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BEFORE THE ARIZONA CORPORATION COMMISSION Arizona Corporation Commission

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AZ CORP COMMISSION
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IN THE MATTER OF THE COMPLAINT
OF THE 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
BUREAU OF INDIAN AFFAIRS
CLOSING ARGUMENT

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. FACTS.....	2
A. Mohave: A Rural Electric Cooperative whose Certificated Area Includes Parts of the Hualapai Reservation.....	2
B. The BIA: An Agency that Provides Support to Native Americans.....	2
C. Havasupai Village.....	2
1. Generators supply electricity to Havasupai Village.....	3
2. The Havasupai Tribe seeks a reliable source of electricity.....	3
D. The Contract: Mohave Builds and Owns the Line and the BIA's Point of Delivery is a Primary Meter at Long Mesa.....	4
E. Mohave Begins Providing Electric Service to New Customers along the Line.....	5
1. Mohave begins providing electrical service to the BIA.....	5
2. Mohave had two customers in its certificated area.....	5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 3. Mohave had customers outside its certificated area but did not obtain any borderline agreements.....5
- III. THE ACC HAS JURISDICTION.....5
 - A. Robert Moeller’s Testimony Should be Completely Ignored.....6
 - B. Tribal Sovereignty is a Non-Issue.....8
 - C. Because there is no FERC Jurisdiction, the ACC is the Proper Forum.....9
 - D. The ACC is Proper Forum to Decide this Dispute and Has Jurisdiction.....10
- IV. MOHAVE IS PRECLUDED FROM ARGUING THAT THE CONTRACT EXPIRED.....11
- V. THE ACC SHOULD IGNORE MOHAVE’S ASSERTION THAT IT WAS LOSING MONEY BY SERVING THE BIA AND CUSTOMERS ALONG THE LINE.....14
- VI. THE LINE IS A DISTRIBUTION LINE.....16
 - A. Pre-construction: Mohave Treated the Line as a Distribution Line.....17
 - 1. Mohave’s REA loan for a distribution line.....17
 - 2. Mohave’s application to the ACC to approve the REA loan: Mohave states it will build a distribution line.....17
 - 3. The easements were only for a distribution line.....18
 - 4. The Contract for a distribution line.....19
 - 5. Mohave’s sub-contract to build the Line: the “Supai Distribution Line”.....20
 - 6. Mohave’s board of directors approves the sub-contract to build a distribution line.....21
 - B. Post-Construction: Mohave Treated the Line as a Distribution Line.....21
 - 1. Mohave’s yearly REA filings: Line is a distribution line.....21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 2. Mohave's 1989 application for a rate increase: the Line is included in Mohave's rate base as a distribution line.....23
- C. Neither FERC nor the ACC has ever Classified the Line as a Transmission Line.....25
- D. The Actual Use and Characteristics of the Line Indicate it is a Distribution Line.....25
- VII. MOHAVE IMPROPERLY RELOCATED THE BIA'S METER FROM LONG MESA TO THE NELSON SUBSTATION AND ABANDONED ITS CUSTOMERS.....28
 - A. Mohave, Per a Valid and Enforceable ACC Order, was Prohibited from Moving the BIA's Meter.....28
 - B. Mohave Improperly Discontinued Service to its Customers, Including Customers in Mohave's Certificated Area.....29
- VIII. MOHAVE'S QUIT CLAIM OF THE LINE IS VOID. MOHAVE OWNS THE LINE.....30
 - A. Even Ignoring ACC Laws and Regulations, the Quit Claim is Void.....30
 - 1. The Quit Claim is void because the BIA never accepted it.....30
 - 2. The Quit Claim is also void because deeds cannot be used to transfer an electric line.....31
 - B. Because Mohave's Quit Claim Violated A.R.S. § 40-285, It is Void. Mohave Still Owns the Line.....31
 - 1. Mohave's reliance upon a 1982 rate decision is misplaced.....31
 - 2. Mohave failed to obtain ACC approval before abandoning the Line, so the Quit Claim is void.....33
 - 3. The Line is used and useful.....34
 - a. The Line is used and useful to the customers along the Line.....34

1	b.	As the Line is in Mohave's rate base, both Mohave and the ACC have recognized that the Line is used and useful.....	35
2			
3	c.	As the Line is the only viable means of supplying electricity to a remote area, it is used and useful.....	35
4			
5	C.	Mohave Has Failed to Maintain the Line Since Abandoning It.....	37
6			
7	D.	The BIA is Forced to Pay for Electricity Used by Customers Along the Line. Mohave Must Reimburse the BIA.....	39
8			
9	IX.	THE BIA AND THE OTHER CUSTOMERS ALONG THE LINE ARE MOHAVE'S RETAIL CUSTOMERS.....	40
10			
11	A.	Customers Along the Line are Mohave's Retail Electric Customers....	40
12			
13	B.	The BIA at End of Line was Mohave's Retail Electric Customer.....	42
14			
15	X.	MOHAVE'S SERVICE TERRITORY INCLUDES THE AREA ALONG THE LINE.....	44
16			
17	XI.	MOHAVE IGNORED THE ACC LEGAL STAFF'S ADMONISHMENT FOR ABANDONING CUSTOMERS AND QUIT CLAIMING THE LINE.....	46
18			
19	XII.	CONCLUSION.....	47

PRE-FILED TESTIMONY

Witness	Abbreviation	Hearing Exhibit
Leonard Gold (direct)	Gold PF Dt.	C-1
Leonard Gold (sur-rebuttal)	Gold PF Sr.	C-2
James Walker	Walker PF	C-3
James Williams	Williams PF	C-4
Phil Entz	Entz PF	C-5

HEARING TESTIMONY

Leonard Gold	Gold HT
Phil Entz	Entz HT
Tom Longtin	Longtin HT

1 Robert Moeller

Moeller HT

2

3

POST-HEARING SUPPLEMENTAL TESTIMONY

4 **Supplemental Testimony**

Abbreviation

5 Leonard Gold

Gold ST

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1 **I. INTRODUCTION**

2 Respondent Mohave Electric Cooperative (“Mohave”) flaunted and ignored
3 Arizona laws and regulations governing electric utilities. Without prior Arizona
4 Corporation Commission (“ACC”) approval, a licensed electric utility is prohibited from
5 abandoning its customers and from disposing assets used to serve its customers.
6 Mohave did just that, however. Without required ACC authorization, Mohave (1)
7 discontinued electrical service to its customers, including complainant Bureau of Indian
8 Affairs (“BIA”), the Hualapai Tribe, a telephone company, a ranch, and two residences;
9 and (2) unilaterally abandoned an electric line that served those customers. Despite
10 explicit warnings from the ACC’s legal staff that Mohave had violated Arizona laws and
11 regulations, Mohave has refused to correct its mistakes.

12 The ACC should:

- 13 (1) Find that the BIA and the other customers along the line are Mohave’s retail
14 customers as defined in A.R.S. § 40-201(21);
15 (2) Find that Mohave’s service territory, as defined in A.R.S. § 40-201(22),
16 includes the area served by the line;
17 (3) Void Mohave’s transfer of the line under A.R.S. § 40-285(A);
18 (4) Declare that Mohave owns the line under A.R.S. § 40-285(A);
19 (5) Order Mohave to operate and maintain the line under A.R.S. §§ 40-202(A)
20 and 40-321;
21 (6) Order Mohave to relocate the BIA’s meter to its original location at the end of
22 the line under A.R.S. §§ 40-202, 40-321, and 40-285(A);
23 (7) Order Mohave, under Ariz. Const., Art. 15, § 3, A.R.S. § 40-321, and AAC
24 R14-2-210, to reimburse the BIA \$125,851.33 for the repair and maintenance
25 costs on the line that the BIA has had to pay since Mohave wrongfully
26 abandoned the line;
27
28

1 (8) Order Mohave, under Ariz. Const., Art. 15, § 3, A.R.S. § 40-321, and AAC
2 R14-2-210, to reimburse the BIA \$19,994.25¹ for the electricity that has been
3 consumed by Mohave's customers along the line but was paid by the BIA;
4 and

5 (9) Take whatever other action the ACC deems appropriate.

6 **II. FACTS²**

7 **A. Mohave: A Rural Electric Cooperative whose Certificated Area**
8 **Includes Parts of the Hualapai Reservation**

9 Mohave is a rural electric co-operative that serves sparsely populated, rural
10 areas with customers who are located far away from one another. Longtin HT, p. 271,
11 Ins. 1-14. Mohave's purpose, as a rural co-op, is to serve rural areas. Longtin HT, p.
12 290, Ins. 22-24. Mohave's certificated area includes Peach Springs, which is on the
13 Hualapai reservation, and other parts of the Hualapai reservation. Longtin HT, p. 280,
14 Ins. 4-9, p. 369, Ins. 20-24; Williams PF, exh. 1. Mohave has served portions of the
15 Hualapai reservation for more than 40 years. Longtin HT, p. 280, Ins. 19-24. The
16 Hualapai Tribe and its tribal members have accounts with Mohave and are members of
17 Mohave's co-op. Longtin HT, p. 280, Ins. 10-18.

18 **B. The BIA: An Agency that Provides Support to Native Americans**

19 The BIA, U.S. Department of Interior, is an executive agency of the United
20 States. Stipulated Facts, ¶ 2. Under 25 U.S.C. § 13, the BIA is authorized to provide
21 support for the general welfare and civilization of Native Americans, including the
22 Havasupai and Hualapai Tribes. Stipulated Facts, ¶ 3.

23 **C. Havasupai Village**

24 Most Havasupai members live in Havasupai Village. Entz PF, p. 2, Ins. 14-15.
25 Havasupai Village is isolated. It is located at the bottom of the Grand Canyon.

26
27 ¹ This amount is effective as of February, 2009, and continues to increase at
the rate of \$377.25 per month.

28 ² The BIA incorporates the entire administrative record into its closing.

1 Stipulated Facts, ¶ 3. There are no roads connecting Havasupai Village with other parts
2 of Arizona. Stipulated Facts, ¶ 5. Walker PF, p. 2, Ins. 23-24. The only practical ways
3 out of the Village are by helicopter or by traversing a winding, dirt trail on foot or on
4 horseback up the wall of the canyon. Walker PF, p. 2, Ins. 24-26. It takes
5 approximately 4 hours by walking or by riding a horse to complete the trip from
6 Havasupai Village to the top of the canyon at a general location commonly referred to
7 as "Hilltop." Walker PF, p. 2, In. 26 – p. 3, In. 1.

8 **1. Generators supply electricity to Havasupai Village**

9 By 1965, the BIA provided electricity to its government facilities in Havasupai
10 Village using gas-powered generators. Stipulated Facts, ¶ 3. By 1971, the BIA
11 supplied electricity to the Village using diesel-powered generators. Id.

12 **2. The Havasupai Tribe seeks a reliable source of electricity**

13 By 1975, the Havasupai Tribe had become increasingly dependent on electricity.
14 Stipulated Facts, ¶ 6. The Havasupai Tribe hoped to obtain a more reliable source of
15 electricity. To that end, in January, 1975, the Tribe passed resolution no. 4-75 and the
16 Havasupai Tribal Chairman wrote a letter to Mohave. Stipulated Facts, ¶ 6. In tribal
17 resolution no. 4-75, the Havasupai Tribe requested that Mohave provide electricity to
18 the Havasupai reservation by means of a power line built from Peach Springs to Long
19 Mesa. Mohave's Statement of Disputed Facts and Additional Material in Support of
20 Response to BIA's Motion for Partial Summary Judgment, exh. 30. On January 16,
21 1975, the Havasupai Tribal Chairman wrote Mohave and asked that Mohave "provide
22 us with the commercial power that will assure reliable, dependable and consistent use
23 of all the facilities in our community." Id. In March 1975, the Hualapai Tribe passed a
24 similar resolution, resolution no 4-75, requesting electrical service from Mohave.
25 Stipulated Facts, ¶ 7; Mohave's Statement of Disputed Facts and Additional Material in
26 Support of Response to BIA's Motion for Partial Summary Judgment, exh. 30.
27
28

1 Because the Havasupai and Hualapai Tribes wanted and needed reliable
2 electricity, the BIA began to assist them. From about 1968 to 1981, the BIA evaluated
3 alternatives for securing electricity to the Hualapai and Havasupai reservations.
4 Stipulated Facts, ¶ 9. The BIA considered expanding its generators or having a 70-mile
5 electric line built. Id. The BIA chose the 70-mile line. Id.

6 There are now about 200 homes in the Village that use electricity. See Walker
7 HT, p. 153, Ins. 4-5. Temperatures in Havasupai Village often exceed 100° in the
8 summer, so air conditioning by the Supai members probably consumes a lot of the
9 electricity in the Village. Williams PF, p. 4, Ins. 25-28. The BIA charges the Supai
10 members for their electricity, but the BIA does not turn a profit or even break even.
11 Williams PF, p. 5, Ins. 4-12. Except for some emergency generators, the people living
12 in the Village have no other source of electrical power other than the electricity supplied
13 by the 70 mile line that is the subject of this dispute. Walker PF, p. 3, Ins. 17-19.

14 **D. The Contract: Mohave Builds and Owns the Line and the BIA's Point
15 of Delivery is a Primary Meter at Long Mesa**

16 On October 1, 1981, Mohave and the BIA entered into a contract (the "Contract")
17 in which Mohave would construct an approximately 70-mile power line (the "Line") from
18 its existing Nelson Substation to Long Mesa and would supply up to 1,500 KW of
19 electricity for operations on the Hualapai and Havasupai reservations. Stipulated Facts,
20 ¶ 13. Under the Contract, "All facilities to be provided by or on behalf of Mohave shall
21 be and remain its sole property." Gold PF Dt., p. 9 and exh. 8; Stipulated Facts, ¶ 13.
22 Mohave, therefore, owned the Line.

23 As required by the Contract, the Line runs from Mohave's Nelson Substation to
24 Long Mesa, where there is a primary meter for the BIA. Gold HT, p. 71, Ins. 11-12.
25 There is no substation at Long Mesa. Id. From Long Mesa, which is located at the edge
26 of the Grand Canyon, the electricity would be sent down to the government facilities and
27 people living in Havasupai Village. Walker PF, p. 2, Ins. 17-20.
28

1 **E. Mohave Begins Providing Electric Service to New Customers along**
2 **the Line**

3 After constructing the Line, Mohave began servicing customers along its length.
4 As of July, 2003, Mohave provided electricity to twelve accounts along the Line.
5 Stipulated Facts, ¶ 34.

6 **1. Mohave begins providing electrical service to the BIA**

7 In addition to the BIA's meter at Long Mesa, the BIA has two other accounts on
8 the Line, one for a fire observation tower on the Hualapai reservation and another for a
9 radio repeater tower on the Havasupai reservation. Gold PF Dt., p. 19, Ins. 13-16.
10 Mohave billed the BIA separately for each BIA account (Long Mesa, fire observation
11 tower, radio repeater). Williams PF, p. 3, Ins. 10-15, p. 5, Ins. 15-26; Longtin HT, p.
12 357, Ins. 10-13.

13 **2. Mohave had two customers in its certificated area**

14 Mohave also connected two customers to the Line who are located in Mohave's
15 certificated area. Those customers were the Hualapai Tribe for its Tank Well pump and
16 the Cesspooch family for their home. See Longtin HT, p. 366, Ins. 12-13; Walker PF, p.
17 8, In. 24 – p. 9, In. 1 and exh. 4.

18 **3. Mohave had customers outside its certificated area but did not**
19 **obtain any borderline agreements**

20 Mohave also began servicing approximately ten customers, including the BIA,
21 who are located outside Mohave's certificated area. Walker PF, p. 9, Ins. 8-18 and exh.
22 4. Mohave, however, never sought or obtained borderline agreements to serve them.
23 Longtin HT, p. 362, In. 23 – p. 363, In. 7.

24
25 **III. THE ACC HAS JURISDICTION**

26 Mohave argues the ACC does not have jurisdiction. Even though Mohave's
27 jurisdictional argument has been previously rejected, Mohave once again raised it at the
28 hearing and, in fact, offered an expert on the matter. As the ACC has the jurisdiction

1 (and indeed the duty) to oversee and regulate public service corporations like Mohave,
2 Mohave's jurisdictional defense must once again be rejected.

3 **A. Robert Moeller's Testimony Should be Completely Ignored**

4 Mohave's expert witness on jurisdictional issues was Robert Moeller. Mr. Moeller
5 testified that in deference to the Hualapai's and Havasupai's tribal sovereignty, this
6 matter ought to be resolved in either federal or tribal court. For multiple reasons, his
7 entire testimony should be ignored.

8 Mr. Moeller did not know the procedural posture of this case. For example, Mr.
9 Moeller was unaware that Mohave filed a related state proceeding that was removed to
10 federal court and did not know what effect that removed federal case had on this case.
11 Moeller HT, p. 441, Ins. 21-22. When asked about that federal case, Mr. Moeller
12 admitted that he did not know about it "in any detail." Moeller HT, p. 443, Ins. 16-19.
13 Amazingly, even though Mr. Moeller opined that federal court is a proper forum for this
14 proceeding, he did not know that in the federal court action Mohave argued the
15 opposite, that federal court was not the proper forum to resolve a dispute about the
16 Line. Moeller HT, pp. 443-445. Although Mr. Moeller was offered as a procedural or
17 jurisdictional expert, when asked about the related proceeding, he stated: "I actually
18 don't have a judgment on it one way or the other because I just don't know the facts in
19 what sounds like a pretty complicated procedural history." Moeller HT, p. 445, Ins. 16-
20 18. Apparently, this matter was simply too complicated for Mr. Moeller to opine upon
21 with any degree of certainty.

22 Moreover, Mohave failed to give Mr. Moeller copies of all the pleadings in this
23 case and he failed to request copies of them. Moeller HT, p. 441, Ins. 23-25, p. 442,
24 Ins. 1-2. Mr. Moeller, consequently, lacked basic knowledge about this matter such that
25 his opinions cannot be reasonably trusted.

26 In the same vein, although Mr. Moeller supposedly is an expert on tribal
27 jurisdiction, he could not state if any tribal court is available or has the jurisdiction to
28

1 decide this case. He did not know whether the Hualapai or Havasupai tribes have tribal
2 courts. Moeller HT, p. 469, Ins. 12-19. He did not know if a tribal court existed that
3 could resolve the present dispute. Moeller HT, p. 469, Ins. 20-24. And even if one of
4 the tribes had a tribal court, Mr. Moeller had no idea if such court would have jurisdiction
5 to resolve this dispute. Moeller HT, p. 470, Ins. 2-12. In fact, Mr. Moeller testified from
6 his experience that tribal courts do not have jurisdiction over state administrative
7 matters or to enforce ACC regulations. Moeller HT, p. 470, Ins. 11-13, p. 475, Ins. 21-
8 24.³ Thus, a tribal court could not grant all the relief the BIA seeks in this case. Moeller
9 HT, p. 473, Ins. 10-12. No one from Mohave will even recognize or acknowledge that
10 there is tribal court jurisdiction over this dispute. See Moeller HT, p. 475, Ins. 11-15.⁴

11 Mr. Moeller also opined that because of deference to the Hualapai and
12 Havasupai Tribes' sovereignty, the BIA should not have filed this action with the ACC.
13 Amazingly, Mr. Moeller was completely unaware of the fact that the two tribes likely
14 have agreed with, and accepted, ACC jurisdiction over this dispute. Mr. Moeller did not
15 know that both the Hualapai Tribe and the Havasupai Tribe have participated in this
16 proceeding before the ACC without objection and without asserting that the ACC was
17 infringing upon their tribal sovereignty. Moeller HT, p. 457, Ins. 19-22.

18 Moreover, Mr. Moeller ostensibly appeared as an expert on Indian Trader
19 permits. However, he had no idea whether or not Mohave has, or even needed, an
20 Indian Trader permit to serve its customers on the Hualapai reservation. Moeller HT, p.
21 448, Ins. 8-10. He did not know if Mohave needed an Indian Trader permit to respond
22

23 ³ Mohave, on the one hand, contends that this regulatory dispute ought to be
24 resolved in tribal court and, on the other hand, admits that tribal courts do
25 not have jurisdiction over state administrative matters. The ACC should not
26 condone such procedural shenanigans by one its licensed utilities.

27 ⁴ If the ACC were to dismiss this case as Mr. Moeller and Mohave urges, the BIA and
28 the tribes may be left without any forum that could offer relief. As just discussed,
29 Mohave previously contended in federal court that federal court was not the proper
30 forum. If the BIA filed an action in federal court, Mohave likely will argue that
31 federal court lacks jurisdiction and move to dismiss the federal action. And tribal
32 courts may not be a viable forum as, according to Mr. Moeller, there may not be a
33 tribal court that exists that could resolve this matter. Even if there is a tribal
34 court, Mohave seemingly refuses to consent to tribal jurisdiction. Moeller HT, p. 477,
35 Ins. 20-22. As a result, the ACC is the best forum to resolve this dispute.

1 to service calls along the Line. Moeller HT, p. 452, Ins. 17-21. When asked whether
2 Mohave needed an Indian Trader permit to provide electricity to the Hualapai Tribe, Mr.
3 Moeller responded: "You know, I'm just not prepared to offer an off-the-cuff opinion on
4 it. It might be." Moeller HT, p. 453, Ins. 19-23. He could not definitively answer
5 whether or not Mohave needed an Indian Trader permit to provide electricity to a
6 Hualapai member, Mr. Cesspooch. Moeller HT, p. 445, Ins. 1-13. Nonetheless, Mr.
7 Moeller acknowledged that Mohave would not need an Indian Trader permit to conduct
8 business on the Hualapai reservation if they are acting in furtherance of a contract with
9 the BIA. See Moeller HT, p. 450, Ins. 18-25. To further confuse the issue, Mr. Moeller
10 could not say if an Indian Trader permit was even relevant to this case. Moeller HT, p.
11 448, Ins. 11-12.⁵

12 In sum, Mr. Moeller was woefully unprepared and lacked knowledge of the basic
13 procedural and factual history. His testimony should be ignored.

14 **B. Tribal Sovereignty is a Non-Issue**

15 At the hearing, Mohave again contended that the ACC should refuse to decide
16 this case because of tribal sovereignty. Tribal authority, however, is a defense that is
17 raised by the tribes themselves. Arizona v. Zaman, 190 Ariz. 208, 946 P.2d 459 (1997)
18 (non-Indians cannot raise tribal interests or sovereignty to escape their legal
19 obligations); Smith Plumbing v. Aetna Cas. & Surety Co., 149 Ariz. 524, 720 P.2d 499
20 (1986) (only tribes can raise defense). Mohave does not have the right to assert tribal
21 sovereignty.

22 Mohave's own expert, Mr. Moeller, admitted that tribal sovereign immunity is
23 invoked by tribes because it protects their rights. Moeller HT, p. 457, Ins. 3-6. Third
24 parties, like Mohave, do not ordinarily invoke tribal sovereignty. Moeller HT, p. 457, Ins.
25 7-8. Mr. Moeller admitted that by participating in the present action, Hualapai and
26

27 ⁵ As Mohave's own witness did not know if Indian Trader permits are relevant
28 to this case, the BIA is perplexed as to why Mohave repeatedly has raised the
issue.

1 Havasupai officials may have consented to the authority of the ACC to resolve this
2 dispute. Moeller HT, p. 458, Ins. 14-20. If the two tribes were concerned about tribal
3 sovereignty, they could have intervened in the present action or tried to dismiss the
4 proceedings. Moeller HT, p. 458, Ins. 21-25. Neither tribe has done so, however.
5 Moeller HT, p. 459, Ins. 1-8; Moeller HT, p. 477, Ins. 16-18.

6 As Mohave has no standing to assert tribal sovereignty and the two tribes here
7 have never asserted it, the ACC should not be concerned with it.

8 **C. Because there is no FERC Jurisdiction, the ACC is the Proper Forum**

9 Mohave has not sought and does not have a FERC approved tariff for the Line.
10 Gold ST, p. 3, Ins. 14-16. Nor is Mohave collecting any transmission tariffs for the Line.
11 Gold ST, p. 3, Ins. 17-19. Mohave is a Rural Electrification Administration ("REA"; now
12 known as Rural Utilities Service) borrower. Stipulated Facts, ¶ 14. As a REA borrower,
13 for all intents and purposes, Mohave is not subject to FERC regulation or oversight.
14 Gold ST, p. 3, Ins. 22-25. Indeed, Mohave has represented to the ACC that because it
15 is a cooperative with REA loans and liens, its Contract with the BIA is not subject to
16 FERC jurisdiction. Mohave Response to BIA Motion for Summary Judgment, p. 5, fn. 7.

17 Even if Mohave claims it is involved in wholesale transmission of electricity, the
18 ACC has jurisdiction over it. See Southwest Transmission Co-op., Inc. v. Ariz. Corp.
19 Comm'n, 213 Ariz. 427, 434, 142 P.3d 1240, 1247 (Ct. App. 2006) ("Although FERC
20 has some jurisdiction over SWTC as a transmitting utility, it does not directly regulate
21 the company because SWTC has an [REA] mortgage. SWTC is subject to various
22 regulations that RUS imposes on those having [REA] mortgages. [REA], however,
23 recognizes state rate-making authority; it is only when the rates are not subject to state
24 regulation that a company with an [REA] mortgage must obtain rate approval from
25 [REA]. The Commission may, therefore, assert jurisdiction over SWTC as a public
26 service corporation").

27 The ACC, therefore, may assert jurisdiction over Mohave as a public service
28 corporation. See id.

1 **D. The ACC is Proper Forum to Decide this Dispute and Has**
2 **Jurisdiction**

3 Mohave is a public service corporation that is regulated by the ACC. Stipulated
4 Facts, ¶ 1. As such, the ACC has full power to regulate and oversee Mohave. Ariz.
5 Const. Art 15, § 3; see also A.R.S. § 40-202(A) (ACC regulates all PSCs and may do
6 anything, whether or not in ARS, to supervise and regulate them); A.R.S. § 40-321 (the
7 ACC is authorized to determine whether a PSC is acting justly or reasonably and to
8 enforce its determination by order or regulation); A.R.S. § 40-285(A); A.A.C. R14-2-
9 202(B). Mohave is subject to ACC regulation and jurisdiction.

10 Indeed, Mohave's own jurisdiction expert, Mr. Moeller, admitted that the ACC has
11 jurisdiction over anything that licensed utilities do. Moeller HT, p. 463, Ins. 17-20, p.
12 477, Ins. 6-9. He also admitted that the United States has the discretion to decide
13 where, state or federal forums, it wants to pursue its remedies. Moeller HT, p. 467, Ins.
14 1-3. Therefore, the BIA, exercising its discretion, properly brought this administrative
15 action with the ACC.

16 Although the ACC may not have jurisdiction to decide tort or contract claims, the
17 ACC has the exclusive and plenary authority to determine whether or not the services
18 provided by a public service corporation are just and reasonable. Qwest Corp. v. Kelly,
19 204 Ariz. 25, 30, 59 P.3d 789, 794 (Ct. App. 2002) (citing Tucson Elec. Power Co. v.
20 Arizona Corp. Comm'n, 132 Ariz. 250, 645 P.2d 231 (1982)). Mohave, therefore, is
21 subject to ACC jurisdiction.
22

23 Not only do Arizona statutes and regulations confer jurisdiction upon the ACC to
24 resolve the present dispute, but Mohave also contractually agreed to ACC jurisdiction.
25 At least three provisions of the Contract state that the ACC has jurisdiction. See Gold
26 PF Dt., exh. 8 at Technical Provisions, ¶ 3; at Technical Provisions, clause "9.
27
28

1 Disputes;" and at Addendum No. 1, p. 10. Given that Mohave expressly agreed that the
2 ACC would have jurisdiction over this dispute, Mohave cannot now in good faith request
3 dismissal due to a lack of jurisdiction.
4

5 Mohave's most recent attempt to dismiss this case due to a lack of jurisdiction
6 should be denied once again. The ACC has jurisdiction.

7 **IV. MOHAVE IS PRECLUDED FROM ARGUING THAT THE CONTRACT**
8 **EXPIRED**

9 Mohave's primary defense or justification for abandoning both the Line and its
10 customers along the Line is that the BIA failed to exercise an option to renew and
11 therefore the Contract supposedly expired in 1992. Whether or not the Contract expired
12 is irrelevant. It is pertinent that the BIA and Mohave entered into the Contract and
13 under it Mohave built the Line and supplied electricity to the BIA at Long Mesa, but that
14 is all undisputed. Stipulated Facts, ¶ 13. Although the ACC need not decide whether
15 the Contract was renewed, Mohave is estopped from arguing that the Contract
16 terminated. The ACC therefore should ignore Mohave's Contract termination argument.

17 Ever since this action was commenced, Mohave has contended that the ACC
18 lacks jurisdiction to decide contractual matters or construe contracts. For instance, in its
19 Motion to Dismiss filed on October 5, 2005, Mohave stated that ". . . the Commission
20 has no jurisdiction to construe contracts." Motion to Dismiss, p. 12, Ins. 19-20; see also
21 pp. 22-24 (ACC has no jurisdiction to decide contractual disputes).

22 Mohave has stated that the ACC does not have the jurisdiction to determine
23 whether or not the BIA renewed the Contract. Mohave's Reply to BIA's Opposition to
24 Motion to Dismiss, p. 7, Ins. 12-18. Because Mohave so firmly believes that the ACC
25 lacks jurisdiction to determine whether or not the Contract is still effective, Mohave filed
26 a separate state court action and asked the ACC to stay this action pending a
27 determination from the state court about the Contract's effectiveness. Mohave's Motion
28

1 to Continue and Hold Proceedings in Abeyance Pending Ruling by Arizona State Court,
2 filed on December 9, 2005. In its state court complaint, Mohave declared that: "The
3 Arizona Corporation Commission lacks jurisdiction to resolve the question of whether
4 the BIA validly exercised an option to renew the Contract" Mohave's Motion to
5 Continue and Hold Proceedings in Abeyance, exh. 1, ¶ 20 (emphasis added); see also
6 Mohave's Notice of Removal, filed on February 10, 2006, p. 1, Ins. 21-22 (ACC is not
7 proper forum to resolve contract disputes).
8

9
10 The ACC ought to take Mohave at its word. Mohave has repeatedly,
11 emphatically, and strenuously contended that the ACC lacks jurisdiction to decide
12 whether the Contract expired. Mohave cannot now ignore its prior position and
13 statements and ask the ACC to find or conclude that the Contract expired. The ACC,
14 therefore, should disregard Mohave's "the Contract expired so we could abandon the
15 Line" defense.
16

17 Although, as just discussed, the ACC need not decide whether the Contract
18 expired, evidence has been presented that indicates the Contract did not terminate.
19 Per the Contract, Mohave billed the BIA a monthly "facilities charge." Longtin HT, p.
20 286, Ins. 16-18. Included in the contractual facilities charge were the cost to construct
21 the Line, taxes, O&M, and depreciation. Longtin HT, p. 286, ln. 19 – p. 287, ln. 5. The
22 BIA paid Mohave between \$11,000 and \$15,000 per month in facilities charges from
23 April, 1982 through February 1997. Stipulated Facts, ¶ 23. Mohave had the right to
24 charge the BIA for these expenses only because of the Contract. Longtin HT, p. 287,
25 Ins. 8-11. Although Mohave contends the Contract expired in 1992, Mohave continued
26 to bill the BIA for the facilities charges until 1997. Longtin HT, p. 287, Ins. 18-21.
27 Mohave, consequently, billed the BIA for contractual facilities charges for five years
28 after the Contract purportedly ended. Longtin HT, p. 288, Ins. 1-4. The BIA paid

1 Mohave somewhere between \$660,000 and \$900,000 in contractual charges after
2 Mohave contends the Contract ended. Mohave cannot reap the benefits of the Contract
3 for five years and then claim the Contract had expired. Mohave, accordingly, cannot
4 now contend the Contract expired. 17A Am. Jur. 2d Contracts § 506 (continued
5 performance under terms of contract constitutes exercise of option to renew); 17B
6 C.J.S. Contracts § 500 (continued performance is effective renewal of contract).

7 In a case with similar facts, Freytag v. Crass, 913 S.W.2d 171, 172 (Tenn. App.
8 1995), the court held that a utility contract had been extended by the action of the
9 parties. In Freytag, two utility districts entered into a five-year water purchase contract.
10 The contract gave the purchasing utility district the right to extend the contract for 5
11 years, but, like the Contract, it was silent as to how the option to extend was to be
12 exercised. For 1 ½ years after the expiration of the initial contract term, the purchasing
13 utility district continued to purchase water under the same terms and conditions as
14 specified in the contract. The court held that the purchasing utility district, by continuing
15 to operate under the terms of the contract after the conclusion of the initial term,
16 exercised the option to renew for an additional five-year term. Here, for five years the
17 parties continued to act as if the Contract had been extended. Although the ACC need
18 not decide the issue, the Contract did not expire.

19 When raising its "Contract terminated" defense, Mohave also ignores an
20 important fact. While Mohave focuses entirely upon its Contract with the BIA, Mohave
21 conveniently ignores all the contracts that it entered into with each customer along the
22 Line. Mohave has acknowledged that it entered into contracts with the customers along
23 the Line to provide them with electricity. Longtin HT, pp. 352-55, p. 357, Ins. 10-18; see
24 also Gold HT, p. 109, Ins. 16-17. Even if the BIA-Mohave Contract expired, Mohave's
25 contracts with all customers along the Line never expired. Mohave had no right to
26 abandon the Cesspooch family, the Bravo family, and all the other customers along the
27 Line with whom it had contracts to provide electricity.

1 In sum, whether the BIA-Mohave Contract terminated is immaterial to this
2 proceeding and the ACC should not, and need not, resolve the Contract issue.

3 **V. THE ACC SHOULD IGNORE MOHAVE'S ASSERTION THAT IT WAS LOSING**
4 **MONEY BY SERVING THE BIA AND CUSTOMERS ALONG THE LINE**

5 Mohave also argues that it was losing money on the BIA and customers along
6 the Line, which permitted Mohave to abandon the Line and the customers. That
7 argument fails for at least two reasons.

8 First and foremost, if a utility is not recovering its costs serving a particular
9 customer class that utility ought to apply to the ACC for a rate increase. A utility cannot
10 simply walk away from customers because it is not earning enough money from them.
11 Yet Mohave did just that here; Mohave walked away from its customers instead of
12 asking the ACC for a rate increase.
13

14 Second, Mohave's factual predicate, that it was losing money, is incorrect.
15 Mohave applied to the ACC for a permanent rate increase, Docket No 0-1750-89-231,
16 on September 26, 1989 (the "1989 Rate Application). Gold PF Dt., p. 16. Mohave's
17 Cost of Service Study attached to its 1989 Rate Application indicates that Mohave was
18 earning a positive rate of return on the BIA account and that the BIA "was paying its
19 weight." Gold HT, p. 140, ln. 22 – p. 141, ln. 5. Mohave was not losing money serving
20 customers along the Line. Gold PF Sr., p. 10, lns. 13-24. Mohave's Cost of Service
21 summary shows the BIA providing a 5.98% return on the rate base and an Operating
22 TIER of 1.24, which indicates Mohave was providing service without a loss. Gold PF
23 Sr., p. 10, lns. 12-24. Also, the BIA has paid off construction of the Line, every month it
24 was paying for operation and management costs and for depreciation of the Line, and
25 as part of the ACC approved retail rate for the BIA, the BIA has paid a monthly service
26
27
28

1 charge, demand charge and energy charge to Mohave. Gold PF Sr., p. 10, Ins. 12-24.
2 As a result, Mohave was recovering its costs associated with the Line. Gold PF Sr., p.
3 10, Ins. 12-24; Gold ST, p. 5, Ins. 11-28.⁶
4

5 Taking into account that the BIA paid Mohave a large commercial electric rate,
6 paid Mohave the entire cost to construct the Line, and also paid Mohave other
7 contractual charges, Mohave recovered all of its costs associated with the Line. Gold
8 ST, p. 10, Ins. 1-21; Stipulated Facts, ¶ 24. And if Mohave was not collecting enough to
9 recover its contractual costs, under the Contract Mohave had the ability to increase the
10 facility charge to recover its increased costs. Gold ST, p. 10, Ins. 1-21.
11

12 Mohave has admitted that the Line did not financially harm Mohave's customers
13 in general. In response to the BIA's motion for summary judgment, Mohave stated:

14 By specifically allocating plant and the associated revenues and expenses, and
15 utilizing the low cost loan as a reason to hold rates steady, Mohave was following
16 the Commission's directive in Decision No. 53174... to treat the 70-mile
17 transmission line separately so as not to burden Mohave ratepayers with costs
associated with [the Line]. (Emphasis added.)

18 Mohave's Statement of Disputed Facts and Additional Material in Support of Response
19 to BIA's Motion for Partial Summary Judgment, ¶ 8, pp. 4-5. Mohave's own admission,
20 therefore, refutes its argument that it was losing money on the Line or that Mohave's
21 other ratepayers subsidized the Line.
22

23 If anything, the BIA and the customers along the Line were subsidizing Mohave's
24 other 37,000 customers. Gold PF Sr., p. 11, Ins. 1-18; Gold ST, p. 11, ln. 21 – p. 12, ln.

25 5. For example, Clay Bravo, who owns a home along the Line, arguably was

26
27 ⁶ In 1997, Mohave stopped billing the BIA for Facilities Charges, so it is no
28 longer collecting depreciation, O&M, and taxes for the Line. Gold ST, p. 6,
lns. 1-11. However, because Mohave abandoned the Line and moved the BIA's
meter back to the Nelson Substation, Mohave is no longer accruing those
expenses for the Line. Gold ST, p. 6, lns. 1-11.

1 subsidizing Mohave customers/homeowners living in Bullhead City. Gold PF Sr., p. 11,
2 Ins. 1-18; Gold ST, p. 11, In. 21 – p. 12, In. 5. A Bullhead City homeowner was not
3 subsidizing Mr. Bravo. Gold PF Sr., p. 11, Ins. 1-18. The retail rates charged to the
4 customers along the Line were the same retail rates that Mohave charged its 37,000
5 retail customers. Gold PF Sr., p. 11, Ins. 1-18. Built into those retail rates are the
6 expenses associated with the operation, maintenance, construction, and depreciation of
7 the rest of Mohave's entire electrical system, including plant located in Bullhead City.
8 Gold PF Sr., p. 11, Ins. 1-18; Gold ST, p. 11, In. 21 – p. 12, In. 5. So the customers on
9 the Line contributed revenue to Mohave that went toward the upkeep and operation of
10 the rest of Mohave's system. Gold PF Sr., p. 11, Ins. 1-18; Gold ST, p. 11, In. 21 – p.
11 12, In. 5. In contrast, the BIA has paid the full cost of the upkeep and operation of the
12 Line. Gold PF Sr., p. 11, Ins. 1-18. As a result, a Mohave customer living in Bullhead
13 City is not, and was not, paying for the expenses associated with the Line, but the
14 customers along the Line were subsidizing Mohave's other customers. Gold PF Sr., p.
15 11, Ins. 1-18; Gold ST, p. 11, In. 21 – p. 12, In. 5.

16
17
18
19 Mohave's contention that it was losing money on the BIA and other customers
20 along the Line should be disregarded.

21 **VI. THE LINE IS A DISTRIBUTION LINE**

22 A central issue in this dispute is whether the Line is a distribution or transmission
23 line. To resolve this issue, one only needs to look at how Mohave treated the Line for
24 more than two decades. For 25 years, Mohave considered the Line to be a distribution
25 line. Now, when it suits its purposes, Mohave conveniently claims it is a transmission
26 line. The ACC should disregard Mohave's self-serving change of position and find the
27 Line to be a distribution line.
28

1 **A. Pre-construction: Mohave Treated the Line as a Distribution Line**

2 **1. Mohave's REA loan for a distribution line**

3 Mohave financed construction of the Line with a \$1,600,000 loan from the REA.
4 Stipulated Facts, ¶ 14; Gold PF Dt., p. 5. As part of Mohave's loan application, Mohave
5 completed and submitted to the REA a "Cost Estimates and Loan Budget for Electric
6 Borrowers." Gold PF Dt., exh. 2. Mohave provided cost estimate information based
7 upon the type of facilities it was going to construct. Id. Mohave requested funding to
8 construct a 24.9 kV 70.0-mile distribution line. Mohave's cost estimates were solely for
9 distribution-related facilities and services; Mohave estimated the following costs for
10 construction of distribution facilities:
11

- 12 • \$1,472,500 for a distribution line tie-in that it called "Supai 14.4/24.9
- 13 Kv Line" of "70.0" miles;
- 14 • \$12,500 for distribution substations, switching stations, and
- 15 metering point changes;
- 16 • \$15,000 for miscellaneous distribution equipment; and
- 17 • \$100,000 for distribution engineering services.
- 18

19 Id. In its loan application, Mohave certified to the REA that all loan proceeds, the entire
20 \$1,600,000, would be used to construct a distribution line and that nothing would be
21 used for transmission-related facilities. Gold PF Dt., p. 6. The REA approved Mohave's
22 application and funded construction of a distribution line. Id.; see also Gold PF Dt., exh.
23 3. Mohave, therefore, was authorized to use the loan funds only to construct a
24 distribution line.

25 **2. Mohave's application to the ACC to approve the REA loan:**
26 **Mohave states it will build a distribution line**

27 Mohave sought ACC approval of its \$1,600,000 REA loan. Gold PF Dt., p. 7.,
28 Ins. 6-19. In Mohave's application to the ACC to get the loan approved, Mohave

1 attached a copy of a cost estimate analysis for the project. Id.; see also Gold PF Dt.,
2 exh. 5. Mohave presented to the ACC estimates for cost of the to-be-built Line if it was
3 for "Distribution Service" or, alternatively, for "Transmission Service" Id. Mohave
4 stated that "For comparison purposes only, an estimated cost of the project, if 69 KV
5 transmission facilities were utilized, is also included herein." Id. Mohave therefore
6 represented that distribution service, not transmission service, was the selected
7 alternative. Id.; Gold HT, p. 131, Ins. 10-12. Mohave estimated the cost for
8 distribution service to be \$1,600,000, which is the loan amount, and \$3,376,000 for 69
9 KV transmission service. Id.; Gold PF Sr., p. 6, Ins. 19-21. Mohave clearly represented
10 to the ACC that it would use the borrowed funds for a distribution line. Gold PF Sr., p.
11 6, Ins. 21-24.

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14 In Decision No. 51491, issued on October 22, 1980, the ACC approved
15 Mohave's REA loan and referred to the Line as an "electric line extension," stating:
16

17 The proceeds from the borrowings will be used for construction purposes
18 of an electric line extension from applicant's certified area across a portion
19 of the Hualapai and Havasupai Indian Reservation located north of Route
20 66 on and adjacent to Supai Road, Coconino County, Arizona. (Emphasis
21 added.)

22 Gold PF Dt., pp. 7-8; see also Gold PF Dt., exh. 6; Stipulated Facts, ¶20. Because a
23 "line extension" is a line extending an electric distribution system to additional
24 customers (AAC R 14-2-201(22)), the ACC approved funding for construction of a
25 distribution, not transmission, line. Gold PF Dt., pp. 7-8; see also Gold PF Dt., exh. 6.

26 **3. The easements were only for a distribution line**

27 As the Line runs along a BIA right-of-way, Mohave needed easements to initially
28 construct and then maintain the Line. Gold PF Dt., p. 6. The Hualapai and Havasupai

1 Tribes passed resolutions to allow the BIA to grant Mohave easements across their
2 respective reservations. Walker PF, p. 2, Ins. 20-21. The BIA granted Mohave 50 foot
3 easements, one for the Hualapai Reservation and another for the Havasupai
4 Reservation, “to be used to construct, install, operate and maintain an electrical
5 distribution line, along with the right to ingress thereto and egress therefrom.” Id.; see
6 also Gold PF Dt., exh. 4; Stipulated Facts, ¶ 15. The tribes consented to these
7 easements that ran across their respective reservations. Stipulated Facts, ¶ 15. Per
8 the easements, therefore, Mohave only had the right to build and maintain a distribution
9 line; Mohave did not have the right to construct a transmission line. Gold PF Dt., p. 7;
10 Longtin HT, p. 279, Ins. 8-10.

13 4. The Contract for a distribution line

14 In June 1976, the BIA issued a request for quotes (RFQ) to provide electricity.
15 Stipulated Facts, ¶ 10. That RFQ was not for wholesale electric service. Gold PF Sr.,
16 p. 8, In. 25; see Longtin HT, p. 288, In. 23 – p. 289, In. 5. Mohave, APS, and Citizens
17 Utilities Company responded to the RFQ. Stipulated Facts, ¶ 11. When Mohave
18 responded to the RFQ, Mohave knew that it would be selling electricity to the BIA on a
19 commercial, not wholesale, basis. See Longtin HT, p. 288, In. 23 – p. 289, In. 5.

20 Although the Contract ambiguously refers to the Line as a “power line,”
21 “distribution line,” “transmission line,” and “line extension,” the Contract’s service
22 characteristics clearly indicate the Line would be a distribution line. Gold PF Dt., p. 9,
23 Ins. 17-21. The Contract’s point of delivery for the BIA is a primary meter on the line
24 side of the Long Mesa transformer. Gold HT, p. 72, Ins. 12-14, p. 80, Ins. 17-20., p. 129,
25 Ins. 16-18; Gold PF Dt., p. 8 & exh. 8. Because the delivery point is a primary meter,
26 and not a substation, the Line was a distribution line. See id.; Gold HT, p. 129, In. 5 – p.
27
28

1 130, In. 7. The service characteristics also include "...three (3) phase, sixty cycles, and
2 shall be delivered at 14.4/24.9 kilovolts..." and "The electric energy furnished hereunder
3 shall be metered at 24.9 kilovolts." Gold PF Dt., p. 9 & exh. 8. Because 24.9 KV is
4 Mohave's normal distribution voltage level for serving its retail customers (Gold PF Dt.,
5 p. 23, Ins. 10-11), the Contract called for a distribution line.
6

7 **5. Mohave's sub-contract to build the Line: the "Supai**
8 **Distribution Line"**

9 Mohave sub-contracted the actual construction of the Line. Longtin HT, p. 326,
10 Ins. 22-24. Mohave called the project the "Supai Distribution Line." Gold PF Sr., p. 7,
11 In. 6 and exh. 4. Mohave's request for bids asked for quotes to construct 60 miles of
12 overhead distribution lines and some underground distribution facilities. Longtin HT, p.
13 330, Ins. 2-7; Gold PF Sr., p. 7, Ins. 6-12 and exh. 4. Mohave's request for bids
14 indicated that no portion of the project would be for transmission. Longtin HT, p. 330,
15 Ins. 9-12; Gold PF Sr., p. 7, Ins. 6-12 and exh. 4. The winning bidder, Four States
16 Electric, indicated in its bid to Mohave that it would construct a distribution line. Longtin
17 HT, p. 332, Ins. 8-11. In Four States' bid, it broke down the number, type, and cost of
18 the facilities that it would construct. Gold PF Sr., p. 7, Ins. 18-24 and exh. 4. All facilities
19 to be constructed were distribution; no construction would be for transmission facilities.
20 See pages 27-74 of Four States' proposal; Gold PF Sr., p. 7, Ins. 18-24. Four States'
21 bid was for \$986,223.47 to build a distribution line and nothing for transmission line
22 construction. Longtin HT, p. 332, In. 21 – p. 333, In. 1. Mohave accepted Four States'
23 bid to build distribution, not transmission, facilities. Longtin HT, p. 333, Ins. 11-21; Gold
24 PF Sr., p. 7, Ins. 13-15 and exhibit 4.
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1 **6. Mohave's board of directors approves the sub-contract to**
2 **build a distribution line**

3 Four States' proposed sub-contract was presented to Mohave's board of
4 directors. Mohave's attorneys normally attend the board of directors' meetings in case
5 the board members have any legal questions. Longtin HT, p. 335, Ins. 2-14. It is safe
6 to assume that both Mohave's CEO and its attorneys were at the board meeting when
7 the board adopted a resolution approving Four States' sub-contract. Longtin HT, p.
8 335, Ins. 15-22. Mohave's CEO and attorney would have known the difference between
9 a distribution and transmission line. Longtin HT, p. 335, In. 23 – p. 336, In. 1. At the
10 board meeting, Mohave's board approved a sub-contract to construct a distribution line.
11 Longtin HT, p. 334, Ins. 6-9; Gold PF Sr., p. 8, Ins. 1-15 and exh. 5. Mohave's board,
12 therefore, recognized that the Line would be a distribution line. Gold PF Sr., p. 8, Ins.
13 16-18.
14
15

16 **B. Post-Construction: Mohave Treated the Line as a Distribution Line**

17 Once Mohave obtained funding and all necessary approvals and easements, it
18 began (through Four States) to build the Line. Mohave completed construction of the
19 Line in November, 1981 and began delivering electricity through it by the spring of 1982.
20 Stipulated Facts, ¶ 16. After Mohave completed constructing the Line, Mohave
21 continued to treat the Line as a distribution line on its books. Longtin HT, p. 339, Ins.
22 15-18.
23
24

25 **1. Mohave's yearly REA filings: Line is a distribution line**

26 As a REA borrower, every year Mohave files with the REA a financial and
27 statistical report. Gold PF Dt., pp. 10-11; Stipulated Facts, ¶ 17. In its annual REA
28

1 reports, Mohave summarizes its revenues, expenses, outstanding loans, number and
2 type of customers, and miles of transmission and distribution lines. Gold PF Dt., pp.
3 10-11 & exh. 9. For over 20 years, Mohave reported to the REA that the Line was a
4 distribution line.
5

6 Beginning in 1980, Mohave reported to the REA that it had the following miles of
7 transmission lines:

<u>Year</u>	<u>Transmission Lines</u>
1980-84	82 miles
1985-96	84
1997	93
1998-2000	94
2001-05	102
2006-07	107

13 Gold PF Dt., p. 11 & exh. 9. Before Mohave completed construction of the Line (1980
14 and 1981), Mohave reported to the REA that it had 82 miles of transmission lines. Id.
15 In 1982, immediately after Mohave completed construction of the Line, Mohave still
16 reported that it had 82 miles of transmission lines. Id. Because the number of
17 transmission line miles did not increase by about 70 after construction of the Line,
18 Mohave did not consider the Line to be a transmission line. Gold PF Dt., p. 12, Ins. 11-
19 17; Gold HT, p. 132, In. 12 – p. 133, In. 3. Interestingly, in its 1982 report, after Mohave
20 completed construction of the Line, Mohave represented to the REA that its overhead
21 distribution lines had increased by about 60 miles over 1981. Gold PF Dt., p. 12, Ins.
22 18-21. So Mohave represented that the Line was a distribution line. That is consistent
23 with Mohave's representation to the REA when it applied to the REA for a construction
24 loan to build a distribution line. See § VI(A)(1) above. Post-construction, therefore,
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1 Mohave represented to the REA that the Line was a distribution line. Gold PF Dt., p.
2 11; Gold HT, pp. 132-133.

3
4 Moreover, if Mohave considered the Line a transmission line, then Mohave's
5 reported transmission line mileage should have decreased in 2003, the year in which
6 Mohave quitclaimed the Line. Gold PF Dt., p. 12, ln. 24 – p. 13, ln. 3 and exh. 9.
7 However, in 2001, 2002, 2003, 2004, and in 2005 Mohave reported 102 miles of
8 transmission lines; there was no reduction after the Mohave quit claim. Id. This again
9 indicates that Mohave always classified the Line as a distribution line. Id. If the
10 approximately 70 miles of the Line were part of those 102 total miles, this would mean
11 that Mohave had only an additional 24 miles of other transmission lines. Id. However,
12 the ACC records indicate that Mohave has about 95 miles of transmission lines, so
13 Mohave mathematically could not have treated the Line as a transmission line and must
14 have classified it as a distribution line. Id. at pp. 13-14.

15
16
17 For over 20 years, therefore, Mohave always treated the Line as a distribution
18 line in its REA filings.

19
20 **2. Mohave's 1989 application for a rate increase: the Line is
included in Mohave's rate base as a distribution line**

21 A utility must classify all of its lines and equipment by its functionality, either as
22 distribution or as transmission. Gold HT, p. 89, ln. 19 – p. 90, ln. 5. Mohave always
23 classified the Line as part of its distribution plant. Also, the Line has been, and currently
24 still is, included in Mohave's rate base as a distribution line. Gold ST, p. 4, Ins. 4-6.
25 Mohave admits this. Longtin HT, p. 370, Ins. 7-9.
26
27
28

1 As part of Mohave's 1989 Rate Application, Mohave filed a Cost of Service Study
2 for the year ending July 31, 1989 and a REA Form 7 for year ending December 31,
3 1988. Gold PF Dt., pp. 16-17 & exh. 10; Stipulated Facts, ¶ 22. They both indicate the
4 Line is a distribution line.
5

6 With regard to Mohave's REA Form 7 that Mohave filed with the ACC, Mohave's
7 manager and accountant certified on January 23, 1989 that Mohave had 84 miles of
8 transmission lines. Gold PF Dt., p. 17 & exh 10. Because the Line is approximately
9 70 miles long and Mohave has far more than 14 miles of other transmission lines,
10 Mohave must have classified the Line as a distribution line in 1989. Id.
11

12 With regard to its Cost of Service Study, Mohave treated the Line as part of its
13 distribution plant. Gold PF Dt., p. 17 & exh. 10. For example, in its Cost of Service
14 Study Mohave represented to the ACC the following:

- 15 • Transmission plant attributable to the BIA was only \$60,545, which was far
16 below the value of the Line. In contrast, Mohave allocated to the BIA
17 \$1,170,499 for distribution plant, which was the approximate actual cost
18 to construct the Line.⁷
- 19 • Accumulated depreciation attributable to the BIA was only \$24,420 for
20 transmission plant, while \$261,247 was for distribution plant.
- 21 • Operation and maintenance expenses attributable to the BIA were only
22 \$234 for transmission, while \$8,878 was for distribution.
- 23 • Transmission plant depreciation attributable to BIA was only \$1,665, while
24 distribution plant depreciation was \$34,802.

25 Gold PF Dt., p. 17-18 & exh. 10; Gold HT, p. 137, Ins. 13-25. Mohave therefore treated
26 the Line as a distribution line. Id. As Mohave has not applied for another rate increase
27

28 ⁷ The amount of transmission plant that Mohave attributed to the BIA was for
transmission equipment used to deliver electricity to the Line. Gold HT, p. 137, Ins.
4-7.

1 and this Cost of Service Study has not been modified or changed, the Line is still
2 classified as a distribution line in the ACC's records. Gold HT, p. 138, In. 11.

3
4 **C. Neither FERC nor the ACC has ever Classified the Line as a
Transmission Line**

5 "Electric transmission facilities" consists of property that has been so classified
6 by FERC or the ACC. A.R.S. § 40-201(11). FERC has never classified the Line as a
7 transmission line. Longtin HT, p. 326, Ins. 6-8. Nor has the ACC ever classified the
8 Line as a transmission line. Longtin HT, p. 326, Ins. 9-11. Because neither FERC nor
9 the ACC has ever classified the Line as a transmission line, it is a distribution line.
10 A.R.S. § 40-201(11).

11 **D. The Actual Use and Characteristics of the Line Indicate it is a
12 Distribution Line**

13 Mohave argues the Line is a transmission line. Transmission lines, however,
14 normally run from one high-voltage substation to another high-voltage substation. Gold
15 HT, p. 128, In. 20 – p. 129, In. 1. Because the delivery point here is to a primary meter
16 at Long Mesa, the Line does not run from one high-voltage substation to another and
17 therefore is not a transmission line. Gold HT, p. 129, In. 5 – p. 130, In. 7. Nor does the
18 BIA step up or step down the power it receives at Long Mesa, which also indicates the
19 Line cannot be a transmission line. Gold HT, p. 130, Ins. 8-15.

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21
22 Mohave, essentially, contends the Line is a transmission line "because we say it
23 is." Mohave's contention ignores the fact that Mohave itself classified the Line as a
24 distribution line (see above), and also ignores the fact that the Line, as it has been used,
25 has all the characteristics of a distribution line.

26 The only electrical engineer that studied the Line, Leonard Gold, opined that it is
27 a distribution line. Gold PF Dt., p. 2, In. 9. The following are some of the physical
28 characteristics that indicate the Line is a distribution line:

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- The Line is operated at 24.9 kV (Stipulated Facts, ¶ 18), which is Mohave's normal distribution voltage for serving its retail customers. Gold PF Dt., p. 23, Ins. 10-11.
 - Throughout Mohave's entire system, Mohave has no other 24.9 kV line that Mohave classifies as a transmission line. Longtin HT, p. 276, Ins. 18-21; Gold HT, p. 140, In. 11; Longtin HT, p. 276, Ins. 13-23. Mohave classifies every other one of its 24.9 kV lines as a distribution line. Id.
 - The Line falls within the definition of "electric distribution facilities." Gold PF Dt., p. 23, In. 12. "Electric distribution facilities" are defined as "all property used in connection with the distribution of electricity from an electric generating plant to retail electric customers except electric transmission facilities." A.R.S. § 40-201(6). Mohave served retail residential and commercial customers from the Line. Gold PF Dt., p. 23, Ins. 16-17.
 - Mohave connected distribution transformers to the Line and then extended the service drops from those transformers to the end user's meter panel to record usage, which is not normally done on transmission lines. Gold PF Dt., p. 23, Ins. 18-21.
 - Under industry standards distribution lines deliver electricity to retail customers like those along the Line while transmission lines are used to move large quantities of power at high voltage. Gold PF Dt., p. 23, Ins. 22-25. The Line's voltage, 24.9 kV, is not normally considered high voltage. Gold PF Dt., p. 23, Ins. 24-25.
 - The Line does not fall with the definition of a "transmission line" in A.R.S. § 40-360(10). Transmission lines typically carry a far greater load than 24.9kV. Gold PF Dt., p. 24, Ins. 4-8.
 - "Electric transmission facilities" are defined to be "all property so classified by the federal energy regulatory commission or, to the extent permitted by law, so classified by the Arizona corporation commission." A.R.S. § 40-201(11). Neither FERC nor the ACC has classified the Line as a transmission line. Gold PF Dt., p. 24, Ins. 11-12; Longtin HT, p. 326, Ins. 6-11.
 - The Line falls within the definition of a "distribution line." Gold PF Dt., p. 24, Ins. 19-20. "Distribution lines" are defined as "utility lines operated at distribution voltage which are constructed along public roadways or other bona fide rights-of-way, including easements on customer's property." AAC R14-2-201(13). The Line's voltage is 24.9kV, the same voltage as

1 Mohave's other distribution lines, and it runs along Indian Route 18. Gold
2 PF Dt., p. 24, Ins. 16-19.⁸

- 3
- 4 • Mohave installed a recloser, or breaker, along the Line, which is
5 commonly done on distribution lines. See Gold HT, p. 75, Ins. 11-14.
6 Transmission lines typically do not have reclosers in the middle of them.
7 Gold HT, p. 77, Ins. 4-5; Gold HT, p. 128, Ins. 15-18. The recloser that
8 Mohave installed on the Line is an oil circuit recloser ("OCR"). Longtin HT,
9 p. 234, Ins. 13-23. OCRs are used to break up distribution lines. Longtin
10 HT, p. 260, In. 24 – p. 261 In. 1. There are only a couple of customers on
11 either side of the OCR on the Line, which is less than the number of
12 customers Mohave normally has between OCRs on its distribution lines.
13 Longtin HT, p. 260, Ins. 16-23.
 - 14 • Mohave's point of delivery for the BIA was not to a substation. Longtin
15 HT, p. 270, Ins. 2-11. The BIA's point of delivery was the line side of the
16 Long Mesa transformer where there is a primary meter. Longtin HT, pp.
17 262-63, 270; Gold HT, p. 72, Ins. 12-14, p. 80, Ins. 17-20, p. 129, Ins. 16-
18 18.

19 All of these physical characteristics indicate the Line is a distribution line and that
20 it is simply a line extension from Mohave's Nelson Substation, as the ACC described
21 the Line when it approved Mohave's REA loan. Gold PF Dt., p. 24, Ins. 21-22; see §
22 VI(A)(2). "Line extension" is the "lines and equipment necessary to extend the electric
23 distribution system of the utility to provide service to additional customers." AAC R 14-
24 2-201(22). The Line extended Mohave's electric distribution system from its Nelson
25 Substation to Long Mesa in order to provide service to additional customers. Gold PF
26 Dt., p. 24, Ins. 25-27. The Line, therefore, is a distribution line.

27 In sum, the Line has all the characteristics of a distribution line, which is how
28 Mohave classified it for 25 years. The ACC should find the Line is a distribution line.

⁸ At the hearing, Mohave contended that because the Line does not always run immediately along Indian Route 18, the Line must be considered a transmission line. That contention lacks merit because Mohave has other distribution lines that do not always follow or run along roads. Longtin HT, p. 274, Ins. 18-21.

1 **VII. MOHAVE IMPROPERLY RELOCATED THE BIA'S METER FROM LONG**
2 **MESA TO THE NELSON SUBSTATION AND ABANDONED ITS CUSTOMERS**

3 In March, 1997, Mohave moved its metering equipment from Long Mesa at the
4 end of the Line to its Nelson Substation at the beginning of the Line. Stipulated Facts, ¶
5 29; Williams PF, p. 4, Ins. 4-6. Mohave then began metering electricity supplied through
6 the Line at Mohave's Nelson Substation rather than at Long Mesa. Stipulated Facts, ¶
7 29.

8 **A. Mohave, Per a Valid and Enforceable ACC Order, was Prohibited**
9 **from Moving the BIA's Meter**

10 Mohave violated an ACC order when it moved the BIA's meter to the Nelson
11 Substation. As part of the order approving Mohave's 1989 Rate Application, the ACC
12 discussed the BIA account and ordered that "All service provisions are specified in the
13 contract." Longtin HT, p. 341, Ins. 18-21; Gold ST, p. 8, In. 19 – p. 9, In. 11. This order
14 has never been changed and it is still a valid and enforceable ACC order. Longtin HT,
15 p. 341, In. 22 – p. 342, In. 4. One service provision of the Contract is to deliver
16 electricity to the BIA's primary meter at Long Mesa. Longtin HT, p. 342, Ins. 5-8; Gold
17 HT, p. 72, Ins. 12-14, p. 80, Ins. 17-20, p. 129, Ins. 16-18. Mohave, therefore, has been,
18 and currently still is, violating an ACC order. This misconduct cannot continue. A.R.S.
19 § 40-202(L) (public service corporation must comply with all ACC orders). Mohave
20 must move the BIA's primary meter back to Long Mesa and must again deliver
21 electricity to Long Mesa.
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1 **B. Mohave Improperly Discontinued Service to its Customers, Including**
2 **Customers in Mohave's Certificated Area⁹**

3 Mohave stopped providing service to all the customers along the Line and
4 unilaterally "transferred" their accounts to the BIA. Williams PF, p. 11, Ins. 23-25 and
5 exh. 10 and 11. Although Mohave has acknowledged the customers along the Line
6 were its retail electric customers (see Longtin HT, pp. 298-99), Mohave still
7 discontinued service to them.

8 Mohave even abandoned customers served by the Line that were within
9 Mohave's CC&N. Longtin HT, p. 294, Ins. 15-21; Stipulated Facts, ¶ 44. The accounts
10 that are within Mohave's certificated area, are served by the Line, and were abandoned
11 by Mohave were the Brian and Patricia Cesspooch home and a Hualapai tribal account
12 for a pump at Tank Well. Walker PF, exh. 4; Walker PF, p. 8, ln. 24 – p. 9, ln. 7;
13 Stipulated Facts, ¶ 34. Of course, Mohave is obligated to provide electric service to
14 anyone who requests it within Mohave's certificated area. Mohave ignored this
15 obligation.
16

17
18 Mohave admits that before discontinuing service to the customers along the Line
19 Mohave needed to obtain ACC approval. Longtin HT, p. 299, Ins. 8-11. Mohave did not
20 obtain ACC approval before discontinuing service to Mr. Bravo's home, however.
21 Longtin HT, p. 299, Ins. 12-14, p. 300, Ins. 18-25. Nor did Mohave obtain ACC approval
22 before abandoning the other customers. A utility must obtain ACC authorization before
23 discontinuing service. See ACC R 14-2-202(B). Mohave did not obtain ACC
24

25 ⁹ Mohave contends that it was only authorized to serve customers along the Line
26 because of the easements and as it transferred the easements it no longer has
27 authority to serve those customers. Longtin HT, p. 305, ln. 24 – p. 306, ln. 22.
28 That contention is nonsensical. Mohave itself quitclaimed the easements, so if it no
 longer has the authority to serve the customers along the Line it is because of its
 own actions and fault. Longtin HT, p. 306, lns. 19-22. Mohave cannot be excused from
 performing its regulatory obligations because of its own wrongful conduct.

1 authorization before discontinuing service to the customers along the Line (Longtin HT,
2 p. 301, Ins. 1-4) and therefore has, once again, violated Arizona regulations.

3 **VIII. MOHAVE'S QUIT CLAIM OF THE LINE IS VOID. MOHAVE OWNS THE LINE.**

4 Mohave owned the Line. Gold PF Dt., exh. 8. On or about July 22, 2003,
5 Mohave executed a quit claim (the "Quit Claim") in which Mohave quitclaimed and
6 abandoned the Line, meters and service drops to the BIA and the two tribes. Stipulated
7 Facts, ¶ 35.

8 **A. Even Ignoring ACC Laws and Regulations, the Quit Claim is Void**

9 Not only is Mohave's Quit Claim void because it violated A.R.S. § 40-285 (see
10 below), but it is also void because the BIA did not accept the Quit Claim and because
11 an electric line cannot be transferred by a deed.

12 **1. The Quit Claim is void because the BIA never accepted it**

13 A deed must be accepted to vest legal title in the grantee. Morelos v. Morelos,
14 129 Ariz. 354, 631 P.2d 136 (Ct. App. 1981); Robinson v. Herring, 75 Ariz. 166, 253
15 P.2d 347 (1953). Here, the BIA never accepted the Quit Claim, so it never transferred
16 title in the Line. See id. Mohave still owns it as a matter of law.

17 On or about August 7, 2003, Mohave's counsel wrote the BIA and the two tribes,
18 enclosed a copy of the Quit Claim, identified the twelve accounts along the Line, and
19 told them the "accounts and facilities are now owned by your entities." Stipulated Facts,
20 ¶ 37. In response, the BIA wrote Mohave and stated that the Quit Claim was not valid
21 until accepted, that Mohave could not abandon the Line without ACC approval, and that
22 Mohave still owned the Line. Williams PF, p. 11, Ins. 15-19 and exh. 7 and 8; Stipulated
23 Facts, ¶ 38. Ten days later, the BIA again wrote Mohave, this time stating that the BIA
24 did not accept the Quit Claim, that the Quit Claim was void and of no effect, that the BIA
25 was to receive power at Long Mesa rather than the Nelson Substation, and that Mohave
26 had to maintain and operate the Line. Stipulated Facts, ¶ 39.

1 Because the BIA never accepted the Quit Claim, it is void and Mohave still owns
2 the Line. See Morelos, 631 P.2d at 138; Roosevelt Savings Bank, 556 P.2d at 825;
3 Robinson, 253 P.2d at 349-50.¹⁰

4 **2. The Quit Claim is also void because deeds cannot be used to**
5 **transfer an electric line**

6 The Quit Claim is void as a matter of law for another reason. It is Black Letter
7 Law that deeds only convey interests in real property. Black's Law Dictionary (8th ed.
8 2004). Through the Quit Claim, Mohave attempted to convey the Line itself, which
9 consists of poles, wiring, transformers, meters, etc. These are personal property, not
10 real property. Mohave, therefore, did not, and could not, transfer title in the Line by the
11 Quit Claim. Mohave still owns the Line.

12 **B. Because Mohave's Quit Claim Violated A.R.S. § 40-285, It is Void.**
13 **Mohave Still Owns the Line.**

14 Absent ACC approval, a public service corporation cannot dispose any part of its
15 line, plant or system that is "necessary or useful in the performance of its duties to the
16 public." A.R.S. § 40-285(A). Any such disposition is void. Id. Mohave did not obtain
17 ACC approval before it quitclaimed the Line to the tribes and the BIA. Gold PF Dt., p.
18 27, Ins. 20-23.

19 **1. Mohave's reliance upon a 1982 rate decision is misplaced**

20 Mohave relies heavily upon a 1982 ACC rate decision, Decision No. 53174, to
21 argue that the Line is not used or useful and that, therefore, it was entitled to abandon
22

23
24 ¹⁰ If a quit claim (or for that matter any deed) could be effective without
25 the acceptance of the grantee, it would result in mass confusion. If
26 acceptance is not required, then the BIA simply could quit claim the Line
27 back to Mohave and Mohave would then be the legal owner of it. Mohave, in
28 response, could quit claim the Line back to the BIA a second time, the BIA
could then quit claim it back to Mohave, etc. This would continue
indefinitely. The result would be the BIA and Mohave treating the Line as a
"hot potato" and only keeping title to the Line so long as it took to execute
and record yet another quit claim. That is just one reason why an effective
quit claim requires acceptance by the grantee, which did not happen here.

1 the Line without ACC approval. For several reasons, however, that reliance is
2 misplaced.

3 First, Mohave filed a rate application, which led to Decision No. 53174.
4 Stipulated Facts, ¶ 21. Mohave did not file an application under A.R.S. § 40-285(A) to
5 determine whether or not the Line was useful. The Line was briefly mentioned in the
6 decision because Mohave had accumulated an interest expense of \$32,000 on the
7 construction loan for the Line and the ACC had to decide whether or not all of Mohave's
8 customers should be forced to pay that interest. Stipulated Facts, ¶ 21. The ACC
9 concluded that it would be unfair for Mohave's ratepayers to bear or pay the interest
10 expense on assets that would not serve them. See Stipulated Facts, ¶ 21. That
11 conclusion was reasonable. Why should, for example, customers in Bullhead City have
12 to pay the expenses associated with the Line, which at the time of the application had
13 not even been put into service and which would not be used by Mohave's Bullhead City
14 customers? The ACC reasonably concluded that because the Line was not used or
15 useful to Mohave's customers in Bullhead City, they should not have to pay the
16 accumulated interest expense. The ACC never found that the Line would never be
17 useful to those customers who Mohave would eventually serve off of the Line. That
18 issue was not before the ACC in the rate application.

19
20 Second, Mohave filed its application on January 7, 1982, before the Line was
21 operational. Stipulated Facts, ¶ 21. Mohave first started supplying electricity through
22 the Line on or after February 1, 1982. Gold PF Sr., p. 2, Ins. 11-12. The ACC,
23 therefore, was not making, and could not make, a determination about usefulness of the
24 Line to the eventual customers along the Line.

25 It would have been more reasonable for Mr. Longtin to have relied upon
26 Mohave's records, Mohave's ACC filings, and ACC decisions after the Line began
27 supplying electricity. Gold PF Sr., p. 2, Ins. 19-21. For instance, it would have been
28 more logical to rely upon the 1989 Rate Application. Gold PF Sr., p. 2, Ins. 21 – 23.

1 Mohave filed this application after the Line had been operational for over seven years,
2 so it contained Mohave's historical data about actual usage of the Line. Gold PF Sr., p.
3 2, Ins. 23-25. Mohave should have relied upon the 1989 Rate Application and the
4 ACC's November 29, 1990 Decision regarding it (the "1990 Rate Decision"). Gold PF
5 Sr., p. 2, Ins. 26-28. Also, Mohave's annual REA reports from 1980-2007 are more
6 relevant than the 1982 Rate Decision with regard to the usefulness of the Line. Gold
7 PR Sr., p. 3, Ins. 5-6.

8 Third, Decision No. 53174 was made in 1982, more than 25 years ago. As
9 Mohave's own witness testified, whether or not an electric line is "necessary or useful"
10 can change over time. Longtin HT, p. 293, Ins. 1-3. Mohave's own witness
11 acknowledged that even if an electric line had not been used or useful in the past, today
12 that same line could be used and useful due to changed circumstances. Longtin HT, p.
13 292, Ins. 23-25. Here, over the course of 25 years, electricity from the Line began
14 servicing two homes, several tribal accounts, a ranch, a fire observation tower,
15 telephone and radio repeater towers, residents in Havasupai Village, a medical clinic, a
16 jail, a school, etc. Maybe the Line was not used or useful in early 1982, but it certainly
17 became used and useful over the years. And it certainly is used and useful today.

18 In sum, Mohave's reliance upon a 25+ year old rate decision is misplaced. That
19 old rate decision is irrelevant to a determination today about the usefulness of the Line.
20

21 **2. Mohave failed to obtain ACC approval before abandoning the**
22 **Line, so the Quit Claim is void**

23 This whole dispute likely would not have occurred if Mohave simply followed
24 proper procedures and laws. A prudent utility would have filed an application with the
25 ACC before disposing an electric line that serves its customers. Mohave, on the other
26 hand, decided to abandon the Line without obtaining the necessary ACC approval.
27 There is no need for the ACC to even debate whether the Line currently is "necessary
28 or useful." That would have been properly addressed if Mohave had filed the required

1 application with the ACC and obtained the necessary order from the ACC before
2 Mohave quitclaimed the Line. Mohave never obtained ACC approval, and therefore the
3 Quit Claim is void. A.R.S. § 40-285(A).

4 **3. The Line is used and useful**

5 As mentioned, Mohave should have followed proper required procedures and
6 applied to the ACC for an order authorizing it to abandon the Line. Had Mohave done
7 so, the ACC would have denied Mohave's application because the Line is used and
8 useful.

9 **a. The Line is used and useful to the customers along the**
10 **Line**

11 There can be little doubt that the Line benefited Mohave's customers and the
12 public. It is undisputed that the Cesspooch and Bravo families have used electricity
13 from the Line to heat their homes, to cook their food, and to light their rooms. The
14 Hualapai Tribe, TDS telephone company, the BIA, and the Navajo Nation also have
15 used, and continues to use, electricity from the Line for their respective purposes. The
16 Line's benefit to the public always has been recognized. Indeed, when the ACC
17 approved Mohave's application to borrow \$1,600,000 to build the Line, the ACC stated
18 that the loan was "in the public interest." Stipulated Facts, ¶ 20. Ever since the Line
19 began providing electricity, it has been used and useful. It still is today.

20 Although Mohave claims the Line is not used or useful, Mohave admits that Mr.
21 Bravo would consider the Line to be used and useful. Longtin HT, p. 293, Ins. 4-10.
22 The Line is used and useful because Mr. Bravo uses electricity supplied through it.
23 Longtin HT, p. 293, Ins. 22-25. Indeed, Mohave admits that all the customers along the
24 Line would consider the Line to be used and useful. Longtin HT, p. 365, Ins. 3-6.
25 Those customers currently receive their electricity from the Line and have done so for
26 about 25 years, so the Line was and is used and the Line was and is useful to them.
27 Gold PF Dt., p. 27 Ins. 9-12.
28

1 Mountain States Tel. & Tel. Co., 149 Ariz. 239, 717 P.2d 918 (Ct. App. 1985). When
2 considering whether a utility can dispose of its assets, the availability of a substitute
3 service for the public is perhaps the predominate concern. For instance, disposing a
4 railway line was approved where substitute bus service was available to the public and
5 where trucking facilities were available for businesses to ship goods. Safford Chamber
6 of Commerce v. Corp. Comm'n, 81 Ariz. 226, 303 P.2d 713 (1956) (finding that the
7 change in transportation service did not result in "appreciable inconvenience" to the
8 public); see also Arizona Corp. Comm'n v. South Pac. Co., 87 Ariz. 310, 350 P.2d 765
9 (1960) (allowing discontinuation of agent station where other transportation facilities are
10 available). Here, there is no viable substitute source of electricity.

11 Mohave has contended that the BIA can be that substitute source of electricity for
12 the customers along the Line. However, Mohave transferring the Line to the BIA and
13 then forcing the BIA to service all the customers along the Line would be no different
14 than the public utility in Safford (a railroad company) transferring its rail line to one of its
15 customers and forcing that customer to provide rail service to anyone who wanted it.
16 Just as the ACC would not allow the railroad in Safford to dump its assets upon one of
17 its customers, so too should the ACC not allow Mohave to dump the Line off on the BIA.

18 Most of the Line is in a remote, desolate area that is high desert. Gold PF Dt., p.
19 26, Ins. 21-22. It would be difficult to obtain electricity from another electric utility. Gold
20 PF Dt., p. 26, Ins. 24-27. The nearest alternative electric utility is located far away from
21 the Line and the customers along the Line. For example, APS has a service center in
22 Williams, Arizona, but it is about 70 miles from Indian Service Route 18 and Route 66.
23 Gold PF Dt., p. 26, In. 27 – p. 27, In. 1. For APS to bring service to Long Mesa could
24 require construction of line over rugged terrain that could cover 60 – 80 miles or more
25 depending upon APS' closest source. Gold PF Dt., p. 27, Ins. 1-4. Assuming another
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1 utility would be willing to bring service to the area along the Line, it would be expensive
2 to construct another line. Gold PF Dt., p. 27, Ins. 4-6.

3
4 As there are no other readily available sources of electricity, the Line is not only
5 used and useful to the customers along the Line, but it is an absolute necessity if the
6 customers along the Line hope to continue to receive electricity. The Line is used and
7 useful and, accordingly, Mohave should not be allowed to abandon it (even if Mohave
8 had filed the required application with the ACC).

9
10
11 In sum, Mohave's Quit Claim of the Line is void because, first, it did not comply
12 with laws governing deeds, second, Mohave never applied for an order authorizing the
13 Quit Claim, and, third, the Line is used and useful in any event. Mohave still owns the
14 Line.

15
16 **C. Mohave Has Failed to Maintain the Line Since Abandoning It**

17
18 Mohave has not performed routine maintenance on the 70-mile Line for the past
19 few years. Walker PF, p. 4, Ins. 24-25. With regard to repairs, if the BIA learns that
20 there has been an outage along the Line, the BIA calls Mohave. Walker PF, p. 4, Ins.
21 25-26. Before Mohave will respond to the outage, however, Mohave requires a written
22 confirmation from the BIA that it will pay for the repair. Walker PF, p. 4, Ins. 26-28, p. 5,
23 Ins. 6-7. The BIA has made these payments because the BIA has no choice but to get
24 the Line repaired. Walker PF, p. 5, Ins. 25-26.

25 The BIA has had to pay Mohave for repairs and maintenance to the Line since
26 September, 2004. Stipulated Facts, ¶ 42. After Mohave abandoned the Line, Mohave
27 no longer checked the Line for cracked lines or downed cross arms, which is part of
28

1 normal routine maintenance. Longtin HT, p. 265, Ins. 5-19. Although tree trimming is
2 done as the part of routine maintenance, after abandoning the Line Mohave only
3 trimmed trees if requested by the BIA. Longtin HT, p. 264, Ins. 17-22.

4 In the span of eight months, February, 2006 to October, 2006, the flow of
5 electricity over the Line was interrupted nineteen times. Walker PF, p. 5, Ins. 21-22.
6 When the BIA has asked Mohave to repair the Line, Mohave has sometimes responded
7 that they did not have anyone available. Walker PF, p. 5, Ins. 17-21. For some outages
8 along the Line, Mohave has taken several days to respond, claiming, among other
9 things, that they needed various supervisory approvals before repairs could commence.
10 Walker PF, p. 5, In. 23 – p. 6, In. 23. The BIA doubts that supervisory approvals are
11 needed for Mohave's other customers.

12 Mohave's dilatory responses to repair requests have caused dangerous
13 conditions in Havasupai Village. In the summer months, the temperatures in Havasupai
14 Village sometimes exceed 100 degrees Fahrenheit. Walker PF, p. 6, Ins. 27-28. Many
15 residents have to do without fans, evaporative coolers and refrigerators when repairs
16 are not performed on the Line. Walker PF, p. 7, Ins. 2-3. Some individual residents use
17 small generators to run fans and evaporative coolers, but these are inadequate and
18 undependable. Walker PF, p. 7, Ins. 3-5. Most residents do not have generators and
19 thus are left to suffer from the heat when there are problems with Mohave's Line.
20 Walker PF, p. 7, Ins. 5-6. The medical clinic in Havasupai Village has some backup
21 generators, but they are not reliable as they can run out of fuel or can fail for mechanical
22 or other reasons. Walker PF, p. 7, Ins. 6-10. The interruption of electricity resulting
23 from problems on Mohave's Line endangers the health and safety of the residents of
24 Havasupai Village. Walker PF, p. 7, Ins. 10-12.

25 It is believed (and would be reasonable to conclude) that many outages and
26 repair calls resulted from Mohave's refusal to perform regular inspections or routine
27 maintenance on the Line. Walker PF, p. 8, Ins. 7-11. From September 2004 through
28

1 June 2008, the BIA has had to pay \$125,851.33 for repairs and maintenance on the
2 Line. Walker PF, p. 7, Ins. 13-15. Because Mohave always should have maintained
3 and repaired the Line, Mohave should be ordered to reimburse the BIA this amount.¹¹

4 **D. The BIA is Forced to Pay for Electricity Used by Customers Along**
5 **the Line. Mohave Must Reimburse the BIA.**

6 Before Mohave moved the BIA's meter from Long Mesa to the Nelson
7 Substation, all customers along the Line paid Mohave for their own electricity. Walker
8 PF, p. 9, ln. 28 – p. 10, ln. 2. The BIA has never had any responsibility or obligation to
9 pay for the electricity used by the Cesspooch and Bravo families, by the Hualapai Tribe,
10 by the Navajo Nation, or by TDS telephone company. Walker PF, p. 10, Ins. 6-11.

11 For a period of time after Mohave moved the BIA's meter to the Nelson
12 Substation (from July, 1998 through September, 2003), Mohave's bills to the BIA
13 included a credit for "usage billed to other meters." Williams PF, p. 7, Ins. 20-21;
14 Stipulated Facts, ¶ 30. Mohave gave the BIA this credit because after Mohave moved
15 its meter from Long Mesa to the Nelson Substation it billed the BIA for all electricity
16 used along the Line, including that used by all the other customers along the Line.
17 Williams PF, p. 7, ln. 25 – p. 8, ln. 3. Mohave realized that the BIA shouldn't have had
18 to pay for the electricity used by the Hualapai Tribe or others along the Line, so Mohave
19 credited the BIA for their electricity. Williams PF, p. 8, Ins. 1-3. Mohave read all the
20 meters along the Line, added up the KWH used by them, and then calculated the credit
21 that should be given to the BIA. Williams PF, p. 8, Ins. 5-8; Stipulated Facts, ¶ 30. On
22
23

24
25 ¹¹ The BIA has never denied that it ought to pay reasonable O&M for the Line.
26 Indeed, so long as Mohave billed the BIA for the Facilities Charges, which
27 included an O&M charge, the BIA willingly paid Mohave for O&M on the Line.
28 Mohave, however, stopped billing the BIA for the Facilities Charges in 1997
and, as a result, the BIA has not paid O&M since then. Longtin HT, p. 286,
lns. 19 – p. 287, ln. 21. Although the BIA is entitled to be reimbursed the
entire \$125,851.33, the BIA recognizes that the ACC could decide that this
amount effectively is offset as the BIA has not paid Facilities Charges since
1997.

1 average, the BIA received a \$377.25 credit per month for the electricity used by other
2 customers. Williams PF, p. 9, Ins. 1-3.

3 Since October, 2003 (shortly after the Quit Claim), Mohave stopped giving the
4 BIA a credit and the BIA has had to pay for the electricity used by the customers along
5 the Line. Williams PF, p. 9, Ins. 11-14. Once Mohave stopped giving the BIA credit for
6 the electricity used by other customers, the BIA has paid Mohave under protest.

7 Stipulated Facts, ¶ 30.¹²

8 From October, 2003 through February, 2009, the BIA has paid Mohave
9 approximately \$19,994.25 (\$377.25/month X 53 months) for electricity used by
10 Mohave's customers along the Line. Mohave should be ordered to reimburse the BIA
11 this amount and additional amounts that the BIA has to pay in the future.

12 **IX. THE BIA AND THE OTHER CUSTOMERS ALONG THE LINE ARE MOHAVE'S**
13 **RETAIL CUSTOMERS**

14 A "retail electric customer" is someone "who purchases electricity for that
15 person's own use, including use in that person's trade or business, and not for resale,
16 redistribution or retransmission." A.R.S. § 40-201(21). The BIA and all the customers
17 along the Line were Mohave's retail customers.

18 **A. Customers Along the Line are Mohave's Retail Electric Customers**

19 Until 1997, Mohave read the meters of its customers along the Line; billed the
20 customers along the Line retail rates; and responded to their service calls. Longtin HT,
21 p. 295, ln. 15 – p. 296, ln. 8. As of July, 2003, Mohave provided electricity to twelve
22 accounts along the Line. Stipulated Facts, ¶ 34. The twelve customers included:

- 23
- The Cesspooch and Bravo families, who used the electricity Mohave
24 supplied to them for their own homes.
- 25

26
27 ¹² The BIA has not billed the customers along the Line for their electricity
28 because (1) the BIA is not their electric supplier and (2) the BIA does not
have any agreements to provide them with electricity. Williams PF, p. 9,
lns. 16-20.

- 1 • The Hualapai Tribe, which has several Mohave accounts along the Line,
2 for such things as well pumps, lake pumps, a fish hatchery, and a youth
3 camp.
- 4 • The Navajo Nation, which leases a ranch along the Line and receives
5 electricity from the Line for the ranch and living quarters on the ranch.
6 Mohave called this account the “Diamond A Ranch/Camp 16.”
- 7 • Arizona Telephone Company (nka TDS), which had a Mohave account
8 near the end of the Line.
- 9 • In addition to the BIA’s account at the very end of the Line, Mohave had
10 two other BIA accounts along the Line, one for a BIA fire observation
11 tower on the Hualapai Reservation and another for a radio repeater on the
12 Havasupai Reservation.

13 Gold PF Dt., p. 18, In. 5 – p. 20, In. 11; Walker PF, p. 8, In. 24 – p. 9, In. 18; Stipulated
14 Facts, ¶ 34.

15 These customers asked Mohave to provide electricity to them. Gold PF Dt., p.
16 21, Ins. 1-6. Mohave entered into contracts with them to provide them with electricity.
17 Gold HT, p. 109, Ins. 16-17. Mohave charged all of them retail electric rates. Gold PF
18 Dt., pp. 21-22. None of the customers resold or redistributed the electricity they
19 received from Mohave. Gold PF Dt., p. 20, Ins. 12-14. For all of these customers,
20 Mohave installed its meters, read those meters, and billed the customers. Gold PF Dt.,
21 p. 21, Ins. 1-6.

22 The Cesspooch and Bravo families, the Hualapai Tribe, the BIA (for its fire tower
23 account, its radio repeater account, and its Long Mesa account), the Navajo
24 Nation/Diamond A Ranch, and Arizona Telephone Company/TDS all used the electricity
25 they received from Mohave for their own use, including in their trade or business. Gold
26 PF, p. 19, In. 1 – p. 20, In. 24. They, therefore, were Mohave’s retail customers. A.R.S.
27 § 40-201(21).
28

1 Similarly, the BIA used its electricity in its trade or business. The BIA has a fire
2 tower and a radio repeater account along the Line. Gold PF Dt., p. 21, Ins. 7-15. For
3 both of these BIA accounts, Mohave charged the BIA rate 504, which is Mohave's retail
4 small commercial rate. Gold PF Dt., p. 21, Ins. 7-15. Here, operating a fire observation
5 tower and a radio repeater tower is done in the BIA's normal course of business of
6 supporting Native Americans. Williams PF, p. 3, In. 16 – p. 4, In. 2. Mohave thought
7 these two BIA accounts were its retail customers as evidenced by Mohave's letter to the
8 BIA when it discontinued service. When Mohave abandoned these two BIA accounts,
9 Mohave wrote to the Department of Interior (BIA) and told the BIA "your retail electric
10 service has been transferred...." Gold PF Dt., p. 21, Ins. 16-22; Williams PF, p. 11, Ins.
11 20-25, exh. 9 and 10. Therefore, Mohave itself thought the BIA was its retail customer.
12
13

14
15 Moreover, Mr. Bravo, and all the customers along the Line, were members of
16 Mohave's co-op. Longtin HT, p. 295, Ins. 3-11. Mr. Bravo and the Diamond A Ranch
17 (the Navajo Nation ranch) were Mohave's retail customers. Longtin HT, p. 298, Ins. 1-
18 10. Mohave responded to service calls of the customers along the Line because
19 Mohave considered them to be its retail electric customers. Longtin HT, p. 299, Ins. 2-4.

20 The ACC should find that all the customers along the Line were, and still are,
21 Mohave's retail customers.

22 **B. The BIA at End of Line was Mohave's Retail Electric Customer**

23 Although Mohave contends the Contract was a wholesale agreement, the
24 Contract does not even use the term "wholesale." Longtin HT, p. 289, Ins. 8-11. Under
25 the Contract, Mohave charged the BIA a commercial retail rate, not a wholesale rate.
26 Gold PF Sr., p. 8, Ins. 7-10. The Contract created a retail relationship, not a wholesale
27 relationship. Gold PF Sr., p. 8, In. 13. At the hearing, Mohave admitted that the BIA was
28 one of its retail customers. Longtin HT, p. 297, Ins. 21-25. This admission is consistent

1 with Mohave's actions over the years where Mohave treated the BIA as its retail
2 customer. Mohave never treated the BIA as a wholesale customer.

3 In Mohave's own records, Mohave did not treat the BIA at Long Mesa as a
4 wholesale customer. In its REA filings, Mohave treated the BIA as a retail customer. In
5 every annual report Mohave files with the REA, Mohave certified the number and type
6 of its customers, including sale for resale customers. Gold PF Dt., p. 14-15 & exh. 9;
7 Gold HT, p. 133, Ins. 15-22. From 1980 through 1997, Mohave indicated it had no sale
8 for resale customers; from 1998 through 2000, Mohave indicated it had one sale for
9 resale customer; in 2001, Mohave again indicated it had no sale for resale customers;
10 and from 2002 through 2007, Mohave once again indicated it had one sale for resale
11 customer. Id. Although Mohave did not offer evidence at the hearing on who was the
12 one sale for resale customer from 1998 through 2000 and from 2002 through 2007,
13 Mohave clearly did not consider the BIA to be sale for resale customer from 1980
14 through 1997 and in 2001. Id. At least for the first 15 years that the Line was
15 operational, Mohave did not classify the BIA as a sale for resale customer or as a utility.
16 Id. Mohave, therefore, must have considered the BIA to be its retail customer.

17
18
19
20 The BIA at Long Mesa also was a retail customer because Mohave always
21 charged the BIA a retail commercial electric rate. Longtin HT, p. 297, Ins. 17-20. See
22 Gold HT, p. 139, In. 23 – p. 140, In. 6.

23 Finally, the BIA falls under the definition of a retail electric customer. Some of
24 the electricity the BIA sends down to Havasupai Village is used for its own facilities,
25 such as a BIA school, a BIA detention facility, a BIA maintenance building, and BIA
26 living quarters for teachers and other BIA employees. Walker PF, p. 3, Ins. 13-16;
27
28

1 Williams PF, p. 4, Ins. 17-20. The BIA uses this electricity for its "own use" and the BIA
2 therefore was Mohave's retail electric customer in that regard. See A.R.S. §40-201(21).

3 With regard to the electricity that the BIA provides to the tribal members living in
4 Havasupai Village, the BIA's trade or business includes providing support to Native
5 Americans. In this case, the BIA makes electricity available in Havasupai Village in the
6 normal course of its business, which is to support Native Americans, and it allows the
7 Havasupai Village, and Havasupai tribal members, to live in as safe and friendly a
8 community as reasonably possible. Gold PF Dt., p. 20, Ins. 1-9; Williams PF, p. 3, Ins.
9 10-15, p. 4, Ins. 11-16, p. 5, Ins. 4-8. The BIA's supply of electricity to Native Americans
10 in this remote, hot environment falls within the BIA's trade or business of providing
11 support to Native Americans and, therefore, the BIA at Long Mesa was Mohave's retail
12 electric customer. Gold HT, p. 139, In. 21. Mohave has admitted that the BIA at Long
13 Mesa was its retail customer. Longtin HT, p. 297, Ins. 17-25.

14 The ACC should find that the BIA at Long Mesa was, and still is, Mohave's retail
15 customer.

16 **X. MOHAVE'S SERVICE TERRITORY INCLUDES THE AREA ALONG THE LINE**

17 The entire length of the Line is part of Mohave's service territory. "Service
18 territory" includes the area the utility "owns, operates, controls or maintains electric
19 distribution facilities ... and that additional area in which [the utility] has agreed to
20 extend electric distribution facilities ... whether established by a certificate of
21 convenience and necessity, by official action by a public power entity or by contract or
22 agreement." A.R.S. § 40-201(22). The area running along the Line falls within this
23 definition.
24
25

26 As previously discussed (§ VI), the Line is a distribution line. As it is a
27 distribution line, the Line necessarily falls within the definition of "electric distribution
28

1 facility.” Gold PF Dt., pp. 23, 25. “Electric distribution facilities” are defined as “all
2 property used in connection with the distribution of electricity from an electric generating
3 plant to retail electric customers except electric transmission facilities.” A.R.S. § 40-
4 201(6). Mohave has admitted that it served retail residential and commercial customers
5 along the Line, so the area along the Line is part of Mohave’s service territory. Gold PF
6 Dt., p. 23, Ins. 16-17; Gold PF Dt., p. 25, Ins. 18-19; A.R.S. § 40-201(22) (service
7 territory includes the area where the utility owns, operates, controls or maintains electric
8 distribution facilities).
9

10
11 Moreover, the Line is within Mohave’s service territory because Mohave agreed
12 to extend its electric distribution facilities per a contract or agreement. Gold PF Dt., p.
13 25, Ins. 19-22. It is undisputed that Mohave built the Line per the Contract.
14 Accordingly, the area along the Line because part of its service territory. A.R.S. § 40-
15 201(22) (service territory includes the additional area in which the utility has agreed to
16 extend electric distribution facilities by contract or by agreement).
17

18
19 Not only did Mohave agree to extend its distribution facilities to Long Mesa under
20 the terms of its Contract with the BIA, but as Mohave began servicing the customers
21 along the Line, Mohave entered into contracts with them and agreed to extend its
22 distribution facilities to each customer. Gold HT, p. 109, Ins. 16-17. Mohave
23 acknowledged that it entered into contracts with the customers along the Line to provide
24 them with their electric service. Longtin HT, pp. 352-55. Because Mohave had
25 contracts to provide electric distribution facilities to the customers along the Line, the
26 area along the Line is now part of Mohave’s service territory. A.R.S. § 40-201(22).
27

28 Another indication that the area along the Line is part of Mohave’s service
territory is Mohave never sought or obtained borderline agreements for the

1 approximately ten customers located outside Mohave's certificated area. Longtin HT,
2 pp. 362-363. This is a strong indication Mohave believed the customers along the Line,
3 and the Line itself, were within its service territory.

4 Finally, on May 30, 1986, Mohave filed with the ACC its amended Articles of
5 Incorporation. Gold PF Dt., p. 25, Ins. 23-24. Mohave attached to its Amendment its
6 March/April 1986 newsletter that stated that "District 1 encompasses the entire service
7 territory of the co-op lines east of Kingman and includes...and Long Mesa". Gold PF
8 Dt., p. 25 Ins. 24-27 and exh. 17. Mohave, therefore, has acknowledged in its ACC
9 filings that the Line is part of its service territory.

10 The ACC should find that the area along the Line is part of Mohave's service
11 territory.

12 **XI. MOHAVE IGNORED THE ACC LEGAL STAFF'S ADMONISHMENT FOR**
13 **ABANDONING CUSTOMERS AND QUIT CLAIMING THE LINE**

14 The BIA and Mohave attempted to informally resolve their disputes before the
15 ACC. After those efforts failed, ACC's legal division wrote Mohave and stated:

16 The first point on which Commission Staff holds a firm opinion relates
17 to the jurisdictional nature of the Hualapai line. The evidence is clear
18 that MEC constructed the line to serve the Havasupai Tribe. It is also
19 clear that the line has been used to provide retail electric service to a
20 number of customers over its length since it was built. Finally, it is
21 clear that the line was included in rate base in MEC's most recent
22 rate case and that rates were approved by the Commission and
23 charged for service over the line. In Commission Staff's view, it is
24 undeniable that this line is necessary and useful to MEC in the
25 provision of electric service to its customers.

26 The second, and perhaps most important point to be made on behalf
27 of Commission Staff relates to MEC's purported abandonment or
28 quitclaim transfer of the line. Quite apart from the position stated by
representatives of the United States that such abandonment cannot
be effectively made, it is Commission Staff's opinion that any
attempted transfer of the line without Commission approval would be
void pursuant to A.R.S. § 40-285. Without regard to whether MEC
received a Certificate of Convenience and Necessity to serve a

1 particular geographic area, having commenced service, it cannot be
2 abandoned without Commission approval.

3 * * *

4 [I]t is crystal clear to Staff that MEC undertook an obligation to
5 provide service as a public service corporation, obtained Commission
6 approval of rates to charge, and included assets in rate base for
7 recovery in rates. Under these circumstances, MEC cannot escape
8 the obligation it has undertaken without first seeking Commission
9 approval. (Emphasis added.)

10 Stipulated Facts, ¶ 41; Gold PF Dt., p. 27, Ins. 1-24; Exh. 18. Despite the ACC
11 staff's strong warning to Mohave, Mohave refused to change its position. The
12 ACC accordingly should take immediate and appropriate action.

13 **XII. CONCLUSION**

14 As a licensed utility, Mohave is obligated to comply with all ACC rules,
15 regulations, and orders. Although the Line has been used by Mohave's customers for
16 years, Mohave simply abandoned it and walked away from its customers. Even after
17 the ACC legal staff warned Mohave that its actions violated state laws and regulations,
18 Mohave refused to correct its mistakes. Those mistakes, therefore, were not simple,
19 minor errors. Arguably, Mohave intentionally violated ACC regulations, ACC orders,
20 and state laws. Mohave should be immediately ordered to take corrective action. The
21 ACC therefore should:

- 22 (1) Find that the BIA and the other customers along the Line are Mohave's
23 retail customers;
 - 24 (2) Find that Mohave's service territory includes the area served by the Line;
 - 25 (3) Void Mohave's transfer of the Line;
 - 26 (4) Declare that Mohave owns the Line;
 - 27 (5) Order Mohave to operate and maintain the Line;
- 28

- 1 (6) Order Mohave to relocate the BIA's meter to its original location at the end
2 of the Line;
3 (7) Order Mohave to reimburse the BIA \$125,851.33 for the repair and
4 maintenance costs on the Line that the BIA has had to pay since Mohave
5 wrongfully abandoned the Line;
6 (8) Order Mohave to reimburse the BIA \$19,994.25 for the electricity that has
7 been consumed by Mohave's customers along the Line but was paid by
8 the BIA; and
9 (9) Take whatever other action the ACC deems appropriate.

10
11 Respectfully submitted this 20 day of February, 2009.

12 DIANE J. HUMETEWA
13 United States Attorney
14 District of Arizona

15 

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