

AMERICAN TELEPHONE & TELEGRAPH CO.

IBLA 81-753

Decided February 11, 1982

Appeal from decision of the Wyoming State Office, Bureau of Land Management, imposing reappraised annual rental charges for communication site right-of-way W-0165716.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Rights-of-Way: Act of March 4, 1911

Where a right-of-way was issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976) (repealed), and was not conformed to a right-of-way under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976), in accordance with sec. 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976), the regulation at 43 CFR 2803.1-2(d), allowing rental adjustment without a prior hearing, is not applicable because such a pre-FLPMA right-of-way was not issued pursuant to Title V of FLPMA.

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

The requirement of 43 CFR 2802.1-7(e) (1979) for notice and opportunity for a hearing may be satisfied by a hearing at the State Office level in accordance with the basic procedural parameters set forth in Circle L. Inc., 36 IBLA 260 (1978).

APPEARANCES: Richard A. Bromley, Esq., San Francisco, California, for appellant; Marla Mansfield, Esq., Office of the Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

American Telephone and Telegraph Company (AT&T) has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated May 4, 1981, imposing reappraised annual rental charges for communication site right-of-way W-0165716. The right-of-way was granted to AT&T pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976). 1/

In its statement of reasons on appeal, appellant asserts that, as a matter of right, it was entitled to a hearing prior to the revision of rental charges by BLM in accordance with 43 CFR 2802.1-7(e) (1979), 2/ that BLM's reappraisal was defective methodologically and that the increased rental was unsupported. Subsequent to docketing of this appeal, BLM requested a remand of the case for hearing in light of recent Board decisions discussed in this opinion.

By application dated September 21, 1961, AT&T applied to BLM for a 50-year communication site right-of-way located at Church Buttes, Wyoming, pursuant to the Act of March 4, 1911. The right-of-way was granted on December 5, 1961. In a decision dated May 4, 1981, BLM notified appellant that as a result of a reappraisal of the Church Buttes location the annual rental fee for appellant's communication site right-of-way would be increased to \$200 for the 1-year period extending from January 1, 1982, through December 31, 1982. The decision stated that the reappraisal was done in accordance with the regulation appearing at 43 CFR 2803.1-2 (1980), which requires the payment of "fair market rental value" for the use and occupancy of the public lands.

[1, 2] The regulation relied on by appellant, 43 CFR 2802.1-7(e) (1979), provided:

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. [Emphasis added.]

1/ This Act was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2793, effective Oct. 21, 1976, subject to valid existing rights.

2/ This regulation was superseded by the revised right-of-way regulations at 43 CFR Part 2800, issued pursuant to the right-of-way provisions of Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976), which were effective July 31, 1980. 45 FR 44518-44537 (July 1, 1980).

In American Telephone & Telegraph Co., 25 IBLA 341, 346-47 (1976), we held that the requirement of a hearing prior to the imposition of revised rental charges under that regulation is mandatory, stating:

As to the revised charges for the Wyoming, Arizona and Washington sites listed in Appendix II, we note that no hearings were held as required in section 2802.1-7(e), supra. That regulation requires notice and an opportunity for hearing as a matter of right prior to revision of charges. A specific requirement that a hearing be held before government action is taken is mandatory. Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316 (1961). In Texas Gas Transmission Corporation, A-29856 (January 14, 1964), the regulation herein concerned--formerly designated 43 CFR 244.21(e) (1963)--was construed by the Department: "Since the regulation plainly requires that these steps [notice and opportunity for hearing] be taken before rates are changed, it was improper to act without following the prescribed procedures." The decisions as to sites in Wyoming, Arizona and Washington must therefore be set aside and the cases remanded for opportunity for hearing as set forth hereunder prior to imposition of revised charges. [Footnote omitted.]

Appellant argues that 43 CFR 2802.1-7(e) (1979) is controlling in the present case.

BLM in the decision below found that the applicable regulation is 43 CFR 2803.1-2(d) which was published in the Federal Register on July 1, 1980, 45 FR 44533, with an effective date of July 31, 1980. That regulation provides:

Rental fees may be initiated or adjusted whenever necessary to reflect current fair market value: (1) As a result of reappraisal of fair market values which shall occur at least once every 5 years, or (2) as a result of a change in the holder's qualifications under paragraph (c) of this section. Reasonable notice shall be given prior to imposing or adjusting rental fees pursuant to this paragraph. Decisions on fees are subject to appeal pursuant to § 2804 of this title.

In James W. Smith (On Reconsideration), 55 IBLA 390 (1981), we considered whether the regulations revised in July 1980, 43 CFR Part 2800, were applicable to pre-FLPMA rights-of-way. We stated:

When the FLPMA right-of-way regulations, 43 CFR Part 2800, are examined, the interpretation that pre-FLPMA rights-of-way are not governed by such regulations is clear. 43 CFR 2800.0-5(g) defines "right-of-way" as "the public lands authorized to be used or occupied pursuant to a right-of-way grant." "Right-of-way grant" is defined in 43 CFR 2800.0-5(h) as "an instrument issued pursuant to Title V of

the Act authorizing the use of a right-of-way over, upon, under or through public lands for construction, operation, maintenance and termination of a project." (Emphasis added.) The term right-of-way grant is used throughout the regulations in 43 CFR Part 2800, thereby limiting the application of the regulations to instruments "issued pursuant to Title V of the Act."

Id. at 396.

The revised regulations applicable to rental fees, 43 CFR 2803.1-2, in general apply to "[t]he holder of a right-of-way grant or temporary use permit * * *." 43 CFR 2803.1-2(a). As explained above, a right-of-way grant is defined as an instrument issued pursuant to Title V of FLPMA. Therefore, since the rights-of-way in question were issued prior to FLPMA, 43 CFR 2803.1-2(d) is not applicable, and appellant is entitled to the opportunity for a prior hearing pursuant to 43 CFR 2802.1-7(e) (1979). American Telephone & Telegraph Co., 57 IBLA 215 (1981). Therefore, in accordance with the Board's decision in American Telephone & Telegraph Co., (On Reconsideration), 59 IBLA 343 (1981), the decision appealed from is set aside and the case remanded to the BLM State Office to provide the opportunity for a hearing consistent with the procedural parameters set forth in Circle L, Inc., 36 IBLA 260 (1978).

In light of our disposition of this appeal, there is no need to reach the question raised by appellant of the adequacy of BLM's appraisals.

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 set aside and the case remanded for action consistent with this opinion.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Bruce R. Harris
Administrative Judge

