

SOUTHERN CALIFORNIA EDISON CO.

IBLA 77-409

Decided June 18, 1981

Appeal from decision of the Arizona State Office, Bureau of Land Management, requiring reimbursement of costs incurred in processing right-of-way applications, A 9878 and CA 4163.

Affirmed in part, reversed in part, and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Applications -- Rights-of-Way: Federal Land Policy and Management Act of 1976

The Federal Land Policy and Management Act of 1976 authorizes the Bureau of Land Management to recover reasonable costs including costs of environmental analyses for applications of rights-of-way across public lands.

2. Accounts: Fees and Commissions -- Accounts: Payments -- Rights-of-Way: Applications

Management overhead costs are not a reimbursable cost recoverable from right-of-way applicants under 43 CFR 2802.1-2.

APPEARANCES: Tom P. Gilfoy, Esq., Rosemead, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Southern California Edison Company (Edison) appeals from a decision of the Arizona State Office, Bureau of Land Management (BLM), requiring reimbursement of the costs of processing two right-of-way applications, A 9878 and CA 4163, under authority of section 304 of Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1734 (1976).

On January 26, 1977, Edison made application, pursuant to section 501 of FLPMA, 43 U.S.C. § 1761 (1976), for a right-of-way for a 500 kv electric power transmission line from the Palo Verde Nuclear Generating Station in Maricopa County, Arizona, to the Devers Substation near Palm Springs, Riverside County, California. The total length of the transmission line is approximately 230 miles; the 83 miles of public lands in Arizona affected are in application A 9878, while the 52 miles of public land in California are in application CA 4163. Edison submitted a filing fee of \$2,500 to the Arizona State Office and \$1,500 to the California State Office.

By letter of February 28, 1977, BLM notified Edison that the cost for processing the two applications was estimated to be \$600,000, and requested payment of \$596,000 for reimbursement of the costs, as authorized by FLPMA.

Edison requested that the costs be billed in quarters, so on March 29, 1977, Edison was billed for \$150,000. Edison, by letter of April 26, 1977, advised BLM of litigation in the United States District Court for the District of Colorado, seeking a determination on the liability of the right-of-way applicant for cost recovery by BLM in such cases as that at bar. BLM advised Edison that processing of the applications would cease unless payment were remitted in response to the billing notice. Edison paid \$150,000 on June 1, 1977, under protest, and on June 6, 1977, filed notice of appeal. 1/

Edison is appealing because it considers the cost recovery regulations under which the billings were issued to be invalid, and because, even if valid, they are being improperly applied to collect the costs from Edison as a condition precedent to processing its applications. Edison argues that FLPMA does not authorize the procedure being followed by BLM, nor do any pre-existing regulations authorize the collections in issue.

Edison asserts that most of the activities involved in preparing environmental impact statements (EIS's) are designed to ensure the protection of the environment and inure primarily to the benefit of the general public, and so the costs of such preparation may not be charged to a right-of-way applicant. Edison adds that until the Secretary promulgates new regulations governing reimbursement of costs, he is wholly without legal authority to charge right-of-way applicants for processing and monitoring costs associated with pending and future applications for rights-of-way. 2/

[1] Section 504(e) of FLPMA, 43 U.S.C. § 1764 (1976), directs the Secretary to issue regulations relating to rights-of-way.

---

1/ As of May 1981, Edison had paid a total of \$602,765 in connection with the processing of the subject right-of-way applications.

2/ The Department's right-of-way regulations, 43 CFR Part 2800, were amended effective July 31, 1980, 45 FR 44518 (July 1, 1980).

Section 310 of FLPMA, 43 U.S.C. § 1740 (1976), provides that the Secretary shall promulgate regulations to carry out the purposes of FLPMA, but prior to such promulgation the public lands shall be administered under existing regulations to the extent practical.

The applicable Departmental right-of-way regulation, 43 CFR 2802.1-2, was amended in 1975 to require an applicant for a right-of-way to reimburse the United States for administrative and other costs incurred by the United States in processing the application, including preparation of reports and statements required by National Environmental Protection Act, 42 U.S.C. §§ 4321-4347 (1976). The amendment was initiated under the authority of the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a (1976).

Section 304 of FLPMA, 43 U.S.C. § 1734 (1976), specifically authorized the Secretary to establish reasonable filing and service fees and reasonable charges with respect to applications relating to the public lands. Section 304(b) provides:

The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such lands. The moneys received for reasonable costs under this subsection shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated and made available until expended. As used in this section "reasonable costs" include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities. In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency to the government processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

Similarly, section 504(g), 43 U.S.C. § 1764 (1976), provides that the Secretary may, by regulation or prior to promulgation of such regulations, require an applicant for a right-of-way over public lands to reimburse the United States for all reasonable administrative and other costs incurred in processing the right-of-way application.

The cost recovery provisions of sections 304 and 504 were implemented by Secretarial Order No. 3011, 42 FR 55280 (Oct. 14, 1977).

The order governed all applications for rights-of-way over public land which were pending October 21, 1976, or which have been filed since that date.

Edison's assertion that the Secretary is without authority to require reimbursement of costs associated with the processing of a right-of-way application because the general public rather than the applicant is the beneficiary has been considered and answered in Alumet v. Andrus, 607 F.2d 911 (10th Cir. 1979). The court stated:

Clearly, FLPMA is an express legislative mandate that all reasonable costs incurred by the Secretary in processing an application for rights-of-way on public lands shall be chargeable against the applicant for such rights-of-way, and further, that "reasonable costs" include, among other things, the costs of environmental impact statements. We shall assume that Congress was aware of its limitations in delegating the authority to "tax." The language of § 1734(b) reflects that understanding in that Congress expressed that the Secretary should consider the benefit to the general public in its attempted recoupment of costs of an EIS. To hold that, as a matter of law, an EIS inures solely to the benefit of the general public, and therefore, no part is assessable to the applicant, is error.

607 F.2d at 916. The Alumet court overturned the district court ruling below that section 304 of FLPMA did not authorize the Secretary of the Interior to seek reimbursement from an applicant for any part of the costs of preparing an EIS. The court did not address, however, the issue of whether the full costs of an EIS may be recovered from a right-of-way applicant.

In an analogous case, Colorado-Ute Electric Association, Inc., 46 IBLA 35 (1980), <sup>3/</sup> this Board followed Mississippi Power & Light Company v. United States Nuclear Regulatory Commission, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1018 (1980), and held that BLM may recover the full costs of preparing environmental studies associated with right-of-way applications. Although neither Colorado-Ute nor Mississippi Power & Light arose under FLPMA, the rationale of each case is equally applicable to the case at bar; that is, environmental studies and reviews are an integral part of a right-of-way application and as such directly benefit the applicant, Edison in this instance.

[2] Edison has also challenged any indirect costs assessed against it as not falling within the definition of "reasonable costs" in section 304(b) of FLPMA, *supra*. The record does not show whether indirect costs were factored into the computation of assessable costs

---

<sup>3/</sup> Appeal pending, No. 80C-500 (D. Colo. Apr. 16, 1980).

billed to Edison. We held in U.S. Steel Corp., 50 IBLA 190 (1980), and Colorado-Ute Electric Association, Inc., *supra*, that management overhead costs are not a reimbursable cost recoverable from right-of-way applicants under 43 CFR 2802.1-2. Accordingly, we remand the case to BLM for a determination whether indirect costs were factored into the costs charged to Edison and whether any such costs were impermissible charges for management overhead.

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 affirmed in part, reversed in part, and remanded for further action consistent with this decision.

Douglas E. Henriques  
Administrative Judge

We concur:

Bernard V. Parrette  
Chief Administrative Judge

Bruce R. Harris  
Administrative Judge

