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BEFORE THE ARIZONA CORPORATION COMM

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

DOCKET NO. E-01750A-05-0579
BUREAU OF INDIAN AFFAIRS
REHEARING
CLOSING ARGUMENT

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2
3 **PRE-FILED TESTIMONY**

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

9 **HEARING TESTIMONY**

10 Leonard Gold	Gold HT
11 Tom Longtin	Longtin HT

12 **RE-HEARING TESTIMONY**

13 John Tyler Carlson	Carlson RHT
14 James Williams	Williams RHT
15 Del Smith	Smith RHT

16 **RE-HEARING EXHIBITS**

17 Electric Utility Contract	C-6
18 Settlement Points	R-10

1 **I. INTRODUCTION AND FACTS¹**

2 On October 1, 1981, Mohave Electric Cooperative ("MEC") and the Bureau of
3 Indian Affairs ("BIA") entered into a contract (the "Contract") in which MEC would
4 construct an approximately 70-mile power line (the "Line") from its existing Nelson
5 Substation to Long Mesa for operations on the Hualapai and Havasupai reservations.
6 Stipulated Facts, ¶ 13; Electric Utility Contract, Exhibit C-6. From Long Mesa, which is
7 located at the edge of the Grand Canyon, the electricity would be sent down to the
8 government facilities and people living in Havasupai Village. Walker PF, p. 2, Ins. 17-
9 20.

10 After constructing the Line, MEC began servicing customers along its length. As
11 of July, 2003, MEC provided electricity to twelve accounts along the Line. Stipulated
12 Facts, ¶ 34. In addition to the BIA's meter at Long Mesa, the BIA has two other
13 accounts on the Line, one for a fire observation tower on the Hualapai reservation and
14 another for a radio repeater tower near the end of the Line and on the Havasupai
15 reservation. Gold PF Dt., p. 19, Ins. 13-16.

16 The parties resolved the majority of their disputed issues. See Settlement
17 Points, Exhibit R-10. Three issues remain: (1) easements for the Line; (2) the BIA's
18 retail status; and (3) MEC's CCN and whether MEC must obtain ACC approval before
19 abandoning the Line. Parties' Joint Submission of Issues on Which the Parties
20 Continue to Disagree. The ACC should (1) not make any finding regarding easements
21 for the Line as no dispute currently exists about them; (2) find the BIA is a retail
22 customer at Long Mesa; and (3) find that MEC cannot abandon the Line without a prior
23 order from the ACC.
24
25
26
27

28 ¹ The BIA incorporates the entire administrative record into its closing.

1 **II. THE ACC SHOULD NOT ISSUE AN ADVISORY DECISION ABOUT THE**
2 **EASEMENTS**

3 The Line crosses parts of the Hualapai and Havasupai reservations and the
4 Boquillas Ranch. Williams RHT, pp. 102-103. MEC asks the ACC to find that if MEC
5 applies for an easement or other permission from the owner of Boquillas Ranch, the
6 Hualapai Tribe, and the Havasupai Tribe and an easement or permission is not offered
7 on mutually agreeable terms and conditions, then MEC will have no ability to operate or
8 maintain the Line. Parties' Joint Submission of Issues on Which the Parties Continue to
9 Disagree. MEC does not argue that it cannot obtain easements or permissions; rather,
10 MEC asks the ACC to make a finding in anticipation of an event (denial of a "mutually
11 agreeable" easement) that may never happen. The ACC need not, and should not,
12 make such a hypothetical or advisory finding.

13 Advisory decisions and opinions are to be avoided. See *Armory Park*
14 *Neighborhood Ass'n v. Episcopal Comm. Servs.*, 712 P.2d 914, 919 (Ariz. 1985).
15 Tribunals should not anticipate troubles between litigants that do not exist or may never
16 exist. *Citibank v. Miller & Schroeder Fin., Inc.*, 812 P.2d 996, 1000 (Ariz. Ct. App.
17 1991)(citing *Velasco v. Mallory*, 427 P.2d 540 (Ariz. Ct. App. 1967)). Thus, decisions
18 should not be rendered on future rights or obligations "in anticipation of an event which
19 may never happen." *Id.* (citing *Klein v. Ronstadt*, 716 P.2d 1060 (Ariz. Ct. App. 1986));
20 see also *McMurren v. JMC Builders, Inc.*, 63 P.3d 1082, 1088 (Ariz. Ct. App. 2003)).

21 All utilities are required to obtain necessary easements. Smith RHT, p. 138, Ins.
22 15-18. MEC must have easements regardless of where it operates; nothing is unique
23 about the Line. Carlson RHT, p. 68, ln. 20 – p. 69, ln. 5. Thus, MEC will need to obtain
24 proper easements just as it routinely does elsewhere. Neither the Line, nor the fact that
25 parts of the Line cross tribal lands, is unusual. The Line does not present any unique
26 problems.

27 History proves that extension of the easements almost certainly will not present
28 any unique problems. MEC constructed the Line approximately 30 years ago and it has

1 been providing electricity to customers along the Line ever since. No evidence exists
2 to suggest that anyone has ever prevented MEC from accessing the Line over the past
3 three decades. Indeed, MEC has served portions of the Hualapai reservation for more
4 than 40 years. Longtin HT, p. 280, Ins. 19-24. Whenever MEC has properly applied for
5 an easement on the Hualapai reservation, the tribe has granted MEC's application.
6 Williams RHT, p. 104, Ins. 5-9. For 40 years, MEC has not had problems obtaining
7 easements on the Hualapai reservation in general and for 30 years neither the Hualapai
8 Tribe, the Havasupai Tribe, nor the Boquillas Ranch owner has ever prevented MEC
9 from accessing the Line.

10 Furthermore, MEC does not anticipate any problems with extending easements
11 for the Line. Carlson RHT, p. 69, Ins. 9-16; Williams RHT, p. 102, Ins. 11-16. Because
12 the tribes need electricity from the Line, it is in their own best interest to allow access to
13 the Line. See Williams RHT, p. 102, Ins. 17-25. Neither the Hualapai Tribe, the
14 Havasupai Tribe, nor Boquillas Ranch (Navajo Nation) has ever indicated or suggested
15 that they would not extend easements or not allow MEC to access the Line. Williams
16 RHT, p. 103.

17 Not only should a finding about the easements be avoided as it would be
18 advisory, but it also should be avoided as it could result in relitigating matters already
19 agreed upon by the parties. For example, even if an easement were extended, MEC
20 could refuse to accept it claiming its terms are not "mutually agreeable." MEC then
21 could declare that it has no ability to operate or maintain the Line or to read meters
22 along the Line and effectively abandon the Line. To support its position and to ward off
23 any complaints by the BIA or customers along the Line, MEC would rely upon the
24 advisory finding and claim the ACC's advisory finding allowed it to refuse to operate or
25 maintain the Line. MEC, thus, could abandon the Line without complying with the
26 safeguards contained in A.R.S. § 40-285. This would put the parties back into the same
27 situation – MEC's decision to abandon the Line without ACC approval – that originally
28 gave rise to the complaint in this matter. The ACC should refuse to provide MEC with a

1 means to once again abandon the Line without ACC approval and spur re-litigation of
2 the matters already resolved by the parties.

3 Because MEC never has been denied access to the Line and because MEC
4 almost certainly will receive extensions of its easements once it applies for them, the
5 ACC should not make an advisory finding about what could transpire in the unlikely
6 event that an easement is not extended. A finding based upon a remote "event which
7 may never happen" is unnecessary and should be avoided. See *Citibank*, 812 P.2d
8 996.

9 **III. THE BIA IS A RETAIL CUSTOMER, BOTH ALONG LINE AND AT LONG**
10 **MESA**

11 A "retail electric customer" is someone "who purchases electricity for that
12 person's own use, including use in that person's trade or business, and not for resale,
13 redistribution or retransmission." A.R.S. § 40-201(21). For all three of its accounts, the
14 BIA was MEC's retail electric customer.

15 **A. The BIA is a retail customer along the Line**

16 In addition to the BIA's account at the end of the Line intended for the benefit of
17 Supai Village, MEC had two other BIA accounts along the Line, one for a BIA fire
18 observation tower on the Hualapai Reservation and another for a radio repeater on the
19 Havasupai reservation. Gold PF Dt., p. 18, In. 5 – p. 20, In. 11; Walker PF, p. 8, In. 24 –
20 p. 9, In. 18; Stipulated Facts, ¶ 34. The BIA radio repeater account is one of the Line's
21 original accounts and also is located at the end of the Line. Carlson RHT, p. 71, Ins. 8-
22 21.

23 The BIA has used all three of these accounts in its normal course of business.
24 The BIA's "business" or mission includes enhancing the quality of life of Native
25 Americans. Williams RHT, p. 126, Ins. 6-18. The BIA's operation of a fire observation
26 tower and a radio repeater on tribal lands enhances the quality of life of Native
27 Americans. For those two accounts, the BIA certainly has been MEC's retail customer.
28

1 It is undisputed that the BIA is a retail customer for its accounts for the fire
2 observation tower and the radio repeater. The ACC should make such a finding.

3 **B. The BIA is a retail customer at Long Mesa**

4 The BIA receives power at Long Mesa for the sole purpose of fulfilling its mission
5 of providing electricity to the Supai Village. The BIA fulfills its mission by securing and
6 supplying electricity to a tribal school, law enforcement facilities, a BIA maintenance
7 building, a medical clinic, and the residents of Supai. Williams RHT, p. 126, In. 19 – p.
8 127, In. 2; Walker PF, p. 3, Ins. 13-16. The BIA does not resell, redistribute, or
9 retransmit the power. Rather, the BIA uses this electricity for its “own use” to fulfill its
10 mission. As such, the BIA is MEC’s retail electric customer at Long Mesa. See A.R.S.
11 §40-201(21).

12 The BIA also fulfills its mission by providing power to the tribal members living in
13 Supai Village. Providing support to the tribe in this manner falls within the BIA’s trade or
14 business of providing support to Native Americans. The BIA makes electricity available
15 in Supai Village in the normal course of its business, which is to support Native
16 Americans, and it allows the Supai Village, and Havasupai tribal members, to live in as
17 safe and friendly a community as reasonably possible. Gold PF Dt., p. 20, Ins. 1-9;
18 Williams PF, p. 3, Ins. 10-15, p. 4, Ins. 11-16, p. 5, Ins. 4-8. The BIA’s supply of
19 electricity to Native Americans in this remote, hot environment falls within the BIA’s
20 trade or business of providing support to Native Americans and, therefore, the BIA at
21 Long Mesa was and is MEC’s retail electric customer. Gold HT, p. 139, In. 21.

22
23 **1. MEC admitted that the BIA is a retail customer**

24 MEC admitted that the BIA at Long Mesa is its retail customer. Longtin HT, p.
25 297, Ins. 17-25. This admission is consistent with MEC’s actions over the years where
26 MEC treated the BIA as its retail customer. MEC never treated the BIA as a wholesale
27 customer.
28

1 **2. According to MEC's own records, the BIA was a retail customer**

2 The Contract itself and MEC's own records demonstrate that the BIA's "Supai"
3 meter at Long Mesa was a retail, not wholesale, account. Although MEC has
4 contended that the Contract was a wholesale agreement, the Contract does not even
5 use the term "wholesale." Longtin HT, p. 289, Ins. 8-11; Electric Utility Contract, Exhibit
6 C-6. Under the Contract, MEC charged the BIA a commercial retail rate, not a
7 wholesale rate. Gold PF Sr., p. 8, Ins. 7-10; Electric Utility Contract, Exhibit C-6.
8

9 Moreover, in MEC's own records, it always treated the BIA at Long Mesa as a
10 retail customer. In its REA filings, MEC classified the BIA as a retail customer. In every
11 annual report MEC filed with the REA, MEC certified the number and type of its
12 customers, including sale for resale customers. Gold PF Dt., p. 14-15 & exh. 9; Gold
13 HT, p. 133, Ins. 15-22. From 1980 through 1997, MEC indicated it had no sale for
14 resale customers; from 1998 through 2000, MEC indicated it had one sale for resale
15 customer; in 2001, MEC again indicated it had no sale for resale customers; and from
16 2002 through 2007, MEC once again indicated it had one sale for resale customer. *Id.*
17 Although MEC did not offer any evidence at the hearing or rehearing on who was the
18 one sale for resale customer from 1998 through 2000 and from 2002 through 2007,
19 MEC clearly did not consider the BIA to be sale for resale customer from 1980 through
20 1997 and in 2001. *Id.* At least for the first 15 years that the Line was operational, MEC
21 did not classify the BIA as a sale for resale customer or as a utility. *Id.* Finally, the BIA
22 at Long Mesa also was a retail customer because MEC always charged the BIA a retail
23 commercial electric rate. Longtin HT, p. 297, Ins. 17-20. See Gold HT, p. 139, In. 23 –
24 p. 140, In. 6. MEC therefore considered the BIA to be its retail customer.
25
26
27
28

1 The ACC should find that the BIA is a retail customer at Long Mesa. MEC
2 admitted that the BIA is a retail customer at Long Mesa. Also, the BIA has used the
3 electricity supplied at Long Mesa to operate a tribal school, law enforcement facilities, a
4 maintenance building, and a medical building. Supai Village residents also utilize the
5 electricity in their homes. As such, the BIA uses the electricity supplied at Long Mesa to
6 fulfill its mission to support Native Americans. Finally, MEC always classified and
7 treated the BIA at Long Mesa as a retail customer. The ACC should find that the BIA at
8 Long Mesa was, and still is, MEC's retail customer.

9 **IV. MOHAVE CANNOT ABANDON THE LINE WITHOUT FIRST OBTAINING AN**
10 **ORDER PURSUANT TO A.R.S. § 40-285**

11 The parties have agreed that MEC will reassume ownership of the Line. Final
12 Memorandum of Settlement Points. MEC also will reassume its utility relationship with
13 the original 12 customers along the Line and treat them as members. *Id.* MEC also will
14 provide "member-like" services to new customers along the Line. *Id.* The Line,
15 therefore, is necessary and useful for supplying electricity to MEC's current and future
16 customers.

17 Absent ACC approval, a public service corporation cannot dispose any part of its
18 line, plant or system that is "necessary or useful in the performance of its duties to the
19 public." A.R.S. § 40-285(A). Any such disposition is void. *Id.*

20 **A. No substitute electrical service is available**

21 In enacting A.R.S. § 40-285, the Arizona legislature intended to prevent a public
22 service corporation from disposing resources that are used to provide its utility service
23 and thereby impairing its service to the public. *American Cable Tele., Inc. v. Arizona*
24 *Pub. Serv. Co.*, 143 Ariz. 273, 693 P.2d 928 (Ct. App. 1983); *Arizona Pub. Serv. Co. v.*
25 *Mountain States Tel. & Tel. Co.*, 149 Ariz. 239, 717 P.2d 918 (Ct. App. 1985). When
26 considering whether a utility can dispose of its assets, the availability of a substitute
27 service for the public is perhaps the predominate concern. For instance, disposing a
28

1 railway line was approved where substitute bus service was available to the public and
2 where trucking facilities were available for businesses to ship goods. *Safford Chamber*
3 *of Commerce v. Corp. Comm'n*, 81 Ariz. 226, 303 P.2d 713 (1956) (finding that the
4 change in transportation service did not result in "appreciable inconvenience" to the
5 public); see also *Arizona Corp. Comm'n v. South Pac. Co.*, 87 Ariz. 310, 350 P.2d 765
6 (1960) (allowing discontinuation of agent station where other transportation facilities are
7 available). Here, there is no viable substitute source of electricity.

8 Most of the Line is in a remote, desolate area that is high desert. Gold PF Dt., p.
9 26, Ins. 21-22. It would be difficult to obtain electricity from another electric utility. Gold
10 PF Dt., p. 26, Ins. 24-27. The nearest alternative electric utility is located far away from
11 the Line and the customers along the Line. For example, APS has a service center in
12 Williams, Arizona, but it is about 70 miles from Indian Service Route 18 and Route 66.
13 Gold PF Dt., p. 26, In. 27 – p. 27, In. 1. For APS to bring service to Long Mesa could
14 require construction of line over rugged terrain that could cover 60 – 80 miles or more
15 depending upon APS' closest source. Gold PF Dt., p. 27, Ins. 1-4. Assuming another
16 utility would be willing to bring service to the area along the Line, it would be expensive
17 to construct another line. Gold PF Dt., p. 27, Ins. 4-6. As there are no other readily
18 available sources of electricity, the Line is not only used and useful to the customers
19 along the Line, but it is an absolute necessity if the customers along the Line hope to
20 continue to receive electricity.

21 **B. The Line is used and useful**

22 The Line has benefited MEC's customers and the public. MEC hoped and
23 planned to add residential and commercial accounts along the Line. Per the Contract,
24 the parties agreed that MEC would provide electric service to additional future
25 customers along the Line. The Contract provided:
26
27
28

1 MOHAVE ELECTRIC COOPERATIVE, INC., ... agrees ...to supply electric
2 energy to serve existing and future residential and commercial installations on
3 the Hualapai and Havasupai Indian Reservations....

4 Electric Utility Contract, Exhibit C-6, Addendum No. 1, p.1 (emphasis added). The
5 Contract also provided:

6
7 The Government agrees that Mohave may elect to serve the Hualapai Indian
8 Reservation upon its own arrangements from the utility plant proposed to be
9 constructed provided that contemplated system capacities are not unreasonably
10 exceeded.

11 *Id.* at Addendum No. 1, p. 9 (emphasis added).

12 The parties, therefore, understood and agreed that after MEC constructed the
13 Line, MEC would begin to add residential and commercial accounts along the Line.
14 Two such residential customers are the Cesspooch and Bravo families. The
15 Cesspooch and Bravo families have used electricity from the Line to heat their homes,
16 to cook their food, and to light their rooms. The Hualapai Tribe, TDS telephone
17 company, the BIA, and the Navajo Nation also have used, and continues to use,
18 electricity from the Line for their respective purposes. Ever since the Line began
19 providing electricity, it has been used and useful. It still is today.

20 Such a conclusion logically flows from MEC's own filings with the ACC. In its
21 1989 Rate Application, MEC considered the Line used and useful. Gold PF Sr., p. 3,
22 Ins. 7-10. MEC's rate base included the Line. Gold PF Sr., p. 3, Ins. 18-23. Rate base
23 typically means the value of property used by a utility in providing service and upon
24 which a utility is allowed to earn a specified rate of return. Gold PF Sr., p. 3, Ins. 18-23.
25 Rate base is intended to reflect the investment made by the utility in all property and
26 plant that both the utility and Commission consider to be used and useful in providing
27 electric service. Gold PF Sr., p. 3, Ins. 18-23. As Mohave included the Line in its rate
28

1 base, Mohave itself deemed the Line to be used and useful to its customers. Gold PF
2 Sr., p. 3, Ins. 18-23.

3 The Line is used and useful and, accordingly, Mohave must not be allowed to
4 abandon it without prior ACC approval pursuant to A.R.S. § 40-285.

5 **V. CONCLUSION**

6 The ACC should refrain from making an advisory finding about easements for the
7 Line. Moreover, the ACC should find that the BIA at Long Mesa is a retail customer.
8 Such a finding would be consistent with MEC's admission that the BIA is a retail
9 customer and with MEC's three decade classification and treatment of the BIA as its
10 retail customer. Finally, the ACC should find that MEC cannot dispose of or abandon
11 the Line without prior ACC approval.

12 Respectfully submitted this 23 day of July, 2012.

13
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16 District of Arizona

17 

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