

TREASURE VALLEY BROADCASTING COMPANY

IBLA 2003-119

Decided March 22, 2005

Appeal from a decision of the Four Rivers Field Manager, Boise, Idaho, Field Office, Bureau of Land Management, raising rental for communication site right-of-way. IDI-29959.

Affirmed as modified.

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

In order to prevail on a challenge to a rental determination assessed by BLM for a communication site right-of-way and calculated pursuant to the rental schedule established in 43 CFR 2803.1-2(d), an appellant bears the burden of demonstrating that BLM used inappropriate data or erred in its calculations, or otherwise erred in applying the rental schedule to its particular right-of-way. Conclusory statements challenging BLM's rental determination that lack a factual basis do not satisfy the burden of proof which necessarily rests with an appellant.

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

BLM may reduce rental payments for a communication site right-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, and it is in the public interest to do so.

APPEARANCES: Randal Williamson, Boise, Idaho, for Treasure Valley Broadcasting Company; Stephanie A. Balzarini, Esq., Office of the Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Treasure Valley Broadcasting Company (TVB) appeals from a January 29, 2003, decision of the Four Rivers Field Manager, Boise, Idaho, Field Office (BFO), Bureau of Land Management (BLM), rejecting its protest of BLM's decision dated December 18, 2002. The December 18, 2002, decision increased TVB's annual rental for communication site right-of-way grant IDI-29959 from \$2,361 to \$9,443, to be phased in over a 5-year period, and assessed annual rental for 2003 in the amount of \$3,361.

TVB owns and operates radio station KWEI-FM, which broadcasts to Spanish-speaking populations in the vicinities of Nampa, Caldwell, and Boise, Idaho. The station broadcasts from a transmitting facility on public lands under the terms of BLM communication site right-of-way IDI-29959, issued in 1993. The right-of-way is located in Gem County, near Emmett, Idaho, on Squaw Butte, in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 24, T. 8 N., R. 1 W., Boise Meridian. (Sept. 8, 1993, Appraisal, Map of Comparable Rentals; Right-of-Way Grant effective Nov. 10, 1993, at 1.) In the late 1990s, for reasons related to TVB's desire to permit additional users at the site, TVB requested that the right-of-way be amended. On December 14, 1999, the parties executed a document under serial number IDI-29959, but entitled "Telecommunications Use Lease."

Under section 504(g) of the Federal Land Policy and Management Act of 1976, as amended (FLPMA), 43 U.S.C. § 1764(g) (2000), BLM is required to charge an annual rental for communication sites and other rights-of-way based on their "fair market value." Likewise, under the terms of the right-of-way, its holder is required to pay annual rental as determined by BLM and comply with BLM regulations set forth in the Code of Federal Regulations at 43 CFR Part 2800. See Nov. 10, 1993, Right-of-Way IDI-29959 ¶¶ 3 and 4.a; see also 43 CFR 2803.1-2(a).

BLM issued revised regulations governing assessment of rental for communication site rights-of-way in 1995. They provide that "annual rental payment for communication uses listed in paragraph(d)(1) [which includes FM radio broadcasting] of this section is based on rental payment schedules." 43 CFR 2803.1-2(d). Further, "rental schedules will be adjusted annually based on the U.S. Department of Labor Consumer Price Index for All Urban Consumers (CPI-U, U.S. City Average, published in July of each year), and Rationally Metro Area [RMA] population rankings." 43 CFR 2803.1-2(d)(2)(i). The schedule provides "rental rates by population zones for various communication uses and reflects the annual

adjustment based upon the change in the Consumer Price Index, All Urban Consumers (CPI-U) \* \* \* ." (BLM Memorandum entitled "Calendar Year (CY) 2003 Communications Uses Rental Schedule," attached to BLM Answer as Ex. 1.) As depicted on the "Communications Site Fee Rental Calculation Sheet" forwarded to TVB for billing year 2003, RMA rankings are classified in "zones" assigned numerical values from 1 to 9, with Zone 1 representing a population of greater than 5 million, and Zone 9 corresponding to a population of less than 25,000. The rental schedule applies higher rental rates to communication sites serving larger population areas.

Prior to 1999, Ranally ranked the area covered by Boise within Zone 6, based on a population of between 100,000 and 299,999. The nearby Nampa/Caldwell area was ranked in Zone 7, representing a population of between 50,000 and 99,999. During 1998, Rand McNally combined the two RMA's and assigned them a Zone 5 ranking, which includes all communities having a population of 300,000 to 499,999. BLM updated its 1999 rental schedule for communication uses on October 29, 1998, to reflect the 1998 RMA modifications. (Information Bulletin No. 98-23 dated Oct. 29, 1998, at 3.)

BLM did not increase TVB's rental based upon the new RMA ranking, but continued to assess rental based upon the Nampa/Caldwell ranking, concluding that KWEI-FM was a low power user serving primarily Spanish-speaking populations in Nampa and Caldwell. (Mar. 8, 2002, letter from Howard Hedrick, BFO, to Senator Larry E. Craig.) However, a neighboring telecommunications site holder, which had been assessed rental based on the Zone 5 rating, raised the issue of whether it was equitable for BLM to assess TVB's rental on the basis of the lower pre-1999 Zone 7 rating while assessing other right-of-way holders with similar coverage rental based on the Zone 5 ranking. Accordingly, BLM undertook to review TVB's rental.

On December 18, 2002, BLM issued its decision raising TVB's rental for the right-of-way.<sup>1/</sup> BLM stated that, although it had assessed rental since 1995 based upon a population served of 50,000-99,999, in 2002 it reviewed the size of the population KWEI-FM reaches, and concluded that KWEI-FM broadcasts to the "Boise Ranally Metro Area with a population of 300,000 to 499,999." (Dec. 18, 2002, Decision at 1.) The decision noted that, based on the lower population classification (Zone 7 ranking), TVB's 2003 base rental would be \$2,361. *Id.* Figured on the higher population served, *i.e.*, the population represented by a Zone 5 ranking, rental

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<sup>1/</sup> Notably, the decision assessed rental for "communication site lease IDI-29959." (Dec. 18, 2002, decision at heading.) BLM's procedures in establishing a lease under the same serial number as the right-of-way are questionable in light of the fact that IDI-29959 is a right-of-way properly issued under section 504(g) of FLPMA. BLM regulations at 43 CFR Part 2800 apply to rights-of-way and permits. Accordingly, we modify the decision to hold that the rental is properly assessed for the right-of-way.

would be \$9,443. Id. BLM determined that, given the substantial increase, a 5-year phase-in period would be appropriate. It therefore calculated a phase-in amount according to the formula provided by 43 CFR 2803.1-2(d)(4) and ordered TVB to pay \$3,361 for the 2003 rental.<sup>2/</sup> Id. The decision established an annual phase-in amount of \$1,270.50 plus the CPI-U factor to be applied over the next 4 years. Id.

On January 22, 2003, TVB filed a letter with BLM opposing the rental increase. (Jan. 21, 2003, Letter from Randal Williamson to BLM.) In that letter, TVB contended that its signal “is only 8.3 KW [kilowatts] compared to many stations of up to 50 KW.” Id. It claimed that its “location is much lower than many of the stations covering the major population areas,” and that by being “only 8.3 [kilowatts] our signal is more [a]ffected by terrain and structural interference.” Id. TVB maintained that its signal does not penetrate many buildings in the outer areas of its 70 “dBu” contour line, and “[h]ills and mountains block our signal from about three fourths of our potential including many parts of Ada and Canyon Counties including downtown and eastern Boise.” Id. It argued that “[t]he only reason we have any listeners in the Ada or Canyon County areas [is] because we serve a niche market and would not be able to compete with the main stream formats.” Id. In support of its position, TVB submitted the coverage map on file with the Federal Communications Commission (FCC) “show[ing] that our 70 dbu line only covers part of Ada and Canyon Counties.”<sup>3/</sup> (Jan. 22, 2003, letter to BLM from TVB.)

BLM construed TVB’s January 22, 2003, letter as a protest, and responded by letter decision dated January 29, 2003. The Four Rivers Field Manager, BFO, notified TVB that the decision implementing new rental rates would not be modified, as TVB had offered no “evidence upon which a change to the Decision can be made.” (Jan. 29, 2003, BLM letter decision.)

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<sup>2/</sup> That rule provides that “[i]ncreases in base rental payments over 1996 levels in excess of \$1,000 will be phased in over a 5-year period.” Although by its terms the rule applies only for the 5 years subsequent to 1996, BLM has implemented a policy to apply phase-ins to any increase in rental in excess of \$1,000, and determined, therefore, that the “spirit and intent of the regulation would apply to [TVB’s] situation.” (Dec. 18, 2002, Decision at 1; see also BLM Exhibit 2, “Rental Schedule for Communication Uses, Implementation Summary” at ¶ 12.)

<sup>3/</sup> The map submitted by TVB’s technical consultant with its right-of-way application depicts a center point, which represents the location of the tower on Squaw Butte, with two roughly circular lines radiating around it. The inner circle represents the extent of the stronger 70 dBu signal; the outer circle represents a 60 dBu signal. (Sept. 8, 1993, Appraisal Report, Map entitled “Predicted Coverage Contours;” see also identical map attached to TVB right-of-way application.) That map depicts Boise, Nampa, Caldwell, Payette, and Fruitland as falling within the 70 dBu line.

TVB filed a timely appeal and petitioned for stay of the rental decision. TVB's Notice of Appeal states its view that BLM relied on "erroneous data picked off the Internet and not from real data based on thorough research and an understanding of the way radio works." (Notice of Appeal received by BLM on Jan. 29, 2003.) In a second letter entitled "Appeal of Rental Rate Predetermination," TVB challenges BLM for imposing "an almost 400 % increase in [its] lease fee." (Appeal letter received by BLM on Jan. 30, 2003.) TVB repeats the allegations in its first letter, and states that BLM officials indicated that "the increase in fees was based on some unspecified/unfurnished advertisement that came from my station," and contends that it "did not have an opportunity to see the 'advertisement'" and "doubt[s] it was interpreted properly." Id. TVB alleges that "[o]ur station serves a minority population" and that "minority business[es] should receive special consideration." Id.

The Board granted a stay by order dated April 15, 2003. In that order, we required the parties to attempt to resolve their dispute through direct negotiations. On July 18, 2003, the Board received a "Joint Status Report" stating that the parties had met, but had been unable to resolve the dispute.

In a letter filed with the Board on July 15, 2003, TVB argues that BLM is using "inaccurate data coverage maps to overstate my coverage area," and contends that it should not "be forced to pay a fee based on a population that I do not cover adequately." (Letter from TVB dated July 15, 2003.) TVB concedes that it "cover[s] a part of the Boise market with a city grade signal but not all of it and much of [that] coverage area is blocked by mountains. So a circle on a map is not correct." Finally, TVB states: "[W]e are a small business and the 400 % fee increase would present a hardship on us and we are also reaching a minority audience. There are less than 60,000 people with Hispanic surnames in this whole part of the country and even less in our coverage area." Id. It requests the Board to "continue the lease fee based on the population figures agreed to when the BLM gave the go ahead for this project." Id.

On July 17, 2003, the Board issued an order requiring BLM to file an answer and directing TVB to serve BLM with its July 15, 2003, filing. BLM submitted an answer on September 2, 2003. In it, counsel for BLM avers that BLM "has not received a copy of [the July 15, 2003] filing." (Answer at 5 n.3.) Because we affirm the challenged decision below, we do not address this issue further.

In its answer, BLM states that, at the time TVB was issued the right-of-way for Squaw Butte in 1993, the "radio station was determined to be located within the Nampa-Caldwell RMA for purposes of the rental rate." (BLM Answer at 3.) BLM continued to base appellant's rental upon the Nampa/Caldwell RMA subsequent to 1998, when Rand McNally combined the two populations into a single RMA. Id. In 2002, BLM determined that its failure to base rental for the right-of-way on the 1998

Ranally designation of the Boise/Caldwell RMA “was not supported by the regulations and BLM policy,” and therefore changed the 2003 rental “to reflect the inclusion of the [TVB] station in the larger Boise RMA.” *Id.* BLM states that it had re-evaluated the rental rates of all three FM stations “situated in BLM’s Lower Snake River District” in 2002, and determined that all three stations were properly assessed rental based on the Boise RMA. *Id.* at n.2.

BLM explains that its determination that TVB’s station serves the Boise RMA was based on consideration of (1) “the RMA information published in the Rand McNally Commercial Atlas and Marketing Guide and incorporated by BLM policy”; (2) a map of KWEI-FM’s coverage published by the FCC on its website; (3) information found at the Internet website identified as “www.Radio-Locator.com”; (4) a coverage map provided by TVB “which is the same as provided in [TVB’s] 1993 application”; and (5) an advertisement released by KWEI-FM which represents to potential advertisers that its coverage includes Boise. (Answer at 4; BLM Exhibits 1, 4, 5, 6, and 7, respectively.)

BLM objects to TVB’s assumption that a radio station which serves a Spanish-speaking or minority population should be given special consideration. BLM notes that its rules

make no provision for price breaks to stations serving a minority population.

It is also important to note that the regulations do not base rental rates on the number or type of listeners. The rate schedule is based on the population that may be reached by a radio broadcast. For instance, the rental rate of FM station KARO, a Christian radio station, is not based on the number of Christians in the area; nor is the rental rate [for] FM station KQXR based on the number of persons who prefer Alternative music. Instead pursuant to the regulations the rates are based on the type of transmission (radio, t.v., cellular phone), and on the population ranking of the RMA in which the facility is located. The BLM regulations do not provide for a reduction in the fee based on the fact that only a portion of the population served actually listens to a particular FM station.

(Answer at 7-8.)

[1] The holder of a right-of-way grant must pay fair market rental for the right-of-way. 43 U.S.C. § 1764(g) (2000); see 43 CFR 2803.1-2(a). Under Department regulations in effect prior to December 13, 1995, unless right-of-way holders were exempt from rental under the regulations, the appraisal method was

used for determining fair market value for communication sites. See 60 FR 57058 (Nov. 13, 1995). Board decisions setting forth the appellant's burden of proof with respect to communication site rights-of-way rental values have, to date, been decided within the context of the appraisal method for determining fair market rental, and our language pertaining to an appellant's burden of proof has been defined within the context of what an appellant must demonstrate to effectively challenge the appraisal method of determining fair market value. "[A]n appellant bears the burden of demonstrating by a preponderance of the evidence that BLM's appraisal methodology was erroneous, that BLM used inappropriate data or erred in its calculations, or that the annual rental arrived at deviated from the fair market value of the right-of-way." Lone Pine Television, Inc., 158 IBLA 86, 97 (2002); KHWY, Inc., 155 IBLA 6, 13 (2001).

As a result of the 1995 rule changes, rental for FM radio broadcast facilities is determined by the appraisal method only in unusual circumstances. The rental schedule supplants, in most cases, the individual appraisal. The schedule rate is predetermined based upon the population of the communities where facilities are situated, 60 FR 57061 (Nov. 13, 1995), and is adjusted annually based on the Consumer Price Index for all Urban Consumers. See 43 CFR 2803.1-2(d)(2)(i); 60 FR 57064. Where an appellant challenges a rental assessment based not on an appraisal but on the use of the rental schedule, its burden of proof is to show error in the decision. Thus, to prevail on a challenge to a rental assessment for a right-of-way established under the rental schedule, an appellant bears the burden of demonstrating that BLM used inappropriate data or erred in its calculations, or otherwise erred in applying the rental schedule to its particular right-of-way. Conclusory statements challenging BLM's fair market value rental determination that lack a factual basis do not satisfy the burden of proof which necessarily rests with an appellant. Uno Broadcasting Corp., 120 IBLA 380, 383 (1991).

TVB argues that BLM erred in applying the schedule. However, it has provided no data, reports, expert opinions, or other factual or technical evidence to support its allegations that its signal is limited by geographical interference and low power transmission, or that its broadcast serves, at most, a Hispanic population of 60,000. Rather, TVB argues that BLM's data is insufficient to justify application of the schedule rate for the Boise RMA.

TVB's central argument is that because its broadcasts are directed only to a Spanish-speaking population of about 60,000 people, it should be considered to be broadcasting within a Zone 7 population, as before. (Letter to the Board received Jan. 15, 2003.) Even accepting as true the unsupported assertions regarding the size of the relevant population interested in a Spanish language station, we agree with BLM that the regulations set rates based on the type of transmission and on the population ranking of the RMA in which the facility is located. In Lone Pine

Television, 158 IBLA at 88-90, and Scott Schmidt, 158 IBLA 183, 189 (2002), we explained that the purpose of the Department's adoption of the rental payment schedules was to be formulaic, to avoid the costs of individual appraisals, and to consider particularized information regarding a site with an individualized appraisal only where BLM finds that that the site should command a rental value of more than five times the schedule value. 43 CFR 2803.1-2(d)(7) and 2803.1-2(e)(1). While information regarding the portion of the broader population within the FM radio coverage area actually interested in listening to TVB's radio station might be relevant in the context of a request for a hardship reduction in rent under 43 CFR 2803.1-2(b)(2)(iv), this is not a factor in determining the fair market value rental of the communication site, and the regulations do not provide for reductions in the schedule rate because the broadcast channel targets a specialized audience. No appraisal is justified here, nor does TVB suggest that the test for an appraisal based on a rental five times the schedule value is pertinent here. Thus, we agree with BLM that the target audience is not relevant to application of the rental schedule, but rather the Ranally metropolitan ranking of the coverage area is the critical factor. 43 CFR 2803.1-2(d)(2)(i).

TVB's remaining arguments object to BLM's information regarding the coverage area. TVB objects to BLM's use of "Radio-Locator.com" as a basis for forming its opinion that the FM station reaches the greater Boise area. Radio-Locator.com is an Internet website which lists radio stations by, among other things, city, state, call sign, and format for the purpose of providing information to the public. A map provided by BLM (BLM Ex. 5 at 2) downloaded from Radio-Locator purports to depict the "[p]redicted coverage pattern for KWEI-FM," but bears the following disclaimer: "This image is intended solely for entertainment purposes. Radio-Locator makes no claims as to the accuracy of this information, nor towards its suitability for any intended purpose." We therefore would agree with TVB that the Radio-Locator map of its coverage alone fails to provide BLM a technical basis for its decision regarding KWEI-FM's range of coverage.

However, the Radio-Locator map is not the only information on which BLM relied to reach its conclusion. As noted above, BLM's decision to increase rental was based on five factors. A map originally submitted by technical consultants for TVB with its right-of-way application includes the cities of Boise, Nampa, Caldwell, Fruitland, and Payette within the predicted 70 dBu range. That map was used in calculating the initial rental BLM assessed in its September 8, 1993, Appraisal Report for IDI-29959. (Appraisal Figure 5.) The original rental assessment was reduced in an "Appraisal Update" issued by BLM on November 17, 1993, based upon a second map submitted by the same consultant for TVB which depicted the "expected" coverage contours within the 70 dBu range as excluding the city of Boise, and depicted Nampa as receiving scattered coverage. However, there is no technical opinion from TVB's consultant explaining why it retreated from the original predicted

coverage contours, and no independent analysis by BLM confirming the accuracy of the “expected contours.” As BLM has pointed out, the FCC map, which BLM found independently of the Radio-Locator website, depicts the “projected” contours of coverage for KWEI-FM as including a large portion of Ada, Boise, Canyon, Payette, and Washington Counties, which encompasses Boise and the surrounding populations centers. (BLM Exhibit 4.) BLM also relied on a map included on promotional literature generated by KWEI-FM and provided to potential advertisers. That brochure states: “Radio is the most useful medium when targeting the local Hispanic community,” and provides a map diagram similar to the map included in the original application, the FCC diagram, and the Radio-Locator diagram. The diagram on the advertisement depicts Boise, Nampa, Caldwell, Payette, and Emmett as squarely within the listening area of KWEI-FM.

Additionally, BLM’s telecommunications specialist, Dan Hukill, provided information to BLM employees working on the rental issue.

I found Radio Locator was helpful in obtaining technical information \* \* \* i.e., Antenna height and type of Antenna etc. \* \* \* [T]he \* \* \* site on Squaw Butte is at 5990 feet. [<sup>4/</sup>] This additional height will give a better coverage as well (which means you can use lower power and get a farther signal as opposed to being down lower with more power). Of course, using a software program and fine tuning to give a more real world overlay of coverage is the best course to follow. But the FCC gives a protected circle of coverage to a station that inside a set border \* \* \* they should be guaranteed to have no interference, bleedover, etc. Outside of that circle there is potential of who has the strongest signal to capture the receiver. The true test in my opinion is where are you able to receive the station and who are their users in their broadcast area. I can tell you that I listened to 99.5 outside of the [State Office] with a really good signal. \* \* \*

(Electronic mail communication dated Oct. 11, 2002.)

Finally, while BLM did not rely on this data, the technical consultant relied on by TVB in its preparation of construction reports regarding the TVB site relied on a population service figure in excess of 300,000. The “Technical Exhibit, Application for Construction permit, [TVB],” appended to the 1993 appraisal, explains the preparation of the contour map in the appraisal, and on which BLM relies in reaching its conclusions. The report states:

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<sup>4/</sup> This figure is verified by the information included on the “Notice of Proposed Construction or Alteration” submitted with TVB’s right-of-way application.

The population to be served within the predicted 60 dBu contour was determined by a computer program which adds the populations of census districts having centroids within the contour. The 1990 Census was employed. The land area within the 60 dBu contour was determined using a root mean squared method of calculation. The predicted 60 dBu contour encompasses an estimated 16,287 square kilometers in which an estimated 365,745 persons reside.

(Technical Report at 4.) Likewise, in an appraisal document entitled "Section V-B-FM Broadcast Engineering Data," at question 17, TVB's technical consultant specified the same figures, including the population of 365,745 based on the 1990 census, in defining the predicted "1 mV/m contour."

In Lee Enterprises, Inc., 147 IBLA 88, 91 (1998), we reversed BLM for assessing a right-of-way holder a rental based on the higher of two adjacent RMAs when BLM conceded that "due to topographic intervention" the holder's "service was unavailable to all or part of the \* \* \* RMA lying west of the Franklin Mountains," a population of approximately 200,000. By contrast here, the information available in the record supports BLM's conclusion that TVB service extends to an RMA in which it is located. While TVB objects to BLM's sources, it provides no evidence or data to refute the record information or BLM's research which is in large part based on or verified in TVB's own data. TVB claims that its signal is blocked by mountains and therefore does not reach most of Boise, but the record contains no verification of this allegation. No evidence having been offered to the contrary, the information in the record sufficiently establishes that KWEI-FM is properly located in the Boise RMA.

It is worth noting that the Secretary has the discretionary authority to charge less than fair market rental value when the right-of-way holder provides a valuable benefit to the public without charge or at reduced rates. 43 CFR 2803.1-2(b)(2)(ii). It is incumbent, however, upon the right-of-way holder to demonstrate that it is qualified to receive a waiver or reduction of rental. Delbert D. Jones, 147 IBLA 195, 203 (1999); Lone Pine Television, Inc., 158 IBLA at 105. Although TVB broadcasts to the Spanish-speaking population of the greater Boise area, it has not demonstrated that its particular services qualify for a reduction in rental under 43 CFR 2803.1-2(b)(2)(ii).<sup>5/</sup>

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<sup>5/</sup> TVB's other complaint is that BLM did not provide it copies of applicable regulations. We reject TVB's suggestion that this would support a showing of "bad faith" on the part of BLM. The applicable regulations governing rental, 43 CFR Part 2800, have been cited since 1993 in right-of-way IDI-29959. Having applied for, accepted, and signed the right-of-way, TVB is in no position to claim confusion on this point.

[2] We turn to TVB’s statement that “the 400 % increase” in rental would “present a hardship on us.” BLM regulations authorize a reduction in rental for undue hardship. 43 CFR 2803.1-2(b)(2)(iv). <sup>6/</sup> (July 15, 2003, TVB letter to the Board.) There is no indication in the record that appellant requested a hardship reduction prior to this appeal. However, it asserted in its petition for stay that “such an increase would have a major financial impact on a small business such as ours,” alleging that “[o]ur company just barely broke even last year.” (TVB Petition for Stay received by BLM on Jan. 30, 2003.) From the Joint Status Report submitted to the Board on July 18, 2003, it is not possible to determine whether the parties discussed the issue of hardship, even though our April 15, 2003, Order raised the issue. <sup>7/</sup>

On the issue of hardship, TVB’s arguments regarding the size of its audience, as opposed to the population within its coverage area, may have more relevance. In High Country Communications, Inc., 105 IBLA 14, 18-20 (1988), we stated:

Commercial radio and television broadcast stations derive revenue from selling advertising. As a general rule, \* \* \* 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. \* \* \* 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 of the operation, raising the question whether a reduced rental is warranted for the transmitter site

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<sup>6/</sup> That rule provides in pertinent part:

“(2) The authorized officer may reduce or waive the rental payment under the following instances:

\* \* \* \* \*

(iv) 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. In order to complete such consultation, the State Director may require the applicant/holder to submit data, information and other written material in support of a proposed finding that the right-of-way grant or temporary use permit qualifies for a reduction or waiver of rental[.]”

<sup>7/</sup> The Joint Status Report indicated that “[t]he issues before the Board are largely legal in nature, in that they depend on the interpretation of statutes, regulations, and guidelines, and the parties concluded that these issues could not be resolved through settlement at this time.”

in question. \* \* \* 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.

Id. at 19-20. Thus, the size of TVB's potential audience may bear on the question of whether TVB's revenues are limited due to a specialized market such that the rental payment becomes "an inordinately large portion of the station's operating costs." Id. TVB is free to seek such a reduction from BLM and attempt to make the requisite showing that the reduction is warranted.

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 affirmed as modified to reflect that the rental is assessed with respect to right-of-way IDI-29959.

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Lisa Hemmer  
Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge