

FULL CIRCLE, INC.

IBLA 76-646

Decided June 19, 1978

Appeal from a decision of the Idaho State Office, Bureau of Land Management, imposing increased rental charges for renewal of use and occupancy of appellant's communication site right-of-way I-146.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Regulations: Applicability --Rights-of-Way: Generally

Applications for rights-of-way on public lands pending on October 22, 1976, are to be considered as applications under Title V of the Federal Land Policy and Management Act of 1976, but existing regulations will govern the administration of public lands to the extent practical until new regulations are promulgated.

2. Appraisals -- Communication Sites -- Rights-of-Way: Generally -- Words and Phrases

"Fair market value." As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the

right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desired but is not obligated to so use.

3. Appraisals -- Communication Sites -- Rights-of-Way: Generally

The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is the preferred method of determining the fair market rental value of the right-of-way where there is sufficient comparable data available.

4. Appraisals -- Communication Sites -- Rights-of-Way: Generally

Appraisals of rights-of-way for communication sites will be upheld if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive. Where an appellant has raised sufficient doubt that the Bureau properly considered the highest and best use of a right-of-way in determining comparability of other sites as a basis for the use charges, the case may be remanded for the Bureau to reconsider whether a further appraisal or adjustments in the appraised values should be made.

5. Accounts: Payments -- Appraisals -- Communication Sites -- Rights-of-Way: Generally

Where a grantee seeks renewal of a right-of-way for a communication site, the Bureau of Land Management should require an advance annual payment at the rate formerly charged until a new fair market value rate may be established by appraisal. In the absence of contrary directives, the guideline in 43 CFR 2802.1-7(e) should be applied to renewals of existing rights-of-way. Increased charges may not be imposed retroactively, but are only imposed by the authorized officer,

after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision.

6. Accounts: Payments -- Appraisals -- Rights-of-Way: Generally

Interest may be imposed on use charges for right-of-way sites depending on considerations of fairness and equity. In the absence of contrary directives, interest may be imposed for occupancy of a site where use charges should have been imposed at the same rate as past permitted use. Also, interest may be imposed on increased charges due on an annual basis for the years prior to payment of such amount.

7. Appraisals -- Communication Sites -- Federal Land Policy and Management Act of 1976: Rights-of-Way

Under section 504(g) of the Federal Land Policy and Management Act of 1976, payments for use of right-of-way sites should be on an annual basis at the fair market value unless the annual payment would be less than \$100. Therefore, although lands may be appraised for a longer future period of time, lump-sum payments for future years may not be demanded for amounts exceeding the statutory amount; instead charges for such amounts should be made on an annual basis.

APPEARANCES: LeRoy F. Clausen, Branch Operations Supervisor for Full Circle, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Full Circle, Inc. appeals from a decision of the Idaho State Office, Bureau of Land Management (BLM), dated May 11, 1976, which

approved appellant's application for renewal of its communication site right-of-way on Flattop Butte near Jerome, Idaho, 1/ subject to the conditions that it make a lump-sum payment of a revised rental rate of \$5,125 for an 8.7-year term renewal grant, covering the period from May 5, 1972, to December 31, 1980, and file all current FCC licenses within 30 days from receipt of the decision.

The right-of-way in issue was initially granted to Pacific Supply Cooperative on May 5, 1967, pursuant to the Act of March 4, 1911, 43 U.S.C. § 961 (1970), repealed, Federal Land Policy and Management Act of 1976, § 706, 90 Stat. 2743, 2793. The grant permitted construction of a 10-foot by 10-foot concrete block building, a 50-foot steel supporting tower, and a one-frequency transmitter operating on 466.000 Mc/s with an associated one-frequency receiver. The rental for the site was appraised at \$460 for a 5-year term, and was paid, lump sum, in advance. The term of the grant was "5 years subject to renewal with compliance with terms, conditions and stipulations."

After May 5, 1972, the BLM notified Pacific Supply Cooperative that its right-of-way grant had expired, and advised it of the procedures by which it could renew the grant. 2/ Full Circle, Inc., a wholly owned retail subsidiary of Pacific Supply Cooperative,

1/ SW 1/4 NW 1/4 of sec. 13, T. 8 S., R. 17 E., Boise Mer., Jerome County, Idaho.

2/ This letter is dated May 9, 1972, and sent by certified mail, noted as received by Pacific Supply Cooperative on May 24, 1972.

submitted its written request for renewal on June 7, 1972. On September 17, 1975, Full Circle, Inc., was sent notification by the BLM that a review of the rental charge for use and occupancy of the site had been made to bring such charges in line with the current fair market value. That review revealed an adjustment from the \$460 amount for 5 years to \$5,125 for the 8.7-year period from May 5, 1972, to December 31, 1980, which amount was then due and payable. The BLM afforded appellant "the opportunity to comment on the appraised value," and if appellant had present appraisal data which would show the rental determination was erroneous, the BLM would set up a meeting for the presentation of such data. On October 14, 1975, appellant requested such a meeting, stating that:

It is hard for me to believe that our rental should go from \$92.00 per year to \$589.08 per year -- a 640% increase -- for our 10' by 10' structure located on the site.

An informal hearing was set, and appellant was notified to be prepared to present evidence showing the rental value was not proper.

It appears from the record that the "hearing" was held on January 28, 1976. However, there is no transcript or summation of the proceedings, although memoranda in the record indicate that appellant presented no evidence at the meeting. Full Circle, Inc., filed written objections to the appraisal with the BLM on March 25, 1976. On May 11, 1976, the decision being appealed from was issued,

finding that appellant's written protest to the appraisal raised the same issues discussed at the informal hearing and that no additional appraisal data or evidence had been shown. Relying on 43 CFR 2802.1-7, providing that the charge for use and occupancy of such lands is the fair market value of the right-of-way as determined by appraisal by the authorized officer, the BLM required lump-sum payment of the \$5,125 before issuance of the renewal grant would be allowed. This rental amount was based upon an Appraisal Report approved August 13, 1975, that a lump-sum payment of \$4,035.48 was due for the period from May 5, 1972, through December 31, 1980, an 8.663-year period. The \$5,125 figure was reached by adding compound interest for 3.408 years.

Full Circle, Inc., filed a timely appeal alleging in its statement of reasons that the revised rental was too high and specifically arguing, inter alia, that:

1. Only privately owned property was used in the appraisal data.
2. Potential coverage from the site was used as a point in the appraisal and no consideration given to the actual use.
3. More weight was given to TV, radio broadcasting stations, and telephone companies leases than to those used for 2 way radio sites.
4. The Notice of Renewal was received three years and four months after the lease started. The bill included \$1,089.52 interest. We did not have the option of paying the new lease amount without this interest charge.

[1] The renewal application was filed and the State Office decision was issued prior to the enactment of the Federal Land Policy and Management Act of 1976 (hereinafter cited as FLPMA), 90 Stat. 2743. Section 510(a) of that statute provides in part as follows:

Effective on and after the date of approval of this Act, no right-of-way for the purposes listed in this title shall be granted, issued, or renewed over, upon, under, or through such lands except under and subject to the provisions, limitations, and conditions of this title * * *. Any pending application for a right-of-way under any other law on the effective date of this section shall be considered as an application under this title. The Secretary concerned may require the applicant to submit any additional information he deems necessary to comply with the requirements of this title.

Appellant's renewal application is now subject to the provisions of FLPMA. However, section 310 of the Act provides that existing regulations will govern the administration of public lands prior to the promulgation of new rules and regulations to the extent practical. 3/

[2] By statute and regulation, grantees must pay "fair market value" for rights-of-way on public lands. 43 CFR 2802.1-7(a); FLPMA

3/ Section 310 provides as follows:

"The Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands, and the Secretary of Agriculture, with respect to lands within the National Forest System, shall promulgate rules and regulations to carry out the purposes of this Act. The promulgation of such rules and regulations shall be governed by the provisions of chapter 5 of title 5 of the United States Code, without regard to section 553(a)(2). Prior to the promulgation of such rules and regulations, such lands shall be administered under existing rules and regulations concerning such lands to the extent practical."

§ 504(g), 90 Stat. 2743, 2779. ^{4/} The term "fair market value" has been judicially defined and the courts have recognized a number of methods for appraising fair-market value. Drawing upon numerous judicial decisions, the Interagency Land Acquisition Conference developed the Uniform Appraisal Standards for Federal Land Acquisitions (1973). This Department has adopted these standards as guidelines for appraisers in determining charges for use of public lands. See 602 Departmental Manual 1.3; American Telephone and Telegraph Co., 25 IBLA 341, 348-49 (1976). The "fair market value" standard with respect to rights-of-way has been stated as follows:

^{4/} Section 504(g) of FLPMA, 90 Stat. 2743, 2779, provides in part as follows:

"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: Provided, That when the annual rental is less than \$100, the Secretary concerned may require advance payment for more than one year at a time * * *."

43 CFR 2802.1-7(a) provides as follows:

"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."

* * * fair market value [under 43 CFR 2802.1-7(a)] is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use.

American Telephone & Telegraph Co., *supra*, at 349-50; see Uniform Appraisal Standards, *supra* at 3.

[3] The State Office determined the fair market value of appellant's site by comparing that site with various other communication sites under lease, and their rental rates, which is a proper appraisal method when current, well-established rental data for comparable sites is available. American Telephone & Telegraph Co., *supra* at 350; see Uniform Appraisal Standards, *supra* at 9-11.

The Appraisal Report at page 8 listed the following factors as determinative of market value for the purposes of comparing appellant's site with other sites:

TIME: Considers the age of the lease and the effect of passing time on rental prices.

TENURE: The length of the leases and the effect of the length of lease on rental prices.

COVERAGE: Considers the relative area and populations which could be served or covered from the sites.

LOCATION: The relative distances from major population centers.

ACCESS: Considers the type and quality of access available to the sites.

SIZE: Considers the relative sizes of the sites.

POWER: Considers the availability of power at or near the sites.

[4] Appellant primarily contends that the methods used by BLM in making the appraisal were inappropriate. It objects to BLM's use of data from privately owned sites and indicates that two Forest Service sites are rented for \$100 a year. The BLM appraisal noted that BLM was the largest owner of communication sites in the general area, with the Forest Service being next, but it gives no information concerning the charges on any of these Government sites, including those on the same butte where appellant's site is located. There is no reversible error in BLM's using only privately owned leased sites where only they are comparable. Private transactions may provide an especially persuasive indication of the prevailing market for comparable interests in comparable land. However, if Government sites are comparable, they should also be used. Where there are similar and nearby Government sites, the appraisal report should at least explain why they have not been considered.

Appellant contends that BLM improperly gave a higher value to its site because it has a source of power whereas other sites do not. It contends that it paid to have power brought to its site and pays regular charges. The appraisal report indicates only that the Idaho Power Company furnishes metered power to the existing users on the butte. If appellant were the first user of the butte and had paid

to have power brought to the butte, as well as extended to its site, an adjustment would be warranted. The primary user should not be charged for enhanced values attributable to improvements made by it. Whether an adjustment would be warranted would depend upon the distance and cost involved in obtaining the power source. Certainly an ordinary hook-up to an existing powerline would not seem to justify an adjustment, although an expensive extension of power facilities to a site would. There is insufficient information in this case to show whether any adjustment would be warranted here.

Appellant's major specific objection is to the inclusion of sites for TV and radio stations being deemed comparable to its right-of-way. It asserts it is being charged the same amount as users who need the broader coverage and serve hundreds of thousands of people, whereas it serves only 1,600 accounts and does not need the broader coverage. Appellant does not dispute the fact the site has the potential for a broader coverage than it uses. Actual use may demonstrate the highest and best use of a site. However, where it is clear a potential exists for a higher and better use of the site than presently used, that potential may be considered in determining fair market value if a market exists for such a potential use. The Uniform Appraisal Standards, supra, at 7 provides:

Because the highest and best use is a most important consideration, it must be dealt with specifically in appraisal reports. Many things must be considered in determining the highest and best use of the property

including: supply and demand; competitive properties; use conformity; size of the land and possible economic type and size of structures or improvements which may be placed thereon; zoning; building restrictions; neighborhood or vicinity trends.

In rating the site as a "broad coverage site," the BLM appraisal mentioned various classes of communication use and considered the site of value for use by most of the general class. What is lacking in the report, however, is a factor which is difficult to evaluate, but is a part of the highest and best use test. That is the market potential for the use deemed to be higher and better than the existing use. Thus, while it may be feasible for this site to be used for TV and radio communication facilities, there was no consideration of the likelihood that there exists a market demand for that use for this and comparable sites.

The general standard for reviewing rights-of-way appraisals is to uphold the appraisal if no error is shown in the appraisal methods used by BLM or the appellant fails to show by convincing evidence that the charges are excessive. Four States Television, Inc., 32 IBLA 205 (1977); Mountain States Telephone & Telegraph Co., 26 IBLA 393, 83 I.D. 332 (1976); Western Slope Gas Company, 21 IBLA 119 (1973); Western Arizona CATV, 15 IBLA 259 (1974); cf., American Telephone & Telegraph Co., *supra*. Appellant has not shown convincing evidence that the charges are excessive. However, it has raised sufficient doubt and question concerning the methods employed in this appraisal,

especially the application of the highest and best use principle, to warrant BLM's reconsidering whether a further appraisal should be made, or, at least whether an adjustment in the appraised value is warranted. Reconsideration of the charges to be imposed must be undertaken in any event in view of the forthcoming discussion of issues.

[5] Appellant objects to the retroactive application of the charges back to the date its original grant expired and to the imposition of interest on those charges. Appellant did not file an application to renew the right-of-way before the grant expired. BLM did, however, implicitly permit appellant to remain in occupancy of the site. The general regulation, 43 CFR 2802.1-7(a), provides for the fair market value of the right-of-way to be determined by appraisal by the authorized officer and payments made in advance. See also, FLPMA, section 504(g). 5/ BLM did not require advance payment for the continued use and occupancy of the site while it was reviewing the charges. It only indicated a review of the charges would be made. It did not clearly condition the continued use of the site upon a future rate to be applied retroactively. Therefore, we need not decide whether it would be proper to do so. At least, however, BLM should have required advance annual payment at the same rate as the expired grant until an appraisal could be made. The fact BLM erred in this respect does not obviate appellant's obligation to pay a use charge for the time it occupied the site. Under whatever

5/ See n. 4, supra.

hypothetical legal theory may be used to characterize appellant's continued occupancy of the tract, it is apparent from the thrust of the general regulation that payment is required at the fair market value. Until a new fair market value is established then the amount of the charges based upon a prior determination may be used.

The issue then is whether the fair market value established by a subsequent appraisal should be retroactively imposed to May 5, 1972, beginning the period after the last day of the original term of the grant. The granting of a renewal application would relate back to that date for a continuous authorized use. If, rather than 5 years, the original grant had been for a longer term and 5 years of that term had passed, regulation 43 CFR 2802.1-7(e) would be applicable. It provides:

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.

As pointed out in a memorandum to the Director, BLM, dated March 16, 1977, by the then Acting Deputy Solicitor, there is some ambiguity in this regulation, especially concerning what is meant by the "ensuing charge year." He advised that for previously granted rights-of-way increased use charges may not be applied retroactively

but must be imposed prospectively, "effective as of the commencement of the charge year next following the rate adjustment decision of the authorized officer." Therefore, new charges at an increased rate are to be imposed only after the authorized officer's decision following notice and opportunity for hearing. The memorandum did not address the renewal problem presented in our case.

There is no regulation expressly covering our problem where the original term of the grant has expired and the user is seeking a renewal. There is a gap in the regulations between 43 CFR 2802.1-7(a) which requires advance payments for use and occupancy at the fair market value, and 43 CFR 2802.1-7(e) which requires new charges for the ensuing charge year after reasonable notice and opportunity for a hearing. However, the essential policy thrust of the latter regulation for existing users of rights-of-way under a continuous long-term grant is also appropriate for existing users who have installed improvements and have a continuing use of a site. This is so regardless of whether the user may or may not have some contractual right of renewal or may have some other legal basis for continuing its use and occupancy. In the absence of any contrary regulatory or policy direction, BLM should follow the guideline established in 43 CFR 2802.1-7(e) and apply the same procedures and principles to renewals of existing rights-of-way.

In this case the original grant expired May 4, 1972. The decision by the authorized officer increasing the charges following notice

and a hearing was dated May 11, 1976. ^{6/} Therefore, the increased charges would begin the next ensuing charge year, which begins May 5, 1977. The charges for the use prior to that time would be at the annual rate for the original grant. If upon reconsideration of the appraisal upon our remand, the appraised amount is reduced from that set by the May 11, 1976, decision, the new amount may be imposed from May 5, 1977, since it is lower than the amount established by the May 1976, decision. However, if the amount is increased, the amount of the increase over that established by the May 1976 decision should be imposed only after the authorized officer's decision following notice and an opportunity for hearing and would be applicable to the next charge year thereafter.

[6] The imposition of interest poses a difficult issue. We are unaware of any specific regulation requiring interest to be imposed, or forbidding it. BLM here imposed interest on the entire lump-sum amount. This included annual charges for future years. We believe interest imposed on charges for future years was improper. We have reviewed some of the law concerning imposition of interest charges in somewhat analogous situations and find there are varying authorities and conclusions reached. Basically what we have here is appellant's use of the land under an implied license without payment of charges

^{6/} Because appellant has raised no issues concerning the hearing held in this case, we make no comment on its adequacy. A person who fails to make a timely objection to any procedural deficiency in an administrative proceeding is held to have waived the right to object subsequently. Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958).

until BLM notified it of the increase in rental. BLM was under a regulatory mandate to impose an advance rental charge, but did not do so for the years which lapsed between the expiration of the grant and the new charges. Appellant contends it would have made payments to avoid interest charges if it had been informed of the charges. This situation is most like cases concerning the imposition of interest charges prior to a court judgment determining the liability of one party to another. Although there is a split of authority on whether interest may be imposed, the most basic rule is that courts will impose pre-judgment interest under considerations of fairness, and will deny it when it is considered inequitable to do so. Board of County Commissioners v. United States, 308 U.S. 343, 352-53 (1939); Atlantic Richfield Company, 21 IBLA 98, 82 I.D. 316 (1975).

In the absence of any specific contrary policy directive concerning this matter, we rule that interest may be imposed under similar conditions of fairness and equity. Here appellant used the land for a period of time before he was advised of the increase in charges. Although BLM erred in not requiring advance payments in the amount of the prior use charge until a new charge could be imposed, appellant could expect to pay a use charge for that time. No reasonable person would expect free use of the land in the circumstances. Since appellant had the use of its money during the time, it is fair for the United States to recover as interest its loss of the use of money payments which should have been imposed. For the period prior to May 5,

1977, the interest would be on the amount of the annual rate prescribed under the original grant. It is also fair to impose interest on the increased charge due on an annual basis for the years prior to payment of such amount. Although appellant's appeal suspended the effect of the BLM decision during the time of the appeal, this does not affect the consequence of the imposition of the charges in considering equities and fairness. Appellant could have avoided the imposition of interest on the increased amount by paying the charges under protest while it appealed. Therefore, interest will be charged on the increased amount from the period beginning May 5, 1977. If on remand the charge is reduced, interest will be only on the reduced amount. If the charge is increased over that amount set by the May 11, 1976, decision, interest on the amount of the excess over that amount will be charged only if the charge is not paid prior to commencement of the ensuing charge year following imposition of the charge.

[7] The next issue concerns the lump-sum payment for future years. Under the regulations in existence when BLM notified appellant of the charges, the choice of requiring annual or lump-sum payments was left to the discretion of the authorized officer. 43 CFR 2802.1-7(a). Under section 310 of FLPMA, existing regulations may be applied to the extent practical. Section 504(g) of that Act provides for annual payments and would only allow lump-sum payments for future years when the annual rental amounts to less than \$100. This provision is inconsistent with the regulation and governs. Accordingly,

a lump-sum payment should not be demanded for future years where the annual amount exceeds \$100. In this case, the lump-sum payment will only cover the past years of use and an advance payment for the next year. Although section 504(g) provides for the annual rental to be based on fair market value, we do not believe this requires an appraisal each year. Use charges established by an appraisal may be prospective for a reasonable future time period, but the payments in excess of \$100 are to be charged on an annual basis.

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 to the Bureau of Land Management for further action consistent with this decision.

Joan B. Thompson
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur in the result and agree that the case should be remanded to the Bureau, but I believe that the threshold issue which must be determined is whether appellant holds under his initial grant or under an entirely new grant. I would hold that appellant's rights stem from an authorized extension of his original grant. The original grant provides "Expiration date of grant: 5 years subject to renewal with compliance with terms, conditions and stipulations." ^{1/} Clearly the renewal clause was included in the grant for a purpose. On the basis of the grant, including the renewal provision, appellant constructed substantial improvements.

Appellant's rights depend upon whether the exercise of the option to renew should be treated as timely. The original 5-year period ended May 5, 1972. Appellant continued to hold over and by letter of May 9, 1972, the State Office wrote appellant listing requirements for renewal and stating the documents were to be filed within 30 days. Appellant's written request for renewal was received on June 7, 1972. On September 17, 1975, appellant was advised that the charge was increased from \$460 for the first 5 years to \$5,125 for the period May 5, 1972, to December 31, 1980, which amount was stated to be due and payable. In its letter of October 31, 1975, the State Office informed appellant: "A hearing to discuss your right-of-way has been

^{1/} Under 43 U.S.C. § 961 (1970) 50-year grants were authorized.

scheduled for November 18, 1975 * * *. The hearing provided for by the regulations is informal and interlocutory in nature."

The regulation referred to is 43 CFR 2802.1-7(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.

The hearing was held and appellant given the opportunity to make further submissions. On May 11, 1976, the State Office issued its decision entitled "Renewal Application Held for Approval." The charge of \$5,125 for the period May 5, 1972, to December 31, 1980 was imposed.

Where there is a holding over, it is not clear that advance written notification is required for timely exercise of an option to renew. Even if it is so required, in this case BLM intended either to waive the requirement 2/ or to deem the filing to be timely. 43 CFR 1821.2-2(g). Such action was within BLM authority and was most equitable. It is in accord with the provisions of 43 U.S.C.A. § 1764(b) (West Supp. 1977):

Each right-of-way or permit granted, issued, or renewed pursuant to this section shall be limited to a

2/ Cf. Southern Ry. Co. v. Peple, 228 F. 853 (4th Cir. 1915) and cases cited in 51C C.J.S. Landlord and Tenant § 62(3)b (1968).

reasonable term in light of all circumstances concerning the project. In determining the duration of a right-of-way the Secretary concerned shall, among other things, take into consideration the cost of the facility, its useful life, and any public purpose it serves. The right-of-way shall specify whether it is or is not renewable and the terms and conditions applicable to the renewal. [Emphasis added.]

If an entirely new grant were involved then questions could arise as to (1) whether a grantee's own occupancy under his first grant would be virtually conclusive on the issue of highest and best use under a new grant, and (2) whether a grantee should be considered a secondary user rather than a primary user, and charged under a new grant for use of an improved site and certain fixed improvements 3/ constructed under the first grant. See American Telephone and Telegraph Company, 25 IBLA 341, 350-52, 356-58 (1976). Herein, the majority recognizes that appellant may be treated as a primary user in connection with certain power line extensions, which would indicate that appellant should be treated as having a continuing right.

Assuming the Department deemed the option to renew to be properly exercised, appellant has rights which stem from his initial grant, and the issue becomes what charge should be imposed under the renewal when the option clause is silent. The rule in private leases, a somewhat analogous area, is quoted in Yamin v. Levine, 120 Colo. 35, 206 P.2d 596 (1949) at 597:

3/ Subject to 43 CFR 2802.5, a grantee retains the right to remove his improvements.

* * * "A general covenant to extend or renew implies an additional term equal to the first, and upon the same terms, including that of rent." 1 Taylor's Landlord and Tenant (9th Ed.), p. 406, § 332. See, also, Kollock v. Scribner, 98 Wis. 104, 73 N.W. 776; Penilla v. Gerstenkorn, 86 Cal.App. 668, 261 P. 488; 32 Am.Jur., p. 806, § 958. * * *

Applying that same reasoning to the right-of-way grant herein, the renewal rental would continue as originally fixed, until changed pursuant to the grant. The grant incorporates 43 CFR 2802.1-7(e), supra, which provides as a matter of right that new charges may be imposed only after hearing. American Telephone and Telegraph Company, supra, at 346. The charge upon appellant would thus remain at the original rate until the charge year following May 11, 1976. Except as modified on appeal, the new charges would be due from May 5, 1977.

It seems clear the highest and best use of the property is for general communication site purposes, and I do not believe that in making such a determination it is necessary to distinguish between broad and limited coverage sites. Highest and best use categories are usually rather general. Appraisals being difficult, appraisers should be free to use comparison data from both types of communication sites. I agree with the majority that once highest and best use is determined, the value of the site is greatly influenced by the demand for the type of coverage possible from a particular site.

In other respects, I am generally in accord with the majority opinion. While appellant's case would have been stronger had it

submitted independent data, 4/ under the circumstances a remand is necessary.

Joseph W. Goss
Administrative Judge

4/ Mountain States Telephone & Telegraph Co., supra.

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