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**BEFORE THE ARIZONA CORPORATION COMMISSION**

IN THE MATTER OF THE COMPLAINT OF  
BUREAU OF INDIAN AFFAIRS, UNITED  
STATES OF AMERICA, AGAINST  
MOHAVE ELECTRIC COOPERATIVE,  
INC. AS TO SERVICES TO THE  
HAVASUPAI AND HUALAPAI INDIAN  
RESERVATIONS.

DOCKET NO. E-01750A-05-0579

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

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**I. Introduction.**

Respondent Mohave Electric Cooperative, Inc. ("Mohave") hereby submits its Post-Hearing Response Brief. The Arizona Corporation Commission ("Commission") should reject the arguments of the Bureau of Indian Affairs ("BIA"), deny the relief requested by the BIA, find that Mohave properly abandoned the 70-mile transmission line ("Line") between Mohave's Nelson substation and Long Mesa, and hold that Mohave is no longer responsible for the costs associated with the abandoned Line, including operation and maintenance costs. Mohave has previously addressed many of the arguments raised by the BIA in Mohave's Post-Hearing Brief filed on February 20, 2009, and incorporates those arguments here where they were responsive to the BIA's Post-Hearing Brief. For ease of

1 analysis, this Response Brief will follow the order of topics discussed in the BIA's February  
2 20, 2009 Closing Argument Brief.

3 **II. Response To BIA's Statement Of Facts.**

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5 In its factual discussion, the BIA emphasized the fact that the Hualapai Tribe is a  
6 member of Mohave's cooperative and has received electricity from Mohave for a number of  
7 years. BIA's Brief at 2. However, the fact that Mohave provides electrical power to the  
8 Hualapai Tribe in Peach Springs at accounts located within Mohave's CCN area does not  
9 mean Mohave has the legal obligation to provide electrical power to the Tribe outside of  
10 Mohave's CCN in a completely separate location many miles away. Holding otherwise  
11 would mean that every electric utility in Arizona must serve customers throughout the state  
12 based on the fact that a customer has multiple locations both inside and outside the utility's  
13 CCN area. The fact that Mohave's CCN includes Peach Springs and "other parts of the  
14 Hualapai Reservation," BIA's Brief at 2, has no bearing whatsoever on the issues the  
15 Commission faces in this case.  
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19 The BIA acknowledged that it redistributes and resells electricity in Supai Village,  
20 charging Havasupai members and others for the electricity, BIA's Brief at 4, thus excluding  
21 the BIA from the definition of a "retail electric customer" in A.R.S. § 40-201(21).  
22 However, the BIA misrepresented the facts and the record when it contended that "There is  
23 no substation at Long Mesa." BIA's Brief at 4. In fact, the 1981 Contract between Mohave  
24 and the BIA explicitly referred to a "Government substation" at Long Mesa, Ex. R-2, Tab 3  
25 at 000009, and such a substation existed until approximately 1992 when the BIA unilaterally  
26 made physical changes to its facilities at Long Mesa. Tr. 247-57 (Longtin Testimony). The  
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1 fact that the 70-mile Line originally ran between Mohave's Nelson substation and the  
2 "Government substation" at Long Mesa supports a finding that the Line was a transmission  
3 line. The record unambiguously substantiates that the terminus of Mohave's transmission of  
4 power on the 70-mile Line was the "line side" of the transformers up on the Rim of the  
5 Grand Canyon at Long Mesa. Ex. R-2, Tab 3 at 00001.

7 The BIA noted that, after construction of the Line, Mohave began providing  
8 electrical service to twelve accounts along the 70-mile length of the Line, or one customer  
9 every 5.8 miles. BIA's Brief at 5. However, the BIA ignores the fact that Mohave served  
10 these customers at the explicit or implicit request of the BIA and as the BIA's agent. The  
11 1981 Contract specifically required that Mohave coordinate with the telephone provider, Ex.  
12 R-2, Tab 3 at 000013, and provided that Mohave could serve the Hualapai reservation from  
13 the Line. *Id.* at 000016. The Hualapai Tribe specifically requested that the BIA ensure that  
14 Mohave provide electrical service to tribal properties from the Line including Frazier Wells,  
15 the Youth Camp and the Thornton Fire Tower. Ex. R-1. Likewise, the record is clear that  
16 Mohave served the other BIA accounts pursuant to the BIA's request and authorization, as  
17 detailed in Mohave's opening Post-Hearing Brief. Service of the scattered twelve accounts  
18 from the Line as BIA's agent (or to the BIA itself) did not turn the Line into a distribution  
19 line serving retail customers as if they were in Mohave's CCN.  
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24 The BIA also contends that the Mohave served accounts "outside its certified area  
25 but did not obtain any borderline agreements." BIA's Brief at 5. However, the BIA ignores  
26 the existence of the 1981 Contract between Mohave and the BIA, which functioned as a  
27 borderline agreement allowing Mohave to serve outside of its CCN area. The bulk of the  
28

1 area crossed by the Line falls outside of the CCN area of any Commission-regulated utility,  
2 and there was no entity other than the BIA with which Mohave could enter into a borderline  
3 agreement. Absent the 1981 Contract and BIA's authorization, Mohave would not have  
4 been serving any accounts outside of its CCN area, and would not have had authority to do  
5 so.  
6

7 **III. The Commission Should Not Hear the BIA's Complaint for Both Jurisdictional**  
8 **and Prudential Reasons.**

9 The BIA spent much of its jurisdictional argument in its Post-Hearing Brief attacking  
10 the testimony of Robert Moeller, who advised the BIA on federal and tribal law matters  
11 while at the Office of the Solicitor. See BIA's Brief at 6-8. The principal thrust of Mr.  
12 Moeller's testimony concerned the significance of tribal sovereignty, the tribes' immunity to  
13 state regulation and interference with activities on tribal lands, and the federal government's  
14 particular fiduciary duties concerning the tribes, including the provision of electrical service  
15 on the Hualapai and Havasupai reservations. Ex. R-8; Tr. 409-37 (Moeller's Testimony).  
16 Passing over the substantive merits of Mr. Moeller's testimony, the thrust of the BIA's  
17 criticisms instead relate to its attempted impeachment of Mr. Moeller's knowledge of the  
18 procedural history of other actions and suits that were not within the scope of his testimony.  
19 See BIA'S Brief at 6-8.<sup>1/</sup> Thus, the BIA's criticisms do not lessen the credibility of Mr.  
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24 <sup>1/</sup> The BIA mischaracterized the ancillary litigation and Mr. Moeller's testimony in its  
25 Post-Hearing Brief. As set forth in prior filings in this docket, Mohave filed a  
26 declaratory action in state court (CV2005-018954) seeking a declaration that (a) the  
27 BIA did not validly exercise an option to renew the Contract, (b) the Contract has  
28 expired, and (c) the BIA and Mohave did not enter into a new contract to supply  
electricity. The BIA successfully removed the case to federal district court (CV-06-  
0082-PCT-NVW) and moved to dismiss the action on sovereign immunity grounds.  
Mohave simply was opposing dismissal of its case – it did not oppose the federal

1 Moeller's conclusions that the Commission, as a state entity, has no jurisdiction over the  
2 provision of electrical service to the Tribes, and that the primary duty in that regard lies with  
3 the BIA.  
4

5 Contrary to the BIA's argument, BIA's Brief at 7 n.3, Mohave has never contended  
6 that this matter should be decided in tribal court, and thus the BIA's claim that the tribal  
7 courts could not provide complete relief lacks merit. Instead, the jurisdictional difficulties  
8 evident in this matter were created by the BIA – which is attempting to use a state agency,  
9 which has no jurisdiction over the provision of electrical service on Indian reservations, *see*  
10 *In re Trico Electric Co.*, Decision No. 47107 (July 6, 1973), to force Mohave to continue  
11 providing electrical service outside of Mohave's CCN on two Indian reservations under an  
12 expired contract.  
13

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15 As noted in Mohave's Post-Hearing Brief at 30-34, the State has no jurisdiction to  
16 regulate the affairs of Indian Tribes. *See* Enabling Act, 36 U.S. Stat. 567, § 20; Arizona  
17 Const. art. 20, § 4; *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of*  
18 *Oklahoma*, 532 U. 411, 414 (2001) (“an Indian tribe is not subject to suit in a state court . . .  
19 unless Congress has authorized the suit or the tribe has waived its immunity”); *Kiowa Tribe*  
20 *of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) (“As a matter  
21 of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit  
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25 court hearing its declaratory action, but argued that remand to state court was  
26 appropriate if the federal court otherwise lacked jurisdiction. *See* The BIA's Notice  
27 of Dismissal of Mohave's Declaratory Judgment Complaint and attached Order (filed  
28 in this docket on May 10, 2006). Importantly, as to this matter, where the BIA is  
plaintiff, Mr. Moeller testified that federal court was the proper forum to hear the  
BIA's complaint. Ex. R-8 at 10-11; Tr. 444.

1 or the tribe has waived its immunity”); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046  
2 (9<sup>th</sup> Cir. 2006)(“the doctrine [of tribal sovereign immunity] is firmly ensconced in our law  
3 until Congress chooses to modify it”); *Smith Plumbing v. Aetna Casualty & Surety Co.*, 149  
4 Ariz. 524, 531, 720 P.2d 499, 506 (1986)(“The courts of this state may not, nor do they  
5 desire to, exercise authority over an Indian tribe”); *Morgan v. Colorado River Indian Tribe*,  
6 103 Ariz. 425, 428, 443 P.2d 421, 425 (1968)(an Indian tribe, “being a dependent sovereign  
7 immune from suit, cannot be subjected to the jurisdiction of our courts without its consent or  
8 the consent of Congress”). The BIA failed to distinguish these cases or to deal with this  
9 baseline, dispositive proposition in its Post-Hearing Brief. Simply stated, having  
10 jurisdiction over Mohave generally cannot equate to Commission jurisdiction over this  
11 dispute.

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15 Contrary to the BIA’s argument, BIA’s Brief at 8, Mohave has never contended that  
16 it is entitled to assert tribal sovereign immunity. Rather, tribal sovereign immunity has a  
17 profound impact on any attempt by the Commission to regulate the provision of electrical  
18 service on an Indian reservation. The fact that the Hualapai and Havasupai Tribes have not  
19 appeared in this action to contest the Commission’s jurisdiction is irrelevant. The position  
20 of the Tribes is more accurately reflected by their efforts to block Mohave from trying to  
21 serve tribal members residing within Mohave’s CCN area along the 70-mile Line within an  
22 easement granted by the Tribe (*see* Mohave’s Post-Hearing Supplement to Record, Longtin  
23 2/13/09 Affidavit and attached exhibits), and by the Havasupai Tribe’s action in building  
24 and energizing the 13-mile spur without the approval of the Commission, or even notifying  
25 the Commission (or Mohave) that the Tribe had put the spur into service. While the Tribes  
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1 have not intervened or commented upon the Commission’s jurisdiction in this matter, that  
2 still does not mean that the Tribes will allow Mohave to provide electrical service on the  
3 reservations if the Commission so directs – and their recent actions suggest that the opposite  
4 may occur.  
5

6 The BIA’s argument that the Federal Energy Regulatory Commission (“FERC”) has  
7 no jurisdiction in this matter, *see* BIA’s Brief at 9, is another red herring. Mohave has never  
8 contended that FERC has jurisdiction over this dispute. The fact that one agency does not  
9 have jurisdiction does not automatically confer jurisdiction upon another agency, any more  
10 than the fact of OSHA or the Department of Defense not having jurisdiction over this  
11 dispute confers jurisdiction over tribal matters on the Commission.  
12

13 Mohave has also never disputed that the Commission in general has jurisdiction over  
14 Mohave’s activities as a regulated public service corporation. Instead, the significant issue  
15 raised by the BIA’s complaint is not the Commission’s jurisdiction over Mohave but rather  
16 whether the Commission has jurisdiction over the provision of electrical service on Indian  
17 reservations. While the Commission has jurisdiction over Mohave, that does not mean that  
18 it is appropriate for the Commission to order Mohave to provide electrical service on tribal  
19 lands, outside Mohave’s CCN and without a contract. The BIA seeks to obscure this crucial  
20 issue by focusing on the Commission’s power over Mohave, rather than the Commission’s  
21 lack of authority over the BIA, the Havasupai or Hualapai Tribes, or activities on the tribal  
22 lands.  
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1 **IV. The October 1981 Contract Between Mohave and the BIA Expired in 1992 and**  
2 **No Longer Controls Mohave's Relationship with the BIA or the Tribes.**

3 The BIA has taken confusing and self-contradictory positions on the effectiveness of  
4 the 1981 Contract throughout this dispute. The BIA ignored Mohave's written questions  
5 about the agency's renewal intentions regarding the Contract in 1992. Stip., ¶ 25; Ex. R-2,  
6 Tab 9. In 1993, the BIA sought both to renew and to "re-negotiate" the contract at the same  
7 time. Ex. R-2, Tab 10. By March 2002, the BIA was purporting both to extend the expired  
8 contract to 2012 and to "unilaterally" modify it. Ex. R-2, Tab 13. In its Complaint, the BIA  
9 sought an order from the Commission requiring Mohave "to continue to provide electricity  
10 and electrical distribution service at Long Mesa to the BIA *under the Contract.*" Complaint,  
11 ¶ 40(G)(emphasis added). The BIA then contended that it is "immaterial . . . whether the  
12 Contract is currently in effect." Stip. at 10. The BIA now contends both that "Whether or  
13 not the Contract expired is irrelevant" and that "Mohave is estopped from arguing that the  
14 Contract terminated." BIA's Brief at 11.

15 The relevance and materiality of the contract termination is demonstrated by the  
16 BIA's continuing contortions on this issue. Without the 1981 Contract, Mohave would have  
17 never constructed the 70-mile Line, would have never transmitted electrical power to the  
18 BIA at Long Mesa, and would have never served the Hualapai tribal and other accounts  
19 along the Line at the BIA's request and authorization. Because the Contract terminated  
20 years ago, the BIA cannot rely upon it in any way to support the BIA's demand for relief.  
21 For the BIA to contend at this point that the termination of the Contract is "immaterial" and  
22 "irrelevant" underscores the fact that the Contract has indeed terminated, and that  
23 termination precludes the relief the BIA seeks in this action.  
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1 The BIA's estoppel argument also fails. The BIA does not explain whether it seeks  
2 to rely upon judicial or equitable estoppel, but neither doctrine applies here. "Under the  
3 doctrine of judicial estoppel a party is bound by his judicial declarations and may not  
4 contradict them in subsequent proceedings involving the same issues and parties. . . .  
5 *Arizona requires that before the doctrine is applicable the first judicial proceeding must*  
6 *have been terminated in a final judgment."* *Sailes v. Jones*, 17 Ariz. App. 593, 598, 499  
7 P.2d 721, 726 (App. 1972)(emphasis added). The BIA quotes arguments by Mohave that  
8 never resulted in a final judgment, and thus judicial estoppel could never come into play.  
9

10  
11 Equitable estoppel also does not apply. "Equitable estoppel applies if (1) the party to  
12 be estopped intentionally or negligently induces another to believe certain material facts, (2)  
13 the induced party takes actions in reliance on its reasonable belief of those facts, and (3) the  
14 induced party is injured by so relying." *Pueblo Santa Fe Townhomes Owners' Association*  
15 *v. Transcontinental Insurance Company*, 218 Ariz. 13, 21, 178 P.3d 485, 493 (App. 2008).  
16 Whether the 1981 Contract has expired and whether the Commission has jurisdiction to  
17 decide such an issue are legal conclusions, not facts, and the BIA clearly has not  
18 detrimentally relied upon any argument by Mohave; rather, the BIA contended when it filed  
19 its Complaint with the Commission that the Contract was in full force and that the  
20 Commission had jurisdiction to determine whether the Contract had terminated. Thus, the  
21 doctrines of equitable and judicial estoppel do not support the BIA's argument as a matter of  
22 law.  
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26 The BIA also contends that the Contract did not terminate in 1992 because the BIA  
27 continued to pay some part of the facilities charge until 1997. BIA's Brief at 12-13. The  
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1 record is clear that following the expiration of the Contract, Mohave did continue to provide  
2 electrical power on a month-to-month basis while hoping that the parties would be able to  
3 negotiate a new contract. Tr. 302-03, 353. However, that fact does not support the BIA's  
4 claim that the 1981 Contract continued past 1992. The BIA paid only part of the facilities  
5 charge on a month-to-month basis, Mohave continually asked the BIA about its intentions  
6 regarding a new contract, and the BIA internally admitted that the Contract had expired. Ex.  
7 R-2, Tabs 8, 11, 12, 14. The BIA's payment of a portion of the facilities charge during  
8 1992-97 does not grant the Contract any continuing effectiveness in the 2002-12 time  
9 period.  
10

11 The BIA's citation to *Freytag v. Crass*, 913 S.W.2d 171 (Tenn. App. 1995) also fails  
12 to support its argument. In that case, which involved a contract between two water utilities,  
13 the Tennessee Court of Appeals held that the continued silent acquiescence of both utilities  
14 meant that an option had been exercised and the contract had been renewed for another five-  
15 year term:  
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18 Where a party has an option or a right to extend a contract for a definite period of  
19 time, under the same terms and conditions as the original term, remains silent at the  
20 end of the original term and continues to perform under the terms of the contract; *and*  
21 *the other party likewise remains silent* but likewise continues to perform under the  
22 terms of the contract, then there has been an extension for a like period by  
acquiescence, absent a provision in the contract to the contrary.

23 *Id.* at 173 (emphasis added). In this matter, there was no silence by Mohave. Rather,  
24 Mohave continually asked the BIA about its intentions, requested that the BIA negotiate a  
25 new contract, notified the BIA that Mohave would move the meter to its Nelson substation,  
26 and ultimately moved the meter consistent with that notice. None of these actions indicate  
27 any silent acquiescence by Mohave. Nor did the BIA acquiesce to the original terms and  
28

1 conditions of the Contract; it instead sought renewal on new and renegotiated terms. Ex. R-  
2 2, Tab 10. Arizona law provides that option agreements must be strictly construed and are  
3 effective only when exercised strictly according to their terms. *Andrews v. Blake*, 205 Ariz.  
4 236, 243, 69 P.3d 7, 14 (2003); *Rogers v. Jones*, 126 Ariz. 180, 182, 613 P.2d 844, 846  
5 (App. 1980). The BIA failed to exercise its option under the October 1981 Contract, and it  
6 consequently lapsed.  
7

8  
9 The BIA's alternative argument that "contracts" with other accounts along the Line  
10 never expired also fails to support the BIA's requested relief. BIA's Brief at 13. As  
11 Mohave previously argued, Mohave could only serve the accounts outside its CCN area as  
12 the BIA's agent and pursuant to the BIA's authority. Once the 1981 Contract between  
13 Mohave and the BIA expired, Mohave had no legal right to continue serving accounts  
14 outside of its CCN area. Concerning the two accounts on the Hualapai Reservation and  
15 inside Mohave's CCN (the Cesspooch cabin and one Hualapai tribal account), Mohave  
16 continued to provide power to these accounts at the Nelson substation, and recently sought  
17 to transition that service to a new line physically separate from the 70-mile Line facilities  
18 that had been abandoned; Mohave's efforts to do so thwarted by the Hualapai Tribe. *See*  
19 Mohave's Post-Hearing Supplement to Record, Longtin 2/13/09 Affidavit and attached  
20 exhibits. The majority of the accounts along the Line were necessarily dependent upon the  
21 1981 Contract under which Mohave constructed and operated the Line. After that Contract  
22 expired, the legal and practical basis upon which Mohave could provide service also  
23 disappeared.  
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1 **V. Mohave Has Never Based Its Decision to Abandon the Line Solely on the Fact**  
2 **that Mohave Lost Money on the Line.**

3 Mohave's Board of Directors did consider the financial implications of continuing to  
4 own the Line when deciding to abandon it, but financial considerations were never the sole  
5 consideration. R-2, Tab 15. Thus, Mohave did not abandon the Line solely because "it was  
6 losing money on the BIA and customers along the Line," as contended by the BIA. See  
7 BIA's Brief at 14.  
8

9 First, contrary to the BIA's argument, Mohave's continued ownership of the Line did  
10 constitute a financial drain to Mohave. Neidlinger Supp. Testimony at 4-6. The BIA bases  
11 its entire argument on the testimony of Leonard Gold, who is not an accountant and who  
12 assumes a situation in which BIA was still continuing to pay the facilities charge, when the  
13 record shows it ceased doing so in 1997. BIA's Brief at 14-16. Mr. Gold contends without  
14 foundation that the BIA "was always willing" to pay the facilities charge and "would pay it  
15 in the future," Gold's Supp. Testimony at 10, although the BIA itself has never made such a  
16 statement to Mohave or anyone else. It is beyond dispute that Mohave cannot recoup its  
17 expenses related to the Line without payment of the facilities charge anticipated by the  
18 Contract, which expired by the BIA's own actions. Neidlinger Supp. Testimony at 4-6.  
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22 Second, the BIA contends that Mohave should simply seek a rate increase, BIA's  
23 Brief at 14, but the BIA's conduct has made such an application impossible. Mohave's  
24 current rates, set in Decision No. 57172 (Nov. 29, 1990), were based on treatment of the  
25 BIA as a separate customer class pursuant to the 1981 Contract between Mohave and the  
26 BIA. Decision No. 57172, Exhibit A; Neidlinger Supp. Testimony at 4. This separate  
27 treatment was required under the Commission's prior Decision No. 53174 (August 11,  
28

1 1982), which found the Line to be a transmission line and required segregating all expenses  
2 and revenues associated with the Line. Decision No. 53174 at 8-9. After the 1981 Contract  
3 expired (which termination the BIA contends is “irrelevant”, BIA’s Brief at 11), there no  
4 longer existed any contractual predicate for treating the BIA and the Line on a standalone  
5 basis. Because the 1981 Contract has expired, Mohave’s 38,000 members in the Bullhead  
6 City and Kingman areas of Mohave’s CCN would have ended up subsidizing service to a  
7 small number of customers on sovereign tribal land outside the CCN, including a federal  
8 agency, the BIA. Such a result would not be fair or equitable to Mohave’s members, and  
9 further compels denial of the relief the BIA seeks.  
10

11  
12 **VI. The 70-Mile Line, Despite Variable Terminology in Different Documents,**  
13 **Always Functioned as a Transmission Line and Both the Commission and**  
14 **Mohave Treated It as Such.**

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

17 The BIA spends eleven pages arguing that “The Line Is a Distribution Line,” *id.* at  
18 16-27, and even contends that the Commission never classified the Line as a transmission  
19 line. *Id.* at 25. Yet, in this entire section of its brief, the BIA never once mentions Decision  
20 No. 53174 (August 11, 1982), which explicitly found that the Line was a “*transmission line*  
21 *dedicated to serving the Hualapai Indian Reservation.*” Decision No. 53174 at p. 8  
22 (emphasis added). The Commission further held that the Line “is not used and useful, will  
23 not be used and useful, and was never intended to be used and useful in the provision of  
24 electric service to [Mohave’s] ratepayers.” *Id.* (emphasis in original).  
25  
26

27 The BIA only addresses this Commission finding in a cursory fashion later in its  
28 Brief, characterizing Decision No. 53174 as “a 25+ year old rate decision” which is

1 “irrelevant.” BIA’s Brief at 33. However, the Commission’s classification of the Line as a  
2 transmission line in that Decision remains binding on the Mohave and determines the issue  
3 which the BIA concedes is “central” to this dispute. BIA’s Brief at 16. Moreover, the  
4 BIA’s argument concerning the age of Decision No. 53174 fails to recognize that the Line is  
5 still located outside of Mohave’s CCN area, just as it was in 1982, and that Mohave’s rates  
6 set in 1990 were based on the direction in Decision No. 53174 to segregate all expenses and  
7 revenues related to the Line. The BIA seems to believe that a Commission decision can be  
8 collaterally attacked simply based on age and the passage of time; however, A.R.S. § 40-252  
9 does not allow the parties to disregard a Commission decision on that basis.  
10  
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12 **B. The 70-Mile Line Has Always Functioned as a Transmission Line**  
13 **Carrying Contracted Power to a Single User, the BIA, Which Steps the**  
14 **Power Down for Its Own Distribution Uses.**

15 The BIA argues that the 70-mile Line is a distribution line based on REA loan  
16 applications, tribal easements and the request for quotations to build the line, picking out  
17 every stray reference to “distribution” that the BIA and its witness, Mr. Gold, could find.  
18 BIA’s Brief at 17-21. The BIA’s argument ignores both the subsequent Decision No. 53174  
19 finding that the Line was a “transmission line” and the subsequent function of the Line.  
20 Likewise, the BIA’s focus on accounting classifications in REA filings and the rate  
21 application Cost of Service Study (which was disregarded by the Commission), BIA’s Brief  
22 at 21-25, disregards both the Commission’s findings and the actual function of the Line.  
23  
24

25 BIA’s assertion that “Neither FERC nor the ACC has ever Classified the Line as a  
26 Transmission Line,” BIA’s Brief at 25, is inaccurate and irrelevant in part. As noted above,  
27 the Commission has classified the Line as a “transmission line,” Decision No. 53174 at 8,  
28

1 and the BIA itself acknowledges that FERC has no jurisdiction in this matter. *See* BIA's  
2 Brief at 9. Because the Commission has in fact classified the Line as a "transmission line,"  
3 the Line falls within the definition of "electric transmission facilities" in A.R.S. § 40-  
4 201(11).  
5

6 When the BIA finally discusses the actual function of the Line, its argument is based  
7 on numerous factual errors. *See* BIA's Brief at 25-27. As previously noted, the Contract  
8 between the BIA and Mohave refers to a government substation at Long Mesa, and such a  
9 substation did exist when the Contract was formed in 1981 until approximately 1992, at  
10 which time the BIA on its own initiative reorganized its facilities at Long Mesa. Thus, the  
11 Line as constructed fulfilled the recognized function of a transmission line carrying power  
12 between substations. The BIA's subsequent and unilateral act of physically altering the  
13 substation (such that the BIA now steps the power down for use in Supai below the Rim)  
14 does not change the function of the Line or the Commission's prior classification of it as a  
15 transmission line.  
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19 The 24.9 kV voltage of the Line is also not determinative of its use and function,  
20 particularly when the Commission has classified it as transmission line. As Thomas Hine  
21 testified, WAPA (which offered to take over the Line if the BIA would pay operation and  
22 maintenance costs; the BIA refused) considers all of its lines to be transmission lines, even  
23 lines with a voltage of 34.5 kV. Tr. 399. The Line runs in a relatively straight line in a  
24 remote and rural area from the Nelson substation to the substation at Long Mesa, diverging  
25 sharply from Indian Route 18, consistent with its use as a transmission line rather than a  
26 distribution line. Tr. 106-07, 236; Ex. R-2, Tab 3. The Line includes only one recloser  
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1 along its entire length, also consistent with the Line's function as a transmission line. Tr.  
2 236-38, 377-78. Moreover, the principal use of the Line has always been to provide power  
3 to a single bulk user, the BIA, which then resells and distributes the power to individual  
4 consumers in Supai. All of these factors support the Commission's finding that the Line is a  
5 transmission line, and the relatively few agency service drops along the Line (approximately  
6 one per every 5.8 miles) at the request of the BIA and the Tribes do not convert the Line  
7 into a distribution line.  
8

9  
10 **VII. Mohave Acted Properly When Moving the Meter to Its Nelson Substation and**  
11 **Placing the Burden of Reading Any Individual Meters Along the Line on the**  
12 **BIA.**

13 The BIA contends that Mohave violated a Commission order by moving the BIA's  
14 meter to the Nelson substation, citing the language "All service provisions are specified in  
15 the contract" in an exhibit to Decision No. 57172 (Nov. 29, 1990). See BIA's Brief at 28.  
16 The BIA argues that "One service provision of the Contract is to deliver electricity to the  
17 BIA's primary meter at Long Mesa." *Id.* Even accepting arguendo that the Commission's  
18 language is an "order," BIA's argument also presumes that the Contract (which the BIA  
19 otherwise characterizes as irrelevant) is still in effect. However, because the Contract  
20 expired in 1992, the BIA cannot now claim that Mohave has violated the Contract or a  
21 Commission order. It is somewhat disingenuous for the BIA to refuse to renew the Contract  
22 and let it expire, then to argue that Mohave has violated a Commission order by not  
23 adhering to the BIA's interpretation of the Contract.  
24

25  
26 Moreover, the Contract actually stated that electrical power would be delivered to the  
27 "Line side of [the] Long Mesa Power Transformer," Ex. R-2, Tab 3 at 00001, or "the 24.9  
28

1 kilovolt side of the Government substation.” *Id.* at 00009. The BIA removed the  
2 transformer in approximately 1992 and now argues that “There is no substation at Long  
3 Mesa.” BIA’s Brief at 4. Effectively, the BIA seeks to blame Mohave for not metering the  
4 electrical power at a substation that the BIA unilaterally altered. The BIA’s argument has  
5 numerous contortions: the BIA first unilaterally altered the factual predicate of the 1981  
6 Contract by removing the transformers (although the “line side” meter remained), then  
7 allowed the Contract to lapse, then did not renegotiate it, then argued that the continued  
8 effectiveness of the Contract is irrelevant, and now claims that Mohave has violated a  
9 Commission order by reason of not complying with a narrow provision of the Contract that  
10 the BIA rendered impossible to perform.  
11

12  
13 The BIA also contends that Mohave violated ACC R14-2-202(B) by discontinuing or  
14 abandoning service to the accounts along the Line. BIA’s Brief at 29. That Commission  
15 rule provides: “Any utility proposing to discontinue or abandon utility service currently *in*  
16 *use by the public* shall prior to such action obtain authority therefor from the Commission.”  
17 ACC R14-2-202(B)(1)(emphasis added). In this instance, the Commission has already  
18 specifically found that the Line “is not used and useful, will not be used and useful and was  
19 never intended to be used and useful in the provision of electrical service to [Mohave’s]  
20 ratepayers.” Decision No. 53174 at 8 (emphasis in original). Because the Commission has  
21 squarely and explicitly held that the Line, which was built under the Contract to serve the  
22 BIA, is not used by the public and will never be used by the public, the BIA’s argument that  
23 Mohave has violated the Commission regulation fails. Mohave did not abandon service to  
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1 the public because the Commission has already found that the Line does not serve the  
2 public.

3  
4 Moreover, Mohave never ceased providing electricity to the BIA at the Nelson  
5 substation. This allowed service to continue to the two users within Mohave's CCN (the  
6 Cesspooch cabin and one Hualapai Tribal account). Mohave, recognizing the duty to  
7 provide service to accounts within its CCN area, recently attempted to do so by an  
8 alternative method not using the actual physical Line. See Mohave's Post-Hearing  
9 Supplement to the Record, Longtin 2/13/09 Affidavit, and attached exhibits. While  
10 attempting to construct an alternative free-standing line in an area covered by a tribal  
11 easement, Mohave's employees were ordered to cease work and threatened with trespass  
12 claims. *Id.* Mohave recognizes and acknowledges that it has an obligation to serve  
13 customers within its CCN area who request service, but Mohave cannot be blamed for an  
14 inability to do so when the Hualapai Tribe has frustrated and prevented Mohave from  
15 providing such service.<sup>2/</sup>  
16  
17  
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22 <sup>2/</sup> Comparison and contrast of Mohave's post-hearing affidavits and exhibits with the  
23 rebuttal affidavits the BIA recently docketed confirms this. A reasonable reading of  
24 Mohave's request letters to the Tribe is that Mohave sought any and all permits and  
25 consents necessary to build its new line facilities, and reasonably thought it received  
26 that permission with the return letters and permits. The Tribe's forcibly confronting  
27 and chasing away the utility personnel with intimidation on the pretext of needing yet  
28 more consents and permissions — when the initial requests could not have been more  
clear and there is no evidence that such additional "hoops" were required to be  
"jumped through" previously — demonstrates the practical problems with granting  
the relief the BIA seeks.

1 **VIII. Mohave Validly and Effectively Abandoned and Quitclaimed the Line to the**  
2 **BIA and the Tribes.**

3 **A. The Abandonment Is Valid Despite Any Refusal by the BIA to Accept the**  
4 **Line and the BIA's Quibbles about the Status of the Line.**

5 The BIA contends that a deed must be "accepted" to vest legal title, citing *Morelos v.*  
6 *Morelos*, 129 Ariz. 354, 356, 631 P.2d 136, 138 (App. 1981), and that Mohave's  
7 abandonment of the Line is void because the BIA did not accept the Line. See BIA's Brief  
8 at 30. However, the BIA has not addressed the argument Mohave made in its opening brief  
9 that an acceptance is not needed for an effective abandonment. See *Mason v. Hasso*, 90  
10 Ariz. 126, 130, 367 P.2d 1, 4 (1961); see also *McFadden v. Wilder*, 6 Ariz. App. 60, 64, 429  
11 P.2d 694, 698 (App. 1967)("Abandonment requires an intention to abandon, together with  
12 an act or omission to act, which carries the intention into effect"). In any case, the  
13 Havasupai Tribe accepted the Line by constructing and energizing the 13-mile spur, which  
14 actions the BIA approved and ratified by allowing placement of the spur in the BIA's right  
15 of way.  
16  
17

18 The BIA also contends that a quitclaim deed cannot convey the Line because it is  
19 "personal property, not real property." BIA's Brief at 31 (citing *Black's Law Dictionary*).  
20 Apparently no Arizona case law supports the BIA's argument, and the dictionary cited by  
21 the BIA defines a deed variously as "a written instrument by which land is conveyed" or  
22 "any written instrument that is signed, sealed, and delivered and conveys some interest in  
23 property." *Black's Law Dictionary* (8<sup>th</sup> ed.). The BIA's argument that deeds cannot convey  
24 personal property is much ado about nothing, and ignores the fact that Mohave did not even  
25 characterize its notice of quitclaim and abandonment as a "deed." See Ex. R-2, Tab 16. In  
26  
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28

1 any case, the Line is more accurately characterized as a fixture which has been physically  
2 attached to the land. *See Murray v. Zerbel*, 159 Ariz. 99, 101, 764 P.2d 1158, 1160 (App.  
3 1988)(holding that a mobile home had become affixed to real property). Moreover, the  
4 BIA's concerns about whether the Line is personal or real property are irrelevant in the  
5 context of an abandonment. *See Mason*, 90 Ariz. at 133, 367 P.2d at 5 (finding an  
6 abandonment of personal property, that is, the rights under a contract).

8  
9 **B. There Was No Violation of A.R.S. § 40-285 Because the Line, Which Was  
10 Built Under a Contract with the BIA, Was Not Useful to the Public.**

11 Decision No. 53174 held that the Line was a transmission line which was not useful  
12 to Mohave's ratepayers. *Id.* at 8. Because the Line was not useful or necessary to Mohave  
13 in its duties to the public, Mohave could properly dispose of the Line under A.R.S. § 40-  
14 285(C). After ignoring Decision No. 53174 for the first 30 pages of its Brief, the BIA  
15 finally turns to the Decision, arguing that Mohave's abandonment of the Line was void  
16 because "Mohave's reliance upon a 25+ year old rate decision is misplaced" and "That old  
17 rate decision is irrelevant to a determination today about the usefulness of the Line." BIA's  
18 Brief at 33.

19  
20 The BIA first contends that Mohave should disregard Decision No. 53174 because  
21 the Commission found the Line was "not used or useful to Mohave's customers in Bullhead  
22 City" but "never found that the Line would never be useful to those customers who Mohave  
23 would eventually serve off of the Line." BIA's Brief at 32. However, Decision No. 53174  
24 explicitly and categorically stated that the Line would *never* be used and useful to Mohave's  
25 ratepayers. The BIA also conspicuously ignores the fact that the bulk of the Line stretches  
26 outside of Mohave's CCN area and serves BIA accounts outside of Mohave's CCN area.  
27  
28

1 The BIA effectively argues that, even though the Line is not used and useful to Mohave's  
2 customers in Bullhead City, it is used and useful to individuals outside the CCN, and  
3 therefore Mohave's members inside the CCN should be forced to subsidize the Line. That  
4 argument misconstrues the "used and useful" distinction and the impact of the Decision No.  
5 53174.  
6

7 The BIA also contends that Mohave should have disregarded Decision No. 53174  
8 because Mohave filed its rate application resulting in that Decision before the Line became  
9 operational. BIA's Brief at 32. However, Decision No. 53174 explicitly relied upon a non-  
10 historical test year of 1982 and a rate base as of December 1982, *after* the Line became  
11 operational. *Id.* at 4. The Commission therefore directed that Mohave segregate all  
12 expenses and revenues related to the Line. *Id.* at 8-9. Thus, the Decision clearly assumed  
13 that the Line was functioning and operational – but still held that the Line was not used and  
14 useful to Mohave's ratepayers.  
15  
16

17 The BIA contends that Mohave was required to first seek Commission approval  
18 before deciding whether to abandon the Line. BIA's Brief at 33-34. However, A.R.S. § 40-  
19 285 and Arizona case law clearly allow a utility to make an initial determination that  
20 property is not useful or necessary and can be abandoned. *See Babe Investments v. Arizona*  
21 *Corporation Commission*, 189 Ariz. 147, 939 P.2d 425 (App. 1997). *Babe Investments*  
22 involved a private contract between a railroad and a property owner under which the  
23 railroad constructed, operated and maintained a siding to serve a particular property owner.  
24 The railroad subsequently decided to terminate the contract and remove the siding "to  
25 eliminate any obligation to further maintain it." *Id.* at 149, 939 P.2d at 427. The property  
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1 owner challenged the railroad's action before the Commission, and the Commission  
2 ultimately denied the property owner any relief. *Id.* at 150, 939 P.2d at 428. The Court of  
3 Appeals affirmed that decision, holding that "the legislature did not intend to require  
4 Commission approval every time a public service corporation disposes of property. . . .  
5 Subsection C [of A.R.S. § 40-285] allows [a public service corporation] to initially  
6 determine whether a given piece of property is necessary or useful." *Id.* at 151, 939 P.2d at  
7 429. Thus, Mohave acted within its powers when deciding to abandon the Line without first  
8 seeking a Commission order authorizing such abandonment.  
9  
10

11 The BIA contends that "[t]here can be little doubt that the Line benefited Mohave's  
12 customers and the public," pointing to use of electricity from the Line by the BIA and small  
13 number of other accounts. BIA's Brief at 34. The BIA confuses such use by a small  
14 number of individuals outside of a CCN and pursuant to the trust obligation of a federal  
15 agency with public convenience and necessity under state law. As held by the Arizona  
16 Supreme Court in a case cited by the BIA,  
17

18 [T]he maintaining of an uneconomic service resulting in an economic waste cannot  
19 be justified or excused by a showing that the service has been in the convenience and  
20 necessity of some individual. *The convenience and necessity required are those of*  
21 *the public and not of an individual or individuals.*

22 *Arizona Corporation Commission v. Southern Pacific Railroad*, 87 Ariz. 310, 315, 350 P.2d  
23 765, 769 (1960)(emphasis added). This, again, is the crucial distinction that the BIA refuses  
24 to grasp. The fact that the 70-mile Line can be used by the BIA, certain Hualapai tribal  
25 accounts and the Bravo family for their individual convenience does not mean that it is  
26 "necessary or useful in the performance of [Mohave's] duties to the public." A.R.S. § 40-  
27 285(A). Moreover, the bulk of the accounts along the Line are outside of Mohave's CCN  
28

1 area, and thus not included in the “public” that the Commission has specifically directed  
2 Mohave to serve.<sup>3</sup>

3  
4 The BIA also contends that Mohave considered the Line to be “used and useful” in  
5 the 1989 rate application that resulted in Decision No. 57172 (Nov. 29, 1990). However, as  
6 Mohave discussed in its Post-Hearing Brief and *supra*, all expenses and revenues related to  
7 the Line were segregated as required by Decision No. 53174 under a specific accounting  
8 related to Contract with the BIA. Thus, Mohave’s customers and members within its CCN  
9 area were not forced to subsidize the Line.  
10

11 The BIA also contends that Mohave cannot abandon the Line because “there is no  
12 viable substitute source of electricity” and “It would be difficult to obtain electricity from  
13 another electric utility.” BIA’s Brief at 36. However, Mohave has never refused to sell  
14 electrical power to the BIA at Mohave’s Nelson substation. Rather, the issues have been  
15 which party owns and maintains the Line after it leaves the Nelson substation, and whether  
16 Mohave must meter the electrical power at the Long Mesa or Nelson end of the Line. The  
17 BIA’s claim that affirming Mohave’s abandonment of Line would “require [APS’s]  
18 construction of line over rugged terrain that could cover 60-80 miles or more depending on  
19 APS’ closest source,” BIA’s Brief at 36, is a baseless scare tactic. Instead, all that need  
20 happen is that the BIA would take over operation and maintenance on the Line which the  
21  
22  
23

24  
25 <sup>3</sup> As noted *supra*, Mohave has attempted to serve the two accounts within its CCN area  
26 by construction of a free-standing line on an easement granted by Hualapai Tribe – but has  
27 been frustrated in that attempt by the Hualapai Tribe itself. This conduct underscores the  
28 difficulty of providing service on sovereign lands that reject the authority of the  
Commission and the efforts of the Commission-regulated utilities to provide utility service,  
where the BIA should be providing the service by law.

1 BIA already uses to serve Supai Village and others on the Hualapai and Havasupai  
2 reservations. The BIA has never addressed its refusal of WAPA's offer to operate the Line,  
3 which is yet another method by which the BIA could fulfill its obligation to serve the  
4 Tribes, as it has in other locations throughout Arizona. The fact that Mohave participates in  
5 a mutual aid agreement regarding maintenance of the Line is also uncontroverted.  
6

7 **C. Because of the Effective Abandonment and Quitclaim of the Line,**  
8 **Mohave Is Not Responsible for Operation and Maintenance Costs**  
9 **Associated with the Line.**

10 Consistent with abandonment of the Line, Mohave has not performed routine  
11 maintenance and repair unless the BIA requested and paid for such services. Buried in a  
12 footnote of its Brief, the BIA concedes that "it ought to pay reasonable O&M [costs] for the  
13 Line." BIA's Brief at 39 n.11. The BIA incoherently argues that Mohave should reimburse  
14 the BIA for \$127,851.33 that the BIA incurred repairing the Line, but then admits that "the  
15 BIA recognizes that the [Commission] could decide that this amount is effectively offset as  
16 the BIA has not paid Facilities Charges since 1997." *Id.*  
17

18 The BIA's belated acknowledgment of these facts should end any dispute over the  
19 repair and maintenance costs on the Line since 2003. Under the 1981 Contract, the BIA was  
20 required to pay for any operations and maintenance costs related to the Line as part of the  
21 Facilities Charge. The BIA has not paid the Facilities Charge since 1997; instead, starting  
22 in 2004, the BIA has separately paid individual invoices for repair and maintenance. The  
23 BIA has no right to complain or seek reimbursement, since any repair invoices paid by the  
24 BIA since 2004 are offset by the Facilities Charge which has not been paid for more than a  
25 decade. The BIA's claim for reimbursement should be rejected.  
26  
27  
28

1           The BIA also contends that Mohave has provided “dilatory responses to repair  
2 requests.” BIA Brief at 38. However, the BIA has conceded that the Line is located in “a  
3 remote, desolate area” which is far from the service facilities of Mohave or any other utility.  
4 BIA Brief at 36; *see also* Tr. at 175 (BIA’s witness Mr. Walker acknowledges that there  
5 would be a considerable time delay for anyone to repair the Line). The BIA’s claim that  
6 Mohave has been “dilatory” in responding to repair calls from the BIA, or that outages on  
7 the Line resulted from a lack of maintenance, BIA’s Brief at 38, are not supported by expert  
8 testimony but instead based on the testimony of Mr. Walker, who is not an engineer.  
9 Moreover, the BIA’s concerns about lack of maintenance to the Line could be easily  
10 resolved if the BIA simply decided to devote more resources towards repair and  
11 maintenance – since BIA acknowledges that it is responsible for such costs in any case, *see*  
12 BIA’s Brief at 39 n.11, and BIA already provides repair and maintenance for the distribution  
13 system in Supai Village.  
14

15           **D.     The BIA Could Read the Other Meters Along the Line, as It Reads**  
16           **Meters in Supai, and Collect Costs from Those Users.**

17           Once Mohave had quitclaimed and abandoned the Line in 2003, Mohave no longer  
18 had any right or obligation to read individual meters along the Line. Indeed, without a  
19 contract with the BIA or the Tribes, Mohave’s agents would be at risk if they attempted to  
20 enter tribal lands to read the meters, as demonstrated by the recent actions of the Hualapai  
21 Tribe. Moreover, the BIA clearly has the ability to read the meters itself and to disconnect  
22 non-paying accounts – just as it does in Supai Village.  
23

24           Having failed to read the meters of these accounts itself, the BIA instead seeks to fine  
25 Mohave a speculative amount based on Mr. Williams’ unexplained calculations using 1998  
26  
27  
28

1 to 2003 usage. The Commission should reject this claim by the BIA. Mohave never had a  
2 duty or right to read the meters on the Line after 2003, and the BIA has no right to  
3 reimbursement for a problem which the BIA created for itself by refusing to read the meters.  
4  
5 Nor has any of these asserted damages been proven to the requisite degree of certainty to  
6 support an award. *See* Mohave's Post-Hearing Brief at 22 n.4, 54-55 & n. 12.

7 **IX. Mohave's Provision of Electrical Power to the BIA and Isolated Users Along the**  
8 **Line Did Not Convert Them into Mohave's Retail Customers.**

9 Arizona law defines a "retail electric customer" as "a person who purchases  
10 electricity for that person's own use, including use in that person's trade or business, *and*  
11 *not for resale, redistribution or retransmission.*" A.R.S. § 40-201(21)(emphasis added).  
12  
13 The BIA's argument that it and other accounts along the Line are Mohave's retail electric  
14 customers should be rejected.

15 The BIA acknowledges that it sells electric power to over 200 accounts in Supai  
16 Village. However, the BIA also argues that, because it uses some electricity for its own  
17 facilities in Supai and because its "trade or business includes providing support to Native  
18 Americans," it is a retail electric customer of Mohave. BIA's Brief at 42-44. The BIA's  
19 argument is illogical and flatly ignores the last clause of the definition of "retail electric  
20 customer" in A.R.S. § 40-201(21). The BIA is a governmental agency, not a person  
21 engaged in a trade or business, and the great bulk of the power it purchases is resold and  
22 redistributed in Supai Village as part of its governmental and trust obligations. The BIA's  
23 argument would also lead to irrational results. For example, any bulk sale of electricity by  
24 APS to Salt River Project, a quasi-governmental agency which arguably has a "business" of  
25 providing electrical power to others, would turn Salt River Project into APS's "retail  
26  
27  
28

1 electrical customer.” The Commission should reject the BIA’s argument and find that the  
2 BIA is not Mohave’s retail electric customer, but was rather the purchaser of power from  
3 Mohave for resale and redistribution.  
4

5 The BIA also contends that the Hualapai Tribe and others receiving power from the  
6 Line were Mohave’s retail electric customers. BIA’s Brief at 40-42. Mohave does not  
7 dispute that these accounts involve retail electric customers under A.R.S. § 40-201(21).  
8 Rather, the issue is whether these accounts are *Mohave’s* retail customers or instead  
9 customers of the BIA. As discussed *supra*, the 1981 Contract between Mohave and the BIA  
10 provided that the Mohave would coordinate with the telephone company and would provide  
11 electrical power to Hualapai Tribe. *See* R-2, Tab 4 at 00013, 00016; R-1; Tr. 101-05.  
12 Mohave had no right or obligation to serve any customers outside of its CCN area except as  
13 the BIA’s agent, and Mohave acted solely under the BIA’s authority and direction when  
14 providing service. Tr. 301, Ex. R-2 at 14-15. As such, any accounts outside of Mohave’s  
15 CCN are the BIA’s retail customers, not Mohave’s. Moreover, Mohave has tried to serve  
16 the two accounts in Mohave’s CCN through new facilities constructed apart from the Line,  
17 and stands ready to serve them if allowed to do so by the BIA and the Hualapai Tribe.  
18  
19  
20

21 **X. Mohave’s Provision of Electrical Power to Isolated Users Along the Line as an**  
22 **Accommodation to the BIA and the Tribes Did Not Create a Permanent Service**  
23 **Territory for Mohave.**

24 Under the definition of “service territory” provided in A.R.S. § 40-201(21), a  
25 geographic area constitutes part of an electric utility’s service territory if the utility “owns,  
26 operates, controls, or maintains electric distribution facilities” in the area or has agreed to  
27 extend “electric distribution facilities” to the area “whether established by a certificate of  
28

1 convenience and necessity, by official action by a public power entity or by contract or  
2 agreement.” A.R.S. § 40-201(21).

3  
4 The bulk of the area served by the Line lies outside Mohave’s CCN area, and the  
5 1981 Contract with the BIA has expired, thus providing no contractual basis to contend that  
6 the area is part of Mohave’s service territory. Moreover, as already demonstrated at the  
7 hearing and in Mohave’s post-hearing brief, the Line was never a distribution line but rather  
8 a transmission line carrying power to the BIA for resale and redistribution in Supai. The  
9 fact that twelve isolated other accounts also received electrical power from the Line –  
10 approximately one account for every 5.8 miles of the Line – does not convert the Line into a  
11 distribution line. Because the Line was never a distribution line, the area crossed by the  
12 Line was never part of Mohave’s service territory.

13  
14  
15 **XI. The Commission Staff’s Letter Does Not Control.**

16 In September 2004, prior to a full hearing on this matter and indeed prior to the  
17 BIA’s filing of the Complaint, a letter was written containing certain assertions in an  
18 apparent effort to drive a resolution of this dispute. Stip. ¶ 41. The Commission’s Staff has  
19 since that time not become further involved in this matter and indeed did not participate in  
20 the evidentiary hearing in November 2008; nor did Staff take a formal position in this matter  
21 similar to that espoused in the September 2004 letter. As a seeming last-minute argument  
22 in its Brief, the BIA argues that the Staff’s 2004 letter requires “immediate and appropriate  
23 action,” BIA’s Brief at 47, but does not make any other legal argument regarding the letter.

24  
25  
26 The BIA’s argument lacks merit. There is no reason for the Commission to limit its  
27 consideration to a position of Staff at an early stage of this matter, prior to the BIA’s filing  
28

1 of its Complaint. Rather than basing its decision on a Staff member's position in 2004, the  
2 Commission should take into account the full evidence presented in this matter, including  
3 the parties' presentations in November 2008, the post-hearing submittals, and the post-  
4 hearing briefs, and should especially note Staff's silence on the issues set forth in the 2004  
5 letter.

6  
7 **XII. Conclusion.**

8  
9 Prior to 1981, the BIA voluntarily assumed responsibility for generating, distributing  
10 and selling electricity on the Havasupai and Hualapai reservations under the authority  
11 granted it by the Snyder Act, 25 U.S.C. § 13. In furtherance of its responsibility, the BIA,  
12 after considering various options, contracted with Mohave to build the 70-mile Line – which  
13 was located almost entirely outside of Mohave's certificated area and crossed two sovereign  
14 Indian nations – to secure the power supply the BIA needed to meet the growing demands  
15 within the two Indian nations.<sup>4</sup> The BIA continues to distribute and re-sell the electricity  
16 supplied by Mohave to the 600-700 residents in Supai.

17  
18  
19 The foregoing is nothing more than a wholesale power arrangement under which a  
20 governmental body purchases electricity from a public service corporation for resale and its  
21 own governmental use. The Commission has approved such arrangements in other parts of  
22 the State. The Commission's classification of the 24.9 kV Line as a transmission line and  
23 its emphatic determination that the Line is not, will not be, and was never intended to be  
24 used and useful in the provision of electric service to Mohave's ratepayers recognized the  
25

26  
27 <sup>4</sup> The Contract required the BIA to pay costs associated with the Line in addition to  
28 Mohave's Large Commercial and Industrial Rate (which covered the cost of getting  
power to the Line).

1 wholesale character of the service. Decision No. 53174. The Commission's rare  
2 prospective declaration in its Decision reflects the intended finality of that determination.

3  
4 Even if the Commission's jurisdiction were not limited, as it is, by the Line's location  
5 within two sovereign Indian nations, A.R.S. § 40-285(C) grants Mohave authority to sell,  
6 transfer, quitclaim or abandon the Line constructed for and dedicated to the provision of  
7 contractual service outside of the Mohave's certificated area once the Contract terminated.  
8 Even if the BIA had not assumed a utility function, which it did, and even if Mohave were  
9 not acting as the BIA's agent, which it was, the existence of a handful of customers over the  
10 length of the Line and the BIA's failure to negotiate a new contract with Mohave does not  
11 transform the fundamental wholesale character of the service or convert the area traversed  
12 by the Line into Mohave's retail service territory.  
13  
14

15 Under these circumstances, and for the reasons presented in the record and in  
16 Mohave's post-hearing briefs, the Commission should deny the BIA's requested relief and  
17 dismiss BIA's complaint against Mohave.  
18

19 RESPECTFULLY SUBMITTED this 4th day of May, 2009.

20 BRYAN CAVE LLP

21  
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1 **ORIGINAL and 13 COPIES** of the  
2 foregoing were hand-delivered for  
3 filing this 4<sup>th</sup> day of May, 2009 to:

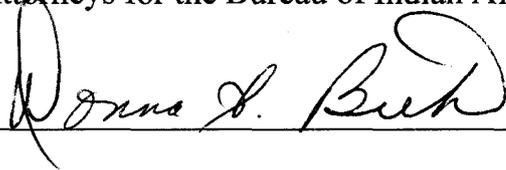
4 Docket Control  
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8 **COPY** of the foregoing hand-delivered  
9 this 4th day of May, 2009, to:

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