have jurisdiction over Mohave as a public  
11 service corporation providing electrical service, Mohave respectfully submits that the  
12 Commission lacks jurisdiction to order Mohave to provide electrical service on an Indian  
13 reservation and outside of Mohave’s CCN area. The Commission has no jurisdiction over  
14 electrical facilities on a reservation, *see* Decision 47107 (July 6, 1975), and cannot require  
15 an Indian tribe to accept service from Mohave or even allow Mohave to enter tribal lands  
16 without the tribe’s permission. If the Commission were to extend Mohave’s CCN to include  
17 the reservation, the tribe could still exclude Mohave and receive service from a non-CCN  
18 provider. *See United States v. Becerra-Garcia*, 397 F.3d 1167, 1175 (9<sup>th</sup> Cir. 2005)  
19 (“Intrinsic in tribal sovereignty is the power to exclude trespassers from the reservation”);  
20 *see also* Tr. 430 (a state agency like the Commission cannot require the tribes to receive  
21 electrical service from any specific utility, including the holder of a CCN granted by the  
22 Commission). The Commission, and the State government as a whole, cannot even prevent  
23 the tribe from arresting Mohave’s employees and seizing Mohave’s equipment, if the tribe  
24 chose to do so. *See* Tr. 381-85; footnote 2, *supra* and Mohave’s Post-Hearing Supplement  
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1 to Record, Longtin 1/29/09 and 2/13/09 Affidavits and attached exhibits. It is obvious from  
2 what Mohave's employees have faced on both the Fort Mohave and Hualapai reservations  
3 that tribal authorities give no weight to a CCN or to authority granted to a state-regulated  
4 utility by the Commission. *Id.* Moreover, "[t]he protections of the United States  
5 Constitution are generally inapplicable to Indian tribes, Indian courts and Indians on the  
6 reservation." *United States v. Percy*, 250 F.3d 720, 725 (9<sup>th</sup> Cir. 2001).  
7

8  
9 The power of the federal government and the tribes in this area, and the  
10 corresponding lack of jurisdiction of the Commission, is further demonstrated by the  
11 Havasupai Tribe's construction of the 13.5 mile Spur with the approval of the BIA. The  
12 BIA and the Tribe never sought Commission approval of the Spur, and Mohave rejected any  
13 duty to provide engineering oversight or service related to the Spur. Yet the Havasupai  
14 Tribe, abetted by the BIA, went ahead and built the Spur – and the Commission and Mohave  
15 did not even know if it had been energized. The BIA and the Tribe now apparently expect  
16 Mohave to provide service to the Spur, even though it was built without any oversight or  
17 even agreement by the Commission or Mohave.  
18

19  
20 Moreover, the BIA seeks an order requiring Mohave to serve outside of its CCN and  
21 without a contract. Indeed, if the Commission were to require Mohave to serve electricity to  
22 the BIA at Long Mesa, the Commission would be ordering Mohave to provide electrical  
23 service approximately seventy miles outside of its CCN, and even further from Mohave's  
24 primary facilities and personnel, putting Mohave's employees at even greater personal risk  
25 of arrest and equipment seizure. The Commission would far exceed its power and authority  
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1 under Arizona law if the Commission were to require Mohave to provide such service,  
2 particularly on tribal lands where the Commission has recognized that it lacks jurisdiction.

3 The BIA's choice to bring this action in a state forum also implicates tribal  
4 sovereignty. As noted in the testimony of Robert Moeller, the BIA has a fiduciary duty to  
5 protect tribal sovereignty. *See HRI, Inc. v. Environmental Protection Agency*, 198 F.3d  
6 1224, 1245 (9<sup>th</sup> Cir. 2000); *see also* Tr. 428-30. Rather than protecting tribal sovereignty,  
7 the BIA has questioned it by bringing this case before the Commission. If the Commission  
8 were to exert jurisdiction over facilities on Indian lands, such as the Line, it would invade  
9 and damage the Havasupai and Hualapai Tribes' right to manage their own affairs under the  
10 protection of the federal government. If, on the other hand, the Tribes were to ignore the  
11 Commission's assertion of jurisdiction over the Line, that disregard would undercut the  
12 Commission's power and jurisdiction. By bringing this action before the Commission and  
13 demanding that the Commission assert jurisdiction over the Line, the BIA has created a  
14 situation in which tribal sovereignty and the Commission's jurisdiction collide, to the  
15 detriment of both. This jurisdictional collision is faced in real-life terms by Mohave's  
16 employees, who face arrest and seizure of the cooperative members' property by tribal  
17 representatives with guns drawn when trying to satisfy what they thought were the BIA's  
18 desires within Mohave's CCN area.

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24 **B. The Federal Government, Particularly the BIA, Has the Primary**  
25 **Responsibility to Ensure That the Tribes Receive Electrical Service, and**  
26 **Should Not Be Allowed to Shift that Obligation to Mohave.**

27 Federal courts have also made it clear that the primary duty of providing support and  
28 protection to the Indians is owed by the federal government. "In general, a trust relationship

1 exists between the United States and Indian Nations.” *Marceau v. Blackfeet Housing*  
2 *Authority*, 519 F.3d 838, 844 (9<sup>th</sup> Cir. 2008)(citing *Cherokee Nation v. Georgia*, 30 U.S. 1,  
3 17 (1831)). As stated by the Supreme Court, “a fiduciary relationship necessarily arises  
4 when the Government assumes [] elaborate control” over the property and lands of Indians.  
5 *United States v. Mitchell*, 463 U.S. 206, 224 (1983)(holding that statutes giving the federal  
6 government the right to manage Indian resources created a fiduciary relationship).  
7

8 The Supreme Court recognized “the undisputed existence of a general trust  
9 relationship between the United States and the Indian people” such that there exists “the  
10 distinctive obligation of trust incumbent on the Government in its dealings with these  
11 dependent and sometimes exploited people.” *Id.* at 225; *see also Morton v. Ruiz*, 415 U.S.  
12 199, 236 (1974)(because of the Snyder Act and federal obligations to the Indians, “[t]he  
13 overriding duty of our Federal Government to deal fairly with Indians wherever located has  
14 been recognized by this Court on many occasions”); *Seminole Nation v. United States*, 316  
15 U.S. 286, 296 (1942)(acknowledging the federal “fiduciary duty of the Government to its  
16 Indian wards”).  
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19 As noted by the Ninth Circuit Court of Appeals, “This fiduciary relationship  
20 conceived by Justice John Marshall [in *Cherokee Nation*] ascribes to the government both a  
21 political duty and a moral commitment to the Indians.” *Dewakuku v. Martinez*, 271 F.3d  
22 1031, 1040 (9<sup>th</sup> Cir. 2001). In short, “The federal government bears a special trust  
23 obligation to protect the interests of Indian tribes, including protecting tribal property and  
24 jurisdiction.” *HRI, Inc. v. Environmental Protection Agency*, 198 F.3d 1224, 1245 (9<sup>th</sup> Cir.  
25 2000).  
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1 In this instance, there is no doubt that the BIA has assumed "elaborate control,"  
2 *Mitchell*, 463 U.S. at 224, over the provision of electrical service to the Havasupai and  
3 Hualapai reservations. The Snyder Act authorizes the BIA to provide electrical service to  
4 Indian tribes, and the BIA has done so in numerous situations. The BIA initially provided  
5 service to the Havasupai and Hualapai reservations by means of generators, issued an RFQ  
6 for electrical service to the reservations, contracted with Mohave, and approved easements  
7 for the Line. The BIA has read meters, issued bills, repaired lines and serviced accounts in  
8 the Supai village -- and has requested that Mohave provide service on the Hualapai  
9 reservation to various areas identified by the Hualapai Tribe.  
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12 In short, the BIA created a dependency on electricity on the part of the Tribes, and  
13 has overseen and monitored all electrical service on the two reservations since the 1970s.  
14 Tr. 426-27, 460-61. By creating the dependence on electricity and assuming control over its  
15 provision, the BIA has assumed a fiduciary duty to provide electrical energy to the two  
16 reservations. *Mitchell*, 463 U.S. at 224. The BIA's fiduciary duty extends to repairing and  
17 maintaining facilities on tribal lands, including the Line. The BIA now seeks, by means of  
18 this action against Mohave, to impose its own fiduciary duty upon Mohave and its members.  
19 Tr. 462.  
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22 The BIA contends that it incurred more than \$125,000 in repair costs on the Line  
23 during the 2004-2008 period. Under the Contract in effect from 1982 to 1992, the BIA was  
24 responsible for those and other costs through the Facilities Charge. By bringing this  
25 Complaint against Mohave, the BIA seeks to impose those and other costs on Mohave and  
26 its members. Moreover, as noted in the testimony of Dan Neidlinger, those costs are not  
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1 covered by the Large Commercial rate under which the BIA has been billed. The full costs  
2 of providing electrical service to the Havasupai and Hualapai reservations are a federal  
3 responsibility, not the responsibility of a nonprofit rural electrical cooperative like Mohave.  
4  
5 It was because of this unfunded mandate forced upon Mohave that the cooperative's Board  
6 of Directors determined to abandon and quitclaim the Line to the BIA and the Tribes. The  
7 Commission should approve that decision, and ensure that Mohave's members are not  
8 unfairly burdened, by rejecting the BIA's complaint and denying relief.  
9

10 **C. For Prudential Reasons, the Commission Should Decline to Hear the**  
11 **BIA's Complaint or Otherwise Become Involved in the BIA's Trust**  
12 **Relationship with the Tribes.**

13 As discussed above, the Commission has no jurisdiction over facilities on Indian  
14 reservations. *See Central Machinery Company v. Arizona State Tax Commission*, 448 U.S.  
15 160 (1980); *In re TRICO Electric Company*, Decision No. 47107 (July 6, 1973). However,  
16 even if the Commission has jurisdiction in this matter, there exist numerous reasons why the  
17 Commission should decline to assert oversight over the Line or otherwise grant the BIA's  
18 requested relief.  
19

20 First, the Line extends nearly 70 miles outside of Mohave's CCN area, crossing two  
21 Indian reservations. To Mohave's knowledge, the Commission has never before compelled  
22 a regulated utility to provide service to users 70 miles from the borders of the utility's CCN.  
23 Such a requirement would be an unprecedented expansion of the concept of a "service  
24 area," or the obligation to serve that is assumed by regulated utilities in return for the grant  
25 of a CCN. Granting the relief sought by the BIA would also entangle the Commission in the  
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1 provision of electrical service on Indian reservations, intervening in the trust relationship  
2 between the federal government and the Tribes, and potentially impacting tribal sovereignty.

3  
4 Moreover, the Contract under which the BIA seeks its relief, assuming that the BIA  
5 had properly exercised its options to renew, expires in April 2012. Likewise, the two tribal  
6 easements crossing the Havasupai and Hualapai reservations (to the extent they have not  
7 been already abandoned by Mohave) expire soon, and the Boquillas easement has already  
8 expired. Without the easements, Mohave has no right to use the Boquillas land and will  
9 soon have no rights to use tribal lands at all. Once the tribal easements are expired, either or  
10 both tribes could eject Mohave from the reservation, arrest its employees and seize its trucks  
11 – and Mohave would have no recourse at all. Tr. 385, 421-22. Even with easements in  
12 hand and having reasonably requested all permission to go upon tribal lands, Mohave's  
13 employees continue to face exactly these risks right up to the present day, even within  
14 Mohave's CCN area. *See* Mohave's Post-Hearing Supplement to Record, Longtin 1/29/08  
15 and 2/13/09 Affidavits and attached exhibits. Granting the BIA its requested relief would  
16 only temporarily postpone a resolution of the fundamental question of providing electrical  
17 service on the two reservations, and in fact would give the BIA further grounds to ignore its  
18 own responsibilities to provide that service.  
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22 If the Commission rules that the Contract has expired but still grants the BIA its  
23 requested relief, the Commission would effectively be ordering Mohave to provide electrical  
24 utility service on an Indian reservation with no long term contract at all, subjecting Mohave  
25 to undefined liabilities and burdening Mohave's members with the expense of maintaining  
26 electrical facilities as much as 70 miles from Mohave's CCN and primary resources. Thus,  
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1 even if the Commission has jurisdiction over this matter, which Mohave disputes, there are  
2 public policy and fairness reasons why the Commission as a matter of prudence should  
3 refuse to grant the relief requested by the BIA.  
4

5 **II. The October 1981 Contract Between Mohave and the BIA Expired in 1992 and**  
6 **No Longer Controls Mohave's Relationship with the BIA or the Tribes.**

7 The initial term of the Contract expired in April 1992, although the Contract also  
8 contained the provision that "Mohave consents to the Government's right and option to  
9 renew this Contract for two (2) additional ten (10) year periods." R-2, Tab 3 at 00014.  
10 Here, it is clear that the BIA never effectively exercised its renewal option and that the  
11 Contract expired in April 1992, as even the BIA grudgingly seems to acknowledge. *See*  
12 BIA's Notice Re: Contract Effectiveness (contending that the Contract is still in effect but  
13 "immaterial"); Stip. at 10 (the BIA contends that it is "immaterial . . . whether the Contract  
14 is currently in effect," but also disputes that the Contract has been terminated).  
15

16 Arizona courts strictly construe option agreements "because such provisions allow  
17 the optionee freedom to exercise nor not exercise the option, whereas the optioner is bound  
18 by the option." *Andrews v. Blake*, 205 Ariz. 236, 243, 69 P.3d 7, 14 (2003); *see also Rogers*  
19 *v. Jones*, 126 Ariz. 180, 182, 613 P.2d 844, 846 (App. 1980) ("the law is crystal clear that an  
20 option agreement must be strictly construed, in that it must be exercised in exact accord with  
21 its terms and conditions"); *Mack v. Coker*, 22 Ariz. App. 105, 107, 523 P.2d 1342, 1344  
22 (App. 1974) ("an option must be exercised strictly according to its terms and conditions");  
23 *Oberan v. Western Machinery Co.*, 65 Ariz. 103, 109, 174 P.2d 745, 749 (1946)("an option  
24 must exercised strictly according to the terms and conditions in the option").  
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1 An option must be exercised within a reasonable time: “With regard to option  
2 contracts, courts generally hold that a reasonable time period will be judicially imposed  
3 where none is specified in the agreement.” *Byke Construction Co. v. Miller*, 140 Ariz. 57,  
4 59, 680 P.2d 193, 195 (App. 1984); *see also Mack*, 22 Ariz. App. at 108, 523 P.2d at 1345  
5 (courts impose a reasonable time on option agreement that does not specify a time for  
6 performance).<sup>8</sup> The Arizona Supreme Court has also held that “time is of the essence in  
7 option contracts, even when the contract does not include an express statement to that  
8 effect.” *Andrews*, 205 Ariz. at 246, 69 P.3d at 17.  
9

10  
11 The Arizona Supreme Court has also set a high standard before allowing equity to  
12 excuse a failure to strictly comply with the terms of an option agreement, specifically  
13 refusing to allow an excuse of “mere negligence.” *Id.* at 247, 69 P.3d at 18. Thus, an  
14 optionee’s failure to strictly comply with the terms of an option to renew “may be equitably  
15 excused *only* when the failure is cause by incapacity, fraud, misrepresentation, duress,  
16 undue influence, mistake, estoppel, or the [optionor’s] waiver of its right to receive notice.”  
17 *Id.* at 247, 69 P.3d at 18 (emphasis added). The “mistake” mentioned above “cannot be  
18 based on a negligent act or omission” and “mere forgetfulness is not the equivalent of a  
19 mistake.” *Id.* at 247 n.6, 69 P.3d at 18 n.6. This high standard “serves the important goal of  
20 giving finality and predictability to a contract’s meaning.” *Id.* at 247, 69 P.3d at 18. Even if  
21 the optionee shows that its failure to exercise the option fell within one of the narrow  
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25 <sup>8</sup> The BIA has argued at times that, because the contract did not explicitly  
26 specify a time by which the renewal option had to be exercised, the BIA could renew at any  
27 time. *See* BIA’s Complaint, ¶ 14; BIA’s Opposition to Mohave’s Motion to Dismiss at 14.  
28 Crediting such an argument would mean that the option contract violates the Rule Against  
Perpetuities and A.R.S. § 33-261. *See Byke*, 140 Ariz. at 59-60, 680 P.2d at 195-96.

1 categories allowed by the Supreme Court, the optionee still has further hurdles before it can  
2 receive relief:

3 We further hold that, if the optionee shows one of the aforementioned circumstances  
4 under which equitable relief may be available, an optionee's nonnegligent failure to  
5 timely exercise an option to renew . . . may be excused only if the *three prerequisites*  
6 of the Corbin rule are met, namely: (1) *the delay was short*, (2) *the delay did not*  
7 *prejudice the [optionor], and (3) the [optionee] would suffer a forfeiture or other*  
*substantial hardship if relief is not granted.*

8 *Id.* at 247, 69 P.3d at 18 (emphasis added).

9 The BIA clearly has no right to relief either under the Contract or under a theory of  
10 equitable relief. Mohave wrote the BIA in March 1992, prior to expiration of the first term,  
11 asking the BIA if it wanted to renew. *See* Ex. R-2, Tab 9. The BIA failed to respond at that  
12 time. Instead, the BIA waited until more than a year later, April 19, 1993, at which time it  
13 wrote Mohave seeking simultaneously to both (1) to exercise its option to renew, and (2)  
14 "re-negotiate and amend" the Contract. Ex. R-2, Tab 10; *see also* Stip., ¶ 25. A contract  
15 cannot be both renewed and re-negotiated at the same time and thus the BIA's April 1993  
16 letter constitutes a counter-offer of some variety rather than an exercise of an option to  
17 renew. Moreover, attempting to exercise an option to renew more than a year after the  
18 initial term expired clearly exceeds any "reasonable time" allowed to exercise the option  
19 under the Contract.  
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23 After the April 1993 letter, the BIA continued to send ineffective communications  
24 purporting to both renew and re-negotiate the Contract at the same time, none of which  
25 constitute effective exercises of the option to renew. *See* R-2, Tab 13; *see also* Stip. ¶ 32.  
26 Internally, the BIA has acknowledged that the Contract expired, Stip. ¶ 26, and the BIA has  
27 made ambiguous statements before this Commission as to whether the BIA contends that  
28

1 the Contract was ever effectively renewed. *See* Stip. at p. 10, ¶ B; *see also* BIA’s Notice  
2 Re: Contract Effectiveness. The BIA has also contended that it has no duty to pay the  
3 facilities charge required under the 1982 Contract, seeking to impose those unreimbursed  
4 operations and maintenance costs for the Line on Mohave. *See* BIA’s Complaint at 15.  
5 Under Arizona law, these facts clearly indicate that the BIA failed to exercise its option to  
6 renew the Contract in a timely manner.  
7

8           The BIA also lacks grounds for equitable relief to excuse its failure to exercise its  
9 option to renew in a timely manner. The BIA has never contended, and has never presented  
10 any evidence, that it was the victim of fraud, incapacity, mistake or any of the other  
11 circumstances outlined in *Andrews*. Nor does it meet the “three prerequisites” needed to  
12 excuse its delay required under *Andrews*: the BIA’s delay was lengthy, Mohave was  
13 prejudiced by being forced to bear unreimbursed costs during the 1997-2003 period and  
14 would be further prejudiced if forced to bear such costs in the future, and the BIA has not  
15 suffered a forfeiture but has instead gained possession of the Line by reason of Mohave’s  
16 abandonment. Mohave remains willing to provide the BIA with electrical power at  
17 Mohave’s Nelson substation, so long as the BIA pays for it, and the BIA also could make  
18 other arrangements to receive power from other sources. The BIA has no grounds to merit  
19 any equitable relief from its failure to renew. Because of the BIA’s failure to renew the  
20 Contract in a timely manner, Mohave and the BIA now have a month-to-month relationship,  
21 rather than a long-term contract, and the 1982 Contract has no further relevance.  
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1 **III. The 70-Mile Line, Despite Variable Terminology in Different Documents,**  
2 **Always Functioned as a Transmission Line and Both the Commission and**  
3 **Mohave Treated It as Such.**

4 **A. The Commission in Its Decisions Has Recognized that the Line Is a**  
5 **Transmission Line.**

6 A.R.S. § 40-201(22) defines an electrical utility's "service territory" as the  
7 geographic area in which the utility "maintains electric distribution facilities." A.R.S. § 40-  
8 201(6) in turn defines "electric distribution facilities," specifically carving out "electric  
9 transmission facilities." In contrast, "electric transmission facilities" are any property so  
10 classified by the federal energy regulatory commission or the Commission. A.R.S. § 40-  
11 201(11). Thus, the classification of the Line as either a distribution line or a transmission  
12 line determines whether or not the recipients of power from the Line fall within Mohave's  
13 service territory.  
14

15 The Commission in its prior decisions has uniformly classified the Line as a  
16 transmission line, rather than as a distribution line serving Mohave's members. Thus, the  
17 Commission when approving borrowing for the Line stated that the Line extended "*from*  
18 applicant's certified area" to cross the Hualapai and Havasupai reservations. Decision No.  
19 51491, Findings of Fact, ¶ 2 (Oct. 22, 1980)(emphasis added). The Commission further  
20 found that the Line was constructed pursuant to a contract with the BIA and intended "to  
21 supply electric energy to serve existing and future residential and commercial installations  
22 on the Hualapai and Havasupai Indian reservations." *Id.*, ¶ 3. Thus, the Commission  
23 recognized that the Line was located *outside* Mohave's CCN area and was constructed  
24 solely pursuant to a contract by which Mohave would provide power to the BIA, which  
25 would in turn deliver the power on a retail basis to serve users on the reservations. The  
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1 Commission further held that the Line would serve “consumers,” not Mohave’s members.  
2 *Id.*, Conclusions of Law, ¶ 1. Nothing in Decision No. 51491 suggests that the Line was a  
3 distribution line or that the recipients of power though the Line would become Mohave’s  
4 members or retail electric customers.  
5

6 Two years later, in Decision No. 53174 (August 11, 1982), the Commission  
7 specifically held that the Line was a “*transmission line* dedicated to serving the Hualapai  
8 Indian Reservation.” *Id.* at p. 8 (emphasis added). In that Decision, which used a 1982 test  
9 year assuming that the Line was in service, the Commission explicitly stated that the Line  
10 “is not used and useful, will not be used and useful, and was never intended to be used and  
11 useful in the provision of electric service to [Mohave’s] ratepayers. [Mohave] has  
12 recognized this inequity [of asking Mohave’s ratepayers to pay for the Line] by excluding  
13 the transmission line from rate base and proposing to segregate all expenses and revenues  
14 associated with the line.” *Id.* (emphasis in original). Thus, the Commission unequivocally  
15 held that the Line was a transmission line which did not serve Mohave’s members.<sup>9</sup>  
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19 Nothing in the subsequent Decision No. 57172 (Nov. 29, 1990) indicates that the  
20 Commission has revised its classification of the Line as a transmission line. As directed by  
21 the Commission in Decision No. 53174, Mohave segregated all expenses and revenues  
22 associated with the Line so as to not require Mohave’s members and other classes of  
23 customers to subsidize the Line. Neidlinger Testimony at 4. The Commission specifically  
24 noted that Mohave’s new rate design would “establish separate rates for [Mohave’s] three  
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26 <sup>9</sup> The Commission also noted that Mohave provided electric service to the  
27 public in Mohave County. *Id.*, Findings of Fact, ¶ 1. However, none of the Line lies within  
28 Mohave County.

1 large contract customers,” the BIA, Chemstar and Cyprus Baghdad, as opposed to Mohave’s  
2 rates for residential and commercial customers. Decision No. 57172 at 5. Unlike Mohave’s  
3 other contracts, the majority of revenues under the BIA contract came from facilities charge,  
4 rather than “customer sales.” See Neidlinger Testimony, Ex. DLN-2. The Commission  
5 ultimately approved a specific contract rate available only to the BIA. Nothing in the  
6 Commission’s Decision constituted a reclassification of the Line; rather, the Decision  
7 recognized that the BIA was in a separate class from Mohave’s residential, commercial and  
8 even other contract customers.  
9  
10

11 **B. The 70-Mile Line Has Always Functioned as a Transmission Line**  
12 **Carrying Contracted Power to a Single User, the BIA, Which Steps the**  
13 **Power Down for Its Own Distribution Uses.**

14 The BIA and its witness Leonard Gold have argued that the 24.9 kV voltage of the  
15 Line is determinative, requiring a conclusion that the Line is a distribution line under  
16 Arizona law and the Commission’s rules and practices, despite the Commission’s  
17 classification of the Line as a transmission line in Decision No. 53174. The BIA and Mr.  
18 Gold support this contention by focusing of selected phrases in various documents produced  
19 in this matter. However, a review of the function and operation of the Line supports the  
20 Commission’s transmission classification.  
21

22 As detailed in the testimony presented in this docket, the Line is located in a remote  
23 area of the State, far from the center of Mohave’s CCN and electric facilities. Tr. 106-07,  
24 237-38; *see also* Ex. R-2, Tab. 7. The Line runs in a relatively straight line for 70 miles  
25 from Mohave’s Nelson substation to what used to be a “government substation” at Long  
26 Mesa. Tr. 236, *see also* Ex. R-2, Tab 3. The Line often diverges widely from the closest  
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1 road, Indian Route 18, again consistent with a transmission line. Tr. 106-07. There is only  
2 one recloser along the entire length of the Line, unlike a distribution line and supporting its  
3 classification as a transmission line. Tr. 236-38, 377-78. At Long Mesa, the power was at  
4 one time stepped down for retail distribution by the BIA in Supai. Ex. R-2, Tab 3; Tr. 247-  
5 48, 268-70, 380; *see also* A.R.S. § 40-201(21)(BIA is not a retail customer because it resells  
6 power to residents in Supai). Following removal of the generators and transformers at Long  
7 Mesa, the BIA now steps the power down in the Supai village below the canyon rim. Tr.  
8 169 (Walker testimony.) Once the BIA has received the power, it resells the power to retail  
9 users in Supai. Tr. 71, 153, 184. There are a minimal number of power drops along the  
10 Line, approximately one per every 5.8 miles. Tr. 153. Mohave's operations and  
11 engineering manager always considered the Line to be a transmission line, rather than a  
12 distribution line, because it was "used as a transmission line." Tr. 325-26, 338.

13  
14  
15  
16 The voltage of a power line is not determinative as to whether it is a distribution or  
17 transmission line. For example, Thomas Hine testified that all of WAPA's lines are  
18 classified as transmission lines, even small lines with voltage as low as 34.5 kV. Tr. 399.  
19 The Commission has already determined that the Line is a transmission line in Decision No.  
20 53174, and a review of the functionality and operation of the Line confirms that  
21 determination.

22  
23  
24 **IV. Mohave's Provision of Electrical Power to Isolated Users Along the Line as an**  
25 **Accommodation to the BIA and the Tribes Did Not Convert the Line Into a**  
26 **Distribution Line or Create a Permanent Service Territory for Mohave.**

27 The BIA seeks a declaration that the Line is part of Mohave's "service territory."  
28 Arizona law defines "service territory" as "the geographic area in which a public power

1 entity . . . owns, operates, controls or maintains electric distribution facilities . . . and that  
2 additional area in which the public power entity. . . has agreed to extend electric distribution  
3 facilities . . . , whether established by a certificate of convenience and necessity, by official  
4 action by a public power entity or by contract or agreement.” A.R.S. § 40-201(22); *see also*  
5 A.R.S. § 40-202(B)(4)(recognizing service areas can be established by a CCN or by contract  
6 or agreement among utilities).  
7

8  
9 There is no dispute that the bulk of the Line lies outside Mohave’s CCN.<sup>10</sup> In fact,  
10 parts of the Line cross APS’s CCN area. *See* Ex. R-3. Moreover, as demonstrated above,  
11 the Line is not a “distribution line,” but rather a “transmission line” both functionally and  
12 under Decision No. 53174. It is also clear that Mohave’s only “agree[ment]” to “extend  
13 electric distribution facilities,” A.R.S. § 40-201(22), to the area involved the 1982 Contract,  
14 which is now expired, and additional service drops requested by the BIA for which Mohave  
15 served as the BIA’s agent. Tr. 101-05; Ex. R-1. With the Contract expired and the Line  
16 abandoned, there is no longer a basis for the BIA to argue that the Line falls within  
17 Mohave’s service territory.  
18  
19

20  
21  
22  
23 <sup>10</sup> The BIA also cannot reasonably claim that the Line falls within the “run along  
24 rights” for an area contiguous to Mohave’s CCN under A.R.S. § 40-281(B). *See Electrical*  
25 *District No. 2 v. Arizona Corporation Commission*, 155 Ariz. 252, 257, 745 P.2d 1383,  
26 1388 (1987)(restaurant that was merely 50 feet outside the city limits was *not* contiguous;  
27 the “ordinary course of business” does not include the extension by the utility of its system  
28 into a community or territory that is not then served by the utility). The Long Mesa end of  
the Line is approximately 70 miles from Mohave’s CCN boundary, and cannot be construed  
as “contiguous” to Mohave’s CCN or necessary in “the ordinary course” of Mohave’s  
“business.”

1 Further, none of the twelve individual accounts along the Line between the Nelson  
2 and Long Mesa substations support a finding that the Line should be included in Mohave's  
3 service territory:  
4

5 *The BIA's Fire Tower and Radio Repeater.* These two accounts, both of which are  
6 located outside Mohave's CCN and on reservation land, simply involve the BIA using  
7 Mohave as its agent to serve itself. They cannot be characterized as Mohave's retail  
8 accounts or turn the line into a distribution line. The BIA clearly has authority to serve itself  
9 electricity on the reservations, Tr. 417-18, and could set up generators to do so if it chose to  
10 do so. (Mohave does provide electrical service to the BIA in Peach Springs, but that service  
11 is not at issue here. Tr. 369.)  
12

13 *The Six Hualapai Tribal Accounts.* These six accounts are all on the Hualapai  
14 reservation.<sup>11</sup> The BIA has a trust obligation to serve the Hualapai, and Mohave provided  
15 the service to the accounts as the BIA's agent. *See* Ex. R-2. As tribal accounts for facilities  
16 such as pumps and wells, they do not create a retail relationship or turn the line into a  
17 distribution line. (As with the BIA, Mohave also provides power to the Hualapai Tribe in  
18 Peach Springs, but that service is not at issue here. Tr. 366.)  
19  
20

21 *The Telephone Tower on the Havasupai Reservation.* The expired Contract between  
22 Mohave and the BIA explicitly mentioned the telephone company. Ex. R-2, Tab 3 at 00013;  
23 Tr. 358. The Contract clearly contemplated that Mohave would provide electrical power to  
24

25 \_\_\_\_\_  
26 <sup>11</sup> One of the six Hualapai accounts is within Mohave's CCN area and could be  
27 handled by another line, as Mohave has agreed to do and since the hearing has attempted to  
28 install. Tr. 54-55, 366-67; Mohave's Post-Hearing Supplement to Record, Longtin 2/13/09  
Affidavit and attached exhibits. Moreover, the BIA could serve that tribal account on its  
own even though it lies within Mohave's CCN area. Tr. 417.

1 the telephone company as the BIA's agent, and Mohave's doing so did not convert the Line  
2 into a distribution line. Moreover, the telephone tower was clearly intended to serve the  
3 Havasupai Tribe and the BIA could legally serve the account if it chose to do so. Tr. 419-  
4 20.  
5

6 *The Boquillas/Diamond A Ranch.* This ranch, which is now owned by the Navajo  
7 Tribe, but not on Navajo reservation lands, lies between the Havasupai and Hualapai  
8 reservations and far from Mohave's CCN area. The prior owners of the ranch granted a 25-  
9 year easement (now expired) to Mohave for the line, with the provision of electric service  
10 understood as part of the deal. Now that the 25-year easement has expired, Mohave has no  
11 basis on which to serve the account. Moreover, since the account involves Indian purposes,  
12 the BIA could certainly serve the account if it chose to do so, even though it is not on  
13 reservation lands. Tr. 416-17. Mohave's provision of power to this account in exchange for  
14 the now-expired easement should not be deemed to have converted the Line into a  
15 distribution line.  
16  
17

18 *The Bravo Account.* This account involves Hualapai tribal members living on the  
19 Hualapai reservation and outside Mohave's CCN area. Mohave could only serve the  
20 account as the agent of the BIA or the Hualapai, Tr. 418, and this single account standing  
21 alone does not convert a transmission line into a distribution line.  
22

23 *The Cesspooch Account.* This account involves Hualapai members living on the  
24 Hualapai reservation, but falls within Mohave's CCN area. Mohave would still need  
25 permission from the Hualapai to serve the account, but could serve the account through  
26 other means, without using the 70 mile line, as it has agreed to do. Tr. 54-55, 366-67.  
27  
28

1 Following the hearing in this matter, Mohave took steps to serve the Cesspooch account  
2 through a new line, in order to remove any doubt concerning the use of the abandoned 70-  
3 mile line itself for such service. Mohave's Post-Hearing Supplement to Record, Longtin  
4 2/13/09 Affidavit, at ¶¶ 2-4 and attached exhibits. The BIA or the Hualapai Tribe also has  
5 the legal authority to serve the Cesspooch account, even though the account is within  
6 Mohave's CCN area. Tr. 418-19. The Tribe could also exclude Mohave from serving  
7 Cesspooch if it wanted to do so, even though the account is within Mohave's CCN area. Tr.  
8 420-21; *see also* Mohave's Post-Hearing Supplement to Record, Longtin 2/13/09 Affidavit,  
9 at ¶¶ 6-8 and attached exhibits.

12 Most of the twelve accounts do not have people living at them, and Mohave could  
13 not have served them without the explicit or implied permission of the BIA and the Tribes.  
14 All of the accounts are still receiving electricity. The BIA could disconnect these accounts  
15 at any time, or could read their meters if the BIA wanted to recover the costs, but the BIA  
16 has not done so.

18 Moreover, the "small static number" of accounts along the Line, standing alone,  
19 would not be sufficient to result in regulation of Mohave as a public service corporation.  
20 *See Southwest Gas Corporation v. Arizona Corporation Commission*, 169 Ariz. 279, 287,  
21 818 P.2d 714, 722 (App. 1991)(interstate transmitter of natural gas also delivered natural  
22 gas to ten Arizona consumers, which represented a small percentage of its total sales, and it  
23 had no plans to solicit other Arizona consumers; ten sales were insufficient to support a  
24 finding that the company was a public service corporation). The small number of accounts,  
25  
26  
27  
28

1 including only three accounts with residences, are not sufficient to convert the area traversed  
2 by the Line into Mohave's service territory.

3 **V. Mohave Validly and Effectively Abandoned and Quitclaimed the Line to the**  
4 **BIA and the Tribes.**

5 Arizona law provides that a public service corporation must receive authorization  
6 from the Commission before disposing of any part of its lines or system that is "necessary or  
7 useful in the performance of its duties to the public." A.R.S. § 40-285(A). However,  
8 "Nothing in this section shall prevent the sale, lease or other disposition by any such  
9 corporation of property which is not necessary or useful in the performance of its duties to  
10 the public . . . ." A.R.S. § 40-285(C). These sections were intended "to prevent a utility  
11 from disposing of resources devoted to providing its utility service, thereby 'looting' its  
12 facilities and impairing its service to the public." *American Cable Television, Inc. v.*  
13 *Arizona Public Service Company*, 143 Ariz. 273, 277, 693 P.2d 928, 932 (App. 1983).  
14 Likewise, the Commission's rules provide that "Any utility proposing to discontinue or  
15 abandon utility service currently in use by the public shall prior to such action obtain  
16 authority therefor from the Commission." R14-2-202(B)(1).  
17  
18  
19

20 In this instance, the largest portion of the Line is located outside of Mohave's CCN.  
21 Rather than serving the public, the Line was primarily used to provide electric power under  
22 a specific contract to the BIA and a small number of accounts along the Line designated by  
23 the BIA. Once the Contract lapsed, and it became clear that no new long-term contract  
24 would be formed, the Line was no longer "necessary or useful in the performance of  
25 [Mohave's] duties to the public." A.R.S. § 40-285(A); *see also* Decision No. 53174; Tr.  
26 292 (the Line was not used and useful to Mohave's members); Tr. 364-65 (the Line was  
27  
28

1 outside Mohave's CCN and the Contract had expired, so an application under Section 40-  
2 285 was not needed). In fact, once Mohave stopped collecting the facilities charge, the Line  
3 constituted a drain on Mohave's resources and a burden on Mohave's members. Neidlinger  
4 Supp. Testimony at 5, l. 23 through 6, l. 3, and 7, ll. 9-17.  
5

6 The Contract itself contemplated that Mohave would remove the Line, but Mohave  
7 decided to leave that decision to the BIA and the Tribes, as the parties which might still  
8 make use of the Line. Tr. 357. Once Mohave abandoned the Line, it also had to abandon  
9 service to various accounts along the Line. For example, Mohave can (and has attempted  
10 to) make arrangements to serve the Cesspooch account, which lies within Mohave's CCN  
11 area, but Mohave cannot serve the Bravo or Boquillas accounts, which are located well  
12 outside Mohave's CCN. Tr. 295, 355.  
13  
14

15 Mohave's Board acted within its rights and responsibilities to Mohave's members  
16 when it determined to abandon the line. Under federal law, it is the BIA's fiduciary duty to  
17 provide support to the Tribes, including any need for electrical power, *not* Mohave's. In  
18 contrast, Mohave's duties as a non-profit electrical cooperative run to its members, who  
19 were being forced to bear the costs of the BIA's duty and trust obligation to the Tribes. By  
20 declining to remove the Line and instead abandoning it to the BIA and the Tribes, Mohave  
21 did not interfere or impede the BIA's operations in any way. Rather, the BIA remains  
22 capable of using and maintaining the line, reading meters for any accounts along of the  
23 Line, and continuing to provide power to Supai. Mohave remains willing to sell power to  
24 the BIA at Mohave's Nelson substation at Mohave's lowest approved rate. The BIA, if it  
25 chose, could instead start its own electrical utility or re-install generators at Long Mesa and  
26  
27  
28

1 provide for power to Supai by that method. Tr. 193; *see also* Tr. 246 (generators used by  
2 the Hualapai Tribe at Grand Canyon Skywalk and could also be used at Long Mesa).

3  
4 No acceptance is needed for an effective abandonment. *See Mason v. Hasso*, 90  
5 Ariz. 126, 130, 367 P.2d 1, 4 (1961)(“abandonment requires no act of the other party before  
6 it is complete. It is entirely unilateral and the moment the intention to abandon unites with  
7 acts of relinquishment, the abandonment is complete”). Moreover, even if an acceptance  
8 were necessary, the Havasupai Tribe’s construction of the 13-mile spur, which the BIA  
9 approved for placement in its right of way, constitutes an acceptance of Mohave’s quitclaim  
10 of the Line. Thus, the complete 70-mile Line has reverted to the owners of the fee land on  
11 which it stands, and the BIA has a fiduciary duty to maintain it for the benefit of the Tribes.

12  
13 **VI. Because of the Effective Abandonment and Quitclaim of the Line, Mohave Is**  
14 **Not Responsible for Operation and Maintenance Costs Associated with the Line.**

15  
16 Prior to 1997, the BIA reimbursed Mohave for operations and maintenance costs on  
17 the Line through the facilities charge. The BIA has since disputed that it should pay any  
18 facilities charge and has sought to place the costs of operation and maintenance on Mohave  
19 and its members. *See* BIA’s Complaint at 15; Ex. R-2, Tab 13. As Mr. Neidlinger  
20 established in his supplemental testimony, the BIA contract rate included the revenues  
21 generated by all elements of the facilities charge, while the Large Commercial & Industrial  
22 Rate (under which the BIA is currently being charged) was not designed to recover any of  
23 the costs of the Line. Therefore, neither the BIA contract rate nor the LC&I rate recovers  
24 the cost of service unless coupled with the facilities charge. Neidlinger Supp. Testimony at  
25  
26

27 6.  
28

1 Following the BIA's failure to renew the 1982 Contract and unwillingness to  
2 negotiate a new contract, Mohave effectively abandoned and quitclaimed the 70-mile Line  
3 and related easements to the BIA and the Tribes. Because Mohave, a non-profit electrical  
4 cooperative, no longer owns the Line, Mohave and its members have no duty to operate and  
5 maintain it.  
6

7 Moreover, because the Line and easements have reverted to the underlying fee  
8 ownership of the land, it is now the BIA which has a fiduciary duty under federal law to  
9 protect and maintain the Line. *See United States v. Mitchell*, 463 U.S. 206, 224 (1983); *HRI*  
10 *v. Environmental Protection Agency*, 198 F.3d 1224, 1245 (9<sup>th</sup> Cir. 2000); *see also* Tr. 462-  
11 3. Rather than attempting to shift that burden to Mohave and its members, the BIA could  
12 employ repairpersons and meter readers to fulfill its obligations related to the Line, much as  
13 it does with the electrical facilities in Supai. Tr. 184. It is completely unfair and improper  
14 to impose that burden on Mohave and its members, when Mohave no longer owns the Line  
15 and the Line does not benefit Mohave's members.  
16  
17

18 **VII. Mohave Acted Properly When Moving the Meter to Its Nelson Substation and**  
19 **Placing the Burden of Reading Any Individual Meters Along the Line on the**  
20 **BIA.**

21 Once the 1982 Contract expired and it became clear that the parties would not be able  
22 to negotiate a new contract, Mohave had no continuing right to operate on either the  
23 Hualapai or Havasupai reservation. In light of that fact, Mohave acted properly in moving  
24 the meter off reservation lands, and billing the BIA based on meter readings at the Nelson  
25 substation. The BIA and all other accounts along the Line are still receiving electricity and  
26  
27  
28

1 there is no danger of power being cutoff unless the BIA decides to do so or refuses to pay its  
2 own bill.

3  
4 As with the issue of operations and maintenance costs, the BIA has the capacity to  
5 read meters itself, and could easily hired meter readers to read the meters of any individual  
6 accounts and to bill those users. The BIA's failure to do that does not mean that Mohave  
7 should be penalized a speculative amount based on more than five years of usage by  
8 individual accounts along the 70 mile line.<sup>12</sup>  
9

10 **CONCLUSION**

11 For the foregoing reasons, the Commission should deny the BIA's requested relief  
12 and dismiss BIA's complaint against Mohave.

13 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of February, 2009.

14 BRYAN CAVE LLP

15  
16 By   
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23

24 <sup>12</sup> As noted supra, Mr. Williams contended that the average credit during the 78  
25 month period of March 1997 to September 2003 was \$377.25, although he could not support  
26 that calculation. Tr. 187-88. In fact, the total credit was \$27,178, or an average of  
27 approximately \$348 per month. See Exhibit A. However, there is no support for the BIA's  
28 argument that average credit before in the period before September 2003 has any  
relationship to use by the twelve accounts after September 2003. It was the BIA's duty to  
support its claimed reimbursement amount for the twelve accounts, and it has failed to do.

1 **ORIGINAL and 13 COPIES** of the  
2 foregoing were hand-delivered for  
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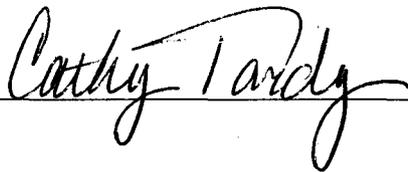
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24  
25  
26  
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28  


**Exhibit A**  
**BIA v Mohave Electric, ACC E-01750-05-0579**  
**Chart of Credits for "Usage Billed to Other Meters"**

Invoice Date	Credit	Comments
7/29/98	6,257.92	Includes cumulative credits from March 1997, when the meter was moved.
8/31/98	612.28	
9/30/98	467.35	
10/30/98	342.36	
11/30/98	321.15	
12/31/98	309.33	
1/29/99	512.04	
2/26/99	425.00	
3/31/99		No credit given on invoice, which is described as a "corrected bill."
4/30/99	494.46	
5/28/99	175.07	
6/30/99	165.06	
7/30/99	415.16	
8/31/99	485.13	
9/30/99	221.10	
10/29/99	543.90	
11/30/99	326.17	
12/30/99	381.64	
1/31/00	502.59	
2/29/00	477.92	
3/30/00	662.27	
4/28/00	247.03	
5/ __/00		Invoice for May 2000 is missing.
6/30/00	392.84	
7/31/00	370.18	
8/31/00	349.36	
9/29/00	389.91	
10/30/00	257.66	
11/30/00	190.88	
12/29/00	201.50	
1/29/01	161.85	
2/28/01	366.66	
3/29/01	409.54	
4/30/01	291.57	
5/30/01	313.74	
6/28/01	390.40	
7/30/01	365.25	
8/28/01	510.33	
9/28/01	471.21	
10/26/01	344.99	
11/30/01	394.03	

Invoice Date	Credit	Comments
12/31/01	321.91	
1/ /02		January 2002 invoice is missing
2/28/02	338.63	
3/28/02	255.71	
4/ /02		April 2002 invoice is missing
5/01/02	523.64	
6/3/02	431.32	
7/1/02	449.73	
8/1/02	527.92	
9/ /02		September 2002 invoice is missing.
10/1/02	571.35	
11/1/02	411.70	
12/2/02		No credit identified on the bill, which includes an overdue balance forward and warns of service disconnection.
1/2/03	380.71	
2/3/03	256.08	
3/3/03	351.92	
4/1/03	325.74	
5/1/03	214.44	
6/2/03	204.29	
7/1/03	204.04	
8/1/03	477.78	
9/2/03	414.48	
<b>TOTAL</b>	27,178.22	Divided by 78 months (March 1997 to Sept. 2003), equals approximately \$348/month.