

Editor's note: 83 I.D. 332; Reconsideration denied by order dated Nov. 29, 1976

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

IBLA 73-421

Decided September 16, 1976

Appeal from a decision of the Idaho State Office, Bureau of Land Management, establishing the charge for use and occupancy of communication site right-of-way I-5769.

Set aside and remanded.

1. Appraisals -- Communication Sites -- Hearings -- Rights-of-Way: Act of March 4, 1911 -- Rules of Practice: Hearings

Under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7(a), an applicant has no right to a hearing in connection with original charges for use and occupancy of a communication site, and a hearing pursuant to a request under 43 CFR 4.415 will

not be granted where applicant fails to make specific allegations or offer specific proof to show in what factors a Departmental appraisal is in error.

2. Appraisals -- Communication Sites -- Rights-of-Way: Act of March 4, 1911

Without convincing evidence that charges prescribed under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7 for use and occupancy of a communication site are excessive, charges properly prescribed by an authorized officer will be sustained on appeal.

3. Appraisals -- Communication Sites -- Rights-of-Way: Act of March 4, 1911

Departmental regulation 43 CFR 2802.1-7 contemplates that a charge will be initially established for the entire term of the grant of a communication site right-of-way.

APPEARANCES: Joseph C. O'Neil and Laura F. Davidson, Esqs., Denver, Colorado, for appellant. Frederick N. Ferguson and Bruce P. Moore, Esqs., Office of the Solicitor, Department of the Interior, Washington, D.C., for the Department.

OPINION BY ADMINISTRATIVE JUDGE GOSS

The Mountain States Telephone and Telegraph Company appeals from a decision of the Idaho State Office, Bureau of Land Management [BLM], dated May 10, 1973, in which it is stated in part:

The fair market rental for use of [communication site I-5769] has been determined to be \$ 2,675 for a five-year period. The rental for the first five-year period is now due and payable.

Appellant requests a hearing before an Administrative Law Judge pursuant to 43 CFR 4.415 and asserts the decision is "contrary to and in conflict with the facts and is arbitrary and capricious."

Appellant had an existing microwave site on Squaw Butte, 1 mile south of I-5769 and requested permission to increase the equipment capacity on such site. BLM refused because an increased antenna height would interfere with coverage from a BLM lookout. Therefore, appellant requested the new site, I-5769, the ninth communication site on Squaw Butte. The old site, which is nearly identical in

size and setting to I-5769, had an annual charge of \$ 92 per year. The old site has been relinquished and the use transferred to the new site. The new rental is based upon a BLM appraisal report.

[1, 2] Under 43 CFR 2802.1-7(a) an applicant has no right to a hearing in connection with initial charges. The regulation provides in part:

(a) Except as provided in paragraphs (b) and (c) of this section, [1/] the charge for use and occupancy of lands under the regulations of this part will be the fair market value of the permit, right-of-way, or easement, as determined by appraisal by the authorized officer. Periodic payments or a lump-sum payment, both payable in advance, will be required at the discretion of such officer * * *. [Emphasis added.]

There has been no specific allegation or offer of specific proof to show in what factors the BLM appraisal of the new site is in error. The fact that the charges are higher than previously established for appellant's nearby site and for which the new site is substituted, is not determinative. Therefore, appellant's request for hearing should be and is denied. Cf. Kathleen M. Smyth, 8 IBLA 425 (1972). Without convincing evidence that use and occupancy charges are excessive, charges properly prescribed by an authorized officer will be sustained on appeal. Western Arizona CATV, 15 IBLA 259, 263-64 (1974).

1/ The exceptions are not applicable here.

[3] The decision herein appealed, however, is incomplete. Appellant had requested a grant for a 50-year term, the maximum period permitted under the statute. While the appraisal assumes a grant for a 10-year term, 2/ neither the term of the grant nor the charge for the entire term is set forth in the decision appealed. Section 2802.1-7(a) contemplates that the charge "will be the fair market value of the * * * right-of-way." The charge is thus to be set for the entire grant, 3/ with either periodic payments or a lump-sum payment, at the discretion of the authorized officer. The established charge may be reviewed periodically and revised under section 2802.1-7(e). 4/ A method often used to establish such "fair market value of the * * * right-of-way" is to measure the specific term and other features of the right-of-way grant against leases or grants for comparable sites, including a comparison of charges over the entire terms. On appeal, this information is essential for the Board in its review of the propriety of the charge compared to charges for similar sites, including the neighboring sites on Squaw Butte. For these reasons, the case should be remanded for clarification by the authorized officer.

2/ It is not clear that the Appraiser or the Reviewing Appraiser is an "authorized officer" who, under section 2802.1-7(a), would have authority to establish the term and charge for the grant.

3/ The BLM Manual includes a sample right-of-way decision which provides for an annual rental during the entire term of the grant, payable "[e]very five-years in advance." BLM Manual 2802, Illustration 1, Page 1 (.15).

4/ American Telephone and Telegraph Company, 25 IBLA 341 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded.

Joseph W. Goss
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN PART, DISSENTING IN PART:

To the extent the majority opinion rejects appellant's request for a hearing and the reasons therefor I concur. However, I must dissent from that part of the decision which sets aside the Bureau's Idaho State Office decision and remands the case for further consideration of the appraisal. It is very difficult to understand the majority's position that this Board has insufficient information upon which to review the propriety of the charge compared to charges for similar sites. The rationale for this conclusion appears to be the failure in the decision to set forth the term of the right-of-way and the charge for the entire term. While the decision appealed from is not a model for furnishing information and only gives the annual rental and the amount of the 5-year lump-sum payment, I cannot see that appellant has suffered any prejudice. It would certainly be proper, and indeed preferable, for the Bureau to indicate in a decision requiring advance rental what the proposed term of the grant will be even though its final decision on the application would not issue until the rental is paid. In the absence of some objection by appellant -- with supporting reasons, that such information is essential in appealing the case on the proposed charges -- I believe this is a harmless omission, and not a sufficient reason for setting aside the decision. 1/

1/ In any event, since the appraisal report reflected the proposed term and appellant has undoubtedly seen the report, it was aware of the proposed term and could have objected to it. It has not done so, nor has it tendered any offer of evidence to show error in the appraisal.

It was proper for the Bureau Office to give notice of the annual rental or lump-sum payment. The majority opinion seems to imply that the rental proposed does not establish the value of the right-of-way. The appraisal report, at p. 1, states that the appraisal is to "estimate the fair annual rental for the rights being granted, under a 10-year grant. The appraisal will serve as the basis for establishing the lump-sum payment for 5-years rent in advance." The report, at pp. 7-9, indicates that one of the valuation factors in comparing this site with other sites is the tenure of the lease, and specifically compares the 10-year proposed grant with the terms of the leases selected as most comparable to this site. It is obvious, therefore, that the proposed 10-year term for the grant was a basis for making the comparison and in determining the proper annual rental charge. To set aside the decision and remand this case to reexamine the appraisal for the reasons given appears to be an unnecessary and unwarranted exercise to which I cannot ascribe.

Joan B. Thompson
Administrative Judge

