

CIRCLE L, INC.

IBLA 76-316

Decided August 15, 1978

Appeal from a decision of the Nevada State Office, Bureau of Land Management, dismissing protest of an increased annual rental charge for right-of-way N-3318.

Set aside and remanded.

1. Rights-of-way: Generally -- Rules of Practice: Appeals: Burden of Proof

Where, on appeal, a grantee of a right-of-way makes a substantial showing of error in the revision of the rental rate for use of the right-of-way, and where the State Office has not had an opportunity to consider the grantee's arguments, a decision dismissing a protest to the revised rental rate will be set aside and the case will be remanded in order to afford the State Office an opportunity to review its appraisal in light of the grantee's contentions.

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

Where there are multiple users on the same communications site each user is individually responsible for the fair market rental value computed as of the time of the initiation of use, and such rental value determined for the site may not be prorated among different users.

3. Administrative Procedure: Hearings -- Communications Sites -- Hearings -- Rights-of-Way: Act of March 4, 1911 -- Rules of Practice: Hearings

The notice and opportunity for hearing envisaged by 43 CFR 2802.1-7(e) requires at

a minimum that the lessee be provided with a copy of the appraisal report, that he be permitted to appear before the decision-maker, that the decision-maker not be the person who made or approved the appraisal, and that adequate records of the hearing conducted pursuant to the regulations be maintained.

APPEARANCES: Ron Oakley, First Vice-President, Circle L, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Circle L, Inc., has appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated October 1, 1975, dismissing its protest against an annual rental charge of \$300 for joint use of right-of-way site N-3318. Right-of-way N-3318 was originally granted solely and exclusively to appellant on August 26, 1969, for an annual rental of \$300 per annum, and was expressly made subject to review in accordance with 43 CFR 2234.1-6(e) (now 43 CFR 2802.1-7(e)). ^{1/} Use of the site was acquired in order to install a television translator station for KCRL-TV to service the Carson City area. Circle L, Inc., appellant herein, is the licensee of television station KCRL.

The regulation states, in relevant part, that:

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 the 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 year.

Pursuant thereto, the State Office informed appellant, by letter of April 15, 1975, that upon review of the right-of-way it had been determined that the present rental value was \$600 for the ensuing year and a total of \$2,630 for the next five year period commencing August 27, 1975. The letter gave the appellant 60 days

^{1/} The right-of-way was granted under authority of the Act of March 4, 1911, 43 U.S.C. § 961 (1970). This Act was repealed by section 706 of Federal Land Policy and Management Act. However, section 709 of FLPMA, 43 U.S.C. § 1769 (1976), provides that no existing right-of-way shall be terminated but that the Secretary of the Interior may, with consent of the holder of the right-of-way, cancel the original right-of-way and in its stead issue a new right-of-way pursuant to Title V of FLPMA.

in which to comment upon the proposed new charges. By letter of April 18, 1975, appellant requested an explanation of the basis of the re-evaluation of the site. Thereupon, the State Office supplied appellant with a copy of the appraisal report.

At about this time, KTVN-TV relinquished its own right-of-way site, N-2659, in favor of co-locating with KCRL-TV on site N-3318. The relocation of KTVN-TV was apparently the result of consultations between the State Office, KTVN and KCRL. On July 3, 1975, appellant was informed "in the matter of your joint use of the same telecommunications site on Duck Hill, we have adjusted your rental for the year beginning August 1, 1975, from \$600 to \$300." Appellant was also informed that KTVN would also be sent a bill for \$300.

[1] Appellant tendered payment of \$300 on August 19, 1975, under protest. By decision of October 1, 1975, the State Office dismissed the protest, finding that the \$300 was a reasonable rental and further, that appellant had "submitted no documentary evidence to indicate otherwise." On appeal, Circle L extensively sets out the reasons why it believes that the BLM appraisal was in error. Normally, we would merely remand this case for the State Office to reconsider its assessment in the light of appellant's assertions and then give notice and an opportunity for a hearing pursuant to 43 CFR 2802.1-7(e). American Telephone and Telegraph, 25 IBLA 341 (1976). However, there are certain difficulties in the instant case which require further elaboration.

[2] For purposes of illustration, we will assume for the next part of the opinion that the State Office's appraisal of the tract occupied by appellant as having an annual rental value of \$600 is correct. We wish to emphasize, however, that we make no determination at this time as to the accuracy of that evaluation. Our concern is directed to the fact that after determining that the annual rental value of the site for use by appellant for a television translator station was \$600 the State Office authorized, after apparently suggesting, that another permittee might occupy the site in conjunction with the appellant and thereby split the annual rental.

We start with the proposition that the State Office determined that the fair market value for appellant's non-exclusive communications site on the Duck Hill tract was \$600. When KTVN sought to move to the tract already occupied by appellant, KTVN was, in effect, making an application for a non-exclusive communications site in which there already was an existing user. The BLM Manual differentiates between the procedures to be followed in the processing of an application for a site where there is an existing user as against a site which is not under present use. However, the

Manual provides that, even where there are existing users of a communications site, "[u]pon receipt of authorization from FCC or IRAC, [the responsible official] arranges for appraisal to determine proper rental." BLM Manual 2861.22. This provision also applies to situations in which there are multiple applicants.

It must be pointed out that the Manual does not speak of pro-rating the charge on the basis of the number of users. Rather, it presupposes that each user will be individually charged the fair market value of his use.

In American Telephone and Telegraph Co., *supra*, the Board discussed the difference between a primary user of a communications site and a secondary user of the same site. Therein the Board followed the definitions of a primary user as "the first occupant on a particular microwave site location" and secondary users as "any subsequent occupants of the same microwave site who enter on the site and construct their own facilities." 25 IBLA at 351, n. 10. The thrust of the discussion therein was that appraisals of grants to primary users should not reflect the increase of value to sites where the increase was the result of improvements which the primary user had made on the site. However, where secondary users were involved it was stated that it would be proper to have the charges reflect the fact that the sites were improved. This analysis, too, is obviously premised on the assumption that proration of costs among multiple users is not a proper method of ascertaining the value of the individual communications site. Accordingly, upon reconsideration of the correctness of the annual rental assessment the State Office may not permit proration of rental among multiple users.

We point out to the State Office that if it has granted a right-of-way to KTVN, the rental rate may not be increased for at least a 5-year period from the date of the grant. See 43 CFR 2802.1-7(e). Similarly, the State Office may not retroactively increase appellant's rental since the regulation only authorizes "such new charges as may be reasonable and proper commencing with the ensuing charge year." (Emphasis supplied.)

[3] We also wish to address the question of the procedures to be utilized in reassessing the correctness of the \$600 evaluation. The regulations require "reasonable notice and opportunity for hearing." 43 CFR 2802.1-7(e). In American Telephone and Telegraph Co., *supra*, this Board eschewed any attempt to establish rigid procedures of universal applicability which would be applied to the hearing contemplated by this regulation. Rather, the Board sought to permit a degree of flexibility which would allow the State Offices to fashion procedures which might vary in individual cases owing to

necessary exigencies, but which would provide all licenses with essential procedural protections. In Full Circle, Inc., 35 IBLA 325 (1978), this Board held that

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.

We do not intend, herein, to formulate any universal procedure. But we do believe that certain elements are so basic to the concept of a fair hearing that their absence vitiates the entire process. First, we believe it is absolutely essential that when a licensee objects to a proposed reassessment he be provided with a copy of the appraisal report which served as a basis for the increase. This was done in the instant case. Then, after permitting the licensee sufficient time in which to peruse the appraisal as well as develop those arguments and data which he believes might bring the appraisal into question, he must be afforded an opportunity to present his views to the decision-maker. The author of the appraisal should be available for interrogation at that time. What is crucial is that the deciding officer cannot be the same person who made or approved the appraisal upon which the request for increased rental was based.

When the licensee desires to exercise his right to present his views in person, the State Office must endeavor to preserve a clear record of what transpired at the meeting. This does not mean that each such encounter must be recorded or a verbatim transcript thereof provided, though either of these two procedures would clearly be permissible. What is necessary at a minimum is that notes be taken, and included in the case file, which indicate the specific contentions of the licensee. Should any documentary support for his position be presented by the licensee such submissions must also be preserved in the case file.

In the instant case, the State Office decision recites that a meeting was held on May 19, 1975. No other record of this meeting appears in the case record. In the future the State Office is requested to clearly document all such meetings.

Beyond the strictures set forth above we do not feel that it is necessary to circumscribe the methods which may be utilized by the State Offices in fulfilling their obligations under the regulation.

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 file is remanded for reconsideration of the rental charge for right-of-way N 3318 in light of the argument expressed by the appellant and in conformity with this opinion.

Douglas E. Henriques
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN DISSENTING IN PART:

I am in agreement with the majority opinion, except as to its delineation of minimal requirements for a hearing, which I deem insufficient.

The Attorney General has expressed the opinion that "in the absence of legislation by Congress, there is probably a right on the part of a claimant to be represented by an agent or attorney in presenting his claim before one of the executive departments * * *" 33 Op. Atty. Gen. 17, 19 (1921).

A sizeable number of state cases, containing abstract definitions of what constitutes a "fair hearing," having reflected the view that a necessary ingredient of such a hearing is the right to be represented by counsel. See, e.g., People ex rel. Mayor v. Nichols, 79 N.Y. 582 (1880); People ex rel. Fallon v. Wright, 7 App. Div. 185, 40 N.Y. Supp. 285 (1896), aff'd, 150 N.Y. 444, 44 N.E. 1036 (1896); People ex rel. Long v. Whitney, 143 App. Div. 17, 127 N.Y. Supp. 554 (1911); Christy v. Kingfisher, 13 Okla. 585, 76 Pac. 135 (1904). And see also People ex rel. Ellett v. Flood, 64 App. Div. 209, 71 N.Y. Supp. 1067 (1901) (statute allowed demotion of firemen for cause after a hearing; order of demotion reversed solely upon the ground that respondent had been denied the right to be represented by counsel); People ex rel. Brady v. O'Brien, 9 App. Div. 428, 41 N.Y. Supp. 529 (1896) (semble); People v. Nokomis Coal Co., 308 Ill. 45, 139 N.E. 41 (1923) (tax proceedings held invalid when board, in the absence of property owner, refused to permit presence of property owner's attorney).

The majority opinion lists as the minimum elements of a fair hearing that applicant be (1) provided with a copy of the appraisal report, (2) afforded an opportunity to present his views to an unbiased decision-maker.

I believe that under Goldberg v. Kelly, 397 U.S. 254, 267-71 (1970), the following elements are minimal requirements that appellant be afforded:

1. Opportunity for oral hearing.
2. Opportunity to confront and cross-examine adverse witnesses (i.e., the appraiser).
3. Right to be represented by counsel.
4. Decision must rest on evidence adduced at the hearing.

5. Decision makers must state reasons for his determination and the evidence relied on.
6. An impartial decision maker.
7. Opportunity to present evidence (through witnesses or otherwise) and to orally argue.
8. Timely and adequate notice detailing the reason for the proposed action.

The majority opinion does not embody what I regard as minimal requirements for a hearing. I do not mean to suggest that a hearing under the Administrative Procedure Act (APA) is required, but in all aspects, except an APA judge, the same requirements must be met.

Frederick Fishman
Administrative Judge

