

SOUTH CENTRAL UTAH TELEPHONE ASSOCIATION, INC.

IBLA 86-1592

Decided July 17, 1987

Appeal from a decision of the Kanab, Utah, Resource Area Office, Bureau of Land Management, determining the rental due for communication site right-of-way U-51361.

Reversed.

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

A telephone microwave repeater station financed pursuant to the Rural Electrification Act, 7 U.S.C. § 901 (1982), is a facility for which a right-of-way shall be granted without rental fees, as provided by the Act of May 25, 1984, P.L. 98-300, 98 Stat. 215, amending 43 U.S.C. § 1764(g) (Supp. III 1985).

Colorado-Ute Electric Association, Inc., 83 IBLA 358 (1984), overruled.

APPEARANCES: Daniel J. Spencer, Office Manager, South Central Utah Telephone Association, Inc., Escalante, Utah, for appellant; John J. McHale, Esq., Division of Energy and Resources, Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Effective November 19, 1982, the Kanab Resource Area, Bureau of Land Management (BLM), granted to South Central Utah Telephone Association, Inc. (South Central) a 1.01-acre communication site right-of-way for 30 years in accordance with 43 U.S.C. § 1761(a)(5) (1982). South Central's application, as amended, stated that a 20-by-32-foot passive microwave repeater would be used to repeat telephone communications from Orderville, Utah, to Blowhard, via Elkhart Cliffs, and explained that "[t]he only line of site [sic] path requires a microwave repeater on Elkhart Cliffs."

In January 1983 BLM notified South Central that an annual rental of \$400 per year had been established in accordance with 43 CFR 2803.1-2 after a formal appraisal. South Central paid this rental for the first 2 years of

the grant, but in November 1984 it apparently wrote BLM about the rental on the basis of the enactment of P.L. 98-300. 1/ BLM responded on December 6, 1984:

We have reviewed your letter of November 27, 1984 regarding rental fees for your microwave repeater right-of-way No. U-51361. Public Law 98-300 provided that rights-of-way granted under the Federal Land Policy [and] Management Act will be rent-free if the facilities constructed were financed with REA [Rural Electrification Act] money, or if they are an extension of such a facility (e.g. extension of a telephone line which was originally REA funded). P.L. 98-300 did not give blanket authorization for rent-free use of Federal land by REAs. The determining factor is the presence of REA financing of the specific facility. In order to allow rent-free status of this right-of-way, we will need some form of showing that the microwave site was funded, at least for more than a token part, by REA funds. [2/]

South Central provided the required documentation and requested a refund of the rent it had paid for the period beginning after P.L. 98-300 was enacted. BLM approved a refund in December 1984. On August 11, 1986, however, BLM issued a decision stating that this refund plus rental for the period November 1984 to November 1986 was due, citing our decision in Colorado-Ute Association, Inc., 83 IBLA 358 (1984). 3/ South Central has appealed BLM's decision.

1/ There is no copy of South Central's letter in the record. P.L. 98-300, 98 Stat. 215, approved May 25, 1984, provides:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection 504(g) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1764) is amended by inserting the following sentence at the end of the subsection:

"Rights-of-way shall be granted, issued, or renewed, without rental fees, for electric or telephone facilities financed pursuant to the Rural Electrification Act of 1936, as amended, or any extensions from such facilities: Provided, That nothing in this sentence shall be construed to affect the authority of the Secretary granting, issuing, or renewing the right-of-way to require reimbursement of reasonable administrative and other costs pursuant to the second sentence of this subsection."
(Emphasis in original).

2/ BLM Instruction Memorandum 84-710 concerning P.L. 98-300, dated Sept. 13, 1984, states in part: "A facility does not need to be exclusively REA financed to make the grant rent-free as long as the REA financing is more than nominal or token."

3/ That decision stated in part:

"Although the language of the amendment does not in so many words limit the application of the amended Act to federally funded owners of transmission lines or to telephone and electric lines only, the recorded remarks of the members of the Congress who proposed the amendments indicate that it was the intention of Congress to so limit the Act. Thus, the statement of Congressman Seiberling declared the purpose of the bill `is a simple and straightforward

South Central argues the Board's decision in Colorado-Ute mistakenly "requires a physical connection by copper wire or some other medium between points," and states that the Congress "did not intend to distinguish between types of technology -- in particular between copper cable networks and microwave radio networks -- when it enacted Public Law 98-300." ^{4/} It argues further that the Board's statement in Colorado-Ute that P.L. 98-300 "was intended to benefit only REA Cooperatives and was not intended to extend to any public utility which might receive funding under the Rural Electrification Act of 1936," 83 IBLA at 361, is also incorrect and the decision should be overruled. BLM has filed an Answer in which it suggests that the Board "may wish to reconsider its ruling in Colorado-Ute."

[1] "Facilities" is a general term, so it was proper for us to look into the legislative history of P.L. 98-300 for indications of what kinds of "electric or telephone facilities financed pursuant to the Rural Electrification Act of 1936" the Congress intended to include within or exclude from the exemption from rental payments for the fair market value of rights-of-way on public lands. As indicated in Colorado-Ute, *supra* at 360, in statements on the floor of the House of Representatives and in the report of the Senate Committee on Energy and Natural Resources, the only words used to explain "facilities" were "lines" or terms including "lines."

We have investigated the legislative history further, however, including the report of the House of Representatives Committee on Interior and Insular Affairs; ^{5/} the unpublished transcripts of that committee's mark-up on H.R. 2211 held on October 26, 1983, and of the House Subcommittee on Public Lands and National Parks hearing on the bill on June 14, 1983, and consideration of the bill on September 29, 1983; and the hearing held before the

fn. 3 (continued)

proposal. It applies only to telephone or electric lines which are being federally subsidized through the Rural Electrification Act.' * * * 129 Cong. Rec. H9316 (Daily ed. Nov. 8, 1983)." 83 IBLA AT 360 (emphasis in original). The Board concluded that only rights-of-way for transmission lines were intended to be given special treatment by the Congress and held that Colorado-Ute's microwave radio set did not qualify. A petition for reconsideration was denied on January 15, 1985.

^{4/} "[I]n the telecommunications industry * * * a 'line' may, and often does, consist of a series of microwave radio stations transmitting two-way communications. As a result, a 'wireless station' of the type employed in Colorado-Ute, if owned and operated by a telephone cooperative or commercial company, would be part of a particular channel of communications used by the telephone carrier in its day-to-day business. * * * [T]he statements quoted in the decision in which Congressmen refer to transmission or phone 'lines' is [sic] nothing more than laymen discussing the application of their proposal to various types of communications channels and paths for distributing electricity. Their statements cannot be considered to [be] expert references to or discussions of the meaning of the term 'line'." (Statement of Reasons at 3-4).

^{5/} H.R. Rep. No. 475, 98th Cong., 1st Sess. (1983.)

Senate Subcommittee on Public Lands and Reserved Water on June 27, 1983. 6/ Although these sources also contain many references to "lines" when discussing the bill, they also indicate that other facilities were included within the scope of the exemption. Representative Marlenee, who introduced H.R. 2211, the bill that became P.L. 98-300, 7/ in explaining the amendment of the bill he presented to the House Subcommittee on Public Lands and National Parks on September 29, 1983, 8/ referred to distribution systems as well as to transmission power lines. He told the subcommittee that the purpose of the bill was to restore the exemption from right-of-way rentals accorded to electric and telephone facilities financed under the Rural Electrification Act of 1936 9/ before the enactment of the Federal Land Policy and Management Act of 1976 (FLPMA). 10/ In a statement to the Senate Subcommittee on Public Lands and Reserved Water, the Department's representative described S. 508, the companion bill to H.R. 2211, as applying to "all facilities, including distribution lines, transmission lines, and power generation plants" financed under the Rural Electrification Act. 11/ And although we cannot be expected to take official notice of technical developments in, or the vernacular of, the telecommunications industry, we are aware that copper lines are no longer the only means for transmitting electric or telephonic energy. We conclude from our re-examination of its legislative history that Congress did not intend to limit P.L. 98-300 to rights-of-way only for "lines." A site where a microwave

6/ Miscellaneous Private Relief, Fee Exemption, Land Conveyances, Boundary Adjustment, and Amendments to the Volunteers in the Parks Act of 1979, Hearing before the Subcommittee on Public Lands and Reserved Water of the Committee on Energy and Natural Resources, United States Senate, Ninety-Eighth Congress, First Session, on S. 482 * * * S. 508 * * * June 27, 1983.

7/ Representative Oberstar introduced a similar bill, H.R. 2027, which was considered along with H.R. 2211.

8/ The amendment restricted the exemption to telephone and electric facilities rather than "entities" financed by the REA, so that if a large company were to take over a rural electric nonprofit corporation or cooperative, the exemption would apply only to such facilities rather than the whole company. See note 12, infra.

9/ 7 U.S.C. § 901 (1982).

10/ See H.R. Rep. No. 475, supra, note 5, at 2:

"For many years, Federal agencies provided rights-of-way at no charge to REA and RTA borrowers. In 1976, the Federal Land Policy and Management Act was enacted * * *. Since 1980, the U.S. Forest Service and the Bureau of Land Management have begun to assess rentals for such REA rights-of-way over Federal lands."

See also Statement of Douglas W. MacCleery, Deputy Assistant Secretary, Natural Resources and Environment, United States Department of Agriculture, before the Subcommittee on Public Lands and Reserved Water, in Hearing, supra, note 6, at 51: "The fee requirement began in the nineteen seventies. Before that, in policy originating in 1938, free use was granted to the REA borrowers. The purpose was to promote a rural development objective of making power and telephone services available to rural areas."

11/ See Hearing, supra, note 6, at 42. The same statement was presented to the House Subcommittee on Public Lands and National Parks on June 14, 1983.

repeater financed by the REA is used for telephone communication may also be exempt from rental payments for the fair market value of a right-of-way on public lands that would be due in accordance with section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (Supp. III 1985).

Finally, we address appellant's objection to our dictum in Colorado-Ute that P.L. 98-300 was only intended to benefit REA cooperatives. As the House report indicates, the Committee on Interior and Insular Affairs did consider an amendment to H.R. 2211 that would have limited the persons eligible for the exemption from rental payments. This amendment was rejected because the bill had already been amended to limit the exemption to facilities receiving REA financing. 12/ Our comment in Colorado-Ute is therefore not supported by the legislative history of P.L. 98-300.

We conclude that our decision in Colorado-Ute holding that a right-of-way for a site for a facility financed under the REA may not qualify for an exemption from rental payments under P.L. 98-300 is incorrect and must be overruled and that BLM's decision of August 11, 1986, in this case must be reversed. 13/

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1(b), the decision appealed from is reversed.

Will A. Irwin
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

12/ See H.R. No. 475, supra, note 5, at 3:

"The committee also considered the possibility of limiting the terms of this bill so that the exemption from rental fees would be applicable only to facilities owned and operated by a State or local government (or agency thereof) or a nonprofit association or nonprofit corporation. After discussion, it was decided that such a limitation was inappropriate since, as reported, the bill limits the exemption so that it applies only to facilities which have met the requirements of the Rural Electrification Act, regardless of the nature of the entity constructing or operating such facilities." Cf. note 8, supra.

13/ We note that BLM has recently amended 43 CFR 2803.1-2 to provide that no rental shall be collected where the facilities constructed on a site or linear right-of-way are or were financed in whole or in part under the REA, as amended, or are extensions from such REA financed facilities. See 43 CFR 2803.1-2(b)(1)(iii), 52 FR 25811, 25816, 25819 (July 8, 1987).

ADMINISTRATIVE JUDGE ARNESS CONCURRING:

While I agree with the result announced by the majority decision, more needs to be said concerning the reason why we should now belatedly overrule Colorado-Ute Electric Association, Inc., 83 IBLA 358 (1984), following our denial of reconsideration of that decision in 1985. As Professor Davis explains in his Administrative Law Treatise, (1983), "[c]ourts of appeals have built up a large body of case law requiring that agencies taking formal action must either be consistent or explain why they have departed from a previous position * * *." Id. at § 20:11. Thus, although this Board is not bound by the judicial rule of stare decisis, it is obliged to explain why it has changed position. This explanation for the change in agency position " * * * must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), cert. denied 403 U.S. 923 (1971).

An agency acts improperly when it "glosses over" prior decisions. Id. at 852. The majority opinion does just that when it relies upon the legislative history of the 1984 amendment to 43 U.S.C. § 1764(g) to relieve appellant from the obligation to pay a communication site rental fee, for it was exactly upon this same basis that the Board in Colorado-Ute required payment of the rental fee. Nothing in the legislative history has changed since the Colorado-Ute decision. 1/ Nor do the majority point to any new matter in the legislative history to discredit our prior reading of the documents which comprise the history; if anything, the prior decision to charge rentals to corporations like appellant seems to be reinforced by the matters now found by the majority to reveal a contrary legislative intention. Despite this apparent lack of foundation for the action now taken to overrule Colorado-Ute there are, however, reasons why Colorado-Ute should be overruled.

Plainly, the 1984 amendment exempts "facilities" and "extensions from such facilities" such as lines from payment of rental fees. Yet the reading given to the statute by our Colorado-Ute decision effectively removed the word "facilities" from the text of the Act and substituted the word "lines" instead. It would be difficult, if not impossible, to deny that appellant's (Rural Electrification Act) REA-financed microwave repeater relay station is a telephone "facility" under any reasonable definition of that term. See

1/ It may be that the majority intend by this otherwise baffling revisit to the legislative history to find a change of legislative purpose in subsequent remarks by members of Congress in response to our Colorado-Ute decision. See reference infra to comments by Senators Garn and McClure and Representative Marlenee. While these later Congressional comments do not point to anything in the recorded legislative proceedings which preceded enactment of the amendment to show that the interpretation of those proceedings made by the Colorado-Ute decision was impossible, their reaction to the use of the legislative history by the Board is not without value.

43 CFR 2800.0-5(j). Pertinently, in Amoco Production Co. v. Village of Gambell, 480 U.S. ____, 107 S. Ct. 1396, 1406 (1987), the Court observed:

Although language seldom attains the precision of a mathematical symbol, where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning. "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used." United States v. Locke, 471 U.S. 84, 95, 105 S.Ct. 1785, 1793, 85 L.Ed.2d 64 (1985) (quoting Richards v. United States, 369 U.S. 1, 9, 82 S.Ct. 585, 590, 7 L.Ed.2d 492 (1962)). This is not that "exceptional case" where acceptance of the plain meaning of a word would "thwart the obvious purpose of the statute." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982) (internal quotations omitted).

In support of its rental determination, the Area Office cited our decision in Colorado-Ute Electric Association, Inc., 83 IBLA 358 (1984), in which we restricted application of the 1984 amendment to rights-of-way for electric and telephone lines and held that the rental exemption does not extend to a right-of-way for a microwave radio site. This holding was based on references by Congressmen involved with the legislation to transmission lines, telephone lines, and electric lines, and these references led us to conclude that the exemption only referred to lines, and not to sites such as microwave relay stations. Both appellant and BLM argue that our Colorado-Ute decision misconstrued the legislature's intent, and they request that we overrule that decision. 2/

Admittedly, in retrospect the rationale of our Colorado-Ute decision contains several critical flaws. The first flaw was our misplaced reliance on the legislative history. As the court observed in Amoco v. Gambell, supra at 1408:

When statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning, that is ordinarily "the end of the matter."

2/ Before we issued our decision in Colorado-Ute, supra, the Director, BLM, informed all field officials that REA financed generating facilities were exempt from rental payments in addition to electrical and telephone lines as "any extension from such facilities." Instruction Memorandum 84-710 (September 13, 1984). When this Instruction Memorandum was cited to the Board in a petition for reconsideration, we held that it provided no basis for changing our decision. Colorado-Ute Electric Association, Inc., (IBLA 83-509, Jan. 15, 1985) (order denying reconsideration).

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). "Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances." United States v. Locke, 471 U.S., at 9596, 105 S.Ct. at 1793 (internal quotations omitted).

Furthermore, even if the word "lines" as used in the legislative history controlled our construction of the word "facilities," appellant contends correctly that we have used that term too narrowly by requiring a physical connection by copper wire or some other medium between points. This narrow meaning given to the word by our Colorado-Ute opinion does not reflect current usage in the telecommunications industry, where the word "line" may refer to a series of microwave radio stations transmitting two-way communications.

Finally, several members of Congress have stated that their intent was misconstrued by our Colorado-Ute opinion. Senators McClure and Garn have stated that the legislation was intended to include microwave transmission facilities in the rental exemption. 132 Cong. Rec. S14980 (daily ed. Oct. 3, 1986). Representative Marlenee, the author of the legislation, also explained that it was not the purpose of the bill to exclude communication sites from the rent exemption. 132 Cong. Rec. H11071 (daily ed. Oct. 17, 1986).

Thus, it is plain we erred in holding that REA-financed microwave communication sites are not entitled to the exemption from rental afforded other REA-financed facilities. Therefore, I agree we should overrule Colorado-Ute Electric Association, Inc., 83 IBLA 358 (1984), and that the BLM decision before us on appeal should be reversed.

One final matter needs to be addressed. BLM has now published final rulemaking which has the effect of overruling the Colorado-Ute decision. 52 FR 25811, 25819 (July 8, 1987). Notwithstanding the publication of these regulations, it is appropriate for the Board to overrule its prior decision in this adjudication. Rules by statutory definition are matters of "future effect." 5 U.S.C. § 551(4) (1982). By demonstrating in this appeal that our prior decision was not a valid application of the statute, there can be no doubt about BLM's authority to provide relief in pending or prior cases. Accord, see Lindsey Lee Lemons, 98 IBLA 75 (1987), denying retroactive effect to Departmental regulations governing mining claim recordings.

Franklin D. Arness
Administrative Judge

