

REHEARING 11/19/2011



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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 APPLICATION FOR A
REHEARING OF DECISION NO.
72043 PURSUANT TO A.R.S. § 40-
253**

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Respondent Mohave Electric Cooperative, Inc. ("Mohave") hereby submits its Application for a Rehearing of Decision No. 72043 (December 10, 2010) (the "Decision") pursuant to A.R.S. § 40-253. In support of this Application, Mohave incorporates its prior briefs filed in this docket, the Stipulated Statement of Facts and Issues in Dispute ("Stip."), the transcript of testimony presented during the hearing on November 18-20, 2008 ("Tr."), and all matters of record filed in this docket or presented at the hearing in this matter, including but not limited to the exhibits admitted during the hearing and the exhibits and affidavits filed after the hearing, and Mohave's exceptions and proposed amendments to the ROO filed on November 24, 2010.

I. EXECUTIVE SUMMARY OF REASONS FOR RECONSIDERATION.

The Decision erred in converting a contractual wholesale relationship between Mohave and the Bureau of Indian Affairs ("BIA"), involving the construction of a 70-mile

1 transmission line to and through two remote Indian Nations (the Hualapai and Havasupai
2 Nations) into an open-ended, undefined retail obligation of a non-profit electric cooperative
3 and its members to provide service on sovereign Indian lands far outside of its Certificate of
4 Convenience and Necessity (“CCN”). The Decision ignores the express determination by
5 the Arizona Corporation Commission (“Commission”), made in 1982, contemporaneously
6 with the installation of the 70-mile transmission line, that the line “is not used and useful,
7 will not be used and useful and was never intended to be used and useful in the provision of
8 electric service to [Mohave’s] ratepayers.” Decision No. 53174 (August 11, 1982)
9 (emphasis in original). The Commission never reversed this determination. Mohave could
10 not and did not alter the Commission’s determination when it acted consistently with the
11 contract and in furtherance of the BIA’s fiduciary obligation by connecting a BIA fire tower
12 and repeater station, six Hualapai tribal accounts primarily for pumps and wells, a telephone
13 tower on the Havasupai reservation and a well account in exchange for a needed easement.

14 The Commission should grant Mohave’s Application for a Rehearing, vacate
15 Decision No. 72043, deny the relief sought by the BIA, and find that: (a) the contract has
16 terminated between the BIA and Mohave; (b) the 70-mile line (“Line”) from Mohave’s
17 Nelson substation to Long Mesa is a transmission line rather than a distribution line under
18 the facts in this record; (c) the BIA is not an retail customer of Mohave at Long Mesa; (d)
19 Mohave provided electricity to a small number of accounts along the Line solely as the
20 BIA’s agent; (e) Mohave properly abandoned and quitclaimed the Line to the BIA and the
21 Tribes; and (f) Mohave is not responsible for costs associated with the abandoned Line,
22 including operation and maintenance costs, or the charges for electricity used by the
23 accounts along the Line.

24 At a minimum, the Commission should grant rehearing to consider the numerous
25 details that must be addressed before the parties can move forward as set forth in Mohave’s
26 Exceptions (and Section III.A., *infra*) and to delete the unsupported finding that the BIA is a
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1 retail customer when it purchases electricity for resale to the Havasupai tribal members
2 residing in the Grand Canyon. *See* Section III.B., *infra*.

3
4 This matter raises important public policy questions, and the Decision, if not
5 reconsidered, would impose significant financial and operational burdens on Mohave, a
6 non-profit rural electrical cooperative with approximately 33,000 members. The Decision
7 essentially requires Mohave to shoulder the fiduciary obligations of the BIA and to bear the
8 costs of providing electrical service to portions of the Hualapai and Havasupai Indian
9 reservations in the BIA's stead. Moreover, the Decision never explains how, or indeed if,
10 Mohave will ever be compensated for these newly-imposed costs and burdens, or how
11 Mohave can operate on tribal lands without necessary consents, permits, easements or other
12 grants of permission.

13 In summary, the federal government, through the BIA, assumed elaborate control of
14 the provision of electrical service to the Havasupai and Hualapai reservations decades ago.
15 This BIA obligation is consistent with the fiduciary trust relationship existing between the
16 federal government and Indian tribes. Mohave, on the other hand, is an Arizona non-profit
17 electrical cooperative operating pursuant to a CCN granted by the Commission. Mohave's
18 duties and obligations run to those customers within its CCN area consistent with Arizona
19 law. Mohave does not have authority to operate on tribal lands without necessary consents,
20 permits, easements or other grants of permission.

21 The Decision has allowed the BIA to shift its own duty and responsibility, in a state
22 forum without jurisdiction over reservation lands, to members of a non-profit cooperative
23 (located for the most part more than a hundred miles away) who should not be forced to
24 bear the expense and responsibilities for duties and expenses that belong by law to the BIA.
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1 **II. SUMMARY OF KEY FACTS REQUIRING RECONSIDERATION.¹**

2 Mohave, a not-for-profit member-owned rural electrical cooperative, responded to a
3 request for quotation from the BIA in 1976 and ultimately entered into a ten-year contract
4 the federal government in 1981 related to the provision of electrical service to Supai village
5 at the bottom of the Grand Canyon on the Havasupai reservation. Key contractual terms
6 included the following:

- 7
- 8 ● Mohave would construct a 70-mile Line from its Nelson Substation to an existing
 - 9 BIA-owned substation at Long Mesa on the edge of the Grand Canyon, crossing both
 - 10 the Hualapai and Havasupai reservations and a private ranch.
 - 11 ● The Contract would have a ten-year term, starting in April 1982, and an option to
 - 12 renew it for two additional 10-year periods.
 - 13 ● Besides paying for the electricity, BIA would pay a monthly “facilities charge”
 - 14 which would cover (a) the cost of constructing the Line, (b) state and local taxes, (c)
 - 15 operation and maintenance of the Line, and (d) depreciation.
 - 16 ● If BIA did not renew the Contract, the BIA was required to pay Mohave for the
 - 17 undepreciated value of the Line as well as the cost of removal of the Line.

18 The Commission approved the contract and the necessary loan without ever requiring
19 Mohave to seek an extension of its CCN.

20 Mohave also received three easements to build and maintain the Line:

- 21 ● an easement across the Hualapai reservation that expires in 2012,
- 22 ● an easement across the Havasupai reservation that expires in 2014, and
- 23 ● an easement across the private Boquillas ranch (now owned by the Navajo Tribe),
24 which expired in 2005.

25

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27 ¹ A full discussion of the relevant facts, with citations to the record, can be
28 found in Exhibit A.

1 For 10 years, Mohave provided the electrical service and BIA paid for the electricity and the
2 facilities charge provided in the contract. The BIA read meters in Supai village and charged
3 users for the power.

4 The Commission issued a rate decision in August 1982 (Decision No. 53174) holding
5 that the Line was a transmission line that did not benefit Mohave's ratepayers. According to
6 the Commission, the Line "is not used and useful, will not be used and useful and was never
7 intended to be used and useful in the provision of electric service to [Mohave's] ratepayers."

8 BIA paid off the remaining costs of building the Line in 1991, but never renewed the
9 Contract in 1992. Instead, the BIA ignored Mohave's inquiries and ultimately sought to
10 renegotiate the Contract rather than exercising its option to extend. The parties never came
11 to an agreement on terms to extend or revise the Contract.

12 In 1997, Mohave moved its metering equipment to the Nelson substation and billed
13 BIA for electrical use on the Line from there.

14 In 2003, Mohave executed a quitclaim deed and notice of abandonment, giving the
15 Line to BIA, the Hualapai Tribe and the Havasupai Tribe.

16 In approximately 2003-2004, the Havasupai built (and the BIA allowed built) a 13-
17 mile long spur interconnection to the Line to serve the Bar Four area on the Havasupai
18 reservation. The Spur was interconnected and energized without seeking any permission or
19 authority from the Commission, or from Mohave.

20 Mohave continued to provide maintenance to the Line so long as BIA reimbursed
21 Mohave for it, and in 2007 entered into an Operations Protocol with APS and UNS for
22 repair and maintenance to the Line. Since that time, there have been no reported problems
23 with repairs and maintenance to the Line.

24 The BIA filed a complaint against Mohave in 2005, seeking (a) to force Mohave to
25 continue ownership of the Line, together with all of the costs of repair and maintenance, (b)
26 to force Mohave to move its metering equipment back to Long Mesa, and (c) to force
27 Mohave to provide service to all of the service drops along the Line.
28

1 **III. REASONS TO RECONSIDER THE DECISION.**

2 **A. The Decision Erroneously Fails to Address Numerous Details That Must**
3 **Be Addressed Before The Parties Can Move Forward.**

4 Despite reaching a conclusion of law that it is not necessary to confirm the validity of
5 the Contract between Mohave and the BIA in order to make a determination on the
6 Complaint (Conclusions, ¶ 7, p. 37), the Decision orders that Mohave “is the owner of the
7 Line” (p. 37, lines 23-24), that it shall “recommence operation and maintenance of the Line
8 to Long Mesa” (p. 37, lines 25-26), that it shall begin reading the meters currently served by
9 the Line (p. 37, lines 27-28), that it shall move its meter to Long Mesa, commence reading
10 the meter and to “determine the proper amount to bill the BIA for electricity used past the
11 point of Long Mesa” (p. 38, lines 1-3). The Decision leaves numerous operational and other
12 issues unaddressed, including but not limited to the following crucial elements:

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

1 such new “customers” in the future?

- 2 • What authority does Mohave have to enter upon lands, now owned by the
- 3 Navajo Nation, to maintain and repair the portion of the Line running across
- 4 the Boquillas Ranch, or to read meters there, now that the easement granted by
- 5 the previous landowners has expired?
- 6 • What authority will Mohave have to enter upon the Hualapai and Havasupai
- 7 Reservations to maintain and repair the Line and read meters when the current
- 8 easements for those portions of the Line expire in January 2012 and December
- 9 2014, respectively?
- 10 • Who is responsible for taxes assessed by Tribes related to the Line?

11 In the Decision, the Commission has made no accommodation for the effect on

12 Mohave’s members of operation and maintenance of the Line going forward. The majority

13 of the Line is constructed outside of Mohave’s CCN area to provide wholesale power to the

14 BIA, which in turn serves the Havasupai Tribe. Under the original Contract, the BIA paid

15 Mohave for the services through the Facility Charge. If not modified, the Decision is

16 incomplete because it does not address the issues of “life going forward,” given that

17 Mohave has been ordered to provide those services to the BIA and to 12 specified customers

18 along the Line. The Commission must address these issues and a rehearing held, if

19 necessary, to take evidence on the parties’ obligations on a going-forward basis.

20 **B. The BIA, Which Receives Electric Power at Nelson Substation And**

21 **Resells and Distributes that Power to Supai Consumers, Is Not Mohave’s**

22 **Retail Customer.**

23 Arizona law defines a “retail electric customer” as “a person who purchases

24 electricity for that person’s own use, including use in that person’s trade or business, *and*

25 *not for resale, redistribution or retransmission.*” A.R.S. § 40-201(21)(emphasis added).

26 The Decision’s holding (changed in this regard by an amendment during the Open Meeting,

27 Conclusions, ¶ 14, p. 37) that the BIA is Mohave’s retail electric customer at Long Mesa

28 should be rejected and overturned on rehearing.

The BIA acknowledged that it sells electric power to over 200 accounts in Supai Village. However, the BIA also argued that, because it uses some electricity for its own facilities in Supai and because its “trade or business includes providing support to Native

1 Americans,” it is a retail electric customer of Mohave. BIA’s Brief at 42-44. The BIA’s
2 argument, and the Decision on this point, ignore the last clause of the definition of “retail
3 electric customer” in A.R.S. § 40-201(21). The BIA is a governmental agency, not a person
4 engaged in a trade or business, and the great bulk of the power it purchases is resold and
5 redistributed in Supai Village as part of its governmental and trust obligations.

6 The BIA contended in its exceptions that its activities are “similar to that of a
7 landlord of a mobile home park or apartment complex with a master meter and individual
8 meters for the tenants. The landlord reads and bills the tenants every month for their electric
9 usage, but the landlord is still a retail customer of the electric utility.” BIA’s Exception to
10 the Recommended Opinion and Order, filed November 26, 2010, at 2. The BIA’s
11 comparison between itself and the landlord of a mobile home park should have been
12 rejected. The BIA is a governmental entity reselling, redistributing and retransmitting
13 electricity to Supai residents as part of the BIA’s governmental responsibilities; it is not the
14 landlord of a mobile home park. Moreover, mobile home park landlords do not use
15 electricity to run schools, law enforcement offices, and a jail -- as does the BIA. *Id.*

16 Allowing this portion of the Decision to stand could lead to other irrational results.
17 For example, any bulk sale of electricity by APS to Salt River Project, a quasi-governmental
18 agency which arguably has a “business” of providing electrical power to others, would turn
19 Salt River Project into APS’s “retail electrical customer.” The Commission should reject
20 the Decision in this regard and find on rehearing that the BIA is *not* Mohave’s retail electric
21 customer, but rather the purchaser of power from Mohave for resale and redistribution.
22

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

26 The BIA sought a declaration that the Line is part of Mohave’s “service territory,”
27 and the Decision’s practical result is an acceptance of this argument. This is in error and
28 should be rejected on rehearing. Arizona law defines “service territory” as “the geographic

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

7
8 There is no dispute that the bulk of the Line lies outside Mohave’s CCN. In fact,
9 parts of the Line cross APS’s CCN area. *See* Ex. R-3. Moreover, as demonstrated above,
10 the Line is not a “distribution line,” but rather a “transmission line” both functionally and
11 under Decision No. 53174. It is also clear that Mohave’s only “agree[ment]” to “extend
12 electric distribution facilities,” A.R.S. § 40-201(22), to the area involved the 1982 Contract,
13 which is now expired, and additional service drops requested by the BIA for which Mohave
14 served as the BIA’s agent. Tr. 101-05; Ex. R-1. With the Contract expired and the Line
15 abandoned, there is no longer a basis for the Decision to provide that the Line is part of
16 Mohave’s service territory.

17 Nor does the Line falls within the “run along rights” for an area contiguous to
18 Mohave’s CCN under A.R.S. § 40-281(B). *See Electrical District No. 2 v. Arizona*
19 *Corporation Commission*, 155 Ariz. 252, 257, 745 P.2d 1383, 1388 (1987)(restaurant that
20 was merely 50 feet outside the city limits was *not* contiguous; the “ordinary course of
21 business” does not include the extension by the utility of its system into a community or
22 territory that is not then served by the utility). The Long Mesa end of the Line is
23 approximately 70 miles from Mohave’s CCN boundary, and cannot be construed as
24 “contiguous” to Mohave’s CCN or necessary in “the ordinary course” of Mohave’s
25 “business.”

26 Further, none of the twelve individual accounts along the Line between the Nelson
27 and Long Mesa substations supported a findings that the Line was included in Mohave’s
28 service territory, and the Decision is in error in each of these respects:

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

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

14 *The Telephone Tower on the Havasupai Reservation.* The expired Contract between
15 Mohave and the BIA explicitly mentioned the telephone company. Ex. R-2, Tab 3 at 00013;
16 Tr. 358. The Contract clearly contemplated that Mohave would provide electrical power to
17 the telephone company as the BIA's agent, and Mohave's doing so did not convert the Line
18 into a distribution line. Moreover, the telephone tower was clearly intended to serve the
19 Havasupai Tribe and the BIA could legally serve the account if it chose to do so. Tr. 419-
20 20.

21 *The Boquillas/Diamond A Ranch.* This ranch, which is now owned by the Navajo
22 Tribe, but not on Navajo reservation lands, lies between the Havasupai and Hualapai
23 reservations and far from Mohave's CCN area. The prior owners of the ranch granted a 25-
24

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

1 year easement (now expired) to Mohave for the line, with the provision of electric service
2 understood as part of the deal. Now that the 25-year easement has expired, Mohave has no
3 basis on which to serve the account. Moreover, since the account involves Indian purposes,
4 the BIA could certainly serve the account if it chose to do so, even though it is not on
5 reservation lands. Tr. 416-17. Mohave's provision of power to this account in exchange for
6 the now-expired easement should not be deemed to have converted the Line into a
7 distribution line.

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

12 *The Cesspooch Account.* This account involves Hualapai members living on the
13 Hualapai reservation, but falls within Mohave's CCN area. Mohave still needs permission
14 from the Hualapai to serve the account, but could serve the account through other means,
15 without using the 70 mile line, as it has agreed to do. Tr. 54-55, 366-67. Following the
16 hearing in this matter, Mohave took steps to serve the Cesspooch account through a new
17 line, in order to remove any doubt concerning the use of the abandoned 70-mile line itself
18 for such service. Mohave's Post-Hearing Supplement to Record, Longtin 2/13/09 Affidavit,
19 at ¶¶ 2-4 and attached exhibits. The BIA or the Hualapai Tribe also has the legal authority
20 to serve the Cesspooch account, even though the account is within Mohave's CCN area. Tr.
21 418-19. The Tribe could also exclude Mohave from serving Cesspooch if it wanted to do
22 so, even though the account is within Mohave's CCN area. Tr. 420-21; *see also* Mohave's
23 Post-Hearing Supplement to Record, Longtin 2/13/09 Affidavit, at ¶¶ 6-8 and attached
24 exhibits.

25 Most of the twelve accounts do not have people living at them, and Mohave could
26 not have served them without the explicit or implied permission of the BIA and the Tribes.
27 All of the accounts are still receiving electricity. The BIA could disconnect these accounts
28

1 at any time, or could read their meters if the BIA wanted to recover the costs, but the BIA
2 did not do so.

3 Moreover, the “small static number” of accounts along the Line, standing alone,
4 would not be sufficient to result in regulation of Mohave as a public service corporation.
5 *See Southwest Gas Corporation v. Arizona Corporation Commission*, 169 Ariz. 279, 287,
6 818 P.2d 714, 722 (App. 1991)(interstate transmitter of natural gas also delivered natural
7 gas to ten Arizona consumers, which represented a small percentage of its total sales, and it
8 had no plans to solicit other Arizona consumers; ten sales were insufficient to support a
9 finding that the company was a public service corporation). The small number of accounts,
10 including only three accounts with residences, are not sufficient to convert the area traversed
11 by the Line into Mohave’s service territory.

12 Conclusion ¶ 153 of the Decision, at page 35, provides that “Once Mohave began
13 serving retail customers using the Line, the Line became necessary and useful in the
14 performance of Mohave’s duties to the public.” Such a conclusion is fundamentally flawed,
15 as the Commission cannot and should not shift the burden of serving remote customers on
16 sovereign Indian lands to ratepayers of a state-regulated cooperative that originally provided
17 service solely by virtue of a Contract with the BIA, an agency which has the authority and
18 duty to provide such service going forward. Whether or not Mohave’s temporary provision
19 of service to these retail customers is characterized as having acted as BIA’s agent, the point
20 remains that the BIA cannot convert a contractual relationship into an apparently open-
21 ended and limitless duty to serve outside of a utility’s CCN area by the unilateral action of
22 refusing to renew the original Contract on its terms. At a minimum, the Decision must be
23 modified on rehearing to provide unambiguously that Mohave’s asserted duties to continue
24 to serve the 12 retail customers is limited to those 12 customers only, as Mohave’s
25 ratepayers should not be exposed to an open-ended and uncontrollable duty to serve as yet
26 unknown customers on sovereign lands far from the boundaries of its CCN area.
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2 **D. The October 1981 Contract Between Mohave and the BIA Expired in**
3 **1992, No Longer Controls Mohave's Relationship with the BIA or the**
4 **Tribes, and the Easements Either Have Expired or Will Soon Expire.**

5 **1. Because the 1981 Contract Has Expired, Mohave and the BIA**
6 **Have Only a Month-to-Month Relationship.**

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

15 Arizona courts strictly construe option agreements "because such provisions allow
16 the optionee freedom to exercise nor not exercise the option, whereas the optioner is bound
17 by the option." *Andrews v. Blake*, 205 Ariz. 236, 243, 69 P.3d 7, 14 (2003); *see also Rogers*
18 *v. Jones*, 126 Ariz. 180, 182, 613 P.2d 844, 846 (App. 1980) ("the law is crystal clear that an
19 option agreement must be strictly construed, in that it must be exercised in exact accord with
20 its terms and conditions"); *Mack v. Coker*, 22 Ariz. App. 105, 107, 523 P.2d 1342, 1344
21 (App. 1974) ("an option must be exercised strictly according to its terms and conditions");
22 *Oberan v. Western Machinery Co.*, 65 Ariz. 103, 109, 174 P.2d 745, 749 (1946) ("an option
23 must exercised strictly according to the terms and conditions in the option").

24 An option must be exercised within a reasonable time: "With regard to option
25 contracts, courts generally hold that a reasonable time period will be judicially imposed
26 where none is specified in the agreement." *Byke Construction Co. v. Miller*, 140 Ariz. 57,
27 59, 680 P.2d 193, 195 (App. 1984); *see also Mack*, 22 Ariz. App. at 108, 523 P.2d at 1345
28 (courts impose a reasonable time on option agreement that does not specify a time for
performance). The Arizona Supreme Court has also held that "time is of the essence in

1 option contracts, even when the contract does not include an express statement to that
2 effect.” *Andrews*, 205 Ariz. at 246, 69 P.3d at 17. The BIA argued at times that, because
3 the contract did not explicitly specify a time by which the renewal option had to be
4 exercised, the BIA could renew at any time. *See* BIA’s Complaint, ¶ 14; BIA’s Opposition
5 to Mohave’s Motion to Dismiss at 14. Crediting such an argument would mean that the
6 option contract violates the Rule Against Perpetuities and A.R.S. § 33-261. *See* *Byke*, 140
7 Ariz. at 59-60, 680 P.2d at 195-96.

8
9 The Arizona Supreme Court has also set a high standard before allowing equity to
10 excuse a failure to strictly comply with the terms of an option agreement, specifically
11 refusing to allow an excuse of “mere negligence.” *Id.* at 247, 69 P.3d at 18. Thus, an
12 optionee’s failure to strictly comply with the terms of an option to renew “may be equitably
13 excused *only* when the failure is cause by incapacity, fraud, misrepresentation, duress,
14 undue influence, mistake, estoppel, or the [optionor’s] waiver of its right to receive notice.”
15 *Id.* at 247, 69 P.3d at 18 (emphasis added). The “mistake” mentioned above “cannot be
16 based on a negligent act or omission” and “mere forgetfulness is not the equivalent of a
17 mistake.” *Id.* at 247 n.6, 69 P.3d at 18 n.6. This high standard “serves the important goal of
18 giving finality and predictability to a contract’s meaning.” *Id.* at 247, 69 P.3d at 18. Even if
19 the optionee shows that its failure to exercise the option fell within one of the narrow
20 categories allowed by the Supreme Court, the optionee still has further hurdles before it can
21 receive relief:

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

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

27 The BIA clearly has no right to relief either under the Contract or under a theory of
28 equitable relief. Mohave wrote the BIA in March 1992, prior to expiration of the first term,

1 asking the BIA if it wanted to renew. *See* Ex. R-2, Tab 9. The BIA failed to respond at that
2 time. Instead, the BIA waited until more than a year later, April 19, 1993, at which time it
3 wrote Mohave seeking simultaneously to both (1) to exercise its option to renew, and (2)
4 “re-negotiate and amend” the Contract. Ex. R-2, Tab 10; *see also* Stip., ¶ 25. A contract
5 cannot be both renewed and re-negotiated at the same time, and thus the BIA’s April 1993
6 letter constitutes a counter-offer of some variety rather than an exercise of an option to
7 renew. Moreover, attempting to exercise an option to renew more than a year after the
8 initial term expired clearly exceeds any “reasonable time” allowed to exercise the option
9 under the Contract.

10 After the April 1993 letter, the BIA continued to send ineffective communications
11 purporting to both renew and re-negotiate the Contract at the same time, none of which
12 constitute effective exercises of the option to renew. *See* R-2, Tab 13; *see also* Stip. ¶ 32.
13 Internally, the BIA acknowledged that the Contract expired, Stip. ¶ 26, and the BIA made
14 ambiguous statements before this Commission as to whether the BIA contends that the
15 Contract was ever effectively renewed. *See* Stip. at p. 10, ¶ B; *see also* BIA’s Notice Re:
16 Contract Effectiveness. The BIA also contended that it has no duty to pay the facilities
17 charge required under the 1982 Contract, seeking to impose those unreimbursed operations
18 and maintenance costs for the Line on Mohave. *See* BIA’s Complaint at 15. Under Arizona
19 law, these facts clearly indicate that the BIA failed to exercise its option to renew the
20 Contract in a timely manner.

21 The BIA also lacks grounds for equitable relief to excuse its failure to exercise its
22 option to renew in a timely manner. The BIA never contended, and never presented any
23 evidence, that it was the victim of fraud, incapacity, mistake or any of the other
24 circumstances outlined in *Andrews*. Nor did the BIA meet the “three prerequisites” needed
25 to excuse its delay required under *Andrews*: the BIA’s delay was lengthy, Mohave was
26 prejudiced by being forced to bear unreimbursed costs during the 1997-2003 period and
27 would be further prejudiced if forced to bear such costs in the future, and the BIA has not
28

1 suffered a forfeiture but has instead gained possession of the Line by reason of Mohave's
2 abandonment. Mohave remains willing to provide the BIA with electrical power at
3 Mohave's Nelson substation, so long as the BIA pays for it, and the BIA also could make
4 other arrangements to receive power from other sources. The BIA had no grounds to merit
5 any equitable relief from its failure to renew. Because of the BIA's failure to renew the
6 Contract in a timely manner, the Commission should have ruled in the Decision that
7 Mohave and the BIA have a month-to-month relationship, rather than effectively holding
8 Mohave to the terms of a long-term contract that does not exist.
9

10 **2. Because of the Loss or Impending Loss of Mohave's Easements,**
11 **Mohave Will Have No Basis or Authority Under Which to**
12 **Maintain the Line.**

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

27 It is one thing to adopt the BIA's position that the terms of the Contract are no longer
28 relevant to the determination of the disputes in this matter; however, the legal effect of the
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 Decision compelling Mohave, apparently indefinitely, to trespass on Indian lands and a
3 private ranch should not stand. At a minimum, the Decision must address how Mohave is to
4 maintain the Line while holding none of the property rights necessary to do so, or provide
5 for a rehearing of this portion of the case so that the parties may address this critical issue
6 themselves.

7
8 **E. The 70-Mile Line, Despite Variable Terminology in Different Documents,
9 Always Functioned as a Transmission Line, and Both the Commission
10 and Mohave Treated It as Such.**

11
12 **1. The Commission in Its Decisions Has Recognized that the Line Is a
13 Transmission Line.**

14 A.R.S. § 40-201(22) defines an electrical utility's "service territory" as the
15 geographic area in which the utility "maintains electric distribution facilities." A.R.S. § 40-
16 201(6) in turn defines "electric distribution facilities," specifically carving out "electric
17 transmission facilities." In contrast, "electric transmission facilities" are any property so
18 classified by the federal energy regulatory commission or the Commission. A.R.S. § 40-
19 201(11). Thus, the classification of the Line as either a distribution line or a transmission
20 line determines whether or not the recipients of power from the Line fall within Mohave's
21 service territory.

22 The Commission in its prior decisions uniformly classified the Line as a transmission
23 line, rather than as a distribution line serving Mohave's members. Thus, the Commission
24 when approving borrowing for the Line stated that the Line extended "*from* applicant's
25 certified area" to cross the Hualapai and Havasupai reservations. Decision No. 51491,
26 Findings of Fact, ¶ 2 (Oct. 22, 1980)(emphasis added). The Commission further found that
27 the Line was constructed pursuant to a contract with the BIA and intended "to supply
28 electric energy to serve existing and future residential and commercial installations on the
Hualapai and Havasupai Indian reservations." *Id.*, ¶ 3. Thus, the Commission recognized
that the Line was located *outside* Mohave's CCN area and was constructed solely pursuant

1 to a contract by which Mohave would provide power to the BIA, which would in turn
2 deliver the power on a retail basis to serve users on the reservations. The Commission
3 further held that the Line would serve “consumers,” not Mohave’s members. *Id.*,
4 Conclusions of Law, ¶ 1. Nothing in Decision No. 51491 suggests that the Line was a
5 distribution line or that the recipients of power though the Line would become Mohave’s
6 members or retail electric customers.

7 Two years later, in Decision No. 53174 (August 11, 1982), the Commission
8 specifically held that the Line was a “*transmission line* dedicated to serving the Hualapai
9 Indian Reservation.” *Id.* at p. 8 (emphasis added). In that Decision, which used a 1982 test
10 year assuming that the Line was in service, the Commission explicitly stated that the Line
11 “is not used and useful, will not be used and useful, and was never intended to be used and
12 useful in the provision of electric service to [Mohave’s] ratepayers. [Mohave] has
13 recognized this inequity [of asking Mohave’s ratepayers to pay for the Line] by excluding
14 the transmission line from rate base and proposing to segregate all expenses and revenues
15 associated with the line.” *Id.* (emphasis in original). Thus, the Commission unequivocally
16 held that the Line was a *transmission line* which did not serve Mohave’s members.
17 Decision 53174 at 8.

18 Nothing in the subsequent Decision No. 57172 (Nov. 29, 1990) indicated that the
19 Commission had revised its classification of the Line as a transmission line. As directed by
20 the Commission in Decision No. 53174, Mohave segregated all expenses and revenues
21 associated with the Line so as to not require Mohave’s members and other classes of
22 customers to subsidize the Line. Neidlinger Testimony at 4. The Commission specifically
23 noted that Mohave’s new rate design would “establish separate rates for [Mohave’s] three
24 large contract customers,” the BIA, Chemstar and Cyprus Baghdad, as opposed to Mohave’s
25 rates for residential and commercial customers. Decision No. 57172 at 5. Unlike Mohave’s
26 other contracts, the majority of revenues under the BIA contract came from facilities charge,
27 rather than “customer sales.” *See* Neidlinger Testimony, Ex. DLN-2. The Commission
28

1 ultimately approved a specific contract rate available only to the BIA. Nothing in the
2 Commission's Decision constituted a reclassification of the Line; rather, the Decision
3 recognized that the BIA was in a separate class from Mohave's residential, commercial and
4 even other contract customers.

5 By holding that Decision No. 53174 is "not determinative" in this proceeding,
6 Conclusions of Law, ¶ 10, the Decision has disregarded all of these prior decisions so as to
7 impose new obligations on Mohave to serve retail customers far outside its CCN area.
8

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

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

19 As detailed in the testimony presented in this docket, the Line is located in a remote
20 area of the State, far from the center of Mohave's CCN and electric facilities. Tr. 106-07,
21 237-38; *see also* Ex. R-2, Tab. 7. The Line runs in a relatively straight line for 70 miles
22 from Mohave's Nelson substation to what used to be a "government substation" at Long
23 Mesa. Tr. 236, *see also* Ex. R-2, Tab 3. The Line often diverges widely from the closest
24 road, Indian Route 18, again consistent with a transmission line. Tr. 106-07. There is only
25 one recloser along the entire length of the Line, unlike a distribution line and supporting its
26 classification as a transmission line. Tr. 236-38, 377-78. At Long Mesa, the power was at
27 one time stepped down for retail distribution by the BIA in Supai. Ex. R-2, Tab 3; Tr. 247-
28 48, 268-70, 380; *see also* A.R.S. § 40-201(21)(BIA is not a retail customer because it resells
power to residents in Supai). Following removal of the generators and transformers at Long

1 Mesa, the BIA now steps the power down in the Supai village below the canyon rim. Tr.
2 169 (Walker testimony.) Once the BIA has received the power, it resells the power to retail
3 users in Supai. Tr. 71, 153, 184. There are a minimal number of power drops along the
4 Line, approximately one per every 5.8 miles. Tr. 153. Mohave's operations and
5 engineering manager always considered the Line to be a transmission line, rather than a
6 distribution line, because it was "used as a transmission line." Tr. 325-26, 338.

7 The voltage of a power line is not determinative as to whether it is a distribution or
8 transmission line. For example, Thomas Hine testified that all of WAPA's lines are
9 classified as transmission lines, even small lines with voltage as low as 34.5 kV. Tr. 399.
10 The Commission previously determined that the Line is a transmission line in Decision No.
11 53174, and a review of the functionality and operation of the Line confirms that
12 determination.

13
14 **F. Because of the Effective Abandonment and Quitclaim of the Line,**
15 **Mohave Is Not Responsible for Operation and Maintenance Costs, or for**
16 **Taxation, Associated with the Line.**

17 Prior to 1997, the BIA reimbursed Mohave for operations and maintenance costs on
18 the Line through the facilities charge. The BIA has since disputed that it should pay any
19 facilities charge and has sought to place the costs of operation and maintenance on Mohave
20 and its members. See BIA's Complaint at 15; Ex. R-2, Tab 13. As Mr. Neidlinger
21 established in his supplemental testimony, the BIA contract rate included the revenues
22 generated by all elements of the facilities charge, while the Large Commercial & Industrial
23 Rate (under which the BIA is currently being charged) was not designed to recover any of
24 the costs of the Line. Therefore, neither the BIA contract rate nor the LC&I rate recovers
25 the cost of service unless coupled with the facilities charge. Neidlinger Supp. Testimony at
26 6.

27 Following the BIA's failure to renew the 1982 Contact and unwillingness to
28 negotiate a new contract, Mohave effectively abandoned and quitclaimed the 70-mile Line
and related easements to the BIA and the Tribes. Because Mohave, a non-profit electrical

1 cooperative, no longer owns the Line, Mohave and its members have no duty to operate and
2 maintain it. Nor can Mohave be subjected to taxation related to the Line.

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

14 **G. Mohave Acted Properly When Moving the Meter to Its Nelson Substation**
15 **and Placing the Burden of Reading Any Individual Meters Along the Line**
16 **on the BIA.**

17 Once the 1982 Contract expired and it became clear that the parties would not be able
18 to negotiate a new contract, Mohave had no continuing right to operate on either the
19 Hualapai or Havasupai reservation. In light of that fact, Mohave acted properly in moving
20 the meter off reservation lands, and billing the BIA based on meter readings at the Nelson
21 substation. The BIA and all other accounts along the Line are still receiving electricity and
22 there is no danger of power being cutoff unless the BIA decides to do so or refuses to pay its
23 own bill.

24 As with the issue of operations and maintenance costs, the BIA has the capacity to
25 read meters itself, and could easily hire meter readers to read the meters of any individual
26 accounts and to bill those users. The BIA's failure to do that does not mean that Mohave
27 should be penalized a speculative amount based on more than five years of usage by
28 individual accounts along the 70 mile line. As noted *supra*, Mr. Williams contended that the
average credit during the 78 month period of March 1997 to September 2003 was \$377.25,

1 although he could not support that calculation. Tr. 187-88. In fact, the total credit was
2 \$27,178, or an average of approximately \$348 per month. See Exhibit A to Mohave's Post-
3 Hearing Brief. However, there is no support for the BIA's argument that average credit
4 before in the period before September 2003 has any relationship to use by the twelve
5 accounts after September 2003. It was the BIA's duty to support its claimed reimbursement
6 amount for the twelve accounts, and it has failed to do.

7 In paragraph 161, page 35, the Decision finds that BIA has paid Mohave under protest
8 "for the electricity used by Mohave's retail electric customers served by the Line," and orders
9 Mohave to reimburse BIA \$348 per month for such payments (Order at p. 38, lines 4 -7). But
10 this finding ignores the fact that of the 12 accounts involved, *eight* were for the BIA itself or
11 Tribal Council facilities and accounts. Not only did the BIA fail to take reasonable steps to
12 mitigate its damages by reading and billing these customers itself during the pendency of this
13 case, it is far more reasonable to hold the BIA responsible for the cost of such power
14 (essentially to itself and the Tribes for which it is responsible) than to order Mohave to refund
15 (and Mohave's ratepayers to subsidize) such monies. Accordingly, at a minimum, the amount
16 of the refund, if any, should be reduced by two-thirds, from \$29,580 to \$9,860.

17
18 **H. Mohave Validly and Effectively Abandoned and Quitclaimed the Line to
the BIA and the Tribes.**

19 Arizona law provides that a public service corporation must receive authorization
20 from the Commission before disposing of any part of its lines or system that is "necessary or
21 useful in the performance of its duties to the public." A.R.S. § 40-285(A). However,
22 "Nothing in this section shall prevent the sale, lease or other disposition by any such
23 corporation of property which is *not* necessary or useful in the performance of its duties to
24 the public" A.R.S. § 40-285(C)(emphasis added). These sections were intended "to
25 prevent a utility from disposing of resources devoted to providing its utility service, thereby
26 'looting' its facilities and impairing its service to the public." *American Cable Television,
27 Inc. v. Arizona Public Service Company*, 143 Ariz. 273, 277, 693 P.2d 928, 932 (App.
28

1 1983). Likewise, the Commission's rules provide that "Any utility proposing to discontinue
2 or abandon utility service currently in use by the public shall prior to such action obtain
3 authority therefor from the Commission." R14-2-202(B)(1).

4 In this instance, the largest portion of the Line is located outside of Mohave's CCN.
5 Rather than serving the public, the Line was primarily used to provide electric power under
6 a specific contract to the BIA and a small number of accounts along the Line designated by
7 the BIA. Once the Contract expired, and it became clear that no new long-term contract
8 would be formed, the Line was no longer "necessary or useful in the performance of
9 [Mohave's] duties to the public." A.R.S. § 40-285(A); *see also* Decision No. 53174; Tr.
10 292 (the Line was not used and useful to Mohave's members); Tr. 364-65 (the Line was
11 outside Mohave's CCN and the Contract had expired, so an application under Section 40-
12 285 was not needed). In fact, once Mohave stopped collecting the facilities charge, the Line
13 constituted a drain on Mohave's resources and a burden on Mohave's members. Neidlinger
14 Supp. Testimony at 5, l. 23 through 6, l. 3, and 7, ll. 9-17. The Line also subjected Mohave
15 to the potential assessment of taxes by the Hualapai and Havasupai tribes.

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

23 Mohave's Board acted within its rights and responsibilities to Mohave's members
24 when it determined to abandon the line. Under federal law, it is the BIA's fiduciary duty to
25 provide support to the Tribes, including any need for electrical power, *not* Mohave's. In
26 contrast, Mohave's duties as a non-profit electrical cooperative run to its members, who
27 were being forced to bear the costs of the BIA's duty and trust obligation to the Tribes. By
28

1 declining to remove the Line and instead abandoning it to the BIA and the Tribes, Mohave
2 did not interfere or impede the BIA's operations in any way. Rather, the BIA remains
3 capable of using and maintaining the line, reading meters for any accounts along of the
4 Line, and continuing to provide power to Supai. Mohave remains willing to sell power to
5 the BIA at Mohave's Nelson substation at Mohave's lowest approved rate. The BIA, if it
6 chose, could instead start its own electrical utility or re-install generators at Long Mesa and
7 provide for power to Supai by that method. Tr. 193; *see also* Tr. 246 (generators used by
8 the Hualapai Tribe at Grand Canyon Skywalk and could also be used at Long Mesa).

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

17 Obligating Mohave to own, operate and maintain the Line on Indian lands also
18 subjects Mohave and its members to taxation by the Hualapai and Havasupai tribes.
19 Although Mohave disagrees with the Decision's findings as to the quitclaim, by failing to
20 conclude as a matter of law that an acceptance is not needed for an effective abandonment, the
21 Decision is in error, and the appropriate finding and conclusion is that the Line was effectively
22 abandoned to the BIA by Mohave.
23
24
25
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28

1 **I. The Commission Should Not Have Heard the BIA’s Complaint for Both**
2 **Jurisdictional and Prudential Reasons.**

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

6 This dispute involves a unique situation: a federal agency, the BIA, requested that a
7 state entity, the Commission, require that a non-profit electrical cooperative provide
8 electrical power outside of its CCN, on two Indian reservations, and without a contract with
9 the BIA, so that the BIA can provide retail electrical service to tribal members on the
10 reservations. In this particular factual context, Mohave submits that the Commission lacked
11 jurisdiction to grant the relief sought by the BIA, and that the Decision should be vacated on
12 that basis.

13 Indian tribes are “unique aggregations possessing attributes of sovereignty over both
14 their members and their territory.” *California Valley Miwok Tribe v. United States*, 515
15 F.3d 1262, 1263 (9th Cir. 2008)(quoting *United States v. Mazurie*, 419 U.S. 544, 557
16 (1975)); *see also Solis v. Matheson*, 563 F.3d 425, 429-30 (9th Cir. 2009)(discuss “special
17 status” of Indian tribes as “sovereigns with limited powers”); *Barona Band of Mission*
18 *Indians v. Yee*, 528 F.3d 1184, 1188 (9th Cir. 2008)(“The historically entrenched idea of
19 tribal autonomy . . . remains central to our reasoning when confronted with the application
20 of state laws on tribal territory”); *United States v. Enas*, 255 F.3d 662, 666 (9th Cir.
21 2001)(“the tribes are autonomous sovereigns”). In general, Indian tribes possess sovereign
22 immunity in both federal and state court, absent some waiver or congressional abrogation.
23 *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754
24 (1998); *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008); *Burlington*
25 *Northern & Santa Fe Railway Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007); *Krystal*
26 *Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004); *Lineen v. Gila River*
27 *Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *Filer v. Tohono O’odham Nation*
28 *Gaming Enterprise*, 212 Ariz. 167, 170, 129 P.3d 78, 181 (App. 2006).

1 State regulation of Indians and Indian land is barred by both federal preemption and
2 by tribal sovereignty. *Barona Band*, 528 F.3d at 1189 (“Unlike traditional preemption, two
3 conceptual barriers have been erected to block State law from regulating Indian behavior:
4 federal enactments and Indian sovereignty”); *see also Blunk v. Arizona Department of*
5 *Transportation*, 177 F.3d 879, 881-82 (9th Cir. 1999). In *Central Machinery Company v.*
6 *Arizona State Tax Commission*, 448 U.S. 160 (1980), the Supreme Court held that
7 comprehensive federal legislation, including the licensing of Indian traders, preempted
8 Arizona’s attempt to impose a transaction tax on a sale of farm equipment on the Gila River
9 Reservation, even though the seller was not a licensed Indian trader:

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

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

26 The Commission has also recognized that it has no jurisdiction over electrical
27 facilities on tribal lands. *See In re TRICO Electric Company*, Decision No. 47107 (July 6,
28 1973)(attached as Exhibit B). In the *TRICO* decision, the electric utility owned certain
electrical facilities on the Papago Reservation, which the utility had used to sell electrical

1 power on the reservation. *Id.*, ¶ 4. The Commission recognized that it lacked jurisdiction
2 over electrical facilities on the reservation, *id.*, ¶ 2, and that TRICO could transfer the
3 facilities to the Papago Tribe because “The facilities to be transferred are not used and
4 useful TRICO and their transfer will not impair TRICO’s ability to provide service to
5 customers within TRICO’s certified area.” *Id.*, Conclusions of Law, ¶ 1.

6 While the Commission may generally have jurisdiction over Mohave as a public
7 service corporation providing electrical service, the Commission lacks jurisdiction to order
8 Mohave to provide electrical service on an Indian reservation and outside of Mohave’s CCN
9 area. The Commission has no jurisdiction over electrical facilities on a reservation, *see*
10 Decision 47107 (July 6, 1975), and cannot require an Indian tribe to accept service from
11 Mohave or even allow Mohave to enter tribal lands without the tribe’s permission. If the
12 Commission were to extend Mohave’s CCN to include the reservation, the tribe could still
13 exclude Mohave and receive service from a non-CCN provider. *See Solis*, 563 F.3d at 435
14 (“A hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands”);
15 *United States v. Becerra-Garcia*, 397 F.3d 1167, 1175 (9th Cir. 2005) (“Intrinsic in tribal
16 sovereignty is the power to exclude trespassers from the reservation”); *see also* Tr. 430 (a
17 state agency like the Commission cannot require the tribes to receive electrical service from
18 any specific utility, including the holder of a CCN granted by the Commission).

19 The Commission, and the State government as a whole, cannot prevent the tribes
20 from arresting Mohave’s employees and seizing Mohave’s equipment, if the tribes choose to
21 do so. *See* Tr. 381-85; footnote 2, *supra* and Mohave’s Post-Hearing Supplement to Record,
22 Longtin 1/29/09 and 2/13/09 Affidavits and attached exhibits. It is obvious from the risks
23 Mohave’s employees have faced on both the Fort Mohave and Hualapai reservations that
24 tribal authorities give no weight to a CCN or to authority granted to a state-regulated utility
25 by the Commission. *Id.* Moreover, “[t]he protections of the United States Constitution are
26 generally inapplicable to Indian tribes, Indian courts and Indians on the reservation.”
27 *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001).
28

1 The power of the federal government and the tribes in this area, and the
2 corresponding lack of jurisdiction of the Commission, is further demonstrated by the
3 Havasupai Tribe's construction of the 13.5 mile Spur with the approval of the BIA. The
4 BIA and the Tribe never sought Commission approval of the Spur, and Mohave rejected any
5 duty to provide engineering oversight or service related to the Spur. Yet the Havasupai
6 Tribe, with the knowledge of the BIA, went ahead and built the Spur – and the Commission
7 and Mohave did not even know if it had been energized. The effect of the Decision is that
8 Mohave must provide service to the Spur, even though it was built without any oversight or
9 even agreement by the Commission or Mohave, and never was within the contemplation of
10 the parties when they entered the contract almost 30 years ago.

11 Moreover, the Decision requires Mohave to serve outside of its CCN and without a
12 contract. Indeed, by requiring Mohave to serve electricity to the BIA at Long Mesa, the
13 Commission is ordering Mohave to provide electrical service approximately seventy miles
14 outside of its CCN, and even further from Mohave's primary facilities and personnel,
15 putting Mohave's employees at even greater personal risk of arrest and equipment seizure.
16 The Decision far exceeds the Commission's power and authority under Arizona law by
17 requiring Mohave to provide such service, particularly on tribal lands where the
18 Commission has recognized that it lacks jurisdiction.

19 The BIA's choice to bring this action in a state forum also implicated tribal
20 sovereignty. As noted in the testimony of Robert Moeller, the BIA has a fiduciary duty to
21 protect tribal sovereignty. *See HRI, Inc. v. Environmental Protection Agency*, 198 F.3d
22 1224, 1245 (9th Cir. 2000); *see also* Tr. 428-30. Rather than protecting tribal sovereignty,
23 the BIA has questioned it by bringing this case before the Commission. By purporting to
24 exert jurisdiction over facilities on Indian lands, such as the Line, the Commission invades
25 and damages the Havasupai and Hualapai Tribes' right to manage their own affairs under
26 the protection of the federal government. If, on the other hand, the Tribes ignore the
27 Commission's assertion of jurisdiction over the Line, that disregard would undercut the
28

1 Commission's power and jurisdiction. By reason of the Decision, the Commission has
2 created a situation in which tribal sovereignty and the Commission's jurisdiction collide, to
3 the detriment of both.
4

5 **2. The Federal Government, Particularly the BIA, Has the Primary**
6 **Responsibility to Ensure That the Tribes Receive Electrical**
7 **Service, and Should Not Be Allowed to Shift that Obligation to**
8 **Mohave.**

9 Federal courts have also made it clear that the primary duty of providing support and
10 protection to the Indians is owed by the federal government. "In general, a trust relationship
11 exists between the United States and Indian Nations." *Marceau v. Blackfeet Housing*
12 *Authority*, 519 F.3d 838, 844 (9th Cir. 2008)(citing *Cherokee Nation v. Georgia*, 30 U.S. 1,
13 17 (1831)); see also *Eastern Shawnee Tribe of Oklahoma v. United States*, 582 F.3d 1306,
14 1308 (Fed. Cir. 2009)("The United States has important trust obligations to Indian tribes").
15 As stated by the Supreme Court, "a fiduciary relationship necessarily arises when the
16 Government assumes [] elaborate control" over the property and lands of Indians. *United*
17 *States v. Mitchell*, 463 U.S. 206, 224 (1983)(holding that statutes giving the federal
18 government the right to manage Indian resources created a fiduciary relationship).

19 The Supreme Court recognized "the undisputed existence of a general trust
20 relationship between the United States and the Indian people" such that there exists "the
21 distinctive obligation of trust incumbent on the Government in its dealings with these
22 dependent and sometimes exploited people." *Id.* at 225; see also *Morton v. Ruiz*, 415 U.S.
23 199, 236 (1974)(because of the Snyder Act and federal obligations to the Indians, "[t]he
24 overriding duty of our Federal Government to deal fairly with Indians wherever located has
25 been recognized by this Court on many occasions"); *Seminole Nation v. United States*, 316
26 U.S. 286, 296 (1942)(acknowledging the federal "fiduciary duty of the Government to its
27 Indian wards").

28 As noted by the Ninth Circuit Court of Appeals, "This fiduciary relationship
conceived by Justice John Marshall [in *Cherokee Nation*] ascribes to the government both a

1 political duty and a moral commitment to the Indians.” *Dewakuku v. Martinez*, 271 F.3d
2 1031, 1040 (9th Cir. 2001). In short, “The federal government bears a special trust
3 obligation to protect the interests of Indian tribes, including protecting tribal property and
4 jurisdiction.” *HRI, Inc. v. Environmental Protection Agency*, 198 F.3d 1224, 1245 (9th Cir.
5 2000).

6 In this instance, there is no doubt that the BIA has assumed “elaborate control,”
7 *Mitchell*, 463 U.S. at 224, over the provision of electrical service to the Havasupai and
8 Hualapai reservations. The Snyder Act authorizes the BIA to provide electrical service to
9 Indian tribes, and the BIA has done so in numerous situations. The BIA initially provided
10 service to the Havasupai and Hualapai reservations by means of generators, issued an RFQ
11 for electrical service to the reservations, contracted with Mohave, and approved easements
12 for the Line. The BIA read meters, issued bills, repaired lines and serviced accounts in the
13 Supai village -- and requested that Mohave provide service on the Hualapai reservation to
14 various areas identified by the Hualapai Tribe.

15 In short, the BIA created a dependency on electricity on the part of the Tribes, and
16 has overseen and monitored all electrical service on the two reservations since the 1970s.
17 Tr. 426-27, 460-61. By creating the dependence on electricity and assuming control over its
18 provision, the BIA assumed a fiduciary duty to provide electrical energy to the two
19 reservations. *Mitchell*, 463 U.S. at 224. The BIA’s fiduciary duty extends to repairing and
20 maintaining facilities on tribal lands, including the Line. By reason of the Decision, the
21 Commission has imposed the BIA’s fiduciary duty upon Mohave and its members. Tr. 462.

22 The BIA contended that it incurred more than \$125,000 in repair costs on the Line
23 during the 2004-2008 period. Under the Contract in effect from 1982 to 1992, the BIA was
24 responsible for those and other costs through the Facilities Charge. By bringing its
25 Complaint against Mohave, the BIA sought to impose those and other costs on Mohave and
26 its members. Moreover, as noted in the testimony of Dan Neidlinger, those costs are not
27 covered by the Large Commercial rate under which the BIA has been billed. The full costs
28

1 of providing electrical service to the Havasupai and Hualapai reservations are a federal
2 responsibility, not the responsibility of a nonprofit rural electrical cooperative like Mohave.
3 Because of this unfunded mandate that had been forced upon Mohave, the cooperative's
4 Board of Directors determined to abandon and quitclaim the Line to the BIA and the Tribes.
5 The Commission should have approved that decision, and ensured that Mohave's members
6 are not unfairly burdened, by rejecting the BIA's complaint and denying relief.
7

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

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

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

25 Moreover, the two tribal easements crossing the Havasupai and Hualapai reservations
26 expire soon (to the extent they have not been already abandoned by Mohave), and the
27 Boquillas easement has already expired. Without the easements, Mohave has no right to use
28 the Boquillas land and will soon have no rights to use tribal lands at all. Once the tribal
easements are expired, either or both tribes could eject Mohave from the reservation, arrest

1 its employees and seize its trucks – and Mohave would have no recourse at all. Tr. 385,
2 421-22. Even with easements in hand and having reasonably requested all permission to go
3 upon tribal lands, Mohave’s employees continue to face exactly these risks right up to the
4 present day, even within Mohave’s CCN area. *See* Mohave’s Post-Hearing Supplement to
5 Record, Longtin 1/29/08 and 2/13/09 Affidavits and attached exhibits. The Decision
6 erroneously continues this situation while postponing a resolution of the fundamental
7 question of providing electrical service on the two reservations, and gives the BIA further
8 grounds to ignore its own responsibilities to provide that service.

9
10 By ruling the Contract is irrelevant in Conclusions of Law, ¶ 7, but still granting the
11 BIA its requested relief, the Decision has effectively ordered Mohave to provide electrical
12 utility service on an Indian reservation with no long term contract at all, subjecting Mohave
13 to undefined liabilities and burdening Mohave’s members with the expense of maintaining
14 electrical facilities as much as 70 miles from Mohave’s CCN and primary resources. Thus,
15 even if the Commission has jurisdiction over this matter, which Mohave disputes, there are
16 public policy and fairness reasons why the Commission as a matter of prudence should
17 refuse to grant the relief requested by the BIA.

18 As set forth above, the status quo that has emerged since the original Contract was
19 not renewed has served all of the parties’ interests well. The institution of the Operations
20 Protocol has satisfied the remaining concerns that in part compelled the BIA to file its
21 Complaint. Maintaining Mohave’s point of delivery of electrical service to the BIA at the
22 Nelson Substation serves the purpose of maintaining the separation of Mohave’s CCN area
23 and the State jurisdiction of this Commission, on the one hand, and sovereign Indian lands
24 with customers located outside of Mohave’s CCN area, on the other hand. Continuing the
25 BIA’s ownership and operation of the Line addresses the impending expiration of the
26 remaining easements that allowed Mohave to build the Line in the first place decades ago,
27 and results in consistent fairness to Mohave’s existing ratepayers.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Commission should grant a rehearing, vacate the
3 Decision, and issue a new Decision either denying the BIA's requested relief and dismissing
4 BIA's complaint against Mohave, or remanding this matter to the Hearing Division for
5 further proceedings to address the remaining questions left unanswered by the Decision.

6 RESPECTFULLY SUBMITTED this 30th day of December, 2010.

7 BRYAN CAVE LLP

8
9
10 By 

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18 foregoing were hand-delivered for
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22 1200 W. Washington Street
23 Phoenix, AZ 85007

24 **COPY** of the foregoing hand-delivered
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Exhibit A

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EXHIBIT A

FACTUAL BACKGROUND

I. Prior to Formation of a Contract between Mohave and the BIA in October 1981, the Havasupai Became Dependant on Electrical Power Provided by the BIA.

A. The BIA Used Generators to Provide Power to the Supai Village in the 1960s and 1970s.

The BIA is an executive agency of the United States of America and part of the Department of the Interior. Stip. ¶ 2. The Snyder Act, 25 U.S.C. § 13, provides that the BIA “shall direct, supervise, and expend” money for the “general support and civilization” of Indians, including the federally recognized Havasupai and Hualapai tribes. *Id.* As part of its obligations under the Snyder Act, the BIA owns and operates electrical utilities providing retail electric service on Indian reservations, including two in Arizona (the San Carlos Irrigation Project Power Division and the Colorado River Irrigation Project Power Division) and the Flathead Irrigation Project Power Division in Montana. *Id.*, ¶ 4; Tr. 179-80). The BIA has also promulgated regulations specifically relating to Indian Electric Power Utilities. *See* 25 C.F.R. § 175 (2007), Ex. R-9; *see also* Tr. 414. As stated in the regulations, “The purpose of this part is to regulate the electric power utilities administered by the Bureau of Indian Affairs.” 25 C.F.R. § 175.2. Despite the BIA’s arguments to the otherwise, it is the BIA, not Mohave, that has the historical and legal duty to provide utility service to the Hualapai and Havasupai reservation members, unless otherwise agreed.

Supai is an isolated village in the Grand Canyon on the Havasupai reservation. The BIA began providing electrical power to Supai in 1965 by means of gas-powered generators. Stip. ¶ 3. In 1971, the BIA switched to diesel generators which the BIA owned and operated at Long Mesa on the rim of the Grand Canyon. Electrical lines operated by the BIA then carried the power into the Canyon. *Id.* The Havasupai Tribe became increasingly dependent on the electricity supplied by the BIA. *Id.*, ¶ 6. By 1976, the BIA and/or Hualapai Tribe also operated electrical generators on the neighboring Hualapai reservation.

1 *Id.*, ¶ 8; *see also* Tr. 179-80 (Mr. Williams acknowledges use of generators prior to 1981
2 contract).

3
4 **B. The BIA Issued an RFQ for the Provision of Electrical Power to the
5 Havasupai and Hualapai Reservations.**

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

20 Three electrical providers responded to the RFQ, including Mohave, a non-profit
21 electrical cooperative, Arizona Public Service Company (“APS”), and Citizens Utilities
22 Company (“Citizens”). *Stip.*, ¶¶ 10-11. Mohave and APS submitted proposals for a
23 “wholesale power agreement” with the BIA. *See* Mohave’s Statement of Facts in Response
24 to BIA’s Motion for Partial Summary Judgment, *Ex.* 30 and 31. In contrast, Citizens
25 submitted a proposal to provide retail service “directly to the individual meters on the
26 Reservation.” *Id.*, *Ex.* 32. The BIA rejected Citizens’ proposal and required Citizens to
27 submit a new proposal to deliver wholesale power to Long Mesa rather than provide retail
28

1 service to individual meters—in direct contrast to the position the BIA took in this matter
2 and as now provided in the Decision. *Id.*, Ex. 33.
3

4 **C. Mohave Sought and Received Permission to Borrow Funds for the**
5 **Construction of the Transmission Line to Long Mesa.**

6 The BIA ultimately decided to contract with Mohave rather than APS or Citizens for
7 construction of the Line to Long Mesa. Stip., ¶ 13. In October 1980, prior to entering into a
8 contract, Mohave sought permission from the Commission to borrow \$1.6 million from the
9 Rural Electrification Administration (“REA”) for construction of the proposed Line. *Id.*, ¶
10 14. The Commission approved the loan, stating that it would “be used for construction of an
11 electric line extension from [Mohave’s] certified area across a portion of the Hualapai and
12 Havasupai Indian Reservation” in order “to supply electric energy to serve existing and
13 future residential and commercial installations on the Hualapai and Havasupai Indian
14 reservations.” Decision No. 51491 (Oct. 22, 1980), Ex. R-2, Tab 5. Although the
15 Commission recognized that the proposed Line would extend outside of Mohave’s CCN
16 area, the Commission did not require Mohave to seek an extension of its CCN.

17 **D. Mohave and the BIA Entered Into a Contract for the Construction of the**
18 **Line and the Provision of Electrical Power.**

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

- 25
- 26 • The point of delivery would be the line side of the Long Mesa Power Transformer.
27 Ex. R-2, Tab 3 at 00001. The Contract also referred to the delivery point as “the
28 Government substation.” *Id.* at 00009.
 - Power would be delivered and metered at 24.9 kV. *Id.* at 00001

- 1 • The Contract would have a term of 10 years from when Mohave first made power
2 available, which was agreed to be no later than April 1, 1982. *Id.* The BIA also had
3 the option to renew the Contract for two additional 10-year periods. *Id.* at 00014.
- 4 • The Contract ambiguously referred to the Line as both a “transmission line” and a
5 “distribution line.” *Id.* at 00008, 00010.
- 6 • Mohave would provide the funding to construct the Line, which would be owned by
7 Mohave. *Id.* at 00011, 00013.
- 8 • The Contract required the BIA to pay a monthly “facilities charge” which included
9 components related to (a) the cost of construction of the line, (b) state and local taxes,
10 (c) operation and maintenance costs, and (d) depreciation. *Id.* at 00013-14. In
11 addition, the Contract required the BIA to pay for the cost of the power under
12 Mohave’s Rate Schedule “L” (Large Power). *Id.* at 00015.
- 13 • The BIA agreed that Mohave would serve the Hualapai reservation “upon its own
14 arrangements” from the Line “provided that contemplated system capacities are not
15 unreasonably exceeded.” *Id.* at 00016.
- 16 • Mohave would coordinate, “where appropriate,” with the Arizona Telephone
17 Company, which provided service to the area. *Id.* at 00013.
- 18 • If the BIA failed to renew the Contract, the BIA was required to pay Mohave
19 “facility removal costs, less salvage value” related to the Line. *Id.* at 00014.

20 The Contract also provided that Mohave would obtain the necessary rights of way for
21 the Line, and Mohave did so. *Stip.*, ¶ 15. The BIA granted Mohave a 50-foot wide
22 easement across the Hualapai reservation for the Line for a term of 30 years, expiring in
23 January 2012. *Ex. R-2, Tab 4.* Mohave also received a 50-foot wide, 30-year easement
24 across the Havasupai Reservation for the Line, expiring in December 2014. *Id.* However,
25 as to the private Boquillas Ranch property, which lies between the Hualapai and Havasupai
26 reservations and across which the Line was to pass, Mohave received only a 25-year
27 easement, which expired in September 2005.³ *Ex. R-2, Tab 19, Boquillas Easement at 2.*

28 ³ Thus, at this date, post-termination of the Contract and abandonment of the
Line, Mohave has no authority to operate an electrical line in the gap between the Hualapai
and Havasupai reservations, and in a short time (assuming the easements have not been
abandoned already by Mohave) will have no permission whatsoever to operate the Line on
those reservations.

1 The 50-foot easements for the Line were consistent with its use as a transmission line,
2 unlike distribution lines, which usually have easements only 20 feet wide. Tr. 238-39.
3

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

6 **A. Mohave Constructed the Line and Began Providing Electrical Power to**
7 **the BIA.**

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

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

26 The BIA used the power provided to the Long Mesa transformers site for BIA
27 facilities in Supai, as well as for the retail distribution of power to tribal members living in
28 the village. Stip., ¶ 19. As the BIA's witness Leonard Gold conceded, Mohave delivered

1 bulk power to the BIA at the rim of the Canyon, which power the BIA then distributed on a
2 retail basis to tribal members. Tr. 71. The BIA resold the power to users in Supai, set the
3 rates, read the meters, billed customers for their usage, and arranged for any repairs. Tr.
4 184. BIA witness James Walker testified that the BIA delivered retail power to
5 approximately 200 metered accounts, or approximately 600 to 700 residents, in Supai. Tr.
6 153.

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

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

21 During the term of the Contract, Mohave began serving a small number of individual
22 accounts along the 70-mile Line. Stip. ¶ 34. The Contract itself mentioned "coordination"
23 with the telephone provider, R-2, Tab 4 at 00013, and provided that Mohave could serve the
24 Hualapai reservation from the Line. *Id.* at 00016. In 1981-83, the Hualapai Tribe requested
25 that the BIA ensure that Mohave provide electrical service to tribal properties from the Line
26 to areas on the Hualapai reservation including Frazier Wells, the Youth Camp and the
27 Thornton Fire Tower. *See* Ex. R-1; *see also* Tr. 101-05. Mohave did not request additional
28 authority to serve these individual accounts along the Line from the Commission, or seek a

1 CCN extension, because Mohave believed it was acting solely as the agent of the BIA under
2 the Contract and the easements received for the Line in providing service to these accounts.
3 Tr. 301 (Longtin Testimony); Ex. R-2 at 14-15.

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

- 6
- 7 • Two additional BIA accounts, including a fire tower and a radio repeater tower;
- 8 • Six accounts in the name of the Hualapai Tribal Council, including pumps, wells and
9 a youth camp;
- 10 • An account for the telephone tower near the rim of the Canyon on the Havasupai
11 reservation;
- 12 • An account at the Boquillas Ranch between the Hualapai and Havasupai
13 reservations;
- 14 • An account in the name of W.C. Bravo on the Hualapai reservation; and
- 15 • An account in the name of Cesspooch for a cabin on Nelson Road, also on the
16 Hualapai reservation.

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

22 Most of these individual accounts involved wells, towers and communications
23 facilities, rather than residences. James Walker testified that only three of the accounts (the
24 Boquillas, Bravo and Cesspooch accounts) had people living at them year-round. Tr. 153-
25 54. While Mr. Walker could not estimate the number of individuals living at those three
26 accounts, he admitted that the vast majority of individuals receiving electrical power
27
28

1 through Line received such power from the BIA in Supai, where there are 600 to 700
2 residents, rather than along the Line itself.⁴ *Id.*
3

4 **C. Mohave Filed a Rate Application That Resulted in Commission Decision**
5 **No. 53174 in August 1982, Characterizing the Line as a Transmission**
6 **Line That is Not “Used and Useful.”**

7 In January 1982, shortly before the Line began serving the BIA, Mohave filed a rate
8 application to reflect the Line operation as well as other factors. *See* Decision No. 53174
9 (August 11, 1982), Ex. R-2, Tab 6 at 1. Because of Mohave’s construction plans, Mohave
10 and the Commission Staff used a non-historical test year of 1982 and a December 1982 rate
11 base. *Id.* at 4. Although Mohave had initially included some costs related to the Line in its
12 rate base, the Commission rejected inclusion of the costs, finding that the Line was a

13 ⁴ Two of the twelve accounts receiving service from the 70-mile Line (the
14 Cesspooch account and one of the Hualapai Tribal accounts) are located within Mohave’s
15 CCN. Until approximately 2002, these two accounts were served by means of an
16 underbuild which then turned east to serve the Grand Canyon Caverns area, also within
17 Mohave’s CCN. In approximately 2002, a new line was constructed to serve the Grand
18 Canyon Caverns area, and the two accounts were moved to the 70-mile Line, which was
19 subsequently abandoned. Tr. 54-55, 366-68. Following the hearing in this matter, Mohave
20 requested permission from the Hualapai Tribe to construct new facilities to serve those two
21 accounts without reliance on the abandoned 70-mile Line. Mohave’s Post- Hearing
22 Supplement to Record, Longtin 2/13/09 Affidavit, at ¶¶ 2-4 and attached exhibits. These
23 requests clearly and unambiguously informed both the Hualapai Tribe *and* the BIA of
24 Mohave’s intentions to serve these customers through a new line, and sought all necessary
25 consents and permissions of any nature to build the line. *Id.* The Hualapai Tribe gave
26 Mohave a signed easement and a letter from its Tribal Vice Chairman on tribal letterhead
27 granting the request, and never indicated that any other consents, permits or easements of
28 any nature were required. *Id.* However, when Mohave went upon the tribal lands—within
its CCN area granted by this Commission and with the tribal easement in hand—its
employees were harassed and threatened and ordered to leave the reservation under penalty
of arrest. *Id.* at ¶¶ 4-8. This conduct underscores the incorrectness of the Decision and
warrants reconsideration—on the one hand the BIA insists that a state-regulated utility
indefinitely operate and maintain a distribution line far outside of its CCN area on tribal
lands, but on the other hand it allows the utility’s employees to be put in personal danger on
pretextual grounds and seemingly is doing everything it can to make it as difficult as
possible for the utility to operate on the reservations.

1 “transmission line” which did not benefit Mohave’s ratepayers, rather than a distribution
2 line. *Id.* at 8. The Commission specifically held that the Line “is not used and useful, will
3 not be used and useful and was never intended to be used and useful in the provision of
4 electric service to [Mohave’s] ratepayers.” *Id.* (emphasis in original). Thus, the
5 Commission approved segregating all expenses and revenues associated with the Line and
6 excluding them from the calculation of Mohave’s rates. *Id.* at 8-9.

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

13 **D. The Line Was Treated on a Standalone Basis During Mohave’s 1990 Rate**
14 **Application.**

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

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

1 As will be discussed *infra*, the BIA subsequently allowed the Contract to lapse and
2 ceased paying the facilities charge. Thus, the current billings to the BIA under the LC&I
3 rate are not recovering any of the additional costs associated with the Line. *Id.* at 6. BIA
4 witness Leonard Gold conceded that his testimony about the alleged revenue stream to
5 Mohave based on the Line in 1989 assumed that Mohave was continuing to bill for, and the
6 BIA was continuing to pay, the facilities charge. Tr. 115-19. Without payment of the
7 facilities charge, the revenues would be considerably lower. Tr. 120-24. An underlying and
8 erroneous assumption on which the Decision was based was that Mohave was earning a
9 return on the transmission line itself as part of its rate base; the record shows that is not the
10 case.

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

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

22 With the initial ten-year period of the Contract set to expire on April 1, 1992,
23 Mohave requested that the BIA “provide Mohave with your intentions towards the renewal
24 options” by letter dated March 17, 1992. Stip., ¶ 25; Ex. R-2, Tab 9. Mohave further wrote
25 the BIA: “Due to the very limited time before the current contract expires, we would
26 appreciate receiving a written response prior to March 31, 1992.” *Id.* The BIA failed to
27 respond to this letter in any way, and in fact said nothing to Mohave at that time about
28 exercising its renewal option.

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

8 **III. Following the BIA's Failure to Renew the Contract in 1992 and Continuing into**
9 **1997, Mohave Continued to Provide the BIA with Electrical Power on a Month-**
10 **to-Month Basis While Seeking to Negotiate a New Contract.**

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

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

25 As Mr. Longtin testified, "We [Mohave] didn't just shut it off and abandon it then.
26 We were trying to work with the BIA." Tr. 302. "We carried on our duties as we had
27 during the contract." *Id.* at 303. As Mr. Longtin explained, "We were good old boys in the
28 sense that we didn't shut it off. The contract says at the end of the contract that we should

1 tear the line out and it's gone. And, I guess, we could have done that, but we didn't. We
2 tried to go on with another contract." Tr. 353.

3
4 **B. Despite Numerous Attempts, the Parties Failed to Negotiate a New Contract.**

5 Mohave's efforts to enter into a new long term contract with the BIA after March
6 1992 failed to result in any agreement. Stip., ¶ 25. For example, in April 1993, more than a
7 year after the Contract expired, the BIA wrote Mohave acknowledging that "The term of
8 this contract was for ten years and has since expired." Ex. R-2, Tab 10. However, the BIA
9 also purported to exercise a "right of renewal" and "to re-negotiate and amend the existing
10 contract." *Id.* Internally, the BIA admitted in December 1994 that "We are approaching a
11 fourth year without a contract for the services [provided by Mohave] as defined in the
12 contract documents" and that the BIA needed "to negotiate a new contract." Stip., ¶ 26.

13 Mohave continued to ask the BIA about its intentions. In June 1995, Mohave again
14 wrote the BIA, stating that the BIA needed to clarify its position on whether the BIA wanted
15 a new contract:

16
17 According to Mohave's records and Mohave's understanding of the contract, the
18 contract expired on April 1, 1992. The BIA clearly declined to exercise the renewal
option as was required by the agreement.

19 Mohave now requests the intentions of the BIA regarding the old contract and the
20 existing service. Does the BIA now wish to discuss a new contract, since the old
21 contract has obviously expired, or is the intent of the BIA for Mohave to cease to
provide service, which was an aspect provided for in the old contract?
22 Stip., ¶ 27; Ex. R-2, Tab 11. The BIA never directly responded to this letter from Mohave,
23 and Mohave continued to supply electrical power on a month-to-month basis.

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

27 We have carefully reviewed many aspects of the expired contract and of the service
28 itself. . . . The review of all aspects has resulted in a determination that continuing

1 with this service as it currently exists is not in the best interests of the members of
2 Mohave Electric. *We intend to transfer ownership of this line to the BIA. This*
3 *transfer will require the relocation of the metering equipment [from] the present*
4 *location near the Grand Canyon to a location near or at the Nelson Substation.*

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

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

8
9 **IV. In 1997, Recognizing that the Prior Contract Had Expired and that the BIA**
10 **Was Refusing to Enter Into a New Contract, Mohave Moved the Meter Off the**
11 **Hualapai Reservation, but Continued to Provide Power on a Month-to-Month**
12 **Basis.**

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

14 In approximately March 1997, Mohave, as it had notified the BIA it would do in
15 prior letters, moved its metering equipment from Long Mesa to the Nelson substation and
16 began metering electricity supplied through the Line at the Nelson substation, within
17 Mohave's CCN area. Stip., ¶ 29. Because the Contract had terminated, Mohave ceased
18 billing the BIA the facilities charge authorized by the terminated Contract. Stip. ¶ 23; Tr.
19 186-87. Without the facilities charge, Mohave no longer received any reimbursement for
20 any maintenance or repair costs related to the Line. Thus, Mohave voluntarily bore all the
21 maintenance and repair costs associated with the Line from approximately March 1997 until
22 the abandonment in July 2003. Mohave continued to bill the BIA for the power delivered to
23 and used by the BIA at Mohave's LC&I rate. Ex. C-4 at 7 and Tab 5.

24 Although Mohave moved the BIA's meter to the Nelson substation in March 1997
25 and billed from that location, Mohave also attempted during this period to read the meters
26 related to the twelve individual accounts along the line and to credit the BIA for that usage
27 by other accounts. Stip. ¶ 30. Thus, in July 1998, Mohave issued the BIA a large initial
28 credit of \$6,257.92 for "usage billed to other meters" during the period from March 1997 to

1 July 1998. Ex. C-4, Tab 6. Thereafter and continuing through September 2003, Mohave
2 issued the BIA monthly credits for “usage billed to other meters.” *Id.*

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

12
13 **B. WAPA Was Willing to Assist a Sister Federal Agency and Oversee
14 Maintenance if the BIA Agreed to Pay, but BIA Refused.**

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

25 Two meetings involving WAPA, Mohave and the BIA occurred in 2001, at which
26 time WAPA expressed a willingness to take over maintenance and repair of the Line. Tr.
27 393, Hine Testimony at 8. WAPA only asked that the BIA reimburse WAPA for the cost of
28 such maintenance and repairs. Despite having agreed in 1982 to pay Mohave a monthly

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

5
6 **C. The BIA Then Suddenly Contended that the October 1981 Contract Was
7 Still In Effect, and Even Purported to Renew It for a 2002-2012 Term.**

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

20 Mohave responded on March 20, 2002, stating that the old Contract had “expired on
21 its own terms in 1992” when the BIA did not seek a renewal and refused to consider any
22 extension, and the Contract could not be renewed or extended ten years later, in 2002. Stip.,
23 ¶ 33; R-2, Tab 14. Mohave confirmed that it had provided service on a month-to-month
24 basis since termination of old Contract in 1992, and that it was still willing to negotiate a
25 new contract. *Id.* The BIA did not respond.

26
27 ⁵ This contrasts with Leonard Gold’s supplemental testimony in which he
28 contended that the BIA was willing to pay the facilities charge. *See* Gold’s Supplemental
Testimony of January 16, 2009 at 10, ll. 25-26.

1 **V. In 2003, Mohave Gave Up Waiting, Recognized The Commission's Findings**
2 **That the 70-Mile Line Was Not Used and Useful to Mohave's Members, and**
3 **Therefore Abandoned and Quitclaimed the Line to the BIA and the Tribes.**

4 **A. Mohave's Board Resolved to Dispose of the Line and Mohave Noticed the**
5 **Abandonment and Executed a Quitclaim Deed.**

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

16 The Board therefore resolved that the Line was not necessary or useful to Mohave's
17 members or in performance of Mohave's duties to the public and that any retail customer
18 receiving service through the Line should be "transferred to the BIA which is authorized to
19 operate on Indian nation lands." *Id.* The Board further resolved to communicate these
20 concerns to the Commission:

21 FURTHER RESOLVED, that Management communicate to the Arizona Corporation
22 Commission the fact first that this wholesale service is for the BIA re-delivery
23 outside the service area of the Cooperative, and that second, the 30,000 members of
24 the Cooperative are threatened with imposition of unfair economic burden and shift
25 of expense by the Federal Government of a trust responsibility owed by the BIA to
26 the Indians and that the BIA intends to impose this Federal expense burden on the
27 backs of the 30,000 members of the Cooperative.

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

On July 22, 2003, Mohave prepared and executed a Notice of Quitclaim and
Abandonment of the Line and the three easements (Havasupai, Hualapai and Boquillas) to

1 the BIA, the Hualapai Tribe and the Havasupai Tribe “as their respective interests may be
2 established.” Stip., ¶ 35; R-2, Tab 16. Mohave also abandoned and quitclaimed the twelve
3 service drops along the Line. *Id.*; see also R-2, Tabs 17 (letters to individual accounts) and
4 18 (August 7, 2003 letter with list of accounts). In letters dated September 2 and 12, 2003,
5 the BIA refused to accept the quitclaim and abandonment. See R-2, Tabs 19 and 20; Stip.,
6 ¶¶ 35-39.

7 There was no interruption of service following the quitclaim and abandonment. Tr.
8 166; Ex. R-2 at 10, 15-16. Rather, Mohave continued to provide electrical power to the BIA
9 at Mohave’s Nelson substation at Mohave’s LC&I rate. Stip. ¶ 36; Ex. R-2 at 10, 15-16.
10 Mohave is willing to continue providing that power to the BIA at the Nelson substation, so
11 long as BIA pays for it. Ex. R-2 at 10, 15-16.

12
13 **B. Mohave Stopped Reading the Meters of Individual Accounts Along the
14 Line and Stopped Crediting the BIA for Their Usage.**

15 Following the quitclaim and abandonment of the Line, Mohave stopped reading the
16 meters of the twelve accounts along the Line and stopped issuing the BIA any credit for the
17 usage by those meters. Ex. R-2 at 10. However, electrical power continued to flow to those
18 accounts and none of the individual accounts has gone without power. Tr. 166. Moreover,
19 the twelve accounts certainly received notice of the change in their service. Two of the
20 accounts were in the name of the BIA, while six more accounts were in the name of the
21 Hualapai Tribal Council – both of which received notice from Mohave. Mohave also sent
22 out individual letters to the twelve accounts. Ex. R-2, Tab 17. Any electrical power used by
23 the accounts was included in the bills Mohave sent the BIA based on meter readings for the
24 Line at the Nelson substation.⁶

25
26
27 ⁶ Because neither the BIA nor Mohave read the meters for the twelve accounts
28 after Mohave abandoned and quitclaimed the 70-mile line, meters and service drops in mid-
2003, it is impossible to reconstruct the amount of electricity these BIA customers used.

1 The BIA disputed Mohave's treatment of the twelve accounts and its decision to
2 cease reading the meters for the accounts. However, the BIA acknowledged that it could
3 read the meters along the line related to those accounts and bill the users of the electrical
4 power if the BIA chose to do so – as the BIA already did when providing retail electric
5 service to all of the residents of Supai. Tr. 156-57 (Walker testimony), 185 (Williams
6 testimony). The BIA also conceded that it could disconnect non-paying accounts along the
7 Line if it chose to do so. Tr. 167.

8
9 **C. Mohave Ceased Repair and Maintenance of the Line Unless Reimbursed
10 by the BIA.**

11 Consistent with Mohave's quitclaim and abandonment of the Line, and its duties to
12 its ratepayers, Mohave ceased to perform repair and maintenance on the Line unless
13 requested to do so by the BIA.⁷ Tr. 162-64; Ex. R-2 at 10. Because the Line traverses two
14 Indian reservations, Mohave insisted on receiving explicit permission from the BIA for
15 entry upon Indian lands, as well as a commitment by the BIA to pay for the cost of the
16 repairs or maintenance. Ex. R-2 at 10. Otherwise, Mohave would not receive any
17 reimbursement for costs expended on the Line which Mohave no longer owns. The BIA
18 admitted that it is capable of hiring its own staff to perform repairs or maintenance, or
19 contracting with third parties, concerning the Line, much as it does for repairs and
20 maintenance to the electrical line and facilities in Supai. Tr. 158.

21 The BIA complained of alleged delays in Mohave's response to service or repair
22 calls by the BIA. Tr. 164, 173-75. However, the BIA conceded that portions of the 70-mile
23 Line are a long way from Mohave's CCN area. Tr. 175 (Mr. Walker admits "It would be a

24
25 ⁷ Mr. Walker testified that the BIA has paid \$125,851.33 for repairs and
26 maintenance of the 70 mile Line during the period of 2004-2008. Walker Testimony, C-3 at
27 7. Approximately \$90,000.00 of that amount was paid to Mohave, with the rest paid to
28 Unisource. *Id.*, Tab 2. Mohave did not dispute the amount paid by BIA, but it did dispute
that Mohave was liable for repairs or maintenance of a Line which Mohave abandoned to
the BIA.

1 time delay for everybody”). Tom Longtin explained the inherent problems of Mohave
2 performing any repairs to the Line, including the hour’s drive from Kingman to Peach
3 Springs, the additional 15 to 20 minute drive to the Nelson Substation, and then the lengthy
4 process of trying to find and repair any problems on the 70-mile Line. Tr. 239-41. Mr.
5 Longtin also explained that the large majority of problems arising with the Line involve the
6 weather, not lack of maintenance or vandalism, and thus tended to occur at the same time
7 that Mohave is busy repairing its own lines within its CCN area. *Id.*
8

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

11 In approximately October 2003, after Mohave’s abandonment and quitclaim of the
12 Line, the Havasupai Tribe began construction of a 13.5 mile spur (the “Spur Line”) from the
13 Line to the Bar Four area on the Havasupai reservation. Stip., ¶ 40. The Havasupai
14 completed construction on the Spur Line in approximately May 2004. Tr. 228. Mohave had
15 no engineering oversight related to the Spur Line and specifically refused to become
16 involved in its construction, consistently stating that the entire Spur Line lay outside
17 Mohave’s CCN area and was not part of Mohave’s system. Tr. 227.

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

26 Mr. Entz was initially uncertain as to whether the Spur Line had in fact been
27 energized. Tr. 29, 205-07. However, Mr. Walker and Mr. Williams confirmed that the Spur
28 Line was fully energized and operational, and in fact was serving a radio repeater tower at

1 the Bar Four area owned and operated by the Havasupai Tribe. Tr. 29, 172, 190-91, 205-07.
2 Mohave had no knowledge about the operational status of the Spur Line, and did not know
3 it had been energized until the BIA's witnesses admitted that fact at the hearing. Tr. 385-86.
4

5 **E. Mohave, APS and UNS Electric Entered Into an Operations Protocol**
6 **Related to Repairs on the Line.**

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

16 At the current time, outages have been addressed and the BIA has compensated the
17 participating utilities for their repair work. While the BIA complained about alleged
18 "delays" in repairs to the Line, Mr. Walker was unable to identify any alleged delay after
19 Mohave entered into the Operations Protocol in 2007. Tr. 165. Thus, the Operations
20 Protocol has resolved any concerns about outages and "delayed" repairs to the Line.

21 The Decision mentions the Operations Protocol, *id.*, Determinations, ¶ 148, but
22 ignores it for the remainder of the Decision and never considers the fact that the Operations
23 Protocol has addressed all of the operations and maintenance issues raised by the BIA.
24 Mohave asserts that the status quo should be continued, and that the Commission should
25 order that Mohave's meter should remain on the Nelson substation site at the Line, that the
26 BIA assume responsibility to operate and maintain the Line and serve all loads connected to
27 the Line, and that the Operations Protocol remain in place to address the BIA's maintenance
28 needs. In short, the Operations Protocol has addressed the concerns that largely led to the

1 filing of the Complaint in the first place, and there is no need to go so far afield to compel
2 Mohave and its members to provide service on sovereign Indian lands where Mohave holds
3 no CCN.
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Exhibit B

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

JUL - 6 1975

1 ERNEST GARFIELD
Chairman
2 AL. FARON
Commissioner
3 BUD TIMS
Commissioner

DOCKETED BY	
<i>[Signature]</i>	

4 IN THE MATTER OF THE APPLICATION)
OF TRICO ELECTRIC COOPERATIVE,)
5 INC., AN ARIZONA NON-PROFIT)
CORPORATION, FOR APPROVAL OF)
6 SALE OF ELECTRIC FACILITIES TO)
THE PAPAGO TRIBE OF ARIZONA)

DOCKET NO. U-1461

DECISION NO. 471:1

OPINION AND ORDER

7 Date of Hearing: January 29, 1976

8 Place of Hearing: Tucson, Arizona

9 Hearing Officer: David C. Kennedy

10 Appearance:

Russell E. Jones of the law firm of Robertson, Molloy, Fickett & Jones, P.C. appeared on behalf of the petitioner.

11 Charles S. Pierson, Assistant Attorney General appeared as counsel on
12 behalf of the Arizona Corporation Commission.

13 Robert G. Fircher, Director, Utilities Division, appeared on behalf of the
14 Arizona Corporation Commission.

FINDINGS OF FACT

15 1. TRICO ELECTRIC COOPERATIVE, INC., is an Arizona non-profit corporation
16 which owns and operates an electrical utilities system as a public service corpora-
17 tion pursuant to certificates of convenience and necessity issued by the Arizona
18 Corporation Commission and certain franchises issued by Pima, Pinal and Santa
19 Cruz Counties, Arizona.

20 2. ~~Facilities owned by TRICO~~ are certain electrical facilities located
21 on the Papago Indian Reservation, under the jurisdiction of the Papago Indian Tribe
22 of Arizona and not subject to the jurisdiction of the Arizona Corporation Commission.

23 3. The Papago Tribal Utility Authority (PTUA) is an entity established and
24 empowered by the Papago Tribe in 1970 to provide utility services on the Papago
25 Indian Reservation.

26 4. TRICO entered into an agreement with the Papago Indian Tribe by and
27 through PTUA for the sale of certain assets located on the Papago Indian Reserva-
28 tion. The agreement was dated September 28, 1972.

29 5. The electrical facilities being sold by TRICO to the Papago Tribe consist
30 of distribution facilities used by TRICO to sell electricity on the Papago
31 Indian Reservation.

6. Subsequent to the agreement of sale in 1972, TRICO and PTUA entered into

1 an "Operating Agreement" dated July 22, 1974 which provides for the continued
2 operation and maintenance of the facilities by TRICO. Under the agreement TRICO
3 will continue to sell and deliver power, operating the facilities sold to the
4 Papago Tribe until such time as responsibilities can be transferred to PTUA smoothly
5 without interruption of service.

6 7. All of the electrical facilities subject to the Agreement of Sale are
7 subject to mortgages in favor of the United States of America which has from time to
8 time lent money to TRICO. In order to sell the facilities to the Papago Tribe,
9 approval from the Rural Electrification Administration (REA) as to such sale, was
10 obtained by TRICO.

11 8. The PTUA, on behalf of the Papago Tribe, agreed to pay TRICO the purchase
12 price in the sum of \$1,150,000.00 payable by PTUA's assumption of a corresponding
13 amount of Trico's indebtedness to the United States.

14 9. As to the area served by the electrical facilities and the consumers
15 formerly served by TRICO by the use of said facilities, there are no refunds due
16 from TRICO in connection with any line extension agreement and there are no refund-
17 able deposits due from TRICO to any consumer or former consumer.

18 10. Pursuant to the aforementioned agreements, TRICO has reserved ownership
19 of any and all facilities used and useful in the supplying of electric energy to
20 points and places within TRICO's certificated area outside the boundaries of the
21 Papago Indian Reservation.

22 CONCLUSIONS OF LAW

23 1. ~~The facilities to be transferred are not used and useful to TRICO and~~
24 ~~their transfer will not impair TRICO's ability to provide service to customers~~
25 ~~within TRICO's certificated area.~~

26 2. The transaction is not detrimental to the interests of the customers of
27 TRICO nor is it detrimental to TRICO's financial integrity.

28 3. The proposed transfer of assets and facilities is in the public interest.

29 ORDER

30 WHEREFORE IT IS ORDERED: approving the sale of assets and transfer of
31 facilities from TRICO to the Papago Indian Tribe of Arizona and the Papago Tribal
32 Utility Authority pursuant to the terms and conditions set forth in application
filed herein.

The facilities transferred are described as follows:

1 Circuit #1

2 A three phase powerline starting at the southwest corner of Section 19, Township
3 11 South, Range 6 East; thence in a northwesterly direction a distance of approxi-
4 mately 11 miles to a point on the west side of the Casa Grande Highway; thence in
5 a southwesterly direction and approximately parallel to the highway for approximately
6 16 miles to the end of the three phase line at a point south of Santa Rosa
7 Village, from this point a single phase powerline continues in a southwesterly
8 direction a distance of approximately 12 miles to the intersection of Arizona
9 Highway 86; thence, in a westerly direction for a distance of approximately 17
10 miles to the end of powerline at San Simon. (Tracy).

11 Circuit #1-A

12 A single phase powerline starting at a point approximately 3 miles east of San
13 Simon (Tracy) and going in a northerly direction a distance of approximately 12
14 miles to the end of powerline at Vaya Chin.

15 Circuit #1-B

16 A single phase powerline starting approximately 7 miles east of San Simon (Tracy)
17 and going in a southwesterly direction a distance of approximately 11 miles to the
18 village of Pisinimo; thence in a westerly direction for a distance of approximately
19 17 miles to end a powerline approximately 2 miles west of the village of Gu Vo.

20 Circuit #1-C

21 A single phase powerline starting at a point approximately 1 1/2 miles west of the
22 intersection of Arizona Highway 86 and Casa Grande Highway and going in a south-
23 westerly direction a distance of approximately 3 1/2 miles to the end of powerline.

24 Circuit #1-D

25 A three phase powerline starting at a point between the village of Santa Rosa and
26 the village of Anagem and going in a northwesterly direction a distance of approxi-
27 mately 2 miles ending at the Santa Rosa School.

28 Circuit #35

29 A three phase powerline starting at the southwest corner of Section 2, Township
30 16 South, Range 9 East; thence, in a southwesterly direction for a distance of
31 approximately 36 miles to the end of the three phase powerline at a point approxi-
32 5 miles west of the village of Sells; thence, from this point, a single phase
line continuing west for a distance of approximately 5 miles to the village of Gu

1 Oldak.

2 Circuit #35-A

3 A single phase powerline starting at a point approximately 3 miles east of the
4 village of Gu Oldak and going in a northerly direction for a distance of
5 approximately 1 1/2 miles.

6 Circuit #35-B

7 The village of Sells has approximately 5 miles of single phase powerline and
8 approximately 1 1/2 miles of V-phase powerline.

9 Circuit #35-C

10 A single phase powerline starting at a point on Arizona Highway 86, a distance of
11 approximately 3 1/2 miles east of the Indian Oasis School in Sells, Arizona and
12 going in a southerly direction for a distance of approximately 28 miles through
13 the village of Topawa and ending at the village of San Miguel.

14 Circuit #35-D

15 A single phase powerline starting at a point approximately 3 miles south of the
16 village of Topawa and going in a southwesterly direction for a distance of
17 approximately 5 miles to the village of Vamorl.

18 Circuit #35-E

19 A single phase powerline starting at a point on Arizona Highway 86 a distance of
20 approximately 11 miles east of the Indian Oasis School in Sells, Arizona and
21 going in a northwesterly direction for a distance of approximately 2 miles to
22 serve the village of Halvana Naxya (Crowhang).

23 Circuit #35-F

24 A single phase powerline starting at a point on Arizona Highway 86 a distance of
25 approximately 16 miles east of the Indian Oasis School in Sells, Arizona and
26 going in a northwesterly direction for a distance of approximately 8 miles to
27 serve the Santa Rosa Ranch School (Schuck).

28 Circuit #36 (Garcia's Ranch)

29 A single phase powerline entering the Reservation approximately 500 ft. north and
30 1300 ft. west of the southeast corner of Section 23, Township 14 South, Range 10
31 East; thence west for a distance of approximately 1/3 mile to serve a rancher.
32

1 Kitt Peak

2 Approximately 1 1/2 miles of three phase power line located on Kitt Peak in
3 Sections 11 and 12, Township 17 South, Range 7 East.

4 (SAN XAVIER SECTION)

5 Taps off Circuit #21

6 A single phase powerline starting at a point of beginning located on the west
7 side of Mission Road at the intersection of San Xavier Road in Section 21,
8 Township 15 South, Range 13 East; thence, going in an easterly direction for a
9 distance of approximately 1 mile; thence in a southerly direction for a distance
10 of approximately 1 1/2 mile; thence in an easterly direction for a distance of
11 approximately 1 mile.

12 Other taps off Circuit #21

13 There are approximately 2 miles of additional taps off circuit #21 located in
14 Sections, 16, 21, 22, 27, 28, and 24, Township 15 South, Range 13 East.

15 All of the above located in the Gila and Salt River Base
16 and Meridian, Pima County, Arizona.

17 All of the above described power lines are 14,4/24.9 KV.
18 GND WYE. The above described facilities are intended to
19 include all metering, transformers, voltage regulators,
20 oil circuit reclosers, and other apputances attached
21 thereto.

22 The above described facilities include numerous short
23 tap lines not specifically delineated above.

24 IT IS FURTHER ORDERED: that the forgoing Order shall be effective 30
25 days following its entry.

26 BY ORDER OF THE ARIZONA CORPORATION COMMISSION

27 *[Signature]* *[Signature]* *[Signature]*
28 CHAIRMAN COMMISSIONER COMMISSIONER

29 IN WITNESS WHEREOF, I, DONALD E. VANCE,
30 Secretary of the Corporation Commission
31 have hereunto set my hand and caused the
32 official seal of the Arizona Corporation
Commission to be affixed at the Capitol,
in the City of Phoenix, this 6th day
of July, 1976.

[Signature]
DONALD E. VANCE
Secretary