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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

**MOHAVE ELECTRIC  
COOPERATIVE, INC.'S INITIAL  
CLOSING BRIEF**

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Pursuant to the direction of Administrative Law Judge Teena Jibilian at the close of the rehearing of this matter on June 11, 2012, Respondent Mohave Electric Cooperative, Inc. ("Mohave"), by and through undersigned counsel, hereby submits its initial closing brief. As directed by the Commission, MEC will limit this closing brief to discussion of the three issues remaining in dispute following Mohave's settlement of the principal issues in the case with the Complainant, Bureau of Indian Affairs ("BIA"). Citations are to testimony and exhibits in the original November 18-20, 2008 hearing and to the June 11, 2012 rehearing in this matter.

**I. Mohave's Agreement to Provide Service to BIA at Long Mesa and to Individual Accounts Along the 70-Mile Line in Settlement of this Long-Standing Dispute Does Not Result in an Extension of Mohave's CC&N Area.**

In its Complaint, the BIA sought a declaration that the 70-Mile Line constituted an extension of Mohave's "service territory." Complaint, ¶ 40(B). The BIA did not seek any declaration that the Line extended the area covered by Mohave's Certificate of Convenience

1 and Necessity (“CC&N”). *Id.* Moreover, the Commission in its prior decisions uniformly  
2 treated the major portion of the Line as being located outside of Mohave’s CC&N. For  
3 example, when approving financing terms for the Line in 1980, the Commission stated that  
4 the Line extended “*from* applicant’s certified area” to cross the Hualapai and Havasupai  
5 reservations. Decision No. 51491, Findings of Fact, ¶ 2 (Oct. 22, 1980) (emphasis added).  
6 The Commission further held that the Line would serve “consumers,” not Mohave’s  
7 members. *Id.*, Conclusions of Law, ¶ 1. Nothing in Decision No. 51491 suggests that the  
8 Line extended Mohave’s CC&N or that the parties using power provided by the Line would  
9 automatically become Mohave’s members or transition into Mohave’s CC&N Area.

10 Two years later, in Decision No. 53174 (August 11, 1982), the Commission  
11 specifically held that the Line was a “transmission line dedicated to serving the Hualapai  
12 Indian Reservation.” *Id.* at p. 8. In that Decision, which used a 1982 test year that assumed  
13 the Line was in service, the Commission explicitly stated that the Line “is not used and  
14 useful, will not be used and useful, and was never intended to be used and useful in the  
15 provision of electric service to [Mohave’s] ratepayers. [Mohave] has recognized this  
16 inequity [of asking Mohave’s ratepayers to pay for the Line] by excluding the transmission  
17 line from rate base and proposing to segregate all expenses and revenues associated with the  
18 line.” *Id.* (emphasis in original). This finding is similarly incongruous with extending  
19 Mohave’s CC&N Area to encompass the area to be served by the Line.

20 Nothing in the subsequent Decision No. 57172 (Nov. 29, 1990) indicated that the  
21 Commission had revised its classification of the Line as a transmission line extending  
22 outside of Mohave’s CC&N. As directed by the Commission in Decision No. 53174,  
23 Mohave segregated all expenses and revenues associated with the Line so as to not require  
24 Mohave’s members and other classes of customers to subsidize the Line. 12/15/08  
25 Neidlinger Supplemental Testimony at 4. The Commission specifically noted that  
26 Mohave’s new rate design would “establish separate rates for [Mohave’s] three large  
27 contract customers,” the BIA, Chemstar and Cyprus Baghdad, as opposed to Mohave’s rates  
28

1 for residential and commercial customers. Decision No. 57172 at 5. Unlike Mohave's other  
2 contracts, the majority of revenues under the BIA contract came from facilities charge,  
3 rather than "customer sales." See 12/15/08 Neidlinger Supplemental Testimony, Ex. DLN-  
4 2. The Commission ultimately approved a specific contract rate available only to the BIA.  
5 Nothing in the Commission's Decision extended Mohave's CC&N to include the totality of  
6 the Line; rather, Decision No. 57172 recognized that the BIA was in a separate class from  
7 Mohave's residential, commercial and even other contract customers.

8 As noted by Mohave's witness Tyler Carlson at the rehearing, Mohave's Board of  
9 Directors never voted to seek an extension of Mohave's CC&N. 6/11/2012 Tr. at 23, 68.  
10 The Commission and Mohave have operated for more than 30 years recognizing that the  
11 majority of the 70-Mile Line was located outside of Mohave's CC&N. In its disputed  
12 points, Mohave has simply asked that this common understanding be embodied within the  
13 Commission's Decision on Rehearing in this matter, and that no inadvertent extension of the  
14 CC&N be deemed to have occurred expressly or implicitly by operation of law. 6/11/2012  
15 Tr. at 75.

16 Commission Staff agrees with this position. As testified to by Staff's witness Del  
17 Smith, Staff "believe[s] that at this time it is not necessary for Mohave to extend its  
18 CC&N," so long as Mohave patrols the Line to ensure that there are no new connections  
19 without the proper agreements and does not abandon the Line without prior Commission  
20 approval. 6/11/2012 Tr. at 137. Mr. Smith clarified as follows:

21 Q. . . . On the CC&N issue, I just want to make sure the record is clear. I think I  
22 heard that you were saying, that in terms of the existing status as we see on the 2012  
23 maps we have put in evidence today, Staff believes it is not necessary for Mohave to  
24 extend its CC&N to continue serving those existing connections?

25 A. That's correct.

26 Q. And Staff believes that Mohave should ensure that no new connections are  
27 made to the line going forward without proper agreements in place along the lines of  
28 what Mr. Carlson spoke of?

1 A. That's correct.

2 6/11/2012 Tr. at 140-41. BIA's witness James Williams also testified that BIA did not seek  
3 to have Mohave's CC&N extended:

4 Q. [By Mr. Van Cleve] Okay. And then the final point of disagreement is  
5 concerning the CC&N status. Is the BIA seeking to have Mohave's CC&N  
6 extended?

7 A. To my knowledge we are not.

8 6/11/2012 Tr. at 111.

9 For these reasons, the Commission should make clear in the Decision on Rehearing  
10 in this matter that Mohave's compromise agreement to continue providing service to the 12  
11 existing accounts along the 70-Mile Line does not result in an extension of Mohave's  
12 CC&N beyond the two existing accounts already located within the CC&N boundaries. In  
13 the settlement agreement, Mohave has agreed that any new accounts outside of its CC&N  
14 Area are to be bound by appropriate member-like agreements. A fundamental basis of this  
15 portion of the settlement that has been reached is that by stepping up and providing service  
16 under these terms, Mohave cannot be characterized that by so doing, it has extended its  
17 CC&N Area and all of the obligations imposed by such a designation outside of its current  
18 CC&N boundaries. This is a necessary and appropriate "deal point" that should be  
19 incorporated into the Decision On Rehearing.

20 **II. The Commission Should Order that Mohave's Provision of Power to BIA at**  
21 **Long Mesa for BIA's Distribution to Tribal Users in Supai Village Constitutes**  
22 **Wholesale, Not Retail, Service.**

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 BIA's position that it is Mohave's retail electric customer at Long Mesa should be rejected.

27 The BIA acknowledged that it sells electric power to over 200 accounts in Supai  
28 Village. However, the BIA also argued that, because it uses some electricity for its own  
facilities in Supai and because it does not change the price of the electricity, it is a retail

1 electric customer of Mohave. 6/11/2012 Tr. at 110-11. The BIA’s argument ignores the last  
2 clause of the definition of “retail electric customer” in A.R.S. § 40-201(21). The BIA is a  
3 governmental agency that itself consumes power for its official business as “a person  
4 engaged in a trade or business,” but the great bulk of the power it purchases is not used for  
5 its own business purposes (such as lighting a BIA office or powering a BIA phone relay  
6 station), but instead is resold and redistributed to users in Supai Village as part of its  
7 governmental and trust obligations, with BIA providing meter reading and billing services  
8 to its own retail customers in that community. 6/11/2012 Tr. at 111, 113-14.

9 The BIA contended that its activities are “similar to that of a landlord of a mobile  
10 home park or apartment complex with a master meter and individual meters for the tenants.  
11 The landlord reads and bills the tenants every month for their electric usage, but the landlord  
12 is still a retail customer of the electric utility.” BIA’s Exception to the Recommended  
13 Opinion and Order, filed November 26, 2010, at 2. The BIA’s comparison between itself  
14 and the landlord of a mobile home park is inapplicable to the facts of this case. The BIA is  
15 a governmental entity reselling, redistributing and retransmitting electricity to the residents  
16 of Supai, not tenants in a single-owner park. A mobile home park landlord does not operate  
17 a switchyard that steps down the power to be distributed through its own lines to remote  
18 individual retail customers. Moreover, mobile home park landlords do not use electricity to  
19 run schools, law enforcement offices, and a jail -- as does the BIA. *Id.*

20 Accepting BIA’s argument that it receives retail service at Long Mesa would lead to  
21 other irrational results. For example, any bulk sale of electricity by Arizona Public Service  
22 to Salt River Project, a quasi-governmental agency which arguably has a “business” of  
23 providing electrical power to others, would turn Salt River Project into APS’s “retail  
24 electrical customer.”

25 Again, the Staff agrees with Mohave’s position. As Mr. Smith testified, “Staff  
26 believes that . . . since Mohave does not read meters, bill customers or maintain the  
27 distribution line beyond Long Mesa where BIA received the power for redistribution to  
28

1 Native American customers, BIA qualifies as a wholesale customer. . . . Basically, we look  
2 at who does the billing. It isn't whether [the BIA is] in the business to sell electricity or not,  
3 or consider themselves. It is how it is actually being billed, who is billing for it." 6/11/2012  
4 Tr. at 136. In this instance, there is no doubt that the BIA engages in all of the hallmarks of  
5 distribution of the electrical power beyond Long Mesa – the BIA steps the power down for  
6 retail use, reads the meters in Supai, maintains the line after Long Mesa, and does all of the  
7 billing to users in Supai. Thus, the Commission on rehearing should revert to the language  
8 in the original November 9, 2010 Recommended Opinion and Order at Conclusions of Law  
9 paragraph 14 and provide that "The BIA is not a retail customer of Mohave at Long Mesa,"  
10 and should further specifically conclude that the BIA is a wholesale customer of Mohave at  
11 Long Mesa.

12 **III. Mohave Cannot Provide Electric Service Through the 70-Mile Line Unless**  
13 **Mohave Receives Easements on Reasonable Terms to Operate and Maintain the**  
14 **Line.**

15 Arizona regulations require every customer of a utility to provide adequate and  
16 reasonable access before the utility can provide service:

17 Each customer shall grant adequate easement and right-of-way satisfactory to the  
18 utility to ensure that customer's proper service connection. Failure on the part of the  
19 customer to grant adequate easement and right-of-way shall be grounds for the utility  
20 to refuse service.

21 AAC R14-2-206(C)(1). Mohave originally received three easements to build and maintain  
22 the Line, two of which are now expired, with the third easement set to expire in the near  
23 future.<sup>1</sup> Because the tribes involved are sovereign nations, Mohave cannot use the power of  
24 eminent domain to condemn a right of way, but instead must receive easements from the  
25 Tribe in order for the Mohave to maintain and operate the line. As Mr. Carlson testified,

26 <sup>1</sup> Mohave's 30-year easement from the Hualapai Tribe expired in January 2012,  
27 while Mohave's 25-year easement to cross the Boquillas Ranch (now owned by the Navajo  
28 Tribe) between the Hualapai and Havasupai Reservations expired in September 2005.  
Mohave's 30-year easement to cross the Havasupai Reservation will expire in December  
2014.

1 You have to have reasonable access. And when you are dealing with a sovereign  
2 nation and the line is wholly within the confines, or portions of the line are wholly  
3 within the confines of the sovereign nation, making sure that you have written and  
4 predictable agreements that everyone can predict the outcome are very, very  
5 important. And I have actually witnessed and seen the risks that people are put under  
6 without such written agreements.

6/11/2012 Tr. at 23-24. According to Mr. Carlson, “in the event we couldn’t [obtain  
7 reasonable easements], we can’t be sending people out at risk.” *Id.* at 77.

8 The BIA’s witness, Mr. Williams, agreed that easements were necessary for Mohave  
9 to enter on sovereign land to operate and maintain the Line:

10 Q. [A]re you aware of any other right of access or entry that a private entity  
11 would have on sovereign lands unless it was a grant of permission through some  
12 legal instrument from that sovereign nation?

13 A. No.

6/11/2012 Tr. at 119-20; *see also id.* at 122-23 (agreeing that the membership of tribal  
14 councils change and that therefore the appropriate course is to secure a written easement or  
15 right of way to maintain and operate the line). The Staff also agreed the Mohave had to  
16 have the proper easements to maintain and operate the line: “Staff believes that no utility  
17 can operate, maintain a distribution line or any other associated electrical equipment without  
18 having access, per the Rule A.A.C. R14-2-206.C.1.” 6/11/2012 Tr. at 134-35.

19 In recognition of the need for Mohave to have easements to enter the land of three  
20 tribes crossed by the Line, Mohave has requested that the Commission specifically provide  
21 in its Decision on Rehearing that Mohave must be granted reasonable access, in the form of  
22 written easements or rights of way, as a condition of Mohave’s agreement to maintain and  
23 operate the Line. Because these easements are essential for Mohave to safely maintain and  
24 operate the Line, the Commission should specifically include language in the Decision  
25 recognizing that Mohave’s obligation to maintain and operate the Line is conditioned on  
26 Mohave receiving easements on reasonable terms to do so.

27 ...  
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**CONCLUSION**

For the foregoing reasons and the reasons presented at the rehearing on June 11, 2012, the Commission should include language in the Decision on Rehearing on this matter specifically finding that (1) Mohave's agreement to provide service to the BIA at Long Mesa and to the individual accounts along the 70-Mile Line does not result in an extension of Mohave's CC&N; (2) Mohave's provision of power to the BIA at Long Mesa for distribution by the BIA to users in Supai Village constitutes wholesale, not retail, service; and (3) Mohave's agreement to provide electric service through the 70-Mile Line is conditioned upon Mohave receiving easements on reasonable terms to operate and maintain the Line.

RESPECTFULLY SUBMITTED this 23rd day of July, 2012.

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**ORIGINAL and 13 COPIES** of the foregoing were hand-delivered for filing this 23rd day of July, 2012, to:

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1 **COPY** of the foregoing hand-delivered  
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