

HIGH COUNTRY COMMUNICATIONS, INC.

IBLA 87-206

Decided October 11, 1988

Appeal from a decision of the Montrose District Office, Bureau of Land Management, establishing rental for communication site right-of-way C-039529.

Vacated and remanded.

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

Generally, the Board of Land Appeals will uphold a BLM appraisal of a right-of-way unless it can be shown that BLM has failed to apply the proper criteria when calculating the fair market value right-of-way rental or the resulting charges are shown to be excessive. Absent error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

2. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally

Generally, the proper appraisal analysis method for determining the fair market rental value of nonlinear rights-of-way is a site-specific analysis of comparable sites with adjustment for variances in the site conditions.

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

BLM may reduce rental payments for communication site rights-of-way if it determines that the imposition of the fair market value rental would cause an undue hardship on the right-of-way holder or applicant.

APPEARANCES: Dan Brown, President and General Manager, High Country Communications, Inc., Gunnison, Colorado, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE MULLEN

High Country Communications, Inc., has appealed a December 2, 1986, decision of the Montrose District Office, Bureau of Land Management (BLM), establishing a \$1,000-per-year rental for communication site right-of-way C-035929. The right-of-way was granted by a decision dated May 23, 1985. Under the terms of the lease, the yearly rental amount was to be set after a subsequent determination of fair market rental value. The decision appealed from set the rental rate at \$1,000 per year and called for payment of \$1,700 for the period July 8, 1985, through July 7, 1987 (\$2,000, less a \$300 advance rental payment previously received).

Appellant operates an FM radio station in Gunnison, Colorado. The right-of-way now under consideration provides for installation and operation of a reception antenna, 10-watt FM translator, and broadcast antenna at a 0.002-acre site on Round Top Mountain in the SE<sup>SE</sup>, sec. 8, and the SW<sup>SW</sup>, sec. 9, T. 43 N., R. 4 W., New Mexico Principal Meridian. The site is also held by the Hinsdale County Chamber of Commerce (Chamber) under communications site right-of-way C-024843. A small building and tower constructed by the Chamber were used for installation of appellant's equipment.

The site is 3 miles south of the town of Lake City, Colorado, which has a population of approximately 250. The translator is used to rebroadcast a radio signal from appellant's radio station located in Gunnison, Colorado, providing reception in the Lake City area. The translator unit also has local broadcast capability.

BLM's fair market rental value determination was based on an appraisal prepared by the Colorado State Office, BLM. The appraisal's stated purpose was "[t]o provide a supplement to the Colorado Telecommunications Use Appraisal [CTUA] dated August 7, 1986 and approved September 29, 1986." The appraiser determined that "[t]he authorized use is for FM Radio translator use as described on page 35 of the above referenced appraisal" and set the "estimated fair market rental" at \$1,000.

A copy of the CTUA is included in the case file. It identifies the requirement of 43 U.S.C. | 1701(a)(9) that "the United States receive fair market value of the use of the public lands" as governing the determination, and reviews rental values for six types of telecommunications uses. The portion of the report for "CATV Receiver and Radio-TV Translator Uses" lists rental fees and other factors for 14 Colorado and 42 out-of-state communication site leases. The discussion of these sites concludes by finding that "the estimated annual fair market rental for the typical BLM or Forest Service CATV or translator use in Colorado is \$1000."

Appellant contends that the market rental value set by BLM is excessive when compared with other rentals in the area. In particular, appellant asserts that Motorola, which manages a private site at Douglas Pass, charges approximately the same rent, but provides without additional charge to the lessee a building, tower, antenna, transmission line, and power, and also maintains the access road.

Appellant maintains that, due to the small population served, it is impossible to generate sufficient revenue to justify paying the rental set by BLM. Appellant states that, absent relief, it will vacate the site and the local citizens will no longer be able to receive the public service information the transmitter provides. Appellant argues that the lack of information about dangerous weather and road conditions will endanger the health, safety, and welfare of the people in the Lake City area.

[1] This Board will uphold a BLM appraisal of a right-of-way unless it can be shown that BLM has failed to apply proper criteria when calculating the fair market value of a right-of-way rental or the resulting charges are shown to be excessive. See, e.g., Harvey Singleton, 101 IBLA 248 (1988); Blue Mesa Road Association, 89 IBLA 120 (1985), B & M Service, Inc., 48 IBLA 233 (1980). Absent a showing of error in the appraisal methods utilized by BLM, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive. Mesa Broadcasting Co., 94 IBLA 381 (1986); James W. Smith, 46 IBLA 233 (1980).

[2] The approach BLM used to establish appellant's rental rate is commonly known as the "going rate" method of evaluation. The Board has approved of the use of this method for determining the fair market rental value of linear rights-of-way. See Northwest Pipeline Corp., 65 IBLA 245 (1982), (On Reconsideration), 77 IBLA 46 (1983), 83 IBLA 204 (1984). However, the proper appraisal analysis method for determining the fair market rental value of non-linear rights-of-way is a site specific analysis of comparable sites with adjustment for variances in the site conditions. See American Telephone & Telegraph Co., 77 IBLA 110 (1984).

In most cases, the determination of the fair market rental value of the specific site requires the comparison of the physical features of a specific site with similar sites in the general area. See, e.g., Francis H. Gifford, 62 IBLA 393 (1982). If the comparable sites are privately held, a percentage adjustment is usually made to reflect the general inferiority of the rights granted under a Federal right-of-way. See Northwest Pipeline Corp., *supra* at 253.

The CTUA lists cable television and a radio-TV transmitter site leases by date of issuance, annual rental, length of lease and options, frequency of rental adjustment, access, availability of power, and other factors. The discussion of the sites states that for Colorado leases, after eliminating the highest value lease, the average rental is \$862; for single user locations the average rental is \$768; for mountainous leases the average is \$1,075; and similarly presents averages based on some of the other factors. <sup>1/</sup> For out-of-state leases the report finds the average rental to be

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<sup>1/</sup> The report does not consider the benefit derived when the lessor furnishes amenities such as those described by appellant as being a part of the Motorola lease. Although all sites considered are classified as not serving major metropolitan areas, the introductory comments to the report suggest that this means the sites do not serve major cities along the front

\$1,107 after deleting the highest-valued lease. It concludes that "[a]ll factors considered, the estimated annual fair market rental for the typical BLM or Forest Service CATV or translator use in Colorado is \$1000." 2/

The CTUA report concludes that the estimated fair market rental for the typical lease in Colorado is \$1,000. However, we find no evidence that the appraiser considered the characteristics of appellant's site to determine whether it fits within the profile of the "typical" site on which the \$1,000 rental is based. In fact, the report does not define the characteristics of the "typical" site. Additionally, it is unclear how the typical site varies from the average Colorado lease and from recent leases, both of which carry a much lower rental amount according to the report. Thus, while the report provides useful information and may serve as a baseline for arriving at the fair market rental of appellant's site, it does not by itself determine that value. The range in annual rental charges for Colorado leases from \$300 to \$5,800 is so wide as to make the concept of a "typical" site of doubtful relevance. As previously discussed, the comparable-site method of evaluation generally requires a comparison of the features of the site under consideration with the features and rental rates of other sites. The appraisal method used by BLM was clearly the going-rate method, rather than the comparable-site method. Therefore, we must vacate the decision and remand the case to BLM in order that it may conduct an appraisal using the proper appraisal method.

[3] Appellant has raised an additional issue, and we believe it appropriate to address that issue. As a starting point we will review the applicable law. As noted in the CTUA, the Federal Land Policy and Management Act of 1976 (FLPMA) includes a congressional declaration of policy that the Federal Government receive fair market value for use of the public lands and its resources. 43 U.S.C. | 1701(a)(9) (1982). However, this statement of policy is qualified by the statement "unless otherwise provided by statute." Id.

Rights-of-way to use public lands administered by the Department of the Interior and National Forest System lands administered by the Department of Agriculture are authorized by Title V of FLPMA, 43 U.S.C. || 1761-1771 (1982). Pursuant to the stated congressional policy, a right-of-way holder is to pay fair market rental value of the land used. 43 U.S.C. | 1764(g) (1982). There are, however, certain limited exceptions to this requirement.

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fn 1 (continued)

range and that no further division based upon the size of population served by the site was made. This approach contrasts with that taken by other BLM offices. See Jancur, Inc., 93 IBLA 310, 312 (1986). To the extent omission of these matters from the report alters the comparability of the sites, and hence might tend to increase the estimated fair market rental value, they are a basis for appellant's argument that the rental imposes a disproportionate financial burden.

2/ See, however, the Forest Service fee schedule for the Rocky Mountain Region. 53 FR 28609 (July 28, 1988). If that schedule were applied, the annual fee would be \$75.

Of importance to this case is the provision that "[r]ights-of-way may be granted, issued, or renewed \* \* \* to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary \* \* \* for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest." Id.

The BLM regulations pertaining to rental assessments, promulgated under the authority of Title V of FLPMA, have been amended subsequent to the appraisal of appellant's right-of-way. As originally promulgated, the regulations provided simply for the annual payment of the fair market rental value "based upon the fair market value of the rights authorized in the right-of-way grant." 45 FR 44518, 44553 (July 1, 1980). The preface to the regulations noted that more specific guidance as to methods for conducting appraisals would be provided, as in the past, by the BLM Manual. Id. at 44523. In accord with the exception to the statutory fair market value requirement, subsection (c) of the regulation stated: "No fee, or a fee less than fair market rental, may be authorized \* \* \* [w]hen a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary." Id. at 44533.

The regulations did not set out a required method for conducting right-of-way appraisals. As a result, BLM state and district offices selected and used a variety of approaches. See Northwest Pipeline Corp. (On Reconsideration), supra at 49-50. In cases where the same appraisal method was used, different factors were often considered relevant in establishing a fair market rental value. The lack of uniform and consistently applied procedures led to criticisms of the agency and questions of fairness.

In response to these concerns, BLM published notice of its intent to propose rulemaking and revise the regulations concerning fair market rental fee determinations for rights-of-way. 49 FR 19049 (May 4, 1984). After receiving a number of suggestions, BLM published a second notice of intent outlining the approach the agency proposed to take in promulgating the rules. 50 FR 2697 (Jan. 18, 1985). Following receipt of additional comments, BLM published proposed rules and sought further comments. 51 FR 32886 (Sept. 5, 1986).

For nonlinear rights-of-way, and excepted linear rights-of-way, the regulation provides that the rental is to "be based on either a market survey of comparable rentals, or on a value determination for specific parcels or groups of parcels." 43 CFR 2803.1-2(c)(3)(i). The regulation also requires that rental determinations be prepared following the standards and format set forth in the Uniform Appraisal Standards for Federal Land Acquisitions (1973) published by the Department of Justice "or in certain cases as required by the Bureau's Appraisal manual." Id. The new regulations also establish competitive bidding procedures for sites when competitive interest exists. 43 CFR 2803.1-3.

In addition, the new regulations added a hardship provision, allowing a reduction or waiver of a rental payment when: "With the concurrence of the State Director, the authorized officer, after consultation with an applicant/holder, determines that the requirement to pay the full rental

will cause undue hardship on the holder/applicant and that it is in the public interest to reduce or waive said rental." 43 CFR 2803.1-2(b)(2)(iv). The difference between the original public interest provision and the recently added hardship provision is that the former turns on the financial structure under which an applicant operates, <sup>3/</sup> and the latter depends on whether the fair market rental charge will create an "undue hardship" on the applicant's ability to successfully operate.

The primary thrust of appellant's arguments on appeal are directed to the hardship the rental will impose on its ability to operate the translator site. On review BLM should consider the regulatory provision authorizing reduction or waiver of a rental charge when the levy of fair market rental will cause undue hardship and whether appellant qualifies under this provision. <sup>4/</sup> We believe this course of action to be in accord with BLM's announced intent to apply the revised regulations to those rights-of-way which provided for a subsequent rental determination. 52 FR at 25817-18 (July 8, 1987).

Commercial radio and television broadcast stations derive revenue from selling advertising. As a general rule, advertising rates are based upon the size of the audience served by the station, measured either by the population within the broadcast range or the estimated size of the actual audience, determined by audience rating surveys. In other words, the economic value of a commercial broadcast advertisement, as reflected by the rate charged, is determined by the actual or potential audience rather than the cost of broadcasting the message. Consequently, the advertising revenues a station receives limits and controls the budget available for programming rather than the expenses of programming determining the costs of advertising. <sup>5/</sup> Thus, for commercial broadcast media, a hardship may arise when a small population base significantly limits revenues, causing the right-of-way rental payment to be an inordinately large portion of the station's operating costs. In such a circumstance the possible hardship imposed by the rental payment may pose a serious threat to the feasibility

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<sup>3/</sup> The present case does not require us to consider the effect, if any, the revisions to the regulations may have upon Tri-State Generation & Transmission Association, 63 IBLA 347, 89 I.D. 227 (1982), and subsequent decisions. We note that in the preface to the revised regulations BLM rejected comments that municipal utilities and cooperatives should not be charged rentals even when their principal source of income is customer charges. 52 FR 25811, 25816 (July 8, 1987).

<sup>4/</sup> A party may be given the benefit of an amended or revised regulation adopted prior to the date a decision becomes final, so long as doing so does not prejudice the rights of third parties or conflict with countervailing public policy. United States v. Ballas, 87 IBLA 88 (1985); Bruce Anderson, 80 IBLA 286, 296, 91 I.D. 203, 208 (1984).

<sup>5/</sup> This fact is clearly recognized in the above-mentioned Forest Service fee schedule. That schedule provides for a sliding scale fee based upon the service area population, with a minimum fee of \$75 for stations serving less than 1,000 and a maximum fee of \$1,200 for those serving over 50,000.

of the operation, raising the question whether a reduced rental is warranted for the transmitter site in question. <sup>6/</sup> Given the congressional mandate that right-of-way holders pay fair market rental value, as a general rule it will be in the public interest to make an exception only when there is clear evidence of a hardship.

Under the revised regulations BLM may require a right-of-way holder or applicant "to submit data, information and other written material in support of the proposed finding that the right-of-way grant or temporary use permit qualifies for a reduction or waiver of rental." 43 CFR 2803.1-2(b)(2)(iv). An applicant seeking a reduction of the rental amount carries the burden of showing that a reduction is warranted. On remand BLM should grant appellant an opportunity to present any evidence appellant believes would demonstrate its qualification for a reduction or waiver of rental.

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 vacated and the case is remanded for further consideration consistent with this decision.

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R. W. Mullen  
Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge

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<sup>6/</sup> Appellant operates a radio station in Gunnison, the translator at the right-of-way at issue, and has additional operations in other towns. While it is possible that the addition of an audience in Lake City may increase advertising revenues at the Gunnison station, it is unlikely given the small population served by the translator. If such revenues are considered, a relative share of the expenses of operating the Gunnison station must also be considered. Certainly BLM may review such interrelated operations questions when considering whether to reduce or waive a rental payment. At present, however, the record before us does not suggest there is any need to do so in this case.