

Appendix A. Bio-Fuel Specifications



***Preventive
Maintenance Products***

March 2001

**CATERPILLAR POSITION ON THE USE OF BIODIESEL
FUEL**

This document applies, within the stated limitations, to Caterpillar engines.

Introduction:

With increased world interest in emissions and reducing the use of petroleum distillate based fuels, many governments and regulating bodies encourage the use of biofuels. Governmental incentives and/or environmental legislation to use biofuels may have an impact on the sales and use of Caterpillar engines and equipment. This document outlines Caterpillar's criteria and parameters when using biodiesel fuel.

Biodiesel is a fuel that can be made from a variety of sources, primarily from soybean oil or rapeseed oil. Without esterification, these oils gel in the crankcase and fuel tank and may not be compatible with many of the elastomers used in today's engines. In their original form, these oils are not suitable for use as a fuel in compression ignition engines. To use these oils as fuel, they must be esterified. Alternate base stocks for biofuel may include animal tallow, waste cooking oils, or a variety of other feedstocks.

ASTM has recently authored a provisional specification for biodiesel, PS121. Caterpillar recognizes BioFuels meeting the ASTM PS121, DIN 51606 or the Caterpillar biodiesel specification.

Caterpillar certifies its engines using the prescribed EPA and European Certification Fuels. Caterpillar does not certify engines on any other fuel. It is the user's responsibility to use the correct fuel as recommended by the manufacturer and allowed by EPA or other local regulatory agencies. It is the responsibility of the user to obtain the proper local, regional, and/or national exemptions required for the use of biodiesel in any emissions regulated Caterpillar engine.

Warranty and the Use of Biodiesel Fuel in Caterpillar Engines

Caterpillar neither approves nor prohibits the use of biodiesel fuels. Caterpillar is not in a position to evaluate the many variations of biodiesel fuels, and the long-term effects on performance, durability or emissions compliance of Caterpillar products. The use of biodiesel fuel does not affect Caterpillar's materials and workmanship warranty. **Failures resulting from the use of any fuel are not Caterpillar factory defects and therefore the cost of repair would NOT be covered by Caterpillar's warranty.**

Recommendation for the use of Biodiesel Fuel in Caterpillar Engines

For Caterpillar 3046, 3064, 3066, 3114, 3116, 3126, 3176, 3196, 3208, 3306, C-10, C-12, 3406, C-15, C-16, 3456, 3408, 3412, 3500 series, 3600 series, CM20, CM25 and CM32 engines: Biodiesel meeting the requirements listed in Caterpillar's biodiesel specification or, meeting either ASTM PS121 or DIN 51606, are acceptable. They may also be blended in any percentage with an acceptable diesel fuel, provided the biodiesel constituent meets the requirements outlined in the Table prior to blending.

For Caterpillar 3003 through 3034, 3054 and 3056 engines: Biodiesel meeting the requirements listed in Caterpillar's biodiesel specification, or meeting either ASTM PS121 or DIN 51606, may be blended with an acceptable diesel fuel at a maximum of 5% biodiesel fuel blended with 95% diesel fuel. The biodiesel must meet the requirements outlined in the Table prior to blending. Use of more than a 5% biodiesel fuel can cause premature failures whose repair would not be covered under Caterpillar warranty.

When burning biodiesel, or any blend of biodiesel, it is the responsibility of the user to obtain the proper local, regional, and/or national exemptions required for the use of biodiesel in any emissions regulated Caterpillar engine. When using a fuel that meets the Caterpillar's Biodiesel specification, ASTM PS121, or DIN 51606 specifications, and when adhering to the following recommendations, the use of biodiesel should pose no problems.

Recommendations:

- The oil change interval can be affected by the use of biodiesel fuel. Use Scheduled Oil Sampling (SOS) to monitor the engine oil condition and to determine the optimum oil change interval.
- Biodiesel provides approximately 5-7% less energy per gallon of fuel when compared to distillate fuels. To avoid engine problems when the engine is converted back to 100% distillate diesel fuel, do not change the engine rating to compensate for the power loss.
- Elastomer compatibility with biodiesel is still being monitored. The condition of seals and hoses should be monitored regularly.
- Biodiesel fuels may pose low ambient temperature problems for both storage and operation. At low ambient temperatures, fuel may need to be stored in a heated building or a heated storage tank. The fuel system may require heated fuel lines, filters, and tanks. Filters may plug and fuel in the tank may solidify at low ambient temperatures if precautions are not taken. Consult your biodiesel supplier for assistance in the blending and attainment of the proper cloud point fuel.
- Biodiesel has poor oxidation stability, which can result in long term storage problems. The poor oxidation stability qualities may accelerate fuel oxidation in the fuel system. This is especially true in engines with electronic fuel systems because they operate at higher temperatures. Consult the fuel supplier for oxidation stability additives.
- Biodiesel fuel is an excellent medium for microbial growth. Microbes cause fuel system corrosion and premature filter plugging. The effectiveness of conventional anti-microbial additives, when used in biodiesel is not known. Consult your fuel and additive supplier for assistance.
- Care must be taken to remove water from fuel tanks. Water accelerates microbial growth. Water is naturally more prevalent in biodiesel fuels than in distillate fuels.

Caterpillar Biofuel Specification

Property	Test Method		Units	Limits
	United States	International		
			Fuel Specific Properties	
Density @ 15°C	ASTM D1298	DIN/ISO 3675	g/cm ³	0.86-0.90
Viscosity @ 40°C	ASTM D445	DIN/ISO 3104	mm ² /s	4.0-6.0
Flash Point	ASTM D93	DIN/ISO 22719	°C	100 min
Cold Filter Plugging - Summer - Winter	ASTM D4539	DIN EN 116	°C	0 6 below ambient
Pour Point - Summer - Winter	ASTM D97	ISO 3016	°C	-9 max -20 max
Sulfur Content	ASTM D2622	ISO 8754	% weight	0.01 max
Distillation - 10% Evaporation - 90% Evaporation	ASTM D1160	ISO 340	°C	To Be Determined 345
Carbon Residue, Conradson (CCR)	ASTM D189	DIN/ISO 10370	% weight	0.5 max
Cetane Number	ASTM D613	ISO 5165		45 min
Ash Content	ASTM D482	DIN 51575 ISO 6245	mg/kg	0.02 max
Water Content	ASTM D1796	DIN51777-1 ISO3733	g/m ³	500 max
Particulate Matter	DIN 51419	DIN 51419		15
Copper Corrosion	ASTM D130	DIN/ISO 2160		No.1
Oxidation Stability	ASTM D2274	IP 306 mod.	mg/100 mL	15 max
Esterification			% volume	98.0 min
Acid Value	ASTM D664	DIN 51558	mg NaOH/g	0.5 max
Methanol Content	GC Method	DIN 51608	% weight	0.2 max
Monoglycerides	GC Method	DIN 51609	% weight	0.8 max
Diglycerides	GC Method	DIN 51609	% weight	0.2 max
Triglycerides	GC Method	DIN 51609	% weight	0.2 max
Free Glycerin	GC Method	DIN 51609	% weight	0.02 max
Total Glycerin	GC Method	DIN 51609	% weight	1.2 max
Iodine Number	DIN 53241 or IP 84/81	DIN 53241 or IP 84/81	cg I ₂ /g	110 max
Phosphorus Content	DGF C-VI4	DIN 51440-1	mg/kg	0.2

Maintenance Products and Services Group
Product Support Division
LC2172 - 309-636-5136

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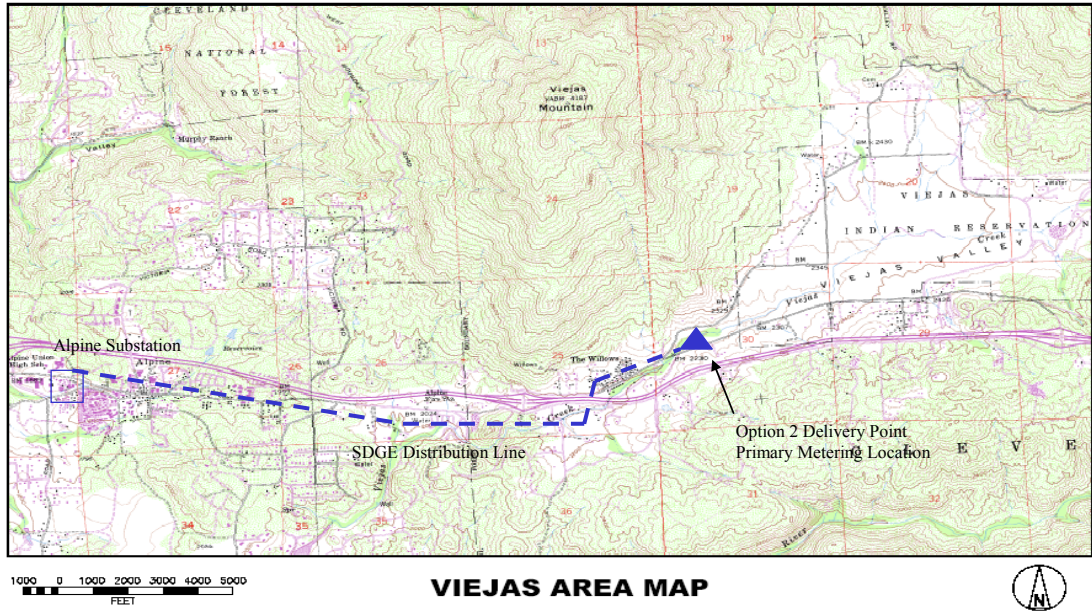
Bio oil specification for Wärtsilä four-stroke engines

Property	Unit	Limit	Test method reference
Viscosity, max.	cSt @ 40 °C	100	ISO 3104
Viscosity, min.	cSt	1.8 - 2.8 ¹⁾	ISO 3104
Injection viscosity, max.	cSt	24	ISO 3104
Density, max.	kg/m ³ @ 15 °C	991	ISO 3675 or 12185
Ignition properties		²⁾	FIA test
Water, max. before engine	% volume	0.20	ISO 3733
Carbon residue (micro method), max.	% mass	0.30	ISO 10370
Flash point (PMCC), min.	°C	60	ISO 2719
Pour point, max.	°C	³⁾	ISO 3016
Cloud point, max.	°C	³⁾	ISO 3015
Cold filter plugging point, max.	°C	³⁾	IP 309
Total sediment existent, max.	% mass	0.05	ISO 10307-1
Sulphur, max.	% mass	0.05	ISO 8754
Ash, max.	% mass	0.05	ISO 6245
Phosphorus, max.	ppm	100	ISO 10478
Silicon, max.	ppm	10	ISO 10478
Alkali content (Na+K), max.	ppm	30	ISO 10478
Copper strip corrosion, max.	3 hrs @ 50 °C	1b	ASTM D130
Steel corrosion, max.	24/72 hrs @ 20, 60 and 120 °C	No signs corrosion	LP 2902
Acid number, max.	mg KOH/g	5.0	ASTM D664
Strong acid number, max.	mg KOH/g	0.0	ASTM D664
Iodine number, max.		120	ISO 3961

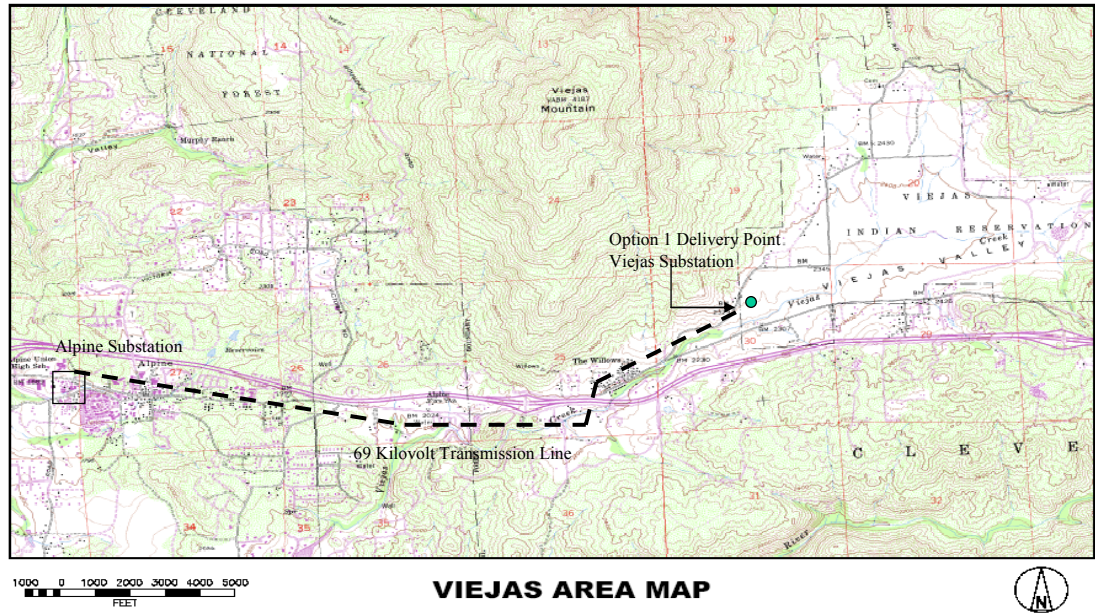
1) W 20: 1.8 cSt; W 26, WV 32, W 32, W 38: 2.0 cSt; W 46, W 64: 2.8 cSt
2) To be equal or better than the requirements for fossil fuels, i.e. CN min. 35, CCAI max. 870
3) To be at least 10 °C below fuel injection temperature

Appendix B. Electrical Interconnections

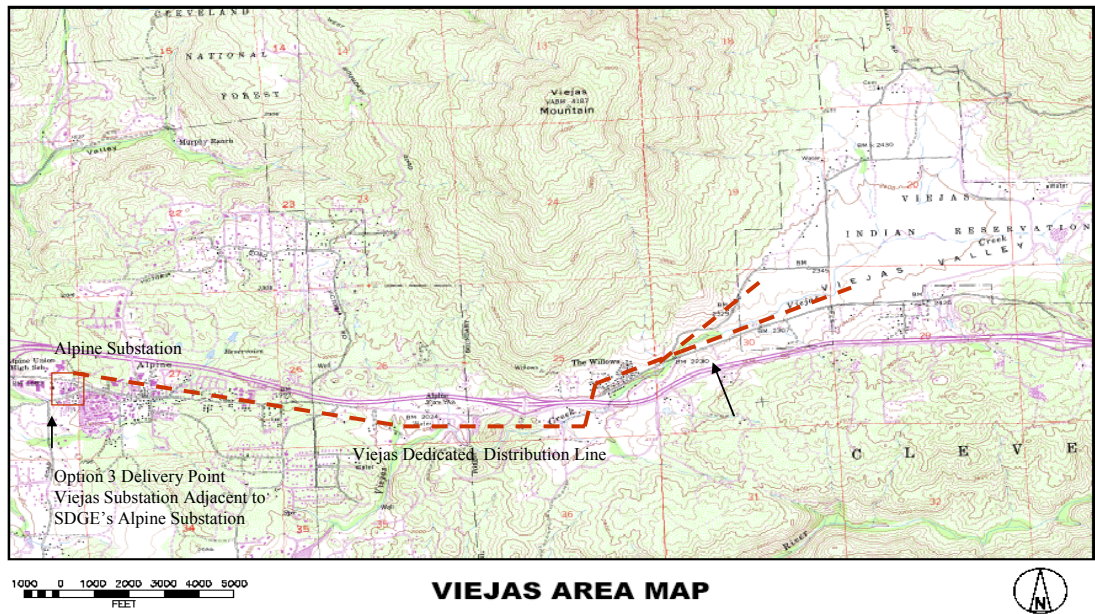
Net Metering



Interconnected Utility



Stand Alone Utility – Dedicated Distribution Line



Appendix C. Base Case Cash Flow Analyses

Operating Year	1	2	3	4	5	6	7	8	9	10
Revenues (\$000)										
Operating Revenues	2,738	2,832	2,929	3,030	3,133	3,241	3,352	3,467	3,586	3,709
Other Income	97	97	97	97	97	97	97	97	97	97
Total Revenues	2,835	2,929	3,026	3,126	3,230	3,338	3,449	3,564	3,683	3,806
Expenses (\$000)										
Power Supply	2,467	2,556	2,649	2,745	2,844	2,946	3,052	3,162	3,276	3,394
O&M	54	55	57	58	60	61	63	64	66	67
Property Taxes	0	0	0	0	0	0	0	0	0	0
Franchise Fee	0	0	0	0	0	0	0	0	0	0
Total Expenses	2,521	2,612	2,706	2,803	2,903	3,007	3,115	3,226	3,342	3,461
Net Operating Income (\$000)	314	317	320	324	327	330	334	337	341	345
Debt Service (\$000)										
Principle	72	72	72	72	72	72	72	72	72	72
Interest	170	164	158	153	147	141	135	130	124	118
Total Debt Service	242	236	230	225	219	213	207	202	196	190
Debt Service Reserve Fund	216	220	225	229	234	239	243	248	253	258
Debt Reserve Interest	4	4	4	5	5	5	5	5	5	5
Capital Outlays (\$000)	0	0	0	0	0	0	0	0	0	0
Funds Net DS	(140)	85	94	104	113	122	131	141	150	160
Income Taxes										
Utility Tax (City Ordinance)	0	0	0	0	0	0	0	0	0	0
St. Tax/Other	0	0	0	0	0	0	0	0	0	0
Total Income Taxes	0	0	0	0	0	0	0	0	0	0
Net Available Funds	(140)	85	94	104	113	122	131	141	150	160
Net Present Value - 10 Yr	651									
Debt Service Coverage Ratio	1.30	1.34	1.39	1.44	1.49	1.55	1.61	1.67	1.74	1.81

Fig. C-1. Base Case Net Metering Scenario Cash Flow

Operating Year	1	2	3	4	5	6	7	8	9	10
Revenues (\$000)										
Operating Revenues	2,738	2,832	2,929	3,030	3,133	3,241	3,352	3,467	3,586	3,709
Other Income	0	0	0	0	0	0	0	0	0	0
Total Revenues	2,738	2,832	2,929	3,030	3,133	3,241	3,352	3,467	3,586	3,709
Expenses (\$000)										
Power Supply	1,650	1,707	1,765	1,826	1,888	1,953	2,020	2,089	2,161	2,235
O&M	300	312	325	338	351	366	380	396	412	428
Property Taxes	0	0	0	0	0	0	0	0	0	0
Franchise Fee	0	0	0	0	0	0	0	0	0	0
Total Expenses	1,950	2,019	2,090	2,163	2,240	2,319	2,400	2,485	2,572	2,663
Net Operating Income (\$000)	788	813	839	866	894	922	952	982	1,013	1,046
Debt Service (\$000)										
Principle	282	282	282	282	282	282	282	282	282	282
Interest	664	642	619	597	574	552	529	507	484	462
Total Debt Service	946	923	901	878	856	833	811	788	766	743
Debt Service Reserve Fund	845	861	879	896	914	933	951	970	990	1,009
Debt Reserve Interest	17	17	18	18	18	19	19	19	20	20
Capital Outlays (\$000)	200	203	206	209	212	215	219	222	225	229
Funds Net DS	(1,185)	(296)	(250)	(203)	(156)	(108)	(59)	(9)	42	94
Income Taxes										
Utility Tax (City Ordinance)	0	0	0	0	0	0	0	0	0	0
St. Tax/Other	0	0	0	0	0	0	0	0	0	0
Total Income Taxes	0	0	0	0	0	0	0	0	0	0
Net Available Funds	(1,185)	(296)	(250)	(203)	(156)	(108)	(59)	(9)	42	94
Net Present Value - 10 Yr	(1,929)									
Debt Service Coverage Ratio	0.83	0.88	0.93	0.99	1.04	1.11	1.17	1.25	1.32	1.41

Fig. C-2. Base Case Utility Scenario Cash Flow (No Generation)

Appendix D. Legal Analysis

Fredericks, Pelcyger & Hester, LLC

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(1952 - 1982)

MEMORANDUM

TO: Tribal Council, Viejas Band of Kumeyaay Indians

FROM: Fredericks, Pelcyger & Hester, LLC

DATE: June 23, 2005

RE: LEGAL ISSUES IN THE FORMATION OF A TRIBAL UTILITY

Introduction

The Viejas Band of Kumeyaay Indians conducted a study regarding the feasibility of constructing a renewable energy project (the "Project") on tribal lands. See Renewable Energy Development on Tribal Lands of Viejas Black & Veatch (herein after "B&V") Project Number 135650, May 2005. This memorandum will address various tribal, federal and state regulatory issues in forming a tribal utility.

Statement of the Facts

The Viejas Band of Kumeyaay Indians ("Tribe") is a federally recognized tribe in San Diego County, California. The Viejas Reservation is comprised of approximately 1,600 acres of tribal trust lands, with another 15,000 acres that is shared in a joint-trust patent with the Barona Band of

Mission Indians.¹ The proposed project will be located within the 1,600 acre part of the Reservation. The Reservation's electrical needs are currently served by San Diego Gas & Electric (SDG&E). The Project is to be constructed on tribal land using one or more renewable energy options. Those options are wind, solar, bio-fuel, co-generation, and fuel cell technology. B&V at TC-1, TC-2.

The feasibility study identified three different options for the Tribe:

1. Option #1- Net Metering: Under this scenario, the Tribe would remain connected to SDG&E. The energy generated by the renewable resource would be essentially credited towards the Tribe's energy bill.
2. Option #2 - Tribal Utility Interactive with the Grid: Under this scenario, the Tribe would remain connected to SDG&E but form its own separate tribal utility ("Viejas Utility"). Energy would be generated on the Reservation but the Viejas Utility would have an agreement with SDG&E and/or other providers to wheel wholesale energy on or off the Reservation.
3. Option #3 - Tribal Utility Independent of the Grid: Under this scenario, the Tribe would form its own separate utility, maintain its current connection with SDG&E, but in essence become independent of the grid by the constructing its own complete energy management facilities on the Reservation, and/or purchasing the existing

¹ See Viejas Band of Kumeyaay Indians website, "Viejas Past and Present: History" <www.viejasbandofkumeyaay.org>(last visited 6/23/05)

distribution system, which is presumably owned by SDG&E. The Tribe may or may not choose to buy or sell power from or to SDG&E or other utilities.

Legal Analysis

Questions Presented

- Does the Tribe have the authority to charter and operate a tribally owned utility on the Reservation? If so, what steps does the Tribe need to take to create a tribal utility?
- Will the Viejas Utility be subject to Federal regulation under the Federal Power Act, 16 U.S.C. § 824 et seq.?
- Will the Viejas Utility be subject to the Federal Public Utility Regulatory Act (PURPA) 16 U.S.C. § 2601 et seq.?
- What other federal laws could apply to the Project?
- Will the Viejas Utility be subject to California State Utility Regulation?

As set forth below, it is our legal opinion that the Tribe has sovereign authority to charter and operate a tribal utility on Reservation trust land. Moreover, the Viejas Tribal Utility would be subject to Federal PURPA Regulation but no other Federal or State regulation under the above statutes, if they follow the steps outlined in this memo.

I. Tribal Authority to Own and Operate an Electric Utility.

It is our opinion that the Tribe has inherent sovereign authority to charter, operate and regulate an electric utility for purposes of providing service to on-Reservation customers located on tribal lands. After examining the principles of federal Indian law on which we base our opinion, this section will then discuss the steps which may be taken by the Tribe to exercise and implement its authority to establish an on-Reservation electric utility.

A. The Tribe's Inherent Sovereign Authority.

Indian tribes have long been recognized as distinct, independent political communities with the power of self-government over both their members and their territory. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1831); California v. Cabazon Band of Indians, 480 U.S. 244 (1987). Tribal sovereignty does not stem from any delegation of power by federal or state governments, but from an early acknowledgement by foreign nations coming to the New World that the various native Indian tribes were separate distinct political entities. Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823). The sovereignty of Indian tribes is therefore inherent, and predates this Tribe's existence. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978). Congress has long recognized the sovereignty of Indian tribes and federal Indian policy has been dominated by a firm congressional commitment to the promotion of "Indian self-government including [the] overriding goal of encouraging tribal self-sufficiency and economic development." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 n. 17 (1983). Tribes today continue to possess all aspects of their sovereignty except that which has been expressly withdrawn by treaty or statute, or by implication as a necessary result of their so-called dependent status. United States v. Wheeler, 435 U.S. 313, 323 (1978).

The Tribe's governmental authority over its own members is well-established. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 167-71 (1973). However, tribal governmental authority over non-members within the Reservation has been severely diminished by the United States Supreme Court. The civil jurisdiction to regulate non-Indians in modern times was addressed in Montana v. United States, 450 U.S. 544 (1981). In Montana, the Supreme Court resolved two disputes between the state of Montana and the Crow Tribe. The first dispute involved the ownership of the bed and banks of the Bighorn River within the Crow Indian Reservation. The second dispute

addressed by the Supreme Court was the Crow Tribe's right to regulate hunting and fishing by non-members within the Reservation on non-member owned land that was held in fee. The Crow Tribe had proposed to regulate hunting and fishing by non-members on their fee lands within the Crow Reservation relying on the Crow Tribe's treaty rights and the Tribe's inherent sovereignty. The Supreme Court held that tribal regulatory power over non-member hunting and fishing on fee land within the Reservation was inconsistent with the Crow Tribe's dependent status. Montana v. U.S., 450 U.S. at 551 (citation omitted). The Supreme Court in so holding fashioned a general rule that the "exercise of tribal power beyond what is necessary to protect tribal government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 566-67. Although Montana involved a Tribe's attempt to regulate non-members on land owned in fee by non-members, the Court recently expanded Montana to limit tribal authority over non-members on tribal trust land as well. Nevada v. Hicks, 533 U.S. 353, 358 (2001); see Smith v. Salish Kootenai College, 378 F.3d 1048, 1051 (9th Cir. 2004) (explaining Montana and Hicks). The effect of the Supreme Court rulings reversed the longstanding traditional presumption that Indian tribes retain power until Congress takes it away. Instead, after Montana, the presumption is that tribes do not retain power over non-members within the Reservation boundaries.

The Supreme Court in articulating the new presumption of no civil jurisdiction over non-members granted two exceptions to the Court's rule. First, "a tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements." Montana, 450 U.S. at 465. Second, tribes "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within [the tribe's] Reservation when that conduct threatens or

has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe. *Id.* at 566. As a result of the Montana decision, absent a recognition of power from Congress, the Tribe's authority to regulate non-Indians within the Reservation depends on whether one of the aforementioned exceptions is applicable.

Tribal authority over non-members within the Reservation was addressed in three other Supreme Court cases, Brendale v. Confederated Tribes and Bands of Yakima Indian Reservation, 492 U.S. 408 (1989), South Dakota v. Bourland, 508 U.S. 679 (1993), and Strate v. A-1 Contractors, et al., 520 U.S. 438 (1997). Brendale involved tribal authority to regulate zoning on non-Indian fee land within the Yakama Indian Reservation. The Supreme Court in Brendale rendered a 4 to 3 to 2 plurality decision with the deciding opinion holding that the Tribe had no authority to zone in the open area of the Reservation (an area where a significant portion of land was owned by non-members in fee status), but could zone in the closed area (an area containing mostly Indian trust land) since it had retained its authority to determine the closed area's character. The distinction between open and closed areas was based on a theory of exclusion: the Tribe had lost its inherent authority to zone non-member land in the open area because it had not excluded non-Indians from the area. Because the Tribe had not excluded non-Indians, it lost the right to determine the essential character of the land (i.e., to zone). Congressional delegation or divestment of power was not an issue, according to the opinion, because Congress had not spoken on zoning. Brendale, 492 U.S. at 433 (Stevens, J., concurring).

The next case that addressed tribal authority to regulate non-Indians within the Reservation was South Dakota v. Bourland, 508 U.S. 679 (1993). In Bourland, the Supreme Court held that the Cheyenne River Sioux Tribe did not have authority to regulate non-Indian hunting and fishing on land and overlying waters located within the Tribe's Reservation but acquired by the United States

for the operation of the Oahe Dam and Reservoir. The Court relied on the Montana analysis and determined that when the United States acquired the land from the Cheyenne River Sioux Tribe for flood control purposes, the Tribe lost its right to exclude non-members from the acquired land. Consequently, the Supreme Court determined that the land taken by the United States for the operation of the Oahe Dam and Reservoir was treated as non-Indian fee land and therefore the Tribe could not regulate non-Indian hunting and fishing on said lands. As stated above, after Nevada v. Hicks, land status is no longer relevant. The limitation on tribal authority over non-members applies to activity on trust land as well as fee land.

The other Supreme Court case that addressed a tribe's authority to regulate non-Indians involved Strate v. A-1 Contractors, et al., 520 U.S. 438 (1997). The Supreme Court in Strate again relied on the Montana analysis to find that the tribal court of the Fort Berthold Indian Reservation was without authority to adjudicate a civil dispute between two non-Indians who had an accident within a state highway right-of-way within the Fort Berthold Indian Reservation.

Collectively, the foregoing Supreme Court decisions have severely eroded the Tribe's ability to regulate non-members on fee lands. Today, it seems that Indian tribes have little or no authority over non-Indians on the Reservation "if the nonmember has a right to be where he is." County of Lewis v. Allen, 141 F.3d 1385, 1394 (9th Cir. 1998) (Boochever, J., concurring).

Although it is arguable whether the Tribe would be able to assert civil jurisdiction over non-tribal members under the second Montana exception discussed above, the Tribe may be able to meet the first Montana exception by entering into consensual contracts to serve any non-tribal members on the Reservation. The tribal utility will need to draft its agreements with the non-members in such a way as to come within the first exception of the Supreme Court's decision in Montana. Moreover, Indian tribes arguably retain the authority to regulate electric utility services occurring on trust land

regardless of whether the provider or user of such service is a tribal member or a non-tribal member. Regulation of utilities involves an important exercise of police powers. See Ark. Elec. Coop. v. Ark. Public Serv. Comm'n., 461 U.S. 375, 377 (1983). As independent sovereigns, Indian tribes possess police power over their territories similar to those possessed by states. Wauneka v. Campbell, 22 Ariz. App. 287, 290, 526 P.2d 1085 (1974). It may be asserted that the Tribe's power to regulate utilities is an essential attribute of tribal sovereignty as it is a necessary instrument of self-government and territorial management. Tribal authority to regulate electric power distribution is no different from its unquestionable authority to impose building, health and safety regulations on members and non-members alike within the boundaries of the Reservation. Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982).

We conclude that pursuant to its inherent sovereignty, the Tribe is empowered to charter, operate and regulate an electric utility authority to be wholly owned by the Tribe, and to provide service to customers within the Reservation, as provided in the discussions *supra*. We recommend that the Tribe implement a comprehensive utility regulatory scheme on the Reservation which will tip the scales sharply in favor of tribal jurisdiction and minimize any interest in on-Reservation jurisdiction the state may attempt to assert. The Tribe will have regulatory jurisdiction over non-members if the tribal utility enters into consensual agreements with the non-members to provide electric utility service.

B. Organization of the Tribe's Electric Utility.

Initially, the Tribe's governing body should adopt a Reservation Public Utilities Ordinance. The ordinance should, among other things, establish a Tribal Public Utilities Commission as the regulatory body charged with administering and enforcing the ordinance within the jurisdiction of the Tribe. It could also establish, or prescribe procedures for establishing, rates and charges by on-

Reservation utilities including, but not limited to, the tribal electric utility. Standards covering the construction, location and specification of utility facilities should also be prescribed. The ordinance could also set forth the conditions pursuant to which exclusive certificates of convenience and necessity would be issued to tribal utilities to serve on-Reservation.²

In addition to promulgating the ordinance, the tribal governing body could issue a charter to create and empower the electric utility. The charter would be roughly analogous to articles of incorporation for a state-organized corporation and would be issued pursuant to the powers vested in the Tribe's governing body. The charter would establish the electric utility as an authority or agency of the Tribe, thereby affording it the Tribe's sovereign immunity and other benefits deriving from tribal government status. The charter could also empower the electric utility to promulgate bylaws establishing internal operational procedures.

After the electric utility is chartered by the Tribe, it may then proceed with organizational and operational matters. It is recommended that the electric utility hire a general manager that is experienced in the electric utility industry to act as manager and perform the necessary tasks of developing, constructing and negotiating the purchase of existing utility lines, poles, substation meters and other equipment to get the utility operational. The manager would be responsible for staffing the utility, proposing a rate structure consistent with the Tribe's ordinance, establishing a billing system, arranging for funding, entering into facility construction contracts, obtaining necessary government approvals, securing a source of power and other matters necessary for start-up.

² In Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1393 (9th Cir. 1987), the Ninth Circuit, in holding the cities' rent control ordinances unlawful on the Reservation, found significant the fact that application of the cities' ordinances would preclude enforcement of a conflicting ordinance enacted by the Tribe and effectively nullify the Tribe's authority to regulate the use of its lands.

Taking over SDG&E's customer base on the Reservation will be difficult logistically, but not impossible. The easiest way to assume SDG&E's functions would be to purchase its on-Reservation distribution system at a negotiated price. In many cases, utility providers on trust land fail to obtain proper easements for the construction of an operation of their distribution lines, as required by federal law.

In such cases, the Tribe has a cause of action for trespass damages, which the Tribe can then use to negotiate a mutually acceptable takeover of the existing facilities, with any damages that the Tribe can claim to be credited against the agreed value of purchase price of the facilities. Obviously, if the Tribe and the tribal utility authority can put themselves in a position to acquire the existing facilities, that will greatly reduce their start-up costs and do away with having to build a new transmission and distribution system.

A more expensive option is to build an entirely new system, which may be cost prohibitive depending on existing and potential future customer load on the Reservation. We recommend that the Tribe enter into negotiations to purchase SDG&E's existing system.

II. Federal Regulatory Interests

A. The Tribe is Not Subject to FERC Regulatory Control Under 16 U.S.C. ' 824 et seq.

The federal government regulates the generation and transmission of electric power under the Federal Power Act, 16 U.S.C. §§ 824-824m, through the Federal Energy Regulatory Commission (FERC). We opine that a wholly owned tribal utility would be exempt from FERC regulatory control pursuant to 16 U.S.C. § 824(f) which provides, in regards to certain government owned utilities:

(f)United States, State, political subdivision of a State, or agency or instrumentality thereof exempt. No provision in this Part [16 U.S.C. ' ' 824 et seq.] shall apply to, or be deemed to include, the

United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

FERC has ruled that a wholly owned tribal utility qualifies as an exempt government-owned utility under the above statute. Sovereign Power Inc. v. FERC, FERC Dkt. No. ER 98-2995-000 (July 13, 1998). In Sovereign Power, a tribal corporation, wholly owned by the Spokane Tribe of Indians, wished to sell wholesale power and asked that FERC disclaim jurisdiction over it, which the Commission did. The Commission applied a test based on the instrumentality definition in City of Paris, KY v. FPC, 399 F.2d 983 (D.C. Cir. 1968) that looks to whether the utility "performs an inherent government function" Id. at 986. The Commission in Sovereign Power ruled that:

The Spokane tribe performs inherent government functions and the funds generated by Sovereign will be used by the tribe on the behalf of the government and in performance of government functions. This money collected by Sovereign will also mean that the tribe will need less funding from the federal government and this generally promotes the goal of encouraging tribal self-determination and economic independence.

Id. at 2-3.

The Commission stated that the Spokane Tribe is "subject to extensive federal oversight," including the protection of trust land and various laws requiring federal approval of proposed tribal transactions. Id. at 3. FERC further relied on the "long-standing principle of statutory construction that >Statutes are to be liberally construed in favor of the Indians, with ambiguous provisions interpreted to their benefit." Id. FERC concluded that because the Spokane Tribe is an instrumentality of the federal government, the Tribe's wholly owned Power Corporation was not a "public utility" for the purposes of FERC's jurisdiction under the FPA. In determining that the City

of Paris test applied, FERC considered and rejected opposing cases which held that tribes are not instrumentalities of the federal government. Id. at 3 (citing United States v. Wheeler, 435 U.S. 313 (1978) and Smart v. State Farm Insurance Co., 868 F.2d 929 (7th Cir. 1989). In footnote 1 of Sovereign Power, FERC stated that it was issuing a separate notice informing Chickasaw Nation Industries (a tribal utility) that FERC disclaimed jurisdiction over its application. FERC thus signaled its intent that the Sovereign Power ruling was to be uniformly applied in Indian Country. To conclude, the Viejas Utility would be performing an inherent government function by generating power and funds on behalf of the Viejas government. Thus they would not be a “public utility”.

Sovereign Power has not been challenged in the courts and remains good agency law. Even if a FERC determination on the Viejas utility were challenged, the federal courts “give great deference” to FERC decisions on review. Northeast Utilities Co v. FERC, 993 F.2d 937, 943 (1993). A Questions involving an interpretation of the FPA involve a *de novo* determination by the court of Congressional intent; if that intent is ambiguous, FERC’s conclusion will only be rejected if it is unreasonable.” Id. at 944. Because Congress did not clearly state its intent as to whether or not tribes are exempt under 16 U.S.C. ' 824(f), it is our legal opinion that courts would affirm FERC’s determination of the issue.

The conclusion that a Viejas utility is exempt under 16 U.S.C. § 824(f) is consistent with an opinion by the Solicitor of the Department of the Interior, which found that Indian tribes are qualified, “like States and political subdivisions,” to participate under the Small Business Reclamation Act of 1956, 25 U.S.C. ' 422a-422k.³

³See Solicitor’s Opinion, No. G-65-1097.3 (Dept. of the Interior August 13, 1965) (cited in Indian Tribes as Preference Customers Under the Reclamation Project Act of 1939, Solicitor’s Opinion, No. m-366771 (Dept. of the Interior July 25 1967)).

Based upon the above legal precedent established by the above-cited authorities, we conclude that FERC would not have jurisdiction over the Viejas Utility as long as the Utility uses the net revenues generated by the Utility on behalf of the government and to fund governmental functions or services.

B. The Tribe Would be Subject to Federal Regulation under the Public Utility Regulatory Act (PURPA), 16 U.S.C. §§ 2601 et seq.

PURPA was enacted by Congress in 1978. Its purpose is "to promote the development of new generating facilities and to conserve the use of fossil fuels." New York v. FERC, 535 U.S. 1, 9 (2002). Through this Act Congress encourages renewable energy projects such as the Viejas Utility by securing a market for their power and establishing fair prices for said power. To qualify under the act is a two step process, the first being as a "small power production facility" and the second as a "qualifying small power production facility". The Viejas Utility would qualify as a "small power production facility" under 16 U.S.C. § 796(17)(A), which provides that:

[a small power production facility] is an eligible solar, wind, waste, or geothermal facility, or a facility which-

- (i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources or any combination thereof; and
- (ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is no greater than 80 megawatts.

The Viejas Utility would then be eligible as a "qualifying small power production facility" under 16 U.S.C. § 796(17)(e). This is because it would meet the requirements of a "small power production facility" and though it would be engaged in selling the energy it produces the energy sold would be generated solely from the same "small power production facility" The statute provides:

...a small power production facility-

- (i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel

efficiency, and reliability) as the Commission may, by rule, prescribe;
and

(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration or small power production facilities);

16 U.S.C. § 796(17)(e).

Regulation under PURPA could have beneficial effects for the Tribe. If the Tribe chooses to wheel or sell power outside of the Reservation as suggested in the feasibility study, see B&V, at 7-2, then under FERC's jurisdiction, SDG&E and other utilities would be required to purchase the energy generated by the Viejas Utility under 16 U.S.C. §824a-3(a)(2). See also FERC v. Mississippi, 456 U.S. 742 (1982) "In order to overcome...these perceived problems, § 210(a) [§ 824a-3(a)(2)] directs FERC...to promulgate...rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities." Id. at 751 (all emphases added). In addition, the utilities must purchase at a price that is "just and reasonable" and must not discriminate against alternate energy producers (AEPs)." 16 U.S.C. § 824a-3(b). In conclusion the Viejas Utility would be subject to PURPA jurisdiction and thus would be privy to its benefits.

C. Other Federal Laws and Regulations

Depending on what type of project Viejas chooses, the following laws, regulations, and regulatory authorities may apply.

1. Leasing Lands: If the lands on which a project is situated are leased, the lease needs to comply with 25 U.S.C. ' 415(a) and 25 C.F.R. Part 162. 25 C.F.R. Part 162 requires compliance with NEPA, 42 U.S.C. ' ' 4321 to 4370d. NEPA requires submission of an environmental impact statement (EIS) for every major federal action significantly affecting the quality of the human environment. Leasing lands constitute a major federal

action. Davis v. Morton, 469 F.2d 593 (10th Cir. 1972). An EIS includes an analysis of environmental impact, proposed adverse effects, alternatives, maintenance and enhancement of long-term productivity, irreversible commitments of resources, and other information. 40 C.F.R. ' 1507(a)(1). However, depending on what renewable plan is adopted, an environmental assessment (EA) may be used to determine whether an EIS is necessary based on the proposed action. 40 C.F.R. ' 1508.9. If an EIS is not necessary, then a finding of no significant impact (FONSI) will be issued. 40 C.F.R. ' 1508.9.

2. Clean Air Act (CAA), 42 U.S.C.S. ' 7410(a): The EPA has primary regulatory authority over the on-Reservation air space under the CAA. 42 U.S.C. ' 7410(c). A tribe may assume authority under Section 7601(d)(1)(A). EPA has primary regulatory jurisdiction for compliance with the CAA.

The Tribe will need to get a PSD (prevention from significant deterioration) permit from EPA Region IX for compliance with 42 U.S.C. § 7477 of the CAA and pursuant to 40 C.F.R. Part 52. A PSD permit usually takes 6-10 months, so in certain instances there may be a need for the Tribe to request an expedited review. Under expedited review, a tribe would enter into an agreement with EPA through an Administrative Order on Consent and would consent to mitigate other air impacts in future projects as well as comply with PSD permitting requirements in exchange for the EPA allowing a project to operate in the interim. It is not clear whether Region IX (EPA California) has experience with the expedited process. Within 12 months of operation, a Title V permit application will need to be completed and submitted to EPA Region IX.

The State of California or a regional entity does not have air quality jurisdiction over Reservations in California. Many California tribes have obtained air grants and tribes are managing their own air quality programs.⁴

While there may be some technical assistance provided by South Coast Regional Air Quality Management Authority, the technical assistance is minimal (if any) and the Regional Authority should be well aware that tribes have jurisdiction over the Reservation.

3. Clean Water Act (CWA) 33 U.S.C. ' ' 1251-1387: Tribes may assume authority of a project under the CWA. 33 U.S.C. ' 1377. For purposes of a proposed project, the relevant provision of the CWA is 33 U.S.C. §1342, National Pollutant Discharge Elimination System (NPDES). If there is any discharge, it may be enough to warrant an NPDES permit. This will need to be verified by EPA.

4. Safe Drinking Water Act (SDWA) 42 U.S.C. ' ' 300f et seq.: Tribes may assume authority of a project under the SDWA. 42 U.S.C. ' 300j-11. The SDWA may be applicable if a project requires drilling for a well, injecting fluids or other materials into the ground, or creates underground storage for materials. See 40 C.F.R. Part 144.

5. Resource Conservation and Recovery Act (RCRA) 42 U.S.C. ' ' 6901 et seq.: The RCRA regulates the disposal of solid waste, including but not limited to management of hazardous solid wastes, non-hazardous solid wastes and regulation of underground storage tanks. See 40 C.F.R. Part 260. However, the EPA may not have the ability to review and/or approve solid waste management plans of tribes and/or tribal entities. See Backcountry Against Dumps v. EPA, 100 F.3d 147 (D.C. Ct. App. 1996). RCRA allows for assistance agreements with Indian tribes for hazardous waste management

⁴ See the EPA website, "Tribal Air: Region 9 Information" <<http://www.epa.gov/air/tribal/region/r9prgmhi.html>>

programs and underground storage tank programs. 42 U.S.C. ' 6908a. More information about solid waste produced by the Project is needed to determine whether RCRA compliance and/or an assistance agreement will be required.

6. Superfund (CERCLA) 42 U.S.C. ' ' 9601-9675: CERCLA applies to hazardous substance releases, liability and compensation for such releases. CERCLA should not be an issue to Viejas unless there is or has been an unlawful release at the site.

7. Endangered Species Act (ESA) 16 U.S.C. ' ' 1531-43: Specifically, Section 9 (16 U.S.C. § 1538(a)) of the ESA requires that “any person” is prohibited from taking any action that will impact listed species or result in the destruction or adverse modification of designated critical habitat. This has been interpreted to include Indian tribes. The Tribe’s natural resources department should make a preliminary determination about whether any species (listed or proposed) may be present on the site or impacted by a project. Once the preliminary determination has been made, a request needs to be made to the Secretary for her determination. 16 U.S.C. ' 1536(c). If there is a species at risk, a biological assessment needs to be conducted. Id.

8. National Historic Preservation Act (NHPA) 16 U.S.C. ' ' 470-470w-6: If the Project site or a building on the site has been designated as protected under the NHPA, the Project must comply with NHPA requirements. 16 U.S.C.S. ' 470f.

9. Occupational Safety and Health Act (OSHA) 29 U.S.C. ' 667 et seq.: The Occupational Safety and Health Administration of the Department of Labor administers OSHA. However, state or tribal OSHA programs may assume responsibility for developing their own occupational safety and health standards by submitting and obtaining Federal approval of a plan. Id. and 29 C.F.R. Part 1952. However Federal OSHA retains

enforcement authority over tribal workplaces. 29 C.F.R. ' 1952.122. Federal OSHA does not have a construction certification process. However, construction undertaken by the Tribe or other entity may need to comply with federal construction regulations as promulgated under 29 C.F.R. Part 1926. Part 1926 also incorporates some requirements outlined in Part 1910, including requirements to be met during the generation, transmission and distribution of electrical power. Also, the construction project will need to have a safety and health program, a hazard communications program (29 C.F.R. ' 1910.1200) and other programs as required by OSHA.

10. Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. ' 3001 et seq.: NAGPRA applies to objects excavated or discovered on Federal or tribal lands. Should any “cultural item”, 25 U.S.C. § 3001(3) be found on the site, the handling of such item must be consistent with NAGPRA and the item must be turned over to the appropriate tribe.

11. Archaeological Resources Protection Act (ARPA), 16 U.S.C. ' 470aa et seq.: If a project is located on “Indian lands,” and requires excavation or removal, it must comply with ARPA. 16 U.S.C. ' 470ii(c). If excavation of, or removal within, the site is required, a permit must be obtained. 16 U.S.C. ' 470cc.

12. Acquisition of Rights of Way: Under the General Right-of-Way Act of 1948, tribal grants of rights of way are subject to Secretarial and tribal official approval. 25 U.S.C. ' 323-328. Applicable regulations are found at 25 C.F.R. Part 169. If future rights-of-way are needed from the Tribe, the granting of a right-of-way to an entity other than the Tribe will require compliance with the Right-of-Way Act.

D. Federal Tax Implications.

The analysis thus far has, per the feasibility study, relied on the fact that the Tribe wishes to form a non-profit tribal utility. The Tribe may also wish to form a “for profit” corporation. There are tax implications for the latter.

The Tribe may choose to incorporate a tribal utility under tribal law if authorized by the Tribal Constitution. The Tribe may also choose to incorporate a tribal utility under Section 17 of the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. § 477. Incorporation under Section 17 exempts the enterprise from federal income tax, regardless of where the business is located. Finally, the Tribe could also choose to incorporate a utility under California state law. However, incorporation under state law will most likely subject the utility to federal income tax.

III. State Regulatory Authority.

Traditionally, Indian Tribes are recognized as distinct, independent political communities, with inherent sovereign powers of self-government over both their members and territory. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1821). Because of their sovereign status, tribes, as well as their Reservation lands, have enjoyed “a historic immunity from state and local control.” Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973). Generally, state laws are not applicable to the activities of the Tribe or its members on the Reservation unless Congress has expressly provided that state law applies. Worcester, 31 U.S. at 560-61; see, also Williams v. Lee, 358 U.S. 217, 221 (1959); McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 170-71 (1973).

California is a Public Law 83-280 (P.L. 280) state. P.L. 280 granted California jurisdiction over criminal and certain civil matters involving Indians as a party on Indian lands. The grant of civil jurisdiction is codified in 28 U.S.C. § 1360(a).

P.L. 280 makes a distinction between criminal laws that prohibit conduct and civil laws which regulate conduct. See California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). In Cabazon, the Court held that California could not enforce the state's gaming laws in Indian country. The Court held that a state could prohibit conduct under criminal law but could not regulate conduct under civil law against an Indian in Indian country.

This decision was in line with and further strengthened Supreme Court precedent. The Supreme Court had previously held that P.L. 280 did not grant a state county the authority to tax an Indian living on Indian trust land in Bryan v. Itasca County, 426 U.S. 373 (1976). In analyzing the legislative history of P.L. 280, the Bryan court explained:

This construction finds support in the consistent and uncontradicted references in the legislative history to >permitting=>State courts to adjudicate civil controversies= arising on Indian Reservations, H.R.Rep. No. 848, pp. 5, 6 (emphasis added), and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian Reservations.

Id. at 384.

Federal statutes which provide for and operate in conjunction with tribal treaties and regulatory schemes may also preempt state authority. The test for preemption in the context of Indian law is a balancing test. Generally, state jurisdiction is preempted by federal law if it interferes with or is incompatible with federal and tribal interests as reflected in federal law, "unless the state interests at stake are sufficient to justify the assertion of state authority." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983), citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). Courts assess the relative interests in light of the tribe's treaty rights, the tribe's inherent sovereignty, and Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." Mescalero Apache, 462 U.S. at 335, citing Bracker, 462 U.S. at 143.

Our current understanding is that the Viejas Utility will only serve tribal members on the Reservation. This scenario comports favorably with this balancing test first articulated in Bracker:

When on-Reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.

Bracker, 448 U.S. at 144-45.

The ability of a state to regulate a tribal entity is further limited when a tribal government, with the support of the federal government, has adopted a comprehensive regulatory policy. See Mescalero Apache Tribe, 462 U.S. at 341. The Viejas Utility will require drafting of a tribal utility code, as well as rules and regulations necessary for the operation and maintenance of the utility. A sample code has been included with this memo.

Based on the above authorities, we opine that the Viejas Utility will not be subject to state regulation provided that the Tribe adopts a comprehensive regulatory plan and that the energy is distributed solely on the Reservation.

Conclusion

Based on the above analysis, our opinion is as follows:

1. That the Viejas Tribe has the authority to charter and operate a tribal utility pursuant to its inherent sovereignty;
2. That FERC will not have jurisdiction over the Viejas Tribal Utility if the utility is wholly owned by the Tribe;
3. That PURPA will have jurisdiction over the Viejas Tribal Utility. If the Viejas Utility chooses to sell power back across the Reservation border PURPA would serve a beneficial effect in assisting the Utility in selling their power and receiving an equitable price for it; and

4. That the State of California will not have jurisdiction to regulate the activities of the Utility if it comports with the requirements set forth in Conclusion 2, above.

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**CHARTER OF THE
AHA MACAV POWER SERVICES**

ARTICLE I

Name

The Fort Mojave Indian Tribe, acting through the Council of the Fort Mojave Tribe and the Fort Mojave Constitution and Bylaws, hereby authorizes this Charter under Article IV of the Constitution of the Fort Mojave Tribe as amended. The name of this tribally chartered authority is the Aha Macav Power Services (AMPS). The Fort Mojave Tribe confers on AMPS all of the Tribe's rights, privileges and immunities as if it engaged in the activities undertaken by AMPS, including, but not limited to, the Tribe's rights of eminent domain, taxation and sovereign immunity.

ARTICLE II

Duration

The period of existence of AMPS shall be perpetual, except that AMPS may have this charter amended or restated or AMPS may be dissolved in accordance with the Fort Mojave Tribal Constitution, as amended.

ARTICLE III

Purposes and Powers

A. General. The purposes for which AMPS is organized are to provide electric power to all users of such power within the Fort Mojave Indian Reservation and any other utility projects which would benefit the Tribe and that are approved by the Fort Mojave Tribal Council. The Fort Mojave Tribal Council hereby finds and declares that the creation of AMPS is necessary and desirable in order to promote the development of the Tribe's resources, to promote the prudent economic vitality of the Reservation and surrounding communities, to protect the health and welfare of tribal members and to provide employment and training opportunities for tribal members.

B. Enumerated Purposes. The purposes for which AMPS is organized are as follows:

1. To develop, operate and manage the provision of electric powers to all users of electricity within and/or on the Fort Mojave Indian Reservation or owned by AMPS unless the Fort Mojave Tribal Council specifically excludes a specific electricity user from AMPS control.
2. To develop, manage and control all other utilities operated within the Fort Mojave Indian Reservation when so requested by resolution or ordinance of the Fort Mojave Tribal Council.
3. To provide training and employment opportunities for members of the Tribe in the construction, management and operation of providing electric power to the users of electricity within the Fort Mojave Indian Reservation.
4. To facilitate economic development on the Reservation and in surrounding communities.

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5. To enhance and protect the health and welfare of tribal members and the electric utility customers of AMPS.
6. To manage all electric utility enterprises owned or operated by AMPS in a prudent, efficient and economic manner in accordance with Tribal law.

C. Ancillary. To do everything necessary, proper, advisable or convenient for the accomplishment of the purposes hereinabove set forth, and do all things incidental thereto or connected therewith, which are not forbidden by law.

D. Enumerated Powers. AMPS shall have the following enumerated powers:

1. To sue and be sued in courts of competent jurisdiction.
2. To enter into contracts and agreements affecting the affairs of AMPS's service area and to accept all funds resulting therefrom.
3. To contract with private persons, associations, or corporations for the provision of any service within or without its boundaries and to accept all funds and obligations resulting therefrom.

4. To borrow money and incur indebtedness and other obligations and evidence the same by certificates, notes or debentures and issue general obligation or revenue bonds, or any combinations thereof.
5. To refund any bonded or other indebtedness or special obligations of AMPS without an election.
6. To acquire, dispose of and encumber real or personal property, including, without limitation, rights and interests in property, including leases and easements necessary to accomplish the purposes of AMPS.
7. To acquire, construct, equip, operate and maintain facilities to accomplish the purposes of AMPS.
8. To manage, control and supervise all the business affairs and properties of AMPS.
9. To adopt, by resolution, rules and regulations consistent with federal, state and tribal law which are necessary, appropriate or incidental to any authorized services provided by AMPS.
10. To delegate the management of the day-to-day operation of AMPS to others, and in exercising its authority hereunder, may rely on its officers and other experts. AMPS shall establish policies and retain responsibility for the ultimate direction and affairs of AMPS but may give usual and essential latitude to AMPS Manager and his delegated employees.
11. To fix and collect taxes, rates, fees, tolls and other service charges pertaining to the services of AMPS, including, without limitation, minimum charges and charges for availability of the facilities or services relating thereto.

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12. To construct, establish, and maintain works and facilities; (a) in, across, or along any easement dedicated to a public use, or any public street, road or highway; (b) in, upon, or over any vacant public lands; and (c) in, across, or along any stream or water course.
13. To plan for the development within the service area served by AMPS including, but not limited to, review of all comprehensive plans of tribal government located within AMPS's service area, and review of all capital construction of other federally funded projects proposed by any governmental entity within the boundaries of AMPS's service area for which review is required by federal, state or tribal law.
14. To require all commercial and residential units within the Reservation to connect to the electric service provided that said unit is within AMPS's designated service area.
15. To have and exercise all powers necessary, convenient or incidental to the express powers identified above.

E. Exercise of AMPS's Powers. AMPS shall exercise its authorized powers in good faith and in a manner which it believes to be in the best interests of the Fort Mojave Indian Tribe and the interests of those within AMPS's service area.

F. Interpretation. The purpose specified herein shall be construed as both purposes and powers.

ARTICLE IV

Ownership

To enable AMPS to carry out its purposes, the Fort Mojave Tribal Council may, from time to time at the request of the Board of Directors of AMPS, vest AMPS with the power to exercise all of the Fort Mojave Tribe's powers with respect to designated tribal properties, both, real and personal, in accordance with the purposes and powers under Article III of this Charter. Such properties transferred to AMPS shall not be revocable by the Fort Mojave Tribal Council during the period AMPS is authorized to exercise control and possession of the transferred properties.

ARTICLE VI

Assets

Subject to such contractual rights of others, including the Fort Mojave Tribe, AMPS shall have as its assets, and the authority to acquire, manage, own, use, pledge, encumber, or otherwise dispose of the following:

A. Tribal Property. Tribal properties of a real or personal nature subject to any conditions set out in the Tribal Council's resolution authorizing the transfer of such properties to AMPS.

B. Funds. All funds which AMPS may acquire by grant, gift, loan or other means.

C. Other Real and Personal Property. All interests in real and personal property whether of a tangible or intangible nature, AMPS may acquire by grant, gift, loan, purchase, lease or other means.

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D. Other assets. All earnings, interest, dividends, accumulations, contract rights, claims and other proceeds arising from the above listed assets.

ARTICLE VII

Control of Assets

All cash assets shall be deposited, invested, re-invested or paid out pursuant to the contractual obligations of AMPS and in accordance with the standards of prudent business practices so as to ensure the continued existence, integrity and viability of AMPS. Such decisions are reserved exclusively to the Board of Directors of AMPS.

ARTICLE VIII

Asset Distribution/Dissolution

AMPS shall determine in its sole discretion as to when a payment is to be issued and the amount of any such payment. Upon dissolution of AMPS, the remaining assets, after payment of all debts and liabilities, shall be returned to the Tribe. In no event shall the Fort Mojave Tribe be liable for any debts or liabilities of AMPS.

ARTICLE IX

Board of Directors

The Board of Directors of AMPS shall consist of seven (7) members and is hereby vested with all powers necessary to carry out the purposes of AMPS. The initial members shall be selected by the Fort Mojave Tribal Council. There are no prohibitions against the Fort Mojave Tribal Council serving as the Board of Directors. Members of the Board need not be enrolled members of the Fort Mojave Tribe. However, no more than three (3) Board members of AMPS may be non-members of the Fort Mojave Indian Tribe. The Board members' term of office and their qualifications shall be specified in the Bylaws.

ARTICLE X

Registered Office and Registered Agent

The address of AMPS's registered office is Office of the Chairperson of AMPS, Fort Mojave Indian Reservation, 500 Merriman Avenue, Needles, California 92363, and the registered agent at this address is the Chairperson of AMPS.

ARTICLE XI

Advisory Board

The Tribal Council of the Fort Mojave Tribe shall act as the Advisory Board to the Board of Directors of AMPS for the purpose of providing information and advice to the Board regarding political, cultural and social issues that concern the Tribe and its members.

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ARTICLE XII

Trustee

AMPS is the trustee of all assets owned or controlled by AMPS on behalf of the Fort Mojave Indian Tribe.

ARTICLE XIII

Litigation

The Fort Mojave Tribe reserves the right to challenge in whatever forum all matters involving AMPS which, in the opinion of the Fort Mojave Tribe, affect its rights, privileges and immunities as a sovereign government. Before initiating or entering an appearance in any such litigation or

administrative proceeding, AMPS shall give at least thirty (30) days, or such time as the court rules allow, prior written notice to the Chairperson of the Fort Mojave Tribe.

ARTICLE XIV

Waiver of Immunity

The acts or omissions of AMPS, whether pursuant to the powers enumerated in Article III or otherwise, shall not create any liability, obligation or indebtedness either of the Fort Mojave Indian Tribe or payable out of assets, revenues or income of the Tribe, and only the assets, revenues and income held by or in the name of AMPS shall be subject to, to the extent otherwise permitted herein and by law, to the debts, obligations or other liabilities created or incurred by AMPS. Any waiver of immunity of or by AMPS shall not be construed to waive any immunity of the Fort Mojave Indian Tribe or any other covered persons and entities or extend any liability to any assets, revenues or income of the Fort Mojave Indian Tribe.

RESOLUTION

BE IT RESOLVED, that the foregoing Charter of the Aha Macav Power Service, be and the same is hereby adopted, as amended. Upon adoption of the amended Bylaws of the Aha Macav Power Service by the Board of Directors, two signed duplicate originals shall be delivered to the office of the Tribal Secretary of the Fort Mojave Tribal Council.

BE IT FURTHER RESOLVED, that the Chairperson and the Secretary of the Fort Mojave Tribe are authorized and instructed to sign this resolution for and on behalf of the Fort Mojave Tribal Council.

Certification

We, the undersigned, Chairperson and Secretary of the Fort Mojave Tribal Council, hereby certify that the Fort Mojave Tribal Council met on this day and by a vote of 6 in favor and 0 opposed in a duly called and convened meeting of the Council, adopted the foregoing resolution.

Dated this 13th day of July, 1991.

Case Study: xxix NEOS Corporation Tohono O'odham Utility Authority

(signature)

Chairperson

Fort Mojave Tribal Council

ATTEST:

(signature)

Secretary

Fort Mojave Tribal Council



MODEL ENERGY AND UTILITY SERVICE CODE

DRAFT

CHAPTER I: GENERAL PROVISIONS

SECTION 1.01 SHORT TITLE:

This code shall be entitled the “Energy and Utility Service Code” and shall be a title within the Tribal Ordinances.

SECTION 1.02 AUTHORIZATION AND REPEAL OF INCONSISTENT LEGISLATION:

1. Authority for this Title is found in the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) as amended, and under Article ___ of the _____ Tribe’s Constitution and Bylaws. The _____ Tribe is a federally chartered tribal corporation that possesses sovereign powers of government within the geographical boundaries of the _____ Reservation. The Chairman of the _____ Tribal Council and the _____ Tribe are authorized to make and enforce this law pursuant to the authorities described above and their status as a sovereign Federally Recognized Indian Tribe.
2. Pursuant to the _____ Tribe’s retention of the full spectrum of sovereign powers, the Tribal Council has the authority, desires to and does hereby establish this Title ___ in order to further the best interests of the Tribe, its members and their communities and for the purposes of managing the natural gas, electrical, telecommunications, railroad, sewer, water and other utility functions of the Tribe, and to regulate all such matters of Third Parties on the Reservation, and for the purposes of facilitating economic development of the Reservation, and providing and saving tribal revenues by effectively managing tribal utility resources.
3. Any prior Tribal regulations, resolutions, orders, motions, legislation, codes or other Tribal laws which are inconsistent with the purposes and procedures established by this Title ___ are hereby repealed to the extent of any such inconsistency.

SECTION 1.03 JURISDICTION

1. This Title shall be applicable to all natural gas, electric, water, sewer, telecommunication and railroad services provided on the Reservation.
2. Chapter VII, regarding Negotiation of Rights of Ways Across the Reservation, shall be applicable to all crossings of Reservation lands by wires, pipelines, fiber, rail, or other conduits and related facilities for transmitting or transporting energy, telecommunications, water/sewer or utility related products or information, when such crossings require the use of Tribal land rights¹.
3. Enforcement of this Title shall be as described herein, or pursuant to the Tribal Court System.
4. To the extent any agreement exists with any Third Party which conflicts with the provisions in this Title, the agreement shall control.

SECTION 1.04 DEFINITIONS

1. Tribal Council: “Tribal Council” means the governing body of the _____ Tribe, established pursuant to Article ____ of the Constitution of the Tribe.
2. Franchise: A “Franchise” is the right to provide energy, telecommunication, or other public utility services under the jurisdiction of this Title ___ within the Reservation. A Franchise may be “Exclusive” which means that only one entity has the right to provide services within the franchised area, or “Nonexclusive” which means that more than one entity may provide similar services within that franchised area.
3. Order: An “Order” is a decision of the Public Utilities Committee regarding a franchise, which sets or adjusts rates and tariffs, prescribes or enforces rules and regulations, or is otherwise necessary and convenient to carry into effect the provisions of this Title.²
4. Public Utility: The term “public utility” means every corporation, company, individual, or association that owns, controls, operates or manages, except for private use, any equipment, plant or generating machinery, transmission lines or pipelines or produces, transmits, delivers, or furnishes heat, light, water, sewer, telephone or rail service, or power.³
5. Public Utilities Committee⁴: The “Public Utilities Committee” refers to the Tribal committee established hereunder with the authority and jurisdiction to supervise and control the public utilities described herein.⁵

¹ Possible include a another section for crossing of allotted lands.

² Kan. Stat. Ann. Sections 66-101 and 66-101(g).

³ See, e.g. Kan. Stat. Ann. Section 66-104 (a), *et seq.* and 79-5a01

⁴ Kansas’ Public Utilities Code establishes a State Corporation Commission, generally referred to as the Public Utilities Commission, to govern public utility providers and services. To distinguish the State Commission from the

- 6. Reservation: “Reservation” means the territory within the present confines of the exterior boundaries of the _____ Reservation, and all lands outside the exterior boundaries of the Reservation which are under the jurisdiction of the _____ Tribe(s), and such other lands without such boundaries as may be added thereto under any laws of the United States.
- 7. Third Party: A Third Party is any party not already referenced.⁶
- 8. Tribe or Tribal: “Tribe or Tribal” shall refer to the Kickapoo Tribe in Kansas, the Prairie Band Potawatomi Nation, the Sac & Fox Nation of Missouri in Kansas, or the Iowa Tribe of Kansas and Nebraska, individually or collectively.

SECTION 1.05 PERIOD OF DURATION

This Title ____ shall be perpetual, or until revoked or surrendered by action of the _____ Tribal Council.

CHAPTER II: PROHIBITION OF STATE TAXES

SECTION 2.01 STATE TAXES PROHIBITED

All entities providing services under this Title are hereby prohibited from assessing, or including within invoices or bills sent to any entity within the Reservation, for service provided within the Reservation, any tax, tariff, or collection established or imposed by the State of Kansas and not explicitly approved or ratified by the Tribal Council, or its designee.

CHAPTER III: PUBLIC UTILITY COMMITTEE

SECTION 3.01 CREATION OF PUBLIC UTILITY COMMITTEE

A Public Utility Committee is hereby established which shall have the purposes, powers, and authorities described herein. The Public Utility Committee may herein be referred to as the “Committee”.

Tribal entity this Article creates, is called a “Committee” for the purposes of this document. See generally, Chapter 66 of Kan. Stat. Ann.

⁵ This body can be called by another name at your discretion.

⁶ If a tribal utility is formed in the future, this code may be amended to exclude the tribal utility from these requirements if needed.

SECTION 3.02 GENERAL PURPOSES, POWERS & AUTHORITY OF PUBLIC UTILITY COMMITTEE

1. The purpose for which the Committee is organized is to provide an entity through which the Tribe may regulate the actions of Third Parties providing services related to all natural gas utility, electrical utility, other energy utility, water, sewer and telecommunications services. The Committee may also regulate certain railroad functions as described herein⁷.
2. The Committee shall have the power and authority to consider and adopt rules, terms and conditions relating to the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing such product or service within the Reservation; to require and permit any public utility to make such additions or extensions to its physical plant as may be reasonable and necessary for the benefit of the public, and may designate the location and nature of such additions and extensions and the time within which such shall be completed; and to provide a reasonable and lawful penalty for noncompliance with any of the provisions adopted hereunder.⁸

SECTION 3.03 SPECIFIC POWERS AND AUTHORITY OF PUBLIC UTILITY COMMITTEE

The Public Utility Committee is authorized to do the following:

1. To adopt reasonable and proper rules and regulations to govern its proceedings, including the assessment of costs on any complaint brought hereunder, and to regulate the mode and manner of all investigations, tests, audits, inspections and hearings not specifically provided for herein,⁹ to request, receive and analyze information, to hold meetings or informal hearings, and to deliberate as necessary to fulfill its function as described in this Title.
2. To issue Orders binding on Third Parties acting on the Reservation pursuant to this Title.
3. To prescribe rules and regulations for the performance of any service or the furnishings of any commodity under its jurisdiction by including such rules in Franchise documents.
4. To employ or appoint employees, agents, or contractors and to define their duties and fix their compensation.
5. To order improvements to the service or facilities of Franchisees.
6. To ascertain the value of the property of every Franchisee and every fact which, in its judgment, may or does have any bearing on such value.

⁷ These railroad functions are not enumerated, but are generally described in Kan. Stat. Ann. Chapter 66.

⁸ Kan. Stat. Ann. Sec. 66-133 (1-3)

⁹ Kan. Stat. Ann. Sec. 66-106(a)

7. To order a surcharge on rates under their jurisdiction sufficient to cover the reasonable costs of the Committee's operation.
8. To apply for and administer grants consistent with the purposes of this Title ____, e.g. prepare and submit a residential energy conservation plan to the federal secretary of energy and receive and disburse and federal funds appurtenant thereto.¹⁰
9. To investigate any written complaint made against any public utility governed by the title that any of the rates, rules, regulations, acts or practices of such utility are in any respect unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, or both, or that any service performed for the public is unreasonably inadequate, inefficient, unduly insufficient or cannot be obtained.¹¹
10. To make joint investigations, hold joint hearings within or without the Reservation, or issue joint or concurrent orders in conjunction or concurrence with any official, agency, instrumentality or commission of any Tribe or State of the United States.¹²
11. To participate on regional boards or bodies and to participate on national tribal boards or bodies, as is approved by the Tribal Council.
12. Other authorities necessary and convenient to accomplish the duties described in this Title ____.
13. To declare it necessary and in the public interest to acquire and control any franchise supplying water, natural or artificial gas, electric light or power or heat, in the event the franchise of a public utility has expired.¹³
14. To make recommendations to the Tribal Council on various matters relating to this Title.

SECTION 3.04 LIMITATIONS ON POWERS OF PUBLIC UTILITY COMMITTEE

The Public Utility Committee shall have no power:

1. To expressly or by implication enter into any agreement of any kind on behalf of the Tribe.
2. To pledge the credit or assets of the Tribe.
3. To dispose of, pledge, or otherwise encumber real or personal property of the Tribe.
4. To waive any right, privilege, or immunity of the Tribe or to release any obligation owed to or by the Tribe.

¹⁰ Kan. Stat. Ann. Sec. 66-1,186

¹¹ Kan. Stat. Ann. Sec. 66-101e

¹² Kan. Stat. Ann. Sec. 66-106(2)(c).

¹³ Kan. Stat. Ann. Sec. 12-811

SECTION 3.05 PUBLIC UTILITY COMMITTEE OPERATIONS

1. The Committee members shall in all cases act as a board, regularly convened, by a majority vote, and they may adopt such rules and regulations for the conduct of their proceedings as they may deem proper, not inconsistent with this Title, and applicable tribal or federal law.
2. A majority of the Committee shall be members of the Tribe. A Committee member's duties shall be performed in good faith, in a manner the member believes to be in or not opposed to the best interests of the Tribe, and with such care as an ordinarily prudent person would use under similar circumstances in a like position.
3. The initial Committee may consist of a subcommittee of the Tribal Council and other members as are appointed by the Tribal Council. The number of Committee members shall be five, but may thereafter be increased or decreased at any time by a duly adopted resolution of the Tribal Council.
4. The Committee shall elect from its own number a Chairperson and a Vice Chairperson and shall appoint a secretary to keep a record of its proceedings.¹⁴ The Chairperson shall be responsible for presiding over meetings of the Committee. The Vice Chairperson shall assume the duties of the Chairperson in the absence of the Chairperson. In the event of a tied vote, the vote of the Chairperson shall break the tie. A quorum of Committee members shall consist of a majority of Committee members. In the event of a quorum not being present, a lesser number may adjourn the meeting from time to time without further notice.
5. Regular or special meetings of the Committee may be called upon the request of the Chairperson or of any two Committee Members. Notice of meetings, other than the regular meeting shall be given by service upon each Committee Member in person orally at a preceding meeting; or by telephone or mailing to the last known post office address of the member, at least three days before the date therein designated for such meeting, including the day of mailing. Such notice shall specify the time and place of such meeting, and the business to be brought before the meeting. No business other than that specified in such notice shall be transacted at any special meeting.
6. Each Committee Member shall have one vote.
7. The Committee shall hold an annual meeting with the Tribal Council beginning with the year 2002. The meeting shall be for the purpose of reporting on the annual activities and business that may come before the Committee. Notice of the meeting shall be posted at customary and appropriate public notice locations at least 30 days in advance of the meeting.
8. The meetings of the Committee shall be publicly noticed and open to the public¹⁵, unless deliberation of the Committee over issues before it requires that the Committee declare an executive session. To the extent practical, executive sessions shall be declared as such in the public notices. On important matters affecting the residents of the Reservation, the

¹⁴ Kan. Stat. Ann. Sec. 13-1221(a)

¹⁵ Kan. Stat. Ann. Sec. 13-1222

Committee shall publish in the Tribal newspaper the nature of the matter and Committee meeting times. The Committee may, in its discretion, hold formal public meetings to better understand the views of Reservation customers and service providers and Franchisees, and to better determine the best interests of the Tribe.

SECTION 3.06 ORDERS OF THE PUBLIC UTILITY COMMITTEE

1. The Committee may regulate Third Parties under its jurisdiction by issuing one of the following types of Orders:
 - a. Orders Approving Franchises or Disapproving a Franchise under Chapter IV of this Title. An Order Disapproving a Franchise may contain a listing of requirements to be met for reconsideration.
 - b. Orders Approving Rates or Tariffs or Disapproving Rates or Tariffs under Chapter V of this Title. An Order Disapproving a Rate or Tariff may contain a listing of requirements to be met for reconsideration.
 - c. Orders Enforcing conditions of Franchises or Rates or Tariffs under Chapter VI of this Title.
2. The Committee shall create a process consistent with the provisions of this Title leading up to the issuance of each of the above types of Orders. When the process is initiated by the Committee by the issuance of a Notice of Franchise pursuant to Chapter IV of this Title, or by issuance of a Notice of Ratemaking pursuant to Chapter V of this Title, or by issuance of a Notice of Enforcement pursuant to Chapter VI of this Title, such Notice shall be accompanied by a tentative schedule for completion of the process and ultimate issuance of the Order.
3. All Orders must be approved by and signed by at least a majority of the members of the Committee.
4. All orders, regulations, services, rates, classifications, etc. fixed by the Committee shall be in force and effect 30 days after approved and shall be prima facia reasonable unless changed or modified by the Committee, Tribal Council or Tribal Court.¹⁶

SECTION 3.07 COMPENSATION FOR PUBLIC UTILITY COMMITTEE

1. The Committee members shall receive such compensation for their services as may be determined by the Tribal Council.
2. Committee members shall be entitled to compensation for their actual and necessary expenses, including travel expenses, incurred in the performance of their duties as members

¹⁶ Kan. Stat. Ann. Sec. 66-115

of the Committee. All requests for reimbursement must be approved by the Committee Chairperson and verified by receipts.¹⁷

SECTION 3.08 TERMS OF SERVICE FOR MEMBERS OF PUBLIC UTILITY COMMITTEE

1. Committee members shall be appointed for staggered terms: one position for an initial period of 1 year, two positions for an initial period of 2 years, and two positions for an initial period 3 years. Thereafter, all terms shall be for 3 years.
2. Committee members may resign by submitting written notice of their resignation, and the Tribal Council at the next Tribal Council meeting shall accept such resignation.
3. Any Committee member may be removed for cause by a majority vote of the Tribal Council at a duly called meeting after the Tribal Council has had the opportunity to fully review the matters constituting cause for removal and after allowing any affected Committee member to appear before the Tribal Council and respond to the allegations which constitute cause for removal. Cause for removal shall be limited to the following:
 - a. Such Committee member has failed to attend any four meetings of the Committee out of any eight consecutive meetings, unless any of such absences is excused; or
 - b. Such Committee member has, during his or her term on the Board, been convicted of any crime reflecting upon such member's honesty or ability to fulfill the fiduciary obligations imposed by law upon such member; or
 - c. The Committee has found, in a meeting where the topic was scheduled for discussion, that the Committee member has committed malfeasance or breached his fiduciary duty to the Tribe.
4. A vacancy shall exist from the date of any Committee meeting after which a member is removed or whose resignation is accepted as provided herein.
5. The Tribal Council will name new appointments to fill any vacancies in the Committee within thirty days after such vacancy occurs. Any vacancy created by the expiration of a Committee member's term may be filled with the exiting Committee member.

SECTION 3.09 ELIGIBILITY TO SERVE ON PUBLIC UTILITY COMMITTEE

1. To be eligible for election to the Committee an individual must be at least 25 years of age, and have experience in one or more of the following fields:
 - a. Financial management,
 - b. Human or natural resources,

¹⁷ Kan. Stat. Ann. Sec. 13-1222

- c. Utility management,
 - d. Law,
 - e. Engineering, or
 - f. Economic development.
2. A Committee member shall vacate his office if during the term of the office he or she shall be a party to a contract for profit with an entity doing business under the jurisdiction of the Committee, and/or that presents a conflict of interest with the duties of the Committee Member.

SECTION 3.10 GENERAL PROVISIONS APPLICABLE TO PUBLIC UTILITY COMMITTEE

1. If any section, or any part thereof, of this Title ___ or the application thereof to any party, person, or entity in any circumstances shall be held invalid for any reason whatsoever by a court of competent jurisdiction or by federal legislative enactment, the remainder of the relevant section or part of this Title shall not be affected thereby and shall remain in full force and effect as though no section or part thereof has been declared to be invalid.
2. Nothing in this Title __ shall provide of be interpreted to provide a waiver of the sovereign immunity of the Tribe or any of its governmental officers, employees and/or agents.

CHAPTER IV: FRANCHISES

SECTION 4.01 FRANCHISE REQUIREMENT

1. All providers of artificial or natural gas, electric light, water, power or heat, street railways, telegraph and telephone line operators, and other entities providing energy or utility services to customers on the Reservation must obtain a franchise to provide service within the Reservation.¹⁸
2. All Franchises shall be Nonexclusive.¹⁹

¹⁸ Kan. Stat. Ann. Sec. 12-2001 (a)

¹⁹ Kan. Stat. Ann. Sec. 12-2001(b)(3); Chapters 12 and 13 of the Kansas statutes address the ability of large cities to own water works and electric light plants, issue bonds, establish rates, and generally produce and supply water and power within city limits. No other electricity suppliers are allowed to furnish, distribute and sell electricity to customers within the city unless the municipality has first refused to do so and the city subsequently authorizes it. KSA 13-1235. Presumably, KSA 66-1,175 discussing the EXCLUSIVE right of retail electric suppliers to provide service within certified boundaries, is referring to these city-owed water and power works.

SECTION 4.02 EXISTING AGREEMENTS

In no way does this title impair existing agreements between the Tribe and Third Parties relating to the provision of services within the Reservation.

SECTION 4.03 PROCEDURES FOR FRANCHISING

1. Franchises shall be Issued by Order of the Public Utility Committee after consideration of all relevant facts submitted to the Committee, and after consideration of the best interests of the Tribe.
2. Entities with Existing Agreements:
 - a. Within 60 days after formation of the Public Utility Committee, the Committee shall issue an Order granting non-exclusive franchises to holders of existing agreements.
 - b. Such franchise shall be for the term of their existing agreement.
 - c. All such Orders shall be forwarded to the holder of the agreement with a cover letter and copy of this Title.
3. Entities without Existing Agreements:
 - a. Within 120 days after formation of the Public Utility Committee, the Committee may issue a Notice of Franchise to entities who have not executed an existing service agreement but who are under their jurisdiction and are currently providing service to customers under the jurisdiction of this Title.
 - b. The Committee shall issue similar Notices of Franchise to all similarly situated entities of which the Committee is aware. The Committee shall also publish a notice that Franchises of the character being noticed are being considered.
 - c. Each Notice of Franchise shall include the following:
 - i. A copy of this Title _____.
 - ii. A requirement that the entity providing service submit an Application for Franchise letter by a date certain requesting a Franchise if they wish to continue providing services within the Reservation. Such Application for Franchise shall contain, in the manner proscribed by the Committee:
 1. Information showing how the entity meets or will meet the Obligations of a Franchisee as set forth herein.
 2. Information regarding the rates charged for services and each type of services provided.
 3. Information regarding the methods by which services are provided.
 4. Other information as needed.
 - iii. Any filing fee requirement, which is to be submitted with the letter requesting a Franchise.

- d. The Committee shall consider all requests for Franchises and shall grant those that are determined to be in the best interests of the Tribe. The Committee may require new Franchisees to negotiate a tribal tax or license agreement for the term of the Franchise as a condition of the Franchise.
- e. No person, firm or corporation shall be granted an exclusive franchise, right or privilege whatsoever.²⁰
- f. Any entity wishing to provide services under the jurisdiction of the Committee on the Reservation shall submit an Application for Franchise and subject itself to the franchising process prior to beginning services.
- g. No grant, right privilege or franchise shall be made to any person, firm, corporation or association unless it provides for adequate compensation or consideration therefore to be paid to the _____ Tribe, such fixed charge to consist of a percentage of the gross receipts derived from customers within the Reservation.²¹

SECTION 4.04 OBLIGATIONS OF FRANCHISEE

1. As a condition for carrying on the commercial transactions on tribal lands and as a condition for the operation and maintenance of facilities on tribal lands to conduct those commercial transactions, all Franchisees shall be bound by the obligations set forth herein.
2. A particular Franchise may contain exemptions from one of more of these obligations. No exemption will be effective unless it explicitly references this Section 4.04 and the exempted subsection number in the Committee's Order granting the Franchise. A particular Franchise may contain additional obligations specific to the service provided.
3. The following obligations attach to Franchises:
 - a. **Obligation to Serve:** All Franchisees within the Reservation are obligated to continue providing such services at rates consistent with other customers within the State of Kansas and under service conditions consistent with service to other customers within the State of Kansas until notice has been provided to the Franchisee by the Committee that the provision of service is no longer an obligation, or until the Committee approves rates and/or regulations governing such service which are different from those customarily provided to other customers within the State of Kansas.
 - b. **Public Benefit Funds Collected:** All funds collected from customers within the Reservation which are collected for the benefit of the public under a State of Kansas or Committee-approved rate shall be utilized for those purposes to benefit residents of the Reservation. Funds collected from customers within the Reservation may not be used to benefit other customers not within the Reservation.

²⁰ Kan. Stat. Ann. Sec. 12-2001(b)(3)

²¹ Kan. State. Ann. Sec. 12-2001(b)(5)

- c. Competition: All Franchisees serving customers within the Reservation shall be in competition with others providing similar services, as follows:
 - i. All infrastructures designed for the delivery of the service shall be open to use by any other service providers. Use of the infrastructure owned by one service provider by another service provider may be subject to charges by the owning entity, however, such charges shall be provided under the same terms and conditions that the service provider owning the infrastructure provides to itself.
 - ii. Such charges shall be public information, to be shared with interested parties at their request.
 - iii. Use of the infrastructure shall be provided on a first come-first served basis. All capacity of the infrastructure not in use during the month of a request shall be available for use by the next requesting service provider who has customers ready and willing to use the system.
 - iv. Capacity for use of the system may be sold in reasonable minimum quantities.
 - v. Any customer switching to a new service provider using the same infrastructure must do so in writing.

- d. Publication and Filing of Rates, Rules and Regulations and Contracts:
 - i. All public utilities shall publish and file with the Committee, in such form and at such time as the Committee may prescribe, copies of all schedules of rates or tariffs, rules and regulations and contracts between public utilities pertaining to any and all jurisdictional services to be rendered by such public utilities.²²
 - ii. Maps of their service territory and the infrastructure therein. The Committee may require that such maps may be in an electronic format sufficient for input into a GIS database.
 - iii. The annual measured usage of each service provided on the Reservation.
 - iv. The annual measured usage of each service provided to the Tribe and/or its subsidiaries, if such Tribal customer makes use of the service provided within the Reservation.
 - v. The annual amount of any Public Benefits Funds collected, and the manner of use of those funds.
 - vi. An annual corporate report verified by the oath of an officer thereof.
 - vii. Other information as is requested by the Committee after reasonable notice.

- e. Quality and Reliability of Service:
 - i. All Franchisees shall establish and maintain reasonably sufficient and efficient service²³ consistent with service provided to similarly situated customers within the State of Kansas. The Committee may Order higher standards of reliability where such standards are in the best interest of the Tribe, however, the Committee shall also approve rate increases as necessary and just to fund needed infrastructure or technical improvements for meeting such higher standards.
 - ii. A Franchisee's revenues will also be reduced where electricity providers sell to others or retire facilities which cause a decrease in electrical generating capacity

²² Kan. Stat. Ann. Sec. 66-101c

²³ Kan. Stat. Ann. Sec. 66-101b

- and decrease the power available to the reservation or tribal customers, upon a finding that such actions were inefficient or imprudent.²⁴
- iii. A lack of prudence shall be presumed, and revenues reduced accordingly, if any tribal, state or federal entity assesses a fine or penalty for safety or quality assurance violations against a public utility.²⁵
 - f. Tribal Employment: tribal employment laws and quotas for hiring of tribal members shall bind all Franchisees.
 - g. Metering and Billing:
 - i. Meters shall at all times be properly calibrated so that accurate measurement of services used is maintained. Evidence of such calibration shall be provided to the Committee upon request. The Committee shall have authority to audit the measurement of all services provided under terms described by the Committee
 - ii. Bills shall be in a format which provides information to customers in a manner that is easy to understand and which promotes conservation of resources.
 - h. Disconnection or Discontinuation of Service Policies: Franchisees shall maintain reasonable public policies for disconnection of customers and for discontinuation of service to customers. Such policies shall provide for reasonable notice prior to disconnection, except in the case of emergencies.
 - i. Provision of Data: Franchisees shall furnish to the Committee, in such form and such detail as the Committee shall prescribe, all tabulations, computations, and all other information required by it to carry into effect any of the provisions of this Title ___ and shall make answers to the best of their knowledge, to all questions submitted by the Committee. Whenever required by the Committee, every Franchisee shall deliver to the Committee copies of any and all maps, profiles, contracts, agreements, franchises, reports, books, accounts, papers and records in its possession or in any way relating to its property or affecting its business containing evidence relating to the merits of or pertinent to the hearing of any issue pending before the Committee.
 - j. Inventory of Physical Properties: Franchisees shall file with the Committee an inventory of all its physical properties on the Reservation, designating the exact location of its property. Such inventory shall show in detail the cost of construction together with the depreciation charges incident thereto since construction, or may show the replacement cost of such properties, if in the opinion of the Committee the original cost and depreciation charges cannot be obtained. In the event any Franchisee refuses or neglects to file such inventory, or the inventory so filed is inaccurate, the Committee may send its agents upon the ground and make an inventory as desired by the Committee. The entire cost of making such inventory by the agents of the Committee shall be paid by the Franchisee from its profit and loss account and shall not be charged to operating expenses, and such payment shall be made to the Tribe.

²⁴ Kan. Stat. Ann. Sec. 66-128(j)

²⁵ Kan. Stat. Ann. Sec. 66-128(i)

- k. **Improvements:** Franchisees shall make improvements to their existing plant, scales, equipment, apparatus, facilities or other physical property, or erect new structures in a manner and within the time specified by the Committee upon a finding of the Committee, after the opportunity to be heard by the Franchisee, that such improvement, addition, extension, repair or change promotes the security or convenience of its employees or the public.
- l. **Interconnection Standards and Obligations:** Franchisees shall maintain reasonable public policies for interconnection to their facilities. No Franchisees shall disapprove an interconnection that meets national standards of safety and reliability. The Tribe and its subsidiaries shall have the right to interconnect wholesale or retail facilities to the facilities of any Franchisee under the same terms and conditions as the Franchisee interconnects to its own facilities.
- m. **Joint Use of Equipment:** Franchisees shall permit the use of their conduits, subways, tracks, wires, poles, pipes or other equipment or any part thereof on, over, or under any street or highway, by any other Franchisee, after an opportunity to be heard, upon Order of the Committee. The Order shall include findings that:
 - i. Public convenience and necessity require the joint use of poles or facilities,
 - ii. Such use will not result in irreparable injury to the owner or other users of the equipment,
 - iii. That such Franchisees have failed to agree upon such use or the terms and conditions or compensation for the same,
 - iv. The Franchisee to whom the use is permitted is liable to the owner, or other users of such conduits, subways, tracks, wires, poles, pipes, or other equipment for such damage as may result from their use, and
 - v. Appropriate compensation is set forth.
- n. **Safety:** Franchisees shall act in a manner as to promote and safeguard the health and safety of its employees, customers, and the public, and to this end to prescribe the installation, use, maintenance, and operation of appropriate safety or other devices and appliances, and to establish appropriate standards of equipment, and to require the performance of any other act necessary for the health or safety of its employees, customers, or the public.
- o. **Authority to Enter Premises:** Franchisees shall allow Members of the Committee and their agents to enter upon any premises occupied by any Franchisee for the purpose of making the examinations and tests and exercising any of the other powers provided for in this Title __ and to set up and use on such premises any apparatus and appliances necessary therefore. The agents and employees of such Franchisee shall have the right to be present at the making of such examination and tests.
- p. **Net Metering:** All electrical utility Franchisees shall have policies providing for Net Metering on the Reservation. Net Metering is the ability of utility customers to install distributed generation behind the Franchisee's meter and to run that generator as

needed, while the meter nets power coming in to the customer and the power going out of the customer's meter.

- q. Energy Conservation: Franchisees shall promote energy conservation as is set forth in 4.05.
- r. Low Income Programs: Franchisees shall maintain a program for subsidizing low income persons within the Reservation as is set forth in 4.06.
- s. Environmental Obligations: Franchisees shall protect the environment as is set forth in 4.07 and in other Federal and Tribal laws.
- t. Special Responsibilities: Franchisees shall have the special utility responsibilities set forth in 4.08 and in other Federal and Tribal laws.
- u. Maintenance: Franchisees shall have the maintenance obligations as set forth in 4.09.
- v. Federal Regulations: Franchisees shall have all obligations described in federal regulation, including but not limited to those set forth in 25 U.S.C. Sec.169.5.

SECTION 4.05 ENERGY CONSERVATION

1. Weatherization: Franchisees providing electrical utility related services shall promote the weatherization of tribal buildings through programs similar to those available to customers within the State of Kansas. Any state or federal funds received for these programs by the Franchisee shall be available for use within the Reservation, if like funding is not also available to the Reservation.
2. Energy Efficiency: Franchisees providing electrical utility related services shall promote efficient use of energy through educational programs, technical assistance programs, energy audits, and financial assistance for improving energy efficiency. Any state or federal funds received for these programs by the Franchisee shall be available for use within the Reservation, if like funding is not also available to the Reservation.

SECTION 4.06 LOW INCOME PROGRAM

1. Franchisees providing electrical utility related services shall maintain a program for subsidizing low income persons within the Reservation through programs similar to those available to customers within the State of Kansas. Any state or federal funds received for these programs by the Franchisee shall be available for use within the Reservation, if like funding is not also available to the Reservation.

2. The Tribe may provide Franchisees with names of customers eligible for these programs if the Tribe determines that the elderly or handicapped, or others should receive a preference in this program.²⁶

SECTION 4.07 ENVIRONMENTAL OBLIGATIONS

1. Facilities on Reservation: Franchisees shall be bound by Federal and Tribal environmental laws regarding all facilities on the Reservation. Franchisees have a duty to protect plants, animals, water, air, and land within the Reservation while doing business on the Reservation and shall adjust their practices when environmental harm can be avoided. Franchisees shall work with the Tribal Environmental, Fisheries, and Cultural Resources offices when issues arise regarding their actions within the Reservation.
2. Notice of Off-reservation Environmental Issues: Franchisees shall provide written notice to the Tribe of all new activities or proposals of the Franchisee that may have a significant impact on the regional environment. Such notice is required of, but not limited to:
 - a. Proposed construction of new facilities likely to cost over \$50,000.
 - b. Proposed changes in company policy significantly affecting the environment.
 - c. Applications for licenses or extension of licenses to Federal entities.
 - d. Transfer of significant ownership of assets of the company.
 - e. Major Federal or State initiatives.
3. No energy utility providing service to this Reservation or its customers shall consider the use of any renewable energy source other than nuclear as the basis for establishing higher rates or surcharges for any service or commodity, nor shall such utility subject any customer utilizing any renewable energy source to any other prejudice or disadvantage on account of the use of any such renewable resource.²⁷

SECTION 4.08 SPECIAL UTILITY REPONSIBILITIES

In exercising its functions within the boundaries of the Reservation, the Franchisee shall adhere to the following principles:

1. No Franchisee shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No Franchisee shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service
2. Except in emergency situations, the Franchisee shall use reasonable efforts to include the customers within the boundaries of the Reservation in the decision making processes which it undertakes for decisions directly affecting service within the Reservation.

²⁶ See e.g. Kan. Stat. Ann. Sections 13-1227 and 13-1228.

²⁷ Kan. Stat. Ann. Sec. 66-117(d)

3. All powers of the Franchisee shall be exercised in good faith and in a manner believed to be in the best interests of the Tribe and Franchisee's customers.

SECTION 4.09 MAINTENANCE OBLIGATIONS

1. All Franchisees shall give notice to the Tribe prior to entering the Reservation for maintenance purposes. Such notice shall include a description of the maintenance to be performed and the time line for the procedures. In the case of an emergency, best efforts shall be made to provide such notice. Franchise documents shall provide the point of contact for notice.
2. Franchisees shall allow Tribal representatives to accompany them during maintenance. Tribal representatives shall have the authority to establish reasonable procedures for protection of cultural plants, cultural places, and the environment.
3. Franchisees shall keep the trimming of trees and other vegetation to a minimum. Franchisees shall consult with Tribal representatives prior to trimming trees or clearing rights of ways. Such Tribal representatives shall have the authority to establish reasonable procedures for trimming of trees and clearing of rights of ways, after consideration of safety and reliability issues described by Franchisee.

SECTION 4.10 OWNERSHIP OF WIRES AND FACILITIES

1. Unless an easement or right-of-way document signed by the Tribe and approved by the Bureau of Indian Affairs exists with regard to Franchisee facilities, no Franchisee holds real property rights or may claim that real property rights have been transferred due to the existence of facilities on the Reservation. All facilities without such documentation are deemed to be personal property.
2. Any new facilities installed on the Reservation by Franchisees in order to extend service to new customers shall be the personal property of the Tribe, and not the personal property of the Franchisee, when the new facilities are paid for by the new customer or by a particular user. The Franchisee shall provide notice to the Tribe of each such facility constructed.
3. Any facilities which are the personal property of the Tribe pursuant to this Section that are used by Franchisee to deliver their product or service shall be operated and maintained by the Franchisee in a manner consistent with the operation and maintenance of their own facilities.

SECTION 4.11 TERM OF FRANCHISE

Each Franchise shall explicitly describe its starting and ending date. No Franchise shall be granted or extended for any longer period of time than 20 years²⁸ from the date of such grant or extension, unless a previous agreement controls such term.

CHAPTER V. RATES AND TARIFFS**SECTION 5.01 RATE OBLIGATIONS**

1. All charges made, demanded or received by any Franchisee for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable.²⁹ Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is prohibited and declared unlawful³⁰.
2. All rates for standard services shall be publicly available to customers.
3. No Franchisee or public utility governed by this Title, shall knowingly or willfully charge, demand, collect or receive a greater or less compensation for the same class of service performed by it within the state, or for any service in connection therewith, than is specified in the printed schedules or classifications, including schedules of joint rates; or demand collect or receive any rate joint rate, toll, fare or charge not specified in such schedule or classification.³¹
4. Rates different from those specified in the published schedule or classification of rates may be charged by any public utility or railway, by agreement with the customer or in cases of charity, emergency, festivity or public entertainment. Additionally, public utilities may grant to the officers, employees and agents of such utility free or reduced rate or service upon such terms and conditions previously instituted.³²

SECTION 5.02 PROCEDURES FOR RATE SETTING

1. Rates for services provided on the Reservation shall be approved by Order of the Public Utility Committee after consideration of all relevant facts submitted to the Committee, and after consideration of the best interests of the Tribe.
2. Entities with Existing Rates for Services Provided on the Reservation:

²⁸ Kan. Stat. Ann. Sec. 12-2001(b)(2)

²⁹ “Just and reasonable” rates are referenced throughout the state public utilities code, see, for example, Kan. Stat. Ann. Sec. 66-1,202.

³⁰ The goal was to make the standard the same so rates would be set based on the non-Reservation customers’ rates for the convenience of utility companies.

³¹ Kan. Stat. Ann. Sec. 66-109

³² Id.

- a. Within 60 days after receiving a Franchise, entities with existing rates for services approved by another regulatory body shall file with the Committee and shall print and keep open to public inspection schedules showing all rates, tolls, rentals, charges and classifications collected or enforced, or to be collected or enforced, together with all rules, regulations, contracts, privileges and facilities which in any manner affect or relate to such rates, tolls, rentals classifications or service. The schedules shall be accompanied by a description of each category of the charges and a description of the calculation of the rates.
 - b. The Committee may approve the rates, or may make inquiry regarding the rates.
 - c. After all inquiries of the Committee are satisfied, the Committee shall approve the rates by Order or suggest changes to the rates consistent with this Title ___.
3. Entities without Existing Rates for Services Provided on the Reservation:
 - a. Concurrent with their Application for Franchise, entities without existing rates for services approved by another regulatory body shall file proposed schedules of rates or tariffs with the Public Utility Committee along with a description of each category of the charges and a description of the calculation of the rates.
 - b. The Committee may approve the rates, or may make inquiry regarding the rates and suggest changes to the rates consistent with this Title ___.
 - c. After all inquiries of the Committee are satisfied, the Committee shall approve the rates by Order.
 4. The Committee may, in their sole discretion, Order an approval of special rates for one or more large users of a particular utility service, however, such negotiated rates shall be demonstrated to be fair to all other customers and in the best interest of the Tribe.³³

SECTION 5.03 CHANGES IN RATES AND SERVICE³⁴

1. Unless the Committee otherwise Orders, no Franchisee or public utility shall make effective any changed rate, joint rate, toll, charge or classification or schedule of charges, or any rule or regulation, contract or practice pertaining or service except by filing with the Committee a schedule showing the changes desired, plainly indicated by proper reference marks in amendments or supplements to existing tariffs, schedules or classification or new issues thereof, at least 30 days prior to the proposed effective date,³⁵ and obtaining the Committee's consent to such change.³⁶

³³ Municipal utilities can fix special rates for water and electricity furnished to the city for such public purposes as street lighting or traffic signals, or to organized institutions of charity. KSA Sections 13-1227 and 13-1228.

³⁴ Based on Kan. Stat. Ann. 66-117

³⁵ Kan. Stat. Ann. Sec. 66-117(a)

³⁶ Kan. Stat. Ann. Sec. 66-117(d)

2. The Committee may, upon complaint or its own motion, give notice and hold a public hearing upon such proposed changes. Pending such hearing, the Committee may suspend the operation of schedule and defer the effective date of such change by delivering to the Franchisee a written statement of its reasons for such suspension. The Committee shall not delay the effective date of the proposed change more than 240 days beyond the date the Franchisee files its application requesting the proposed change. If the Committee does not suspend the proposed schedule within 30 days of the date the same was filed, or issue a final Order relating to the change within 240 days of suspending the proposed change, such proposed schedule shall be deemed approved by the Committee and shall take effect immediately.³⁷ Any amendment that substantially alters the facts or increases the amount sought shall be deemed a new application and the 240 day period shall begin anew.
3. The Committee, for good cause shown, may allow such change to become effective on less than 30 days notice³⁸ by an order specifying the changes so to be made, the time when they shall take effect, and the manner in which they shall be filed and published.
4. Upon a showing by the Franchisee, and a finding by the Committee, that the utility has invested in projects or systems that can be reasonably expected to (a) produce energy from a renewable resource, other than nuclear, for the use of its customers, (b) to cause the conservation of energy used by its customers, or (c) to bring about the more efficient use of energy by its customers, the committee may allow a return on such investment over and above the rate of return fixed for the utility's other investment in property used in its services to the public.³⁹

SECTION 5.04 SALE OF FRANCHISE⁴⁰ OR PROPERTY TO BE APPROVED BY COMMITTEE

1. No Franchisee owning, controlling or operating any property located within the Reservation which is used in the generation, transmission, distribution, or supply of electric power and energy to the Reservation public or any portion thereof shall merge, sell, lease, assign or transfer, directly or indirectly, in any manner whatsoever, any such property or interest therein, or the operation, management or control thereof, or any Franchise covering the same, except when authorized to do so by Order of the Committee.
2. Such Franchisee shall file a verified application setting forth such facts as the Committee shall prescribe or require. The Committee shall review the application.
3. Before Ordering an authorization of the transaction, the Committee shall find the following. The Applicant shall have the burden of showing that the following have been satisfied:
 - a. That the transaction is consistent with the best interests of the Tribe.

³⁷ Kan. Stat. Ann. Sec. 66-117 (b) and (c)

³⁸ Kan. Stat. Ann. 66-117(a)

³⁹ Kan. Stat. Ann. 66-117(e)

⁴⁰ Kan. Stat. Ann. Sec. 66-136

- b. That the cost of and rates for supplying service will not be increased by reason of such transaction.
 - c. That the applicant for such acquisition or transfer has the bona fide intent and financial ability to operate and maintain the property.
4. The Committee shall have power to issue said authorization and Order as requested, or to refuse to issue the same, or to issue such authorization and Order with respect only to a part of the property involved. The Committee shall include in any authorization or Order the terms and conditions as in its judgment the public convenience and necessity may require.

CHAPTER VI. ENFORCEMENT OF CONDITIONS OF FRANCHISES OR RATES AND TARIFFS

SECTION 6.01 ENFORCEMENT

1. The Tribal Attorney, when requested, shall give the Committee such counsel and advice as the committee may from time to time require. It is hereby made the duty of the Tribal Attorney to aid and assist the Committee in all hearings, suits, and proceedings in which the Committee seeks assistance.⁴¹
2. The Rates and Charges and Rules and Regulations of the Public Utilities shall at all times be reasonable and just and reasonably necessary in order to maintain reasonably sufficient and efficient service,⁴² and at the instance of the Committee or consumer, such reasonableness may be reviewed and determined by the Tribal Council.
3. The Committee shall have authority to enforce the terms and conditions of Franchises or Rates and Tariffs by ordering fines and penalties as are just and reasonable, designed to compensate the tribe or customers of the Franchisee, or designed to prevent additional breaches of such terms and conditions. Such Orders shall be enforceable by the Tribal Court, upon institution of an action by the Tribal Attorney.
4. If any public utility violates any of the provisions of this Title, or shall do any act herein prohibited, or fails or refuses to perform any duty enjoying upon it in this act, or fails, neglects or refuses to obey any lawful requirement or order made by the Committee, or any ruling of the Tribal Council, it shall, for every such violation, failure or refusal, forfeit and pay to the Tribe a sum of not less than \$5,000 and not more than \$25,000.⁴³

⁴¹ Kan. Stat. Ann. 66-106(c).

⁴² See Kan. Stat. Ann. Sections 66-1,202 and 13-431

⁴³ E.g. Kan. Stat. Ann. Sec. 66-138, and see also Sections 66-139, 66-177, 66-1,151

CHAPTER VII. NEGOTIATION OF LAND RIGHTS ACROSS RESERVATIONS

SECTION 7.01 PROCEDURE FOR ACQUISITION OF RIGHTS OF WAYS

1. In addition to the procedure required by the United States Department of Interior Bureau of Indian Affairs, all entities seeking a right of way, easement, real property permit, or any other real property right within the Reservation, whether on land held in trust by the United States or on land owned by one or more Allottees, or on fee owned land, shall use the following procedure:
 - a. A duplicate Application for right of way as prescribed by federal regulation shall be filed with the Committee.
 - b. The Committee shall review the Application, and amount and nature of consideration, and shall either make a request to the Applicant that any additional information reasonably necessary for their review of the Application be submitted within a designated time period, or shall inform the Applicant that the Application is adequate for the Committee's initial recommendation to the Tribal Council.
 - c. Upon receipt of all requested information, the Committee shall review the Application and in the case of a right of way across tribal lands shall make a confidential recommendation to the Tribal Council with regard to the terms and conditions and provisions of the right of way document, and consideration for the right of way.
 - d. The Tribal Council shall then determine whether to accept the Application, and provide its consent to the Department of Interior pursuant to 25 C.F.R. Sec. 169.3, or to appoint a team to negotiate with the Applicant. The team shall consist of at least one member of the Committee or member of its senior staff, at least one staff member from the Office of the Tribal Attorney, and any other persons as needed.
 - e. In the case of a right of way across lands belonging to Allottees or others, the Committee shall make a similar confidential recommendation to the Allottees or other. Allottees may then either provide their consent to the Department of Interior pursuant to 25 C.F.R. Sec. 169.3, or may take any other action deemed necessary. The Committee is authorized, but not required, to provide additional assistance at the request of one or more Allottees.
2. For Right of Ways currently under negotiation at the date this Title becomes effective, Section 7.01 shall not be applicable, however, all other provisions of this Title shall be applicable.

SECTION 7.02 VALUATION OF RIGHTS OF WAYS

1. In recognition of the unique land status of the Tribes' Reservation as described in treaty, and in recognition of the special purposes for which this land was reserved from the public domain or other uses by the United States, the granting of real property rights across the Reservation shall only be done with due deliberation and with adequate financial or other consideration.
2. Consistent with 25 C.F.R. Sec. 169.12, such consideration shall be greater than the "fair market value" of off-reservation land rights due to the unique character of Reservation lands and due to the lack of similar or comparable real property transactions for property of this type.
3. The Committee shall recommend appropriate consideration for rights of ways with consideration of the following:
 - a. The cost to the Applicant of not utilizing Reservation lands.
 - b. The Applicant's likely earnings, or historical similar earnings from those facilities crossing Reservation lands, in proportion to the whole facility.
 - c. Previous recent consideration for similar right of way consents.
 - d. The terms and conditions and provisions of the right of way document.
 - e. The obligations and requirements of this Title.
 - f. Any other special circumstances deemed important by the Committee.

SECTION 7.03 TERMS OF RIGHTS OF WAYS

All rights of ways granted under this Title shall be limited in tenure to 25 years from the date of consent.

SECTION 7.04 TRESPASS CHARGES

1. For existing rights of way on the Reservation that may expire without the grant of a new right of way being in effect, and if such delay is not a result of tribal or federal action or inaction, charges for trespass shall be the fair market value for purchase of the land in question in fee simple if such land were off of the Reservation, multiplied by the number of months which the facility has been in trespass.
2. The Committee may recommend to the Tribal Council a different amount for Trespass charges, if appropriate.

SECTION 7.05 TRIBALLY RETAINED RIGHTS

The Tribes shall retain all rights not specifically granted to holders of rights of ways, including but not limited to:

1. The right to tax property or activities within the right of way.
2. The right to regulate and pass laws regarding property or activities within the right of way.
3. The right to control access to the land within the right of way, except as is superseded by the grant of right of way.

CHAPTER VIII: OBLIGATIONS OF THIRD PARTIES HOLDING LAND RIGHTS ACROSS RESERVATION

SECTION 8.01 INTERCONNECTION

All holders of rights of ways on the Reservation shall permit the interconnection of tribal facilities, where safety and reliability are not compromised, and where not prohibited by federal or other tribal law.

SECTION 8.02 NOTICES OF ENTRANCE

1. All holders of rights of ways on the Reservation shall give notice to the Tribe prior to entering the Reservation for maintenance purposes. Such notice shall include a description of the maintenance to be performed and the time line for the procedures. In the case of an emergency, best efforts shall be made to provide such notice. The Committee shall provide the point of contact for notice.
2. All holders of rights of ways on the Reservation shall allow Tribal representatives to accompany them during maintenance. Tribal representatives shall have the authority to establish reasonable procedures for protection of cultural plants, cultural places, and the environment.
3. All holders of rights of ways on the Reservation shall keep the trimming of trees and other vegetation to a minimum. Franchisees shall consult with Tribal representatives prior to trimming trees or clearing rights of ways. Such Tribal representatives shall have the authority to establish reasonable procedures for trimming of trees and clearing of rights of ways, after consideration of safety and reliability issues and other issues described by the right of way document.

SECTION 8.03 NATURAL RESOURCES PROTECTION

1. Facilities on Reservation: All holders of rights of ways on the Reservation shall be bound by Federal and Tribal environmental laws regarding all facilities on the Reservation. All holders of rights of ways on the Reservation have a duty to protect plants, animals, water,

air, and land within the Reservation while doing business on the Reservation and shall adjust their practices when environmental harm can be avoided. All holders of rights of ways on the Reservation shall work with the Tribal Environmental, Fisheries, and Cultural Resources offices when issues arise regarding their actions within the Reservation. All holders of right of ways have a duty to restore such right of ways to their pre-construction condition.⁴⁴

2. Notice of Off-reservation Environmental Issues: All holders of rights of ways on the Reservation shall provide written notice to the Tribe of all new activities or proposals of the right of way holder that may have a significant impact on the regional environment. Such notice is required of, but not limited to:
 - a. Proposed construction of new facilities likely to cost over \$50,000.
 - b. Proposed changes in company policy significantly affecting the environment.
 - c. Applications for licenses or extension of licenses to Federal entities.
 - d. Transfer of significant ownership of assets of the company.
 - e. Major Federal or State initiatives.

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⁴⁴ Kan. Stat. Ann. Sec. 66-1,183