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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 EXCEPTIONS TO  
RECOMMENDED OPINION AND  
ORDER**

Bryan Cave LLP  
Two North Central Avenue, Suite 2200  
Phoenix, Arizona 85004-4406  
(602) 364-7000

Respondent Mohave Electric Cooperative, Inc. ("Mohave") hereby respectfully submits the following exceptions to the Recommended Opinion and Order ("ROO") issued on November 9, 2010, pursuant to A.A.C. R14-3-110(B). Mohave attaches to these exceptions its proposed amendments to the ROO for the Commission's consideration.

**I. Brief Background.**

Mohave is a not-for-profit member-owned electric distribution cooperative serving a portion of northwest Arizona. Mohave responded to an RFQ issued by the Bureau of Indian Affairs ("BIA"), entered into a Contract with United States, secured federal financing through the Rural Electrification Administration and constructed a 70-mile line from Mohave's Nelson Substation, traversing the Hualapai and Havasupai reservations, to the BIA Substation at Long Mesa (the "Line"). The BIA took the power delivered and sold it to the Havasupai Indians residing in Supai, near the bottom of the Grand Canyon. Under the Contract, the BIA paid a Facility Charge in addition to Mohave's Large Industrial Customer rate. The Facility Charge was designed to recover the cost of the Line, pay for maintenance and replacements and depreciation. In Decision No. 53174 (August 11, 1982), the

1 Commission determined the Line “is not used and useful, will not be used and useful and  
2 was never intended to be used and useful in the provision of electric service to such  
3 [Mohave’s] ratepayers.” (emphasis in original)

4 After the first ten year term, Mohave and the United States attempted,  
5 unsuccessfully, to negotiate an extension of the Contract. In 2003 Mohave exercised its  
6 business judgment and declared the Line to not be necessary or useful to Mohave in the  
7 performance of its duties to the public and of no value to Mohave or its members and  
8 authorized the quit claim, sale, relinquishment or abandonment of the Line pursuant to  
9 A.R.S. §40-285. The Line was offered to the United States, the Havasupai and Hualapai at  
10 no cost and, in the alternative, was abandoned.

11 Since 2003, the BIA has continued to use the Line for the delivery of power to meet  
12 the needs of the Havasupai Indians it serves. It has also called out repair crews to repair the  
13 Line as the BIA deemed necessary. In 2007, after this Complaint was filed by BIA, Mohave  
14 and other utilities entered into an Operations Protocol Agreement to ensure that maintenance  
15 and repair needs of the Line would be addressed promptly.

16 Since 2003, the BIA has attempted to compel Mohave’s ratepayers to support the  
17 provision of service outside of Mohave’s CCN on sovereign tribal lands, and to effect an  
18 improper transfer of the BIA’s obligation to serve such customers from the BIA to Mohave.  
19 Further, an interconnection to the Line has been constructed without Mohave’s input or  
20 permission, and the ROO does not address Mohave’s obligations concerning this  
21 interconnection or potential future additional interconnections.

22 **II. The ROO Compels Mohave To Undertake Numerous Duties, But Does Not**  
23 **Address The Mechanics Of How It Is To Do So.**

24 Despite reaching a conclusion of law that it is not necessary to confirm the validity of  
25 the Contract between Mohave and the BIA in order to make a determination on the  
26 Complaint (Conclusions, ¶ 7, p. 37), the ROO orders that Mohave “is the owner of the Line”  
27 (p. 37, lines 23-24), that it shall “recommence operation and maintenance of the Line to  
28 Long Mesa” (p. 37, lines 26-27), that it shall begin reading the meters currently severed by

1 the Line (p. 37, lines 27-28), that it shall move its meter to Long Mesa, commence reading  
2 the meter and to “determine the proper amount to bill the BIA for electricity used past the  
3 point of Long Mesa” (p. 38, lines 1-3). Left unaddressed, among other operational issues,  
4 are at least the following crucial elements:

- 5 ● Is the BIA liable to Mohave going forward for the Facility Charges it used to  
6 pay under the terms of the Contract for the provisions of services for the Line?
- 7 ● If so, what are the amount of the Facility Charges and how are they paid?
- 8 ● What is the appropriate rate to be charged to the BIA for the provision of  
9 wholesale electrical service through the relocated meter at Long Mesa?
- 10 ● What are Mohave’s obligations or rights to provide electric service from the  
11 Line beyond the wholesale service to the BIA at Long Mesa and the twelve  
12 retail accounts?
- 13 ● What are the appropriate rates to be charged to the users along the Line that  
14 are located out of Mohave’s CCN area?
- 15 ● Under what authority did the Havasupai Tribe interconnect the Bar Four Spur  
16 to the Line?
- 17 ● If that interconnection is authorized, what are the terms and rates for the  
18 wholesale service provided to the Havasupai Tribe at the Bar Four Spur, and  
19 who pays the cost of installing the billing meter?
- 20 ● May the Havasupai Tribe or other third parties proceed to make further  
21 interconnections to the Line without the knowledge or approval of Mohave,  
22 and under what terms and conditions is Mohave obligated to serve such new  
23 interconnections?
- 24 ● May new retail service drops be constructed into the Line without the  
25 knowledge or approval of Mohave, expanding Mohave’s obligations to serve  
26 such new “customers” in the future?
- 27 ● What authority does Mohave have to enter upon lands, now owned by the  
28

1 Navajo Nation, to maintain and repair the portion of the Line running across  
2 the Boquillas Ranch, or to read meters there, now that the easement granted by  
3 the previous landowners has expired?

- 4 ● What authority will Mohave have to enter upon the Hualapai and Havasupai  
5 Reservations to maintain and repair the Line and read meters when the current  
6 easements for those portions of the Line expire in January 2012 and December  
7 2014, respectively?  
8

9 In the ROO, the Commission has made no accommodation for the effect on  
10 Mohave's members of operation and maintenance of the Line going forward. The majority  
11 of the Line is constructed outside of Mohave's CCN area to provide wholesale power to the  
12 BIA, which in turn serves the Havasupai Tribe. Under the original Contract, the BIA paid  
13 Mohave for the services through the Facility Charge. The ROO is incomplete because it  
14 does not address the issues of "life going forward," given that Mohave has been ordered to  
15 provide those services to the BIA and to 12 specified customers along the Line. No  
16 Decision and Order should be entered until those issues are addressed, and a rehearing held,  
17 if necessary, to take evidence on the parties' obligations on a going-forward basis.

18 **III. The ROO Fails To Address The 2007 Operations Protocol And The Changed**  
19 **Circumstances Concerning Service Following The Institution Of That**  
20 **Agreement.**

21 This matter has been pending since August, 2005. In the interim, in order to address  
22 Commission concerns as well as uncertainties regarding continued operation and  
23 maintenance of the Line, Mohave entered into a Operations Protocol with Arizona Public  
24 Service and UNS Electric, Inc. concerning repairs and other assistance provided to the BIA.  
25 See Exhibit R-2, Tab 21. The Operations Protocol set forth an orderly process as to which  
26 neighboring utilities would be contacted to perform repair work needed on the Line, and  
27 required reimbursement by the BIA for costs incurred by each such utility. Id. By means of  
28 the Operations Protocol, the BIA has had the resources of all three utilities available for  
maintenance and repairs. As was addressed in the hearing, and to the best of Mohave's

1 knowledge remains the case to the present date, the Operations Protocol has worked well,  
2 and there have been no concerns about outages or delayed repairs to the Line.

3 The status quo should be maintained, and Mohave takes exception to the fact that the  
4 Operations Protocol was not addressed or weighed in the ROO. Mohave asserts that the  
5 status quo should be continued, and that the ROO should be revised to provide that the  
6 Mohave meter should remain on the Nelson substation site at the Line, the BIA assume  
7 responsibility to operate and maintain the Line and serve all loads connected to the Line,  
8 and the Operations Protocol remain in place to address the BIA's maintenance needs, since  
9 the great bulk of the line is located outside of Mohave's CCN area. In short, the Operations  
10 Protocol has addressed the concerns that largely led to the filing of the Complaint in the first  
11 place, and there is no need to go so far afield to compel Mohave and its members to provide  
12 service on sovereign Indian lands where Mohave holds no CCN.

13 **IV. The ROO Does Not Address The Impending Loss Of Mohave's Easements To**  
14 **Maintain The Line, Or The Basis Of Mohave's Authority To Do So With No**  
15 **CCN.**

16 In making its sweeping orders compelling Mohave to recommence operation and  
17 maintenance of the Line to Long Mesa, the ROO does not address the facts in the record that  
18 Mohave is about to lose its legal rights to maintain the Line on Indian lands. Specifically,  
19 the 50-foot wide easement across the Hualapai Reservation for the Line, has a term of 30  
20 years, and expires in January, 2012 – just over a year away. See Exhibit R-2, tab 4. The 50-  
21 foot wide, 30-year easement across the Havasupai Reservation for the Line expires in  
22 December, 2014. Id. The easement for an approximate 15-mile portion of the Line across  
23 the private Boquillas Ranch property between the Hualapai and Havasupai reservations,  
24 now owned by the Navajo Nation, has already expired in September 2005. See Exhibit R-2,  
25 tab 16, Boquillas Easement at 2.

26 It is one thing to adopt the BIA's position that the terms of the Contract are no longer  
27 relevant to the determination of the disputes in this matter; however, the legal effect of the  
28 underlying easements cannot be ignored. Very shortly, Mohave will no longer have the

1 legal or physical means to maintain the Line across Indian lands, and the portions of the  
2 ROO compelling it, apparently indefinitely, to do so should not stand. At a minimum, the  
3 ROO must address how Mohave is to maintain the Line while holding none of the property  
4 rights necessary to do so, or provide for a rehearing of this portion of the case so that the  
5 parties may address this critical issue themselves.

6  
7 **V. The ROO Fails To Address The Fact That Mohave Abandoned The Line**  
8 **Separately From Its Quit Claim Of The Line To The BIA, And That Acceptance**  
9 **Is Not Required For An Effective Abandonment.**

10 The ROO erroneously fails to recognize that acceptance is not needed for an effective  
11 abandonment. See Mason v. Hasso, 90 Ariz. 126, 130, 367 P.2d 1, 4, 1961 (see also  
12 McFadden v. Wilder, 6 Ariz. App. 60, 64, 429 P.2d 694-698 (App. 1967)). Instead, the  
13 ROO focuses solely on the quit claim and the allegation that the BIA did not accept the quit  
14 claim (see ¶¶ 154, 155 at p. 35).

15 However, Mohave's Board of Directors abandoned the Line pursuant to a corporate  
16 resolution independent from its quit claim of the Line to the BIA. See Exhibit R-2, Tab 15.  
17 Although Mohave disagrees with the ROO's findings as to the quit claim, by failing to  
18 conclude as a matter of law that an acceptance is not needed for an effective abandonment, the  
19 ROO is in error, and the appropriate finding and conclusion is that the Line was effectively  
20 abandoned to the BIA by Mohave.

21 **VI. The ROO Does Not Distinguish Between Power Received By The BIA Or Its**  
22 **Affiliates And Third Parties In Computing The Refund.**

23 In paragraph 161, page 35, the ROO finds that BIA has paid Mohave under protest "for  
24 the electricity used by Mohave's retail electric customers served by the Line," and orders  
25 Mohave to reimburse BIA \$348 per month for such payments (Order at p. 38, lines 4 -7). But  
26 this finding ignores the fact that of the 12 accounts involved, *eight* were for the BIA itself or  
27 Tribal Council facilities and accounts. Not only did the BIA fail to take reasonable steps to  
28 mitigate its damages by reading and billing these customers itself during the pendency of this  
case, it is far more reasonable to hold the BIA responsible for the cost of such power

1 (essentially to itself and the Tribes for which it is responsible) than to order Mohave to refund  
2 (and Mohave's ratepayers to subsidize) such monies. Accordingly, the amount of the refund  
3 should be reduced by two-thirds, from \$29,580 to \$9,860.

4  
5 **VII. The ROO Does Not Address, Let Alone Balance, The Rights Of The Members**  
6 **Of Mohave In Comparison To Users Located In Distant Lands Outside**  
7 **Mohave's CCN Area.**

8 The result of the ROO is that the obligation of the United States and the BIA to  
9 provide for health, safety and welfare on Indian lands by providing electricity to Supai  
10 village and associated users has been shifted to Mohave, an Arizona non-profit electrical  
11 cooperative. Contrary to the fiduciary trust relationship existing between the federal  
12 government and the Indian tribes, and the BIA's obligation consistent with that trust  
13 relationship, Mohave's duties and obligations are solely to those customers within its CCN  
14 area consistent with Arizona law. The ROO turns those relationships on its head by  
15 compelling a state public service corporation to provide electrical power on Indian lands  
16 outside of its CCN area so that a federal governmental agency can fulfill its separate and  
17 primary duty to provide service to tribal members on Indian lands. The orders set forth in  
18 the ROO shift the BIA's own duty and responsibility to members of a non-profit cooperative  
19 located for the most part more than 100 miles away, all of whom should not be forced to  
20 bear the expenses and responsibilities for the duties and expenses that belong, by law, to the  
21 BIA.

22 Conclusion 153 of the ROO, at page 35, provides that "Once Mohave began serving  
23 retail customers using the Line, the Line became necessary and useful in the performance of  
24 Mohave's duties to the public." Such a conclusion is fundamentally flawed, as the  
25 Commission cannot and should not shift the burden of serving remote customers on  
26 sovereign Indian lands to ratepayers of a state-regulated cooperative that originally provided  
27 service solely by virtue of a Contract with the BIA, an agency which has the authority and  
28 duty to provide such service going forward. Whether or not Mohave's temporary provision  
of service to these retail customers is characterized as having acted as BIA's agent, the point

1 remains that the BIA cannot convert a contractual relationship into an apparently open-  
2 ended and limitless duty to serve outside of a utility's CCN area by the unilateral action of  
3 refusing to renew the original Contract on its terms. Moreover, the ROO must be amended  
4 to unambiguously provide that Mohave's asserted duties to continue to serve the 12 retail  
5 customers is limited to those 12 customers only, as Mohave's ratepayers should not be  
6 exposed to an open-ended and uncontrollable duty to serve as yet unknown customers on  
7 sovereign lands far from the boundaries of its CCN area.

8 As set forth above, the status quo that has emerged since the original Contract was  
9 not renewed has served all of the parties' interests well. The institution of the Operations  
10 Protocol has satisfied the remaining concerns that in part compelled the BIA to file its  
11 Complaint. Maintaining Mohave's point of delivery of electrical service to the BIA at the  
12 Nelson Substation serves the purpose of maintaining the separation of Mohave's CCN area  
13 and the State jurisdiction of this Commission, on the one hand, and sovereign Indian lands  
14 with customers located outside of Mohave's CCN area, on the other hand. Continuing the  
15 BIA's ownership and operation of the Line addresses the impending expiration of the  
16 remaining easements that allowed Mohave to build the Line in the first place decades ago,  
17 and results in consistent fairness to Mohave's existing rate payers.  
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1 **VIII. Conclusion.**

2 For the foregoing reasons, Mohave respectfully requests that the ROO be amended to  
3 maintain the status quo. A form of recommended amendments is attached and incorporated  
4 into these exceptions. As it presently stands, the sweeping orders set forth in the ROO  
5 compel Mohave's ratepayers to support the provision of service outside of Mohave's CCN  
6 on sovereign tribal lands, and effect an improper transfer of the obligation to serve 12  
7 customers and to provide service via an unauthorized interconnection from the BIA to  
8 Mohave.

9  
10 RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of November, 2010.

11 BRYAN CAVE LLP

12  
13 By 

14 Steven A. Hirsch, #006360  
15 Rodney W. Ott, #016686  
16 Two N. Central Avenue, Suite 2200  
17 Phoenix, AZ 85004-4406  
18 Attorneys for Mohave Electric  
19 Cooperative, Inc.

20 **ORIGINAL and 13 COPIES** of the  
21 foregoing were hand-delivered for filing  
22 this 26<sup>th</sup> day of November, 2010 to:

23 Docket Control  
24 Arizona Corporation Commission  
25 1200 W. Washington Street  
26 Phoenix, AZ 85007

27 **COPY** of the foregoing hand-delivered  
28 this 26<sup>th</sup> day of November, 2010:

Hearing Division  
Arizona Corporation Commission  
1200 W. Washington  
Phoenix, AZ 85007-2927

1 Janice M. Alward, Esq., Chief Counsel  
2 Legal Division  
3 Arizona Corporation Commission  
4 1200 W. Washington Street  
5 Phoenix, AZ 85007

6 Mark J. Wenker, Esq.  
7 U.S. Attorney's Office  
8 40 N. Central Avenue, Suite 1200  
9 Phoenix, AZ 85004-4408  
10 Attorneys for the Bureau of Indian Affairs

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Bryan Cave LLP  
Two North Central Avenue, Suite 2200  
Phoenix, Arizona 85004-4406  
(602) 364-7000



1           9.     ¶ 151, p. 34, line 21 – Replace “customers Mohave serves” with “customers  
2 being provided service by Mohave as BIA’s agent.”

3           10.    ¶ 152, p. 34, line 23 – Replace “does not support” with “supports”.

4           11.    ¶ 153, p. 35, lines 1-2 – Replace the entire existing paragraph with “153. As  
5 previously found by the Commission, the Line is not necessary and useful in the  
6 performance of Mohave’s duties to the public because the retail customers using the Line  
7 are BIA’s customers, not Mohave’s customers.”

8           12.    ¶ 154, p. 35, lines 3-5 – At line 3, replace “attempted to abandon the Line by  
9 means of the Quit Claim” with “abandoned the Line”; at lines 4-5, replace “Mohave was  
10 using the Line to provide service” with “the Line was used by Mohave as BIA’s agent to  
11 provide service”.

12           13.    ¶ 155, p. 35, line 6 – Insert the following to the end of ¶ 155: “but there is no  
13 requirement that BIA accept an abandonment of the Line for such abandonment to be  
14 effective.”

15           14.    ¶ 156, p. 35, lines 7-9 – At line 8, delete “attempted”; at lines 8-9, delete “by  
16 means of the Quit Claim”.

17           15.    ¶ 157, p. 35, lines 10-12 – At lines 11-12, delete “as required by A.A.C. R14-  
18 2-202(B)”; at line 12, delete “attempted” and “by means of the Quit Claim”.

19           16.    ¶ 158, p. 35, lines 13-15 – Delete in its entirety.

20           17.    ¶ 159, p. 35, lines 16-18 – Delete ¶ 159 and insert the following: “159.  
21 Mohave may maintain its meter at the Nelson Substation to determine the proper amount  
22 to bill the BIA for electricity used past the point of the Nelson Substation.”

23           18.    ¶ 160, p. 35, line 19 – Replace “improperly” with “properly”.

24           19.    ¶ 161, p. 35, lines 22-25 – Delete in its entirety, or alternatively, in lines 24-  
25 25, replace “, or \$29,580.” with “for the non-BIA and non-Tribal accounts served by the  
26 Line, or \$9,860.”

27  
28



