

CONTINENTAL TELEPHONE OF THE WEST

IBLA 78-179

Decided June 2, 1978

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting request for free rental for right-of-way NM 4348.

Affirmed.

1. Rights-of-Way: Generally

A request for rent-exempt status for a right-of-way granted for telephone poles and lines pursuant to the Act of March 4, 1911, 43 U.S.C. § 961 (1970), is properly denied where the terms of the grant clearly state that the grant is made in consideration of periodic rental payments and contains no authorization for rent-exempt status.

2. Accounts: Fees and Commissions -- Fees -- Rights-of-Way: Generally -- Words and Phrases

"Rural Electrification Administration projects." A right-of-way holder is not excused from payment of rental under 43 CFR 2802.1-7(c) (1976), by virtue of holding an REA loan, where such holder is neither a cooperative or nonprofit organization.

APPEARANCES: Gregory J. Busko, Associate Corporate Counsel, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Continental Telephone of the West has appealed from a decision dated December 12, 1977, of the New Mexico State Office, Bureau of Land Management (BLM), rejecting appellant's request for free rental for right-of-way NM 4348.

The right-of-way for telephone poles and lines in Sandoval and Rio Arriba Counties, New Mexico, was granted pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1970), [repealed by P.L. 94-579, Title VII, § 706(a), October 21, 1976, 90 Stat. 2793] to Lindrith Telephone Co. on July 12, 1968. Lindrith merged with Western States Telephone Co. in October 1968, and the latter subsequently became part of Continental Telephone Co. of the West.

A provision in the original grant states that the rental amount was \$25 for each 5-year period, payable on or before the first day of each 5-year period. A further provision states that the regulations applicable to the grant were 43 CFR 2234.1 and 2234.41 (1967). Subsection 2234.1-2(a)(2) states in pertinent part:

All applications filed pursuant to this part in the name of individuals, corporations or associations must be

accompanied by an application service fee of \$10 except where the right of way will authorize use and occupancy of the lands exclusively for the purposes stated in sec. 2234.1-6(c). The service fee will not be returnable. \* \* \*

Subsection 2234.1-6 (now 2802.1-7 (1976)) covers payment required, exceptions, default, and revision of charges. It provides, in pertinent part:

(a) Except as provided in paragraphs (b) and (c) of this section, 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: (1) When periodic payments are required, the applicant will be required to make the first payment before the permit, right-of-way, or easement will be issued; (2) upon the voluntary relinquishment of such an instrument before the expiration of its term, any payment made for any unexpired portion of the term will be returned to the payer upon a proper application for repayment to the extent that the amount paid covers a full permit, right-of-way, or easement year or years after the formal relinquishment: Provided, That the total rental received and retained by the Government for that permit, right-of-way, or easement, shall not be less than \$25. The amount to be so returned will be the difference between the total payments made and the value of the expired portion of the term calculated on the same basis as the original payments.

(b) Except as provided in paragraph (c) of this section, the charge for use and occupancy of lands under the regulations of this part shall not be less than \$25 per five-year period for any permit, right-of-way, or easement issued.

(c) No charge will be made for the use and occupancy of lands under the regulations of this part:

(1) Where the use and occupancy are exclusively for irrigation projects, municipally operated projects, or

nonprofit or Rural Electrification Administration projects, or where the use is by a Federal governmental agency.

(2) Where the permit, right-of-way, or easement is granted under the regulations in §§ 2821, 2822, 2842, 2871, 2872.

\* \* \* \* \*

(e) At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year.

In September 1973 a rental review was made of appellant's right-of-way pursuant to section 2802.1-7(e) which resulted in increasing the rental from \$25 per 5-year period to \$150 per 5-year period, effective as of the rental period beginning on July 12, 1973. A decision advising appellant of the increase was issued on October 1, 1973. A further reappraisal was made in 1977 when the rental charges were determined to be \$425, effective as of July 12, 1978. By BLM decision of July 12, 1977, appellant was advised of the reappraisal and of its right to a hearing in connection therewith. Appellant replied to this decision by letter dated September 27, 1977, in which it requested free rental under section 2802.1-7(c)(1), supra, asserting that the project on its right-of-way was originally financed with a Rural Electrification Administration (REA) loan which was still outstanding.

The decision appealed from denied appellant's request essentially on the ground that "use and occupancy" of the right-of-way was by a private corporation for profit and even though "it was initially financed in whole or in part by the REA" it "was not for a REA project exclusively." (Emphasis in original.)

On appeal to this Board, appellant's position is that its status as a private corporation for profit does not preclude its eligibility for free rental under the above-quoted regulation. Appellant states that the poles and lines on the right-of-way were built with REA funds and that therefore it should be entitled to free rental.

[1] Having reviewed the case file, we find that it is completely devoid of any indication that appellant or its predecessors in interest earlier had sought free rent. On January 8, 1968, the land office, in receipt of the right-of-way application, advised that a \$10 filing fee was due. By letter of July 3, 1968, the land office further advised the applicant that an appraisal had fixed the rental at \$25 per 5-year period. As noted above, on October 1, 1973, a decision increasing the rental to \$150 per 5-year period was issued. There is no indication in the record that appellant ever objected to, or protested, any of these assessments for any reason. Appellant appears to have acquiesced in and remitted these fees until the summer of 1975 when it wrote letters demanding refunds of all rentals theretofore paid. 1/

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1/ These letters are not contained in the file. They are mentioned in a memorandum dated October 3, 1975, from the Field Solicitor, Santa Fe, advising the State Director, BLM, to issue a decision denying refund of any rentals.

On appeal, appellant has submitted no evidence to support its allegation that it is entitled to rent exempt status because the initial project was financed by an REA loan.

The essential question raised by the appeal is the interpretation of 43 CFR 2802.1-7(c), which reads as follows:

(c) No charge will be made for the use and occupancy of lands under the regulations of this part:

(1) Where the use and occupancy are exclusively for irrigation projects, municipally operated projects, or nonprofit or Rural Electrification Administration projects, or where the use is by a Federal governmental agency.

(2) Where the permit, right-of-way, or easement is granted under the regulations in §§ 2821, 2822, 2842, 2871, 2872.

43 CFR 2802.1-7(c)(2) applies only to roads and highways under 23 U.S.C. (Interstate and Defense Highway System) and roads over public lands under R. S. § 2477, 43 U.S.C. § 932 (1970). 2/ The precise issue is whether the "use and occupancy are exclusively for \* \* \* Rural Electrification Administration projects." 43 CFR 2802.1-7(c)(1) relates exclusively to Governmental and nonprofit use.

The Rural Electrification Administration of the Department of Agriculture has never had any projects 3/ of its own -- its function

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2/ Repealed by section 706(a) of FLPMA, 90 Stat. 2793.

3/ The term "Federal Project Rural Electrification" was utilized in the early days (circa. 1937) of REA. See The Story of Cooperative

has been and continues as a source of loans for electrical plants, transmission lines, and rural telephone service. 7 U.S.C. §§ 901-924 (1976). See 7 CFR Parts 1700 and 1701.

Agriculture's pamphlet captioned "REA Loans & Loan Guarantees for Rural Electric & Telephone Service" recites at page 3 as follows:

#### Telephone Loans

REA telephone loans may be made to telephone companies, to public bodies, and to cooperative non-profit, limited-dividend or mutual associations. In authorizing the telephone loan program, Congress directed that it be conducted to "assure the availability of adequate telephone service to the widest practicable number of rural users of such services."

About two-thirds of the telephone systems financed by REA are commercial companies and about one-third are subscriber-owned cooperatives.

It is appellant's contention that the "present poles and lines located on NM 4348 were built with REA funds \* \* \* [and] this qualifies as a REA project within the meaning of 43 CFR 2802.1-7(c)(1)."

Appellant also points out that Lindrith Telephone Company received a 2 percent REA loan, that Lindrith was granted the right-of-way in 1968, and that when appellant took over Lindrith in 1974, "it assumed all obligations arising out of the REA mortgage."

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fn. 3 (continued)

Rural Electrification, Department of Agriculture, Miscellaneous Publication No. 811 at page 7. The telephone amendments to the REA Act of 1936 were added by the Act of October 28, 1949, 63 Stat. 948, 7 U.S.C. § 921 et seq. (1976).

It is noteworthy that the Forest Service of the Department of Agriculture waives right-of-way fees as follows:

Fees will be based on land value (FSM 2715) where land value can reasonably be determined. The minimum annual fee is \$2 per acre or \$10 per mile or fraction thereof, whichever is greater for each line constructed on the right-of-way.

Rural Electrification Administration-sponsored cooperatives shall be granted free use provided the company is both organized as a cooperative and has an outstanding REA loan. The annual list of paid-up REA borrowers should be reviewed currently to determine appropriateness of free permits (provided by Annual Statistical Report -- REA bulletin 1-1 for REA electric lines, and REA Bulletin 300-4 for REA telephone lines). Both reports can be obtained from the Government Printing Office (GPO) or possibly from local REA offices. [Emphasis supplied.]

Forest Service Manual § 2728.12(d).

Thus the Forest Service envisages that two criteria must be met: The right-of-way user must (1) be a REA cooperative and (2) have an outstanding REA loan.

We note that sec. 504(g) of FLPMA, 90 Stat. 2779, 43 U.S.C.A. § 1764(g) (West Supp. 1977) provides in applicable portion as follows:

(g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: \* \* \* Rights-of-way may be granted, issued, or

renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest. \* \* \*

Thus FLPMA, for any period following its enactment on October 21, 1976, embodies the Congressional policy of fair-market rental for rights-of-way except where the user is a Governmental agency, a nonprofit association or corporation not controlled by a profitmaking entity, or where such user renders a valuable service to the public either gratis or at a reduced charge. Appellant meets none of these criteria.

We also note that the Reclamation Project Act of 1939, section 9(b), 43 U.S.C. § 485h(c) (1970), provides in part as follows:

(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: Provided, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3-1/2 per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such

periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: Provided further, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936. \* \* \* [Emphasis supplied.]

We recognize the absence of any direct precedential ruling on whether a company is entitled to rent free rights-of-way by virtue of merely holding a REA loan as is contended by appellant. The reference in 43 CFR 2802.1-7(c)(1) to REA projects should be construed in consonance with other statutory and regulatory preferences afforded REA borrowers. These envisage free rental for only "cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936." This is the standard in section 9 of the Reclamation Project Act of 1939, supra, and is virtually identical to the position of the Forest Service and FLPMA.

We conclude there is no basis either in the grant, the regulations, or the record to support appellant's theory of entitlement. The conclusion urged by appellant cannot be reconciled with the terms of the original grant, in which appellant and its predecessors in interest acquiesced for 7 years. Cf. The Superior Oil Co., 12 IBLA 212 (1973). We determine that appellant is neither entitled to a refund of past rentals nor to a rent-free right-of-way for the remainder of the grant. Appellant is, of course, free to avail itself of its right to a hearing on the periodic revision of charges pursuant to 43 CFR 2802.1-7(e).

Accordingly, 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 affirmed.

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Frederick Fishman  
Administrative Judge

We concur:

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Edward W. Stuebing  
Administrative Judge

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Joan B. Thompson  
Administrative Judge

