

JOYCE COMMUNICATIONS, INC.

IBLA 87-657

Decided October 25, 1989

Appeal from a decision of the District Manager, Grand Junction District, Colorado, Bureau of Land Management, requiring payment of annual rental for communication site right-of-way C-43094.

Vacated and remanded.

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

Where a BLM determination of the fair market rental value of a communications site right-of-way is based on a market study appraisal which does not comport with a proper application of the comparable lease method of appraisal and fails to provide data and analysis sufficient to determine the comparability of the right-of-way and private leases for similar communications use, the Board will vacate the value determination and remand the case for reappraisal.

APPEARANCES: Klee Dobra, General Manager, Joyce Communications, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Joyce Communications, Inc. (Joyce) (formerly High Country Broadcasting, Inc.), has appealed from a decision of the District Manager, Grand Junction District, Colorado, Bureau of Land Management (BLM), dated May 6, 1987, requiring the payment of annual rental for communications site right-of-way C-43094.

On August 14, 1986, Joyce filed a right-of-way application for an FM radio translator and antennas to be located at existing facilities, known as the Eagle County Airport Beacon, in Eagle County, Colorado. This radio equipment, which would be located on a ridgetop approximately 2 miles west of Eagle, Colorado, was intended to allow Joyce, which owned and operated an FM radio station, to expand its broadcast operations into the Eagle area. By letter dated August 20, 1986, BLM required Joyce to submit \$25 as an advance rental deposit. Payment was received by BLM on November 17, 1986.

BLM subsequently issued a 30-year right-of-way grant to Joyce on February 13, 1987, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1982). Under the terms of the grant, the holder agreed to pay "fair market rental as determined by the authorized officer."

By memorandum dated March 5, 1987, approved by the Chief State Appraiser on March 11, 1987, a BLM appraiser notified the District Manager that the estimated annual fair market rental for the subject right-of-way for the 5-year period beginning February 13, 1987, was \$1,000. The appraiser further stated that the memorandum was intended to provide a supplement to the "Colorado Telecommunications Use Appraisal dated August 7, 1986, and approved September 29, 1986" (Master Appraisal), and that the subject right-of-way was "consistent with the CATV Receiver[] and Radio-TV Translator Use Category" defined in the Master Appraisal.

In his May 1987 decision, the District Manager stated that the annual fair market rental had been determined to be \$1,000, and required Joyce to pay this amount, less the \$25 advance rental deposit, within 30 days of receipt of the decision. Joyce has appealed from this decision.

In its statement of reasons for appeal, appellant contends simply that the \$1,000 does not represent the annual fair market rental for its right-of-way: "As [Joyce] exercises [its] right-of-way only 2-3 times per year, we obviously feel \$300.00-\$500.00 per trip is entirely excessive." To date, appellant has neither offered an independent appraisal nor made any determination regarding the proper annual fair market rental value of the subject right-of-way.

The record, as supplemented by BLM on appeal, contains a copy of the August 1986 Master Appraisal. The appraisal states that it was prepared in order to estimate the fair market rental of telecommunications site rights-of-way in Colorado. In the Master Appraisal, rights-of-way granted by BLM were divided into six categories of telecommunications use and compared with similar groupings of private leases issued in Colorado and neighboring western states. <sup>1/</sup> These categories are as follows: television and radio broadcast; commercial communications; common carrier microwave relay; cable television receiver and radio/TV translator; industrial microwave or

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<sup>1/</sup> The Master Appraisal contains a preliminary review of private lease transactions under each category, which disclosed that the only factors which had a measurable effect on rental prices were whether the communications site served an urban or rural area and elapsed time from the date of agreement to a current date. Therefore, the private leases selected in each category for comparison with BLM rights-of-way, which principally served rural areas, were also those serving rural areas, and BLM made adjustments to the rental prices of these leases in order to reflect the prices which would be applicable at the date of appraisal of the BLM rights-of-way, Aug. 7, 1986. All of the leases were analyzed in terms of the following factors: lease term, frequency of rental adjustment, access, power availability, whether single or multiple user, and topography.

radio repeater; and passive microwave reflector. An estimated annual fair market rental value was determined in the Master Appraisal for each category.

Appellant's right-of-way is for a radio translator. The Master Appraisal concludes as follows concerning "CATV and Radio-TV Translator Uses":

A total of 42 multi-state leases were in this use group and ranged from \$5800 to \$200 with an average of \$1219. Deleting the highest lease as an outlier leaves 41 leases averaging \$1107. All factors considered, the estimated annual fair market rental for the typical BLM or Forest Service CATV or translator use in Colorado is \$1000.

Thus, BLM applied the amount determined in the Master Appraisal to appellant's right-of-way.

[1] Section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1982), requires the holder of a right-of-way to "pay annually in advance the fair market value thereof as determined by the Secretary [of the Interior]." See also 43 CFR 2803.1-2(a). Appellant, in its statement of reasons, mistakes the nature of fair market rental value. Such value is properly considered the amount "for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use." American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976) (emphasis added). The issuance of this right contractually entitles BLM to compensation regardless of whether the holder intends to or ever actually uses the site. See 49 Am. Jur. 2d Landlord and Tenant, §§ 515, 572, 619 (1970). Thus, fair market rental value is not based on the amount of use which the holder of a particular right-of-way subject to appraisal will or, in fact, does make of that right-of-way. 2/

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2/ Appellant argues, in effect, that the amount of use of a site should control the amount of rent due. Calculating rental on the basis of use would violate the statutory requirement that the holder of a right-of-way pay "annually in advance" the fair market value. 43 U.S.C. § 1764(g) (1982). BLM would have to wait until the conclusion of each year to determine the extent of actual use and thus calculate the appropriate rental. That is clearly not permitted by the statute.

In any event, we are unclear from its statement of reasons what appellant means when it says that it "exercises" its right-of-way only two to three times each year. Presumably appellant's equipment has been placed on the existing tower at the communications site and is automatically translating and beaming appellant's FM signal into the Eagle area. This would be sufficient to constitute the full-time exercise of the right-of-way. However, appellant may mean that it only accesses the site two to three times each year, possibly for maintenance purposes. Regardless of what appellant means or how much appellant actually uses the site, however, BLM's grant of the right to use the site entitles BLM to receive payment of fair market rental value.

Nevertheless, we have had several occasions recently to review the propriety of BLM's reliance on the Master Appraisal in determining the annual fair market rental for telecommunications use rights-of-way in Colorado. That review has convinced us that the Master Appraisal does not constitute a proper application of the comparable lease method of appraisal, which method involves a comparison of the right-of-way to be appraised with similar private leases, adjusting for any differences determinative of rental value between them. Mountain States Telephone & Telegraph Co., 107 IBLA 82, 87 (1989). Such method is the preferred method for determining the fair market rental value of nonlinear rights-of-way. Mountain States Telephone & Telegraph Co., 109 IBLA 142, 145 (1989), and cases cited therein.

Furthermore, we have rejected use of the Master Appraisal on the basis that it does not provide sufficient data and analysis regarding the private leases to enable either the appellant or the Board to verify the comparability of these leases with the BLM rights-of-way subject to appraisal and particularly the rights-of-way under appeal. Mountain States Telephone & Telegraph Co., 107 IBLA at 89. As we said in High Country Communications, Inc., 105 IBLA 14, 17 (1988), which similarly involved appraisal of a right-of-way issued for an FM radio translator site:

[W]e 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. \* \* \* 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.

In those cases, we vacated the BLM decisions establishing the fair market rental values and remanded the cases to BLM for another determination of such values.

Since BLM's determination of the fair market rental value of the subject right-of-way is clearly based on the Master Appraisal, which we regard as fatally flawed, we will vacate the District Manager's May 6, 1987, decision requiring payment in accordance with that rental value and remand the case to BLM for another determination of the fair market rental value for the applicable time period.

In making its redetermination of the fair market rental value of the subject right-of-way, BLM should be guided by the following instruction in Mountain States Telephone & Telegraph Co., 107 IBLA at 90A:

BLM may utilize the information compiled in the Master Appraisal for the purpose of establishing the fair market value of [the right-of-way], but not without the record disclosure of the background information for the leases, as well as a reasoned analysis of how and why the [right-of-way] subject to appraisal [is] comparable to the information utilized.

See also High Country Communications, Inc., supra at 17 (Master Appraisal "may serve as a baseline for arriving at the fair market 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 to BLM for further action as set out above.

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David L. Hughes  
Administrative Judge

I concur:

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Bruce R. Harris  
Administrative Judge