

Editor's note: Reconsideration denied by Order dated Feb. 9, 1994

MCI TELECOMMUNICATIONS CORP.

IBLA 87-85

Decided jUNE 27, 1990

Appeal from a decision of the Roswell District Office, New Mexico, Bureau of Land Management, requiring payment of annual rental charges for communication site right-of-way NM-60194.

Affirmed.

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

The Board will not overturn a BLM appraisal of a communication site right-of-way by the comparable lease method of appraisal where the appellant fails to establish by a preponderance of the evidence either that the appraisal method was erroneous or that the appraised value is excessive. Specifically, the appraisal will be affirmed where appellant does not establish that BLM improperly eliminated certain private and Government leases from comparison with the right-of-way, or that BLM improperly failed to adjust for differences both in the cost of obtaining access to the communication sites and between BLM rights-of-way and private leases.

APPEARANCES: William Stallings, Esq., Richardson, Texas, and Steven P. Quarles, Esq., and Thomas R. Lundquist, Esq., Washington, D.C., for appellant; Margaret C. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

MCI Telecommunications Corp. (MCI) has appealed from a decision of the Roswell District Office, New Mexico, Bureau of Land Management (BLM), dated September 17, 1986, requiring payment of the annual rental charges for its communication site right-of-way (NM-60194).

Effective May 29, 1985, BLM granted a 30-year right-of-way to MCI for a microwave repeater station, including an antenna tower and buildings, to be located on 0.918 acres of land situated in sec. 22, T. 10 S., R. 9 E., New Mexico Principal Meridian, Lincoln County, New Mexico, atop Rose Peak in the Godfrey Hills. The right-of-way also encompassed an existing access

road covering 6.084 acres of land situated in secs. 22 and 23 of that township. The right-of-way was granted pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1982).

Following the grant of the right-of-way, BLM prepared an appraisal report in order to determine the fair market rental value of the right-of-way. In that May 5, 1986, report, the BLM appraiser determined that the annual fair market rental value of the subject right-of-way as of May 29, 1985, was \$2,075. 1/

The BLM appraiser first concluded that the "highest and best use" of the subject site was for communications use, noting that the location of the site atop Rose Peak affords the user point-to-point microwave transmission up and down the Tularosa Valley. He also noted that the site is located near an existing power line and access road, stating that access to the site is gained by proceeding from a Federal highway 6-1/2 miles along a county road, then 3-1/2 miles along a private road, and finally 1 mile along the access road crossing public land to the site.

In determining the "fair market rental value" of the subject right-of-way, the BLM appraiser used the comparable lease method of appraisal. 2/ He initially considered 24 private leases issued between 1964 and 1985 in New Mexico and surrounding states, 3/ with annual rental charges ranging from \$290 to \$8,900. 4/ Of these 24 leases, the BLM appraiser selected 4 leases for comparison with the subject right-of-way, assessing comparability in terms of location, lease terms, access, power, elevation, and

1/ BLM had initially set the rental charge for the subject right-of-way at the "minimum rental" of \$25 for 5 years, "subject to a rental determination at a later date" (Letter to MCI from BLM, dated May 1, 1985). MCI paid this amount. In a June 28, 1985, memorandum to the file, BLM acknowledged that MCI had been "billed incorrectly." Accordingly, by memorandum dated Jan. 9, 1986, the District Manager, requested the State Director, New Mexico, BLM, for an appraisal of the subject right-of-way.

2/ In its appraisal report, BLM correctly defined fair market rental value as the "amount in cash * * * for which in all probability the property would be rented * * * by a knowledgeable owner willing but not obligated to rent to an informed person who desires but is not obligated to rent the property."

3/ The BLM appraiser actually listed 26 private leases in his appraisal report. However, MCI asserts on appeal that the appraiser reported one lease twice (lease Nos. 9 and 11) and one lease which is "non-existent" (lease No. 26). BLM has not rebutted MCI's assertions and agrees that lease No. 26 is non-existent.

4/ BLM adjusted the original rental charges to a "present" value, using the consumer price index. In this manner, BLM sought to ignore renegotiated rental charges "where the lessor may have taken advantage of his bargaining position once the lessee had locked a particular site into an overall microwave network."

other factors. 5/ The four selected leases were among the most current leases at the time of the appraisal, i.e., those issued in 1984 and 1985, and, with one exception, represented the full range of annual rental charges from \$1,000 to \$2,500 during that period. 6/

By comparing the subject right-of-way to the four leases in terms of the various factors, the BLM appraiser determined that it was bracketed by the Zia Tribe lease, to which the right-of-way was inferior, and the Trigg and Mendiburu leases, to which the right-of-way was superior, with the right-of-way most comparable to the Kieckhefer lease which had an adjusted annual rental charge of \$2,075 per year. Accordingly, he set the fair market rental of the subject site at \$2,075 per year.

Thereafter, in its September 1986 decision, the Roswell District Office notified MCI that rental charges had been computed and required MCI to pay such charges "within 30 days from receipt of this letter." MCI has appealed from the District Office's September 1986 decision, paying \$2,075 under protest. 7/

5/ These four leases were identified by BLM as a 1985 lease from the Zia Tribe to Continental Telephone with an adjusted annual rental charge of

\$2,500 (No. 5), a 1984 lease from Kieckhefer to MCI with an adjusted annual rental charge of \$2,075 (No. 12), a 1985 lease from Trigg to Future Communications with an adjusted annual rental charge of \$1,720 (No. 14), and a 1985 lease from Mendiburu to MCI with an adjusted annual rental charge of \$1,000 (No. 24).

6/ Among the group of private leases issued in 1984 and 1985, BLM did not consider a 1985 lease from Thompson to Future Communications with an adjusted annual rental charge of \$7,200 (No. 2), two other 1984 leases to MCI also with adjusted annual rental charges of \$2,075 (Nos. 9 and 10), a 1985 lease from NMSLO to West Microwave with an adjusted annual rental charge of \$1,050 (No. 15), a 1985 lease from NMSLO to Mountain Bell with an adjusted annual rental charge of \$1,000 (No. 16), a 1985 lease from FS to MCI with an adjusted annual rental charge of \$1,200 (No. 23), and a 1985 lease from the Army Corps of Engineers to MCI with an adjusted annual rental charge of \$300 (No. 25). In the case of FS and Corps of Engineers leases, BLM noted that the rental charges had been "[a]dministratively determined" (Appraisal Report at 6). MCI states that the \$300 rental charge in the case of the Corps of Engineers lease is, in actuality, an "application fee." BLM has not rebutted MCI's statement.

7/ In its September 1986 decision, BLM also afforded MCI the opportunity to request a "hearing" regarding BLM's determination of rental charges. By letter dated Nov. 6, 1986, subsequent to filing its notice of appeal, MCI requested the New Mexico State Office, BLM, for a hearing, as well as the suspension of BLM's rental determination pending the outcome of the hearing. The record indicates that an "informal hearing" was held at BLM's district office on Nov. 18, 1986 (Letter to Board from MCI, dated Dec. 18, 1986). In a Dec. 18, 1986, letter to MCI, the District Manager explained that, during the pendency of MCI's appeal to the Board, BLM was barred from

[1] Section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1982), requires the holder of a right-of-way issued pursuant to FLPMA to pay annually in advance the "fair market value thereof as determined by the Secretary." Likewise, 43 CFR 2803.1-2(a) requires the holder of a right-of-way to pay "fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices." See also Chalfont Communications, 108 IBLA 195, 196 (1989); and cases cited.

We have consistently held that, where BLM has appraised the fair market rental value of a communication site right-of-way, such appraisal will not be overturned on appeal unless an appellant is able to demonstrate by a preponderance of the evidence that there was error in the appraisal method used or that the appraised value is excessive. Big Sky Communications, Inc., 110 IBLA 213, 214 (1989); and cases cited. In the absence of a showing of error in the appraisal method used, a BLM appraisal may generally be rebutted only by another appraisal. Id. at 214.

Appellant has not challenged BLM's use of the comparable lease method of appraisal, which, we have long held, is the preferred method for determining the fair market rental value of communication site rights-of-way when there is sufficient comparable rental data. Harvey Singleton, 101 IBLA 248, 250 (1988); Full Circle, Inc., 35 IBLA 325, 333, 85 I.D. 207, 211 (1978). Further, current Departmental regulations endorse the use of a "market survey of comparable rentals." 43 CFR 2803.1-2(c)(3)(i).

Appellant does challenge BLM's determination of the fair market rental value of the subject right-of-way on the basis that there were various errors in BLM's use of the comparable lease method of appraisal and that the appraised value is excessive. Appellant has submitted its own appraisal of the right-of-way prepared by James R. Biber, a private real estate appraiser, on June 1, 1987 (the Biber Appraisal). We will deal with appellant's objections seriatim.

Appellant first contends that BLM failed to explain its elimination of 20 of the original 24 private lease transactions from comparison with the subject right-of-way and that this renders the appraisal arbitrary and, therefore, unlawful, citing Bowen v. American Hospital Association, 476 U.S. 610, 626-27 (1986), and RSR Corp. v. Environmental Protection Agency, 588 F. Supp. 1251, 1254 (N.D. Tex. 1984). BLM is indeed required to explain its decision to eliminate private lease transactions from comparison with a BLM right-of-way subject to appraisal, at least insofar as it identifies

fn. 7 (continued)

taking any administrative action in the case and that, therefore, the purpose of the Nov. 18, 1986 "meeting" had only been to determine if BLM would ask the Board for the case to be remanded to BLM "for reconsideration" should MCI be able to demonstrate error in BLM's appraisal. However, the District Manager stated: "We regret to inform you we found no substantial or compelling reason to request this case be remanded for our reconsideration."

the pool from which comparable private leases might be drawn. See Richard Boulais, 107 IBLA 109, 112, 113 (1989). However, we are satisfied that BLM has adequately done so.

In its answer, BLM states that the original list of 24 private leases was not intended to indicate that all of the leases were comparable to the subject right-of-way, but rather merely to depict the "expansive range of rental prices in the Colorado-New Mexico-Arizona region." 8/ From this list, BLM stated, the appraiser selected four "reasonably comparable leases."

Nor do we agree that BLM failed to adequately explain in its appraisal its elimination of 20 of the original 24 private lease transactions from comparison with the subject right-of-way. A careful reading of the Appraisal Report, including a review of the 24 lease transactions, discloses BLM's rationale for selecting the 4 leases for comparison with the subject right-of-way.

The BLM appraiser eliminated all leases dating from the 1960's and early 1970's (lease Nos. 8, 13, and 17 through 22), with the following explanation:

Early leases * * * tended to have low rents * * * and seldom recognize[d] the bargaining position of the landowner. Communication sites are usually less than an acre, so \$100 or \$150 per year seemed like a lot of rent for rangeland or a mountaintop. Most landowners were uninformed as to what others were getting for their leases. * * * Recent leases tend to have notably higher rents * * *. These changes reflect the economic trends of the last decade. Rising inflation has hit the rural landowner particularly hard and made him aware of the changing value of the dollar. He has become a better businessman in that he recognizes the value of a unique situation, say a communication site lease, to the user and his own bargaining position. Indeed, whereas in the older leases the lessor usually took what was offered, today's landowner * * * will usually bargain with a prospective lessee.

(Appraisal Report at 4). While BLM adjusted the original rental charges for these older leases in order to arrive at a current charge, such

8/ In his July 31, 1987, memorandum to the Field Solicitor, the Deputy State Director further explained, at page 1:

"Collectively, BLM data files have close to 1,000 communication site leases, nearly all between a private or corporate lessor and a communication site user. * * * In the Rose Peak appraisal, the appraiser presented a list of [24] leases which was felt to be a representative sample of rentals paid for common carrier sites by MCI and its competitors." [Emphasis added.]

adjustment did not alter the fact that the original charges were established under what the BLM appraiser perceived as drastically different circumstances than those prevailing in 1988. ^{9/}

Next, the BLM appraiser eliminated those leases with anomalously high adjusted annual rental charges (lease Nos. 1 through 3). Concerning the remaining leases, while the appraiser's reasons are not expressed, it is apparent that he focused on a representative sampling of those leases. Thus, since the sites remaining on the list at that point indicated a range in rental charges from \$1,000 to \$2,800, the appraiser selected four leases with a range from \$1,000 to \$2,800.

Our analysis of BLM's rationale for eliminating 20 of the original 24 private lease transactions from comparison with the subject right-of-way is, for the most part, borne out by the explanation provided in the Supplemental Agency Response filed with the Board, which also demonstrates that BLM's decision was based on sound reasons, even though these reasons were not contemporaneously stated. ^{10/} We conclude that BLM has provided an adequate explanation of why it focused on 4 of the 24 private lease

^{9/} Appellant's appraiser supports BLM's decision to disregard the older leases in describing his selection of comparable private leases from among the 97 leases reviewed by him:

"[M]uch of the data was old, dating back to the 1960's and 1970's. It simply is not possible to realistically adjust data that old to a current date of value for several reasons. First, there have been drastic changes in economic conditions during that time period. Business conditions have changed, both technically and legally. * * * [P]roperty owners as well as property users have changed their thoughts as well as management practices concerning the utility of property."

(Biber Appraisal at 11).

^{10/} In the case of lease Nos. 1 through 3, BLM explained that they were eliminated because their proximity to certain urban areas "ma[de] land values unusually high" (Supplemental Agency Response at 2). See American Telephone & Telegraph Co., 77 IBLA 110, 120 (1983). BLM stated that lease Nos. 4, 6, and 8 were eliminated because they were not considered comparable to the subject right-of-way since they were not issued for microwave transmission purposes. Lease Nos. 7 and 10 were also not considered comparable because they had been renegotiated. See American Telephone & Telegraph Co., *supra* at 117, 118-19. BLM stated that lease Nos. 9 and 11 were eliminated because they were "repetitive of other lease rentals already on [the original] list" (Supplemental Agency Response at 3). Finally, BLM stated that lease Nos. 15, 16, 23, and 25 were eliminated because their rental charges were not based on a "market appraisal." *Id.* In the case of the 1985 FS lease (No. 23), BLM stated that the rental was based on the "value of equipment," while, in the case of the 1985 Corps of Engineers lease (No. 25), it was based on a "flat administrative fee." *Id.*

transactions in determining the fair market rental value of the subject right-of-way. 11/

Appellant contends that BLM's appraisal is fatally flawed because the appraiser failed to consider the three Government leases originally listed in the appraisal, thereby distorting BLM's determination of the subject right-of-way's fair market rental value, assertedly in violation of the Board's dictate in American Telephone & Telegraph Co., supra at 119 n.5, that such leases constitute the "best evidence of fair market value." The three leases which appellant would have BLM consider are the two 1985 leases issued by the State (Nos. 15 and 16) and the one 1985 lease issued by the Forest Service (FS), U.S. Department of Agriculture (No. 23).

In American Telephone & Telegraph Co., all that was said was that the rentals adopted in the case of Government leases at the time of their renewal "may indeed be the best evidence of fair market value for other [Government] renewals" because the statutory requirement, which is subject to enforcement by the courts, that such rentals be set only at fair market value ensures that the rentals will in fact reflect fair market value. Id. (emphasis added). However, what we did not say in American Telephone & Telegraph Co. was that the rentals adopted in the case of Government leases will in all cases constitute the best evidence of fair market value for other Government leases. Indeed, the present case attests to the fact that there are Government leases where BLM may properly disregard the rentals adopted as evidence of the fair market rental value of a BLM right-of-way which is subject to appraisal. Such leases are generally those where the rental was not determined on the basis of a comparison with comparable private leases, since that is the preferred approach in the case of BLM rights-of-way.

It is of course true, as appellant points out, that FS is also required to assess only the fair market rental value of the lease (see 43 U.S.C. § 1764(g) (1982); 36 CFR 251.57 (1985)), so that the rental charges it imposed on its 1985 lease should theoretically constitute fair market rental value. Nevertheless, we believe that BLM's decision not to accept the rental charged by FS on those leases as reflective of the 1985 lease's fair market rental value was justified, since (according to BLM and undisputed by appellant) FS based the rental "on a percentage of equipment costs" (Answer at 4). 12/ That is, the rental varied according to the

11/ In general, we regard as proper BLM's approach of surveying a broad range of private lease transactions from which it selects a smaller number of leases considered most comparable to the right-of-way subject to appraisal for comparison with that right-of-way. Indeed, appellant's appraiser used essentially the same technique, picking 6 out of a total of 97 leases for comparison with the subject right-of-way.

12/ Effective on or about Oct. 15, 1985, FS changed this policy in favor of a policy of establishing rentals for communication site leases on National Forest lands according to appraisals, competitive bidding, or fee schedules based on market studies. See 50 FR 40574, 40576 (Oct. 4, 1985).

cost of the equipment the lessee chose to place at the site. Thus, the rental was dependent more on the discretion of the lessee than the fair and unrestrained bargaining of the lessor and lessee. BLM properly disregarded the rental charged by FS in the case of the 1985 lease as inconsistent with the statutory and regulatory standards as to what constitutes fair market rental value. 13/

So far as BLM's decision not to consider the two 1985 State leases, BLM states that the rentals charged are "based on the [State's] own lease values, thus defeating the purpose of seeking independent market valuations" (Answer at 4). BLM further explains in the Deputy State Director's July 1987 memorandum, at page 1, that the State is "in transition between a set fee and an adequate appraisal of individual sites." Appellant has not challenged BLM's assertion that the rentals charged by the State merely represent rentals administratively determined by the State. In these circumstances, we agree that BLM is justified in disregarding such leases in favor of considering private leases where the rentals were actually derived as a result of negotiations by the parties involved. Another reason for disregarding such leases is that we are not aware of any assurance that the State is, statutorily or otherwise, required to assess only fair market rental value, as we emphasized in American Telephone & Telegraph Co., supra.

Appellant contends that BLM's appraisal is fatally flawed because the appraiser failed to consider six leases issued to appellant, which leases were originally listed in the appraisal, thereby distorting BLM's determination of the subject right-of-way's fair market rental value. The six leases to which appellant refers are lease Nos. 17 through 22. 14/ BLM's rationale for not considering the six leases was that the leases were "too old to

fn. 12 (continued)

The new policy was to be phased in "over a three-year period." Id. In adopting the new policy, FS abandoned its previous policy of determining rental charges based on a percentage of the "holder's total investment value for communication facilities and equipment" plus a percentage of the rental income received by the holder from building tenants and/or equipment users served by the holder (50 FR 40576 (Oct. 4, 1985)). However, it is clear from this statement that FS relied on a percentage of equipment costs method of appraisal in 1985.

13/ That FS did not regard its former reliance on a percentage of equipment costs method of appraisal as resulting in a determination of fair market rental value is evident in the preamble to the announcement of its abandonment of that method. Thus, FS stated that the aim of the change was to "more fully reflect market value" (50 FR 40576 (Oct. 4, 1985)). See also Mountain States Telephone & Telegraph Co. v. United States, 499 F.2d 611, 617, 618 (Ct. Cl. 1974) (approving FS right-of-way appraisal according to "value of the investment," stating "fair market value is not the only test").

14/ Appellant also asserts that BLM should have considered lease Nos. 23 and 25, which were the two 1985 leases from FS and the Corps of Engineers,

be considered comparable" to the subject right-of-way (Supplemental Agency Response at 3). The Appraisal Report, at page 6, indicates that the leases were issued in either 1971 or 1972, for rentals ranging from \$290 to \$585. As noted above, BLM had good reasons for eliminating outdated leases from its comparables.

Appellant also contends that the BLM appraisal is in error because the appraiser, in valuing the subject right-of-way for rental purposes, failed to take into account the fact that appellant does not have "free access" to the site, thus violating the directive in American Telephone & Telegraph Co., *supra* at 117, that BLM value a right-of-way in its "unimproved state." Appellant states that it is forced to pay roughly \$1,800 annually to maintain access across either private land leading to the subject site or other private land. ^{15/} Appellant concludes that this cost "obviously reduces the market value of BLM's [right-of-way], but BLM neglected to make this value adjustment" (SOR at 17-18).

BLM must consider the availability and quality of access to a communication site on public land when it is determining the appropriate fair market rental value to charge for issuing a right-of-way for such a site because these factors are generally considered to affect that rental value. *See Lone Pine Television, Inc.*, 113 IBLA 264, 266 (1990); Denver & Rio Grande Western Railroad Co., 58 IBLA 4, 7 (1981); Full Circle, Inc., 35 IBLA 325, 333, 85 I.D. 207, 211 (1978). Thus, BLM properly considers these factors in selecting private leases for comparison with the right-of-way subject to appraisal and in adjusting for any differences between such leases and that right-of-way. And, in fact, the BLM appraisal indicates that BLM considered these factors in valuing the subject right-of-way. *See Appraisal Report* at 7-8.

Appellant, however, desires BLM to consider not the availability and quality of access to the communication site, but rather the cost which it must incur in obtaining that access, asserting that this factor likewise affects the fair market rental value of a right-of-way covering the site.

fn. 14 (continued)

respectively, to MCI. We have already agreed with BLM's decision to disregard the FS lease because we are not convinced that the rental charged represents fair market rental value. In the case of the Corps of Engineers lease, appellant admits that the adjusted rental charge reported in the BLM appraisal is in actuality an application fee. Thus, BLM properly disregarded that lease.

^{15/} Along with its SOR, appellant has submitted a copy of the Mar. 5, 1985, perpetual easement which it obtained from the Three Rivers Cattle Company for access leading to the subject site. *See Exh. 9* attached to SOR. As part of the easement agreement, appellant agreed as consideration for the easement to engage in the annual regrading of either a certain 7-mile segment of road or the access road leading to the subject site. Appellant states that those regrading costs have amounted to roughly \$1,800 per year.

As proof of this, appellant refers to the Biber Appraisal, which states, at page 12, that the cost of access is "generally considered by those in the marketplace."

It is undoubted that the cost of obtaining access to a communication site would figure in the calculations of a party desiring to lease the site. However, we see no reason to expect that the prospective lessor in such situation would be amenable to lowering the rental because of the costs which the prospective lessee must bear where such costs are beyond the lessor's control and unrelated to the use of the leased land. In essence, the lessee would be asking the lessor to absorb the lessee's costs. Nevertheless, we can envision a lessor agreeing to a decrease in order to lease the site to a lessee who would otherwise not do so because of the access costs which it must incur. In this event, the costs of obtaining access to a communication site could affect the rental value arrived at by a lessor and lessee.

The question, however, is whether the cost of obtaining access to a communication site in a specific situation actually affects its fair market rental value. The answer to this question can only be determined by analyzing the market data to see whether such costs affect the rental charged in comparable private lease transactions. In this way, the evidence must demonstrate not just that a cost was incurred to obtain access to a particular site, but also that the rental charged for that site was discounted directly because of that cost. Neither BLM's nor appellant's appraiser has provided such an analysis of the market data which establishes that the cost of obtaining the type of access involved herein generally affects a communication site's fair market rental value. 16/ Both appraisers merely offer their opinion on that question, appellant's expert concluding that it does affect fair market rental value, and BLM's expert concluding that it does not. 17/ In such a situation, the opinion of appellant's expert is properly regarded as insufficient to overcome that of BLM's expert. See, e.g., Cady v. Morton, 527 F.2d 786, 796 (9th Cir. 1975); Curtin Mitchell, 82 IBLA 275, 282 (1984).

Appellant argues that BLM erred because it failed to take into account the qualitative differences between BLM rights-of-way and private leases

16/ The evidence offered by appellant's appraiser tends to support the conclusion that access costs do not affect rental value. In three of the six comparable private leases selected by the appraiser (Nos. 1, 2, and 6, all held by appellant), in which appellant sustained widely varying access costs, appellant uniformly incurred annual rental charges of \$1,000. See Biber Appraisal at 16, 17, 18, 20. In those cases, appellant was required to make a one-time payment of \$756.94 (No. 1), pay \$435 per year (No. 2), and pay no access costs (No. 6).

17/ BLM states that it is aware "of more than one situation in which the appellant or its competitors have had to build their own road * * * and have paid extremely similar rentals to the one in question" (Answer at 9-10). BLM offered to provide evidence of such lease transactions, but no such evidence has been received by the Board.

in appraising the subject right-of-way. Appellant states that the rights which it receives under a BLM right-of-way are "far less secure and valuable than the rights [it] obtains through its private lease negotiations" (SOR at 11). Appellant states that a BLM right-of-way is "significantly inferior" to private leases because, among other things: (1) it is non-exclusive; (2) it is non-possessory; (3) it can be revoked by BLM; (4) it imposes road maintenance costs; (5) it imposes special aesthetic requirements; (6) it imposes reporting requirements regarding equal opportunity, environmental and construction compliance; (7) it has a rental rate that can be more freely adjusted by BLM; (8) it places restrictions on use; and (9) the right to assign it is limited. Id. at 2. Appellant concludes that, because of these differences, BLM should have discounted the rentals charged in the case of private leases by 35 to 40 percent in order to determine the fair market rental value of the subject right-of-way. Appellant argues that BLM is required to justify not taking the differences between BLM rights-of-way and private leases into account.

The record indicates that in adjusting for the differences between the subject right-of-way and the four private leases selected for comparison with that right-of-way, the BLM appraiser considered comparability with respect to "terms" (Appraisal Report at 7). However, the analysis was limited to whether the private leases differed with regard to the stated interval for the adjustment of rent. In each case, the appraiser noted that there was no difference because the private leases were likewise subject to adjustment at 5-year intervals. See id. at 7, 8. However, the appraiser went no further in considering the differences between BLM rights-of-way and private leases.

The guiding principles for whether and how to consider the differences between BLM rights-of-way and private leases in appraising a BLM right-of-way are set forth in American Telephone & Telegraph Co., supra. In that case, we stated that, "in evaluating the comparability of private leases [with the BLM right-of-way subject to appraisal], BLM should take into account all of the differences which might affect fair market value." American Telephone & Telegraph Co., supra at 120 (emphasis added). Such differences, we noted, include "the possibility, even though deemed remote, of discontinuation or modification [of the right-of-way] by the Secretary, nonexclusivity, and rental revision every 5 years." Id. Where, however, "BLM believes that certain differences between private comparables and Government leases have no effect on ultimate comparability for valuation purposes," we stated that "the basis for [BLM's] belief must be documented." Id.

The crucial question, therefore, is whether the differences between BLM rights-of-way and the private leases "might affect" the fair market rental value of the subject right-of-way. Appellant asserts that such differences affect fair market rental value, pointing to the fact that BLM, in a notice of proposed rulemaking concerning the determination of annual rental charges for linear rights-of-way, proposed establishing a rental schedule derived from a market survey of right-of-way purchase prices which would be adjusted to reflect the measurable differences between BLM and

private rights-of-way and then converted to rental values. Specifically, with respect to such differences, BLM proposed a 20-percent discount in order to account for the fact that BLM rights-of-way are subject to the periodic adjustment of rent and a 10-percent discount in order to account for other differences between BLM and private rights-of-way. See 50 FR 2697, 2701 (Jan. 18, 1985). 18/

Significantly, BLM subsequently published proposed rulemaking with respect to the determination of annual rental charges for linear rights-of-way, which did not incorporate any discount designed to account for the differences between BLM and private rights-of-way. See 51 FR 31886 (Sept. 5, 1986). Final rulemaking, issued effective August 7, 1987, likewise, did not adopt any such discount. See 52 FR 25811 (July 8, 1987). Therefore, we find no support in this rulemaking for discounting the rental values of private communication site leases in appraising a BLM communication site right-of-way, so as to account for the differences between BLM rights-of-way and such leases.

We are not persuaded that it is necessary for BLM to take into account the differences between BLM rights-of-way and private leases because there

18/ In the January 1985 Federal Register notice, BLM reviewed various differences between BLM and private linear rights-of-way other than the requirement for the periodic adjustment of rent, assessing the impact each difference might have on the fair market rental value of a BLM right-of-way. Many of these differences are among those noted by appellant. In each case, BLM either dismissed or admitted the impact such differences might have on fair market rental value, concluding overall that BLM "recognizes that an 'inferiority' difference may exist in the broad sense, but finds that the difference cannot be reliably or precisely measured. Since the proposed procedure is one of sound business practice based, to the extent practicable, on recognized valuation techniques, this difference can be resolved by an administrative decision." 50 FR 2701 (Jan. 18, 1985). However, as noted in the text, infra, the proposal for discounting annual rentals for linear rights-of-way was subsequently reconsidered and rejected by BLM.

Appellant also refers to excerpts from a February 1986 report prepared by the Secretaries of Agriculture and the Interior entitled "Grazing Fee Review and Evaluation" (Exh. 10 attached to SOR) as proof that BLM should, in appraising a BLM right-of-way, discount the rental values of private leases in order to account for the differences between BLM rights-of-way and such leases. The report recommended, in determining the rental charges for a Federal grazing lease based on a market survey of private leases, that the private rental rates be discounted by 15 percent in order to account for the differences between Federal and private leases primarily relating to advance payment of rental and a differential in the quality of the Federal range. See id. at 6. However, that recommendation was based on an analysis of private grazing lease transactions. Appellant has not established that private communication site lease transactions similarly indicate that a discount is also warranted in appraising a BLM communication site right-of-way.

is no evidence that such differences affect the fair market rental value of the subject right-of-way. It is BLM's position that there is no measurable difference between BLM rights-of-way and private leases (Memorandum of Deputy State Director to Field Solicitor, July 31, 1987, at 3), and that there are significant advantages to a BLM lease which counterbalance any reduced rights:

Another argument raised by the appellant * * * is that [BLM's] appraised rental value is excessive because it is not discounted 40 percent for the "reduced rights" granted in a government lease. Before addressing the stipulations and terms found in the agency's lease, it should first be pointed out that there are two very important rights which accompany government leases which cannot be found in their private counterparts. The first is that, absent some special restriction such as wilderness designation, the agency cannot refuse right-of-way access across public land to a qualified applicant. Secondly, a right-of-way applicant or lessee is always granted a right of appeal if it is dissatisfied with the lease terms or decision of the agency. The agency knows of no other comparable rights in the private sector and strongly urges the Board to consider the value of such rights when comparing government and private leases.

Turning now to what the appellant terms the "reduced rights" of the agency's lease, it is the agency's position that its right-of-way stipulations and terms are no more burdensome than the average knowledgeable landowner would require. Some landowners, in fact, are far more stringent and demanding in their requirements than is the agency. Other landowners, however, who might not be characterized by the "knowledgeable landowner" standard, cannot afford a lawyer to review the lease terms, happily accept the first offer that is made to them, and sign a preprinted lease form drafted by the appellant which has little or no meaning to them outside of the cash value it represents.

Appellant appears to place great weight on the fact that the agency lease has a 30-year term and a termination clause. What appellant neglects to consider is the value of such an extremely long term, as opposed to the generally shorter-termed private leases, and the almost nonexistent history of right-of-way terminations by the agency. [Citations to supporting documentation omitted.]

(Answer at 6-7).

While appellant challenges this conclusion based on its own opinion, it presents no evidence to rebut BLM's conclusion, but at best only refers to the "professional judgment" of its appraiser (Supplemental SOR at 6, 7,

8). 19/ This is insufficient to carry appellant's burden of proof. 20/ See Northwest Pipeline Corp., 93 IBLA 293, 296 n.3 (1986); Mountain States Telephone & Telegraph Co., 80 IBLA 128, 132 (1984).

Appellant contends that BLM's appraisal erred in relying on the Kieckhefer lease (No. 12) in order to determine fair market rental value of the subject right-of-way. In particular, appellant argues that the appraiser improperly concluded that the Kieckhefer lease is "equal" to the subject right-of-way (Appraisal Report at 8). Rather, appellant asserts that the Kieckhefer lease cannot be considered directly comparable to the subject right-of-way without adjustment.

Appellant asserts that BLM must adjust for the fact that, unlike the subject right-of-way, the Kieckhefer lease is a private lease and that access to the leased site was secured for a one-time payment of \$1,000. We have already held that no adjustment is warranted either because of the differences between BLM rights-of-way and private leases or because of the cost of access to the subject right-of-way.

Appellant also asserts that BLM must adjust for the fact that the Kieckhefer lease is situated 400 miles from the subject right-of-way, has an "inherently higher value" because it is part of appellant's main digital transcontinental route with substantially higher planned capacity (29,000 versus 14,700 circuits), and is a locked-in site thus rendering the rental charged a "hold up value" (SOR at 19). 21/

19/ Appellant maintains that the BLM appraisal itself contains proof that the differences between BLM rights-of-way and private leases might affect the fair market rental value of the subject right-of-way. It points to the fact that the four private leases (Nos. 5, 12, 14, and 24) considered by the BLM appraiser had an average adjusted annual rental of \$1,823.75 compared to an average adjusted annual rental of \$1,083.33 for the three Government leases (Nos. 15, 16, and 23). See SOR at 14-15. However, we are not persuaded by this analysis, as we have earlier noted that the rentals charged in the case of these Government leases are not be considered reflective of the fair market rental value of those leases.

20/ Appellant also cites the statement in High Country Communications, Inc., 105 IBLA 14, 16 (1988), that, in appraising a BLM right-of-way, "a percentage adjustment is usually made to reflect the general inferiority of the rights granted under a Federal right-of-way." However, the case cited in support of that statement, Northwest Pipeline Corp., 65 IBLA 245 (1982), concerned the valuation of linear rights-of-way with respect to which BLM, at the time, felt that such an adjustment was warranted. As noted above, that is no longer BLM's view. In any event, appellant has not demonstrated that a similar adjustment is equally warranted in the case of a communication site right-of-way.

21/ Appellant explains that it regards the site as locked in because it had virtually no ability "to avoid the Kieckhefer land," due to the need to shield its microwave signals from other carriers' signals in crossing a "frequently congested" area of Arizona, and due to the large landholdings of the Kieckhefers (SOR at 20).

With respect to the first two factors, appellant has not supplied evidence to support its contention that the location of and greater capacity available at the Kieckfer site translates into a higher rental value than would be obtained at the subject site such that BLM must adjust for that lack of comparability. The burden is upon appellant to demonstrate that such factors bear on rental value. Appellant has failed to meet that burden.

Where a lessee is locked into a particular site such that it cannot choose to go elsewhere if it desires to continue its route, BLM should not consider the rental charged for the private lease if that rental resulted from a disparity in bargaining power between the lessor and lessee. American Telephone & Telegraph Co., *supra* at 117. However, we did not say in American Telephone that BLM must disregard all private leases where the lessee was locked into a particular site. As explained by BLM in its answer at page 10, that would eliminate virtually all private communication site leases from consideration:

In a certain sense, all telecommunication sites have "locked in" values because there are only so many desirably located mountaintops, with reasonable access, low land values, and which are outside of overly-congested right-of-way corridors. Furthermore, inherent equipment limitations which affect how far a particular telecommunication site can transmit a signal often dictate where a tower must be placed.

We conclude that, before we can direct that a particular private lease transaction be disregarded, there must be some proof that the rental charged actually resulted from the wielding by the lessor of his disparate bargaining power owing to the fact that the lessee was locked into that site or, as appellant asserts, sites of that particular landowner. That is, the rental charged must be shown to be a hold up value. Appellant has failed to offer such proof in the case of the Kieckfer lease. Accordingly, we conclude that BLM properly relied on that lease.

Rather than the Kieckfer lease, appellant contends that BLM should properly have relied on the Mendiburu lease (No. 24), contending that, of the 24 leases selected by BLM, this lease was the one "most comparable" to the subject right-of-way (SOR at 22). BLM's Appraisal Report, at page 8, indicates that the BLM appraiser regarded the Mendiburu lease as generally comparable to the subject right-of-way, excepting only the following factors: "The subject has longer and more difficult access than this site 3.6 miles from U.S. 380. The subject has superior elevation * * *. The other adjustment in this case is the negotiating situation where the landowner's lawyers appear to be uninformed as to the market rental demanded for communication sites." Id. Overall, the appraiser concluded that the "subject is superior to this site, equal emphasis on both upward adjustments." Id.

While appellant agrees that the subject right-of-way is inferior to the Mendiburu lease in terms of access, it asserts that the "[e]levation of

both sites is adequate to provide the necessary clearance over terrain for the signals" (SOR at 22-23). This assertion, however, does not dispel the BLM appraiser's conclusion that a higher rental would be extracted because of the higher elevation of the subject right-of-way.

Moreover, appellant has not overcome BLM's appraiser's conclusion, based on talking with the parties involved, that the low rental in the case of the Mendiburu lease was attributable in part to the fact that those who negotiated the rental were not aware of other rentals charged for communication site leases. 22/ Appellant merely questions whether the Mendiburus or their lawyers were "uninformed" on rental rates, pointing out that they had previously leased communication sites to the New Mexico Broadcasting Company and to Rogers Cablesystem. Id. at 23. This is not sufficient to establish that they acted as knowledgeable landowners seeking the best possible rental price for a lease of their land. To the extent that they did not, the rental charged by them was properly discounted by BLM.

Appellant also states that the Mendiburu lease should be considered superior to the subject right-of-way because of other factors, specifically the size of the leased area, site preparation costs, access costs, and differences between BLM rights-of-way and private leases. 23/ Again, appellant has not demonstrated that these factors have any bearing on the fair market rental value of communication site rights-of-way in the market place. Thus, appellant has not established that BLM should have considered these factors in assuring the comparability of the Mendiburu lease and the subject right-of-way.

Appellant contends that BLM's appraisal is in error because the appraiser failed to consider "12 out of the 15 recent MCI leases" obtained since 1983 in New Mexico within 200 miles of the subject right-of-way, "and seven out of the eight most comparable MCI leases" (SOR at 25). According to an analysis of these 15 leases attached to the SOR (Exh. 6), the annual rental of the 15 leases ranges from \$1,000 to \$2,500, with an average annual rental of \$1,687. However, appellant asserts that the average annual rental of the eight "most comparable" leases, which rental

22/ In its Supplemental Agency Response, at page 4, BLM states:

"It was the opinion of [BLM's] appraiser, * * * after interviewing the lessor of lease no. 24, that the lessor was not a knowledgeable landowner, having no knowledge of what prices other leases in the area were commanding. The lessor, therefore, accepted the first offer which was made to him by the appellant."

23/ By the size of the leased area, appellant means the size of the area within a site available for future expansion, *i.e.*, the "developable area" (SOR at 23). That differences in the size of such an area do not affect rental values is evident in the fact that, although the Mendiburu lease (No. 24) and another lease issued to appellant (the Rica lease identified in Exhibit 6 attached to the SOR) have developable areas of, respectively, 10,000 and 43,560 square feet, both were leased for \$1,000. See Exh. 6 attached to SOR at 2, 15.

also ranges from \$1,000 to \$2,500, is \$1,325, thereby "strongly suggest[ing]" that the \$2,075 rental determined by BLM is excessive (SOR at 27).

While we agree with appellant's conclusion that the eight leases to which it refers are comparable to the subject right-of-way, appellant further pairs down this list of eight leases to only two leases, concluding that the other six leases are "less comparable" to the subject right-of-way (Exh. 6 attached to SOR at 13). In so concluding, appellant relies primarily on the factors of size of the leased area, site preparation costs, power costs, and access costs, which have not been shown to be determinative of rental value.

Reviewing all eight leases identified by appellant, we find no fault with the BLM appraiser's decision not to consider these leases, since the annual rental charges for the two MCI leases that he did consider (\$1,000 and \$2,000) fall within the range of annual rental charges for the eight leases (\$1,000 to \$2,500). We see no error in the appraiser's consideration of a small number of MCI leases which are representative of all of the MCI leases identified by appellant. Indeed, we note that it is BLM's opinion that consideration of these leases "would make little if any difference in [BLM's] appraisal" (Answer at 6). Appellant has not adequately challenged that opinion.

Accordingly, we conclude that BLM properly appraised the subject right-of-way and thus affirm the Roswell District Office's September 1986 decision to impose annual rental charges of \$2,075.

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.

David L. Hughes
Administrative Judge

I concur:

James L. Burski
Administrative Judge