

INTERIOR BOARD OF LAND APPEALS

Citicasters Co.

166 IBLA 111 (June 24, 2005)

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CITICASTERS CO.

IBLA 2002-407; 2003-340

Decided June 24, 2005

Appeals from a 2002 rental determination and a 2003 rental billing notice issued by the Ridgecrest, California, Field Office, Bureau of Land Management, for a communication site on Soledad Mountain. CACA-38499.

Set aside and remanded.

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

BLM must ensure that a decision increasing rental for a communication site right-of-way is supported by a rational basis, set forth in the written decision and demonstrated in the administrative record accompanying the decision. Although BLM may, pursuant to its policy for implementing 43 CFR 2803.1-2(d)(2)(i), assess a higher rental schedule rate for a communication site right-of-way based upon a modification combining two or more Ranally Metro Areas published in the "Rand McNally Commercial Atlas and Marketing Guide," it is nonetheless incumbent upon BLM to develop an administrative record that provides a rational basis for doing so.

APPEARANCES: Kael R. Murray, Lancaster, California, for the appellant.

## OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

On June 17, 2002, Citicasters Co.,<sup>1/</sup> which operates radio station KVVS-97.7 FM (KVVS) under Federal Right-of-Way Communications Use Lease, CACA-38499 (ROW grant CACA-38499)<sup>2/</sup> appealed a May 15, 2002, request for payment issued by the Ridgecrest (California) Field Office, Bureau of Land Management (BLM), assessing 2002 annual rental in the amount of \$42,448.38.<sup>3/</sup> On June 23, 2003, Citicasters also appealed BLM's 2003 request for payment, received by Citicasters on May 23, 2003, assessing rental in the amount of \$40,134.08.<sup>4/</sup> ROW grant CACA-38499 authorizes Citicasters' use of public lands, managed by BLM, at the Soledad Communications Site, Soledad Mountain in Kern County, California, about 3.5 miles south of Mojave, San Bernardino Meridian, for Citicasters' KVVS transmitter

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<sup>1/</sup> Citicasters Co. is an Ohio company and wholly-owned subsidiary of Clear Channel Communications, Inc.

<sup>2/</sup> The grant for CACA-38499 is entitled "Communications Use Lease." However, section 504(g) of the Federal Land Policy and Management Act of 1976 (FLPMA), which governs, inter alia, communication site rights-of-way, makes no provision for a "communications use lease." In Treasure Valley Broadcasting, Inc., 165 IBLA 113, 115 n.1 (2005), the Board noted that "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 [the grant in question] is a right-of-way properly issued under section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (2000), [and] BLM regulations at 43 CFR Part 2800 apply to rights-of-way and permits." In that case, we modified BLM's decision to hold that the rental is properly assessed for the right-of-way. Id. As we are setting aside and remanding the decision appealed here, we merely note the misnomer, and refer to CACA-38499 as a right-of-way grant.

<sup>3/</sup> Citicasters received the 2002 rental determination on May 23, 2002. Citicasters' appeal of that determination was docketed by this Board as IBLA 2002-407.

<sup>4/</sup> The 2003 request for payment of rental is undated but the record shows that BLM sent it by certified mail on May 21, 2003. Citicasters' appeal of the 2003 notice was docketed by the Board as IBLA 2003-340. The 2003 request for payment was stayed by Order of this Board, dated Sept. 3, 2003. As both appeals involve the same appellant and the same factual and legal issues, we have consolidated them for purposes of issuing this decision.

facilities. See Soledad Mountain Quadrangle Map; ROW Grant CACA-38499. The right-of-way was originally held by Antelope Broadcasting Company, Inc., prior to its assignment to Citicasters in 1999.<sup>5/</sup>

Under section 504(g) of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 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." Under the terms of the ROW grant for CACA-38499, its holder is required to pay annual rental as determined by BLM and comply with BLM regulations set forth in 43 CFR Part 2800. See ROW Grant CACA-38499 at 2, ¶¶ II.A. and II.B.

In 1995, BLM issued revised regulations governing assessment of rental for communication site rights-of-way. They provide that "annual rental payment for communication uses listed in paragraph (d)(1) of this section [which includes FM radio broadcasting] is based on rental payment schedules" and that "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 Ranally Metro Area population rankings," 43 CFR 2803.1-2(d); 2803.1-2(d)(2)(i).<sup>6/</sup> The rental schedule provides "rental rates by population zones for various communication uses \* \* \*." (BLM Information Bulletin (IB) 99-025, dated October 29, 1998, entitled "Calendar Year (CY) 1999 Communication Uses Rental Schedule," at 1.<sup>7/</sup>)

Prior to 1999, BLM based rental for the right-of-way on the Lancaster Ranally Metro Area (RMA) population rankings which classified Lancaster, California, as an RMA having a population strata between 100,000 and 299,999. See 1997 and 1998 "Communications Site Fee Rental Calculation Sheet[s]" and 1997 and 1998 "Communication Site Rental Calculation Sheet[s]."<sup>8/</sup> According to the Federal Communications Commission (FCC), KVVS is located in Mojave, California, and

<sup>5/</sup> BLM approved Citicasters' Oct. 22, 1998, application for assignment of Antelope's ROW grant CACA-38499 on March 30, 1999.

<sup>6/</sup> The Ranally Metro Area population rankings are identified in the "Rand McNally Commercial Atlas and Marketing Guide." See 60 FR 57059-60 (Nov. 13, 1995).

<sup>7/</sup> BLM provided IB 99-025 to Antelope by facsimile transmission dated Feb. 24, 1999.

<sup>8/</sup> These four worksheets document aspects of BLM's 1997 and 1998 rental calculations for ROW grant CACA-38499.

according to appellant, Lancaster is 30 miles south of Mojave. (June 23, 2003, Notice of Appeal and attached FCC postcard renewal certificate dated August 14, 2000.) In 1998, Rand McNally eliminated the Lancaster RMA and included Lancaster within the Los Angeles RMA, which is more than 90 miles south of Mojave and is assigned a population ranking of over 5 million. On October 29, 1998, BLM updated its 1999 rental schedule for communication uses to reflect the 1998 RMA modifications. See IB 99-025 at 3.

On February 19, 1999, one month prior to approval of the assignment, BLM notified Antelope Broadcasting Co., Inc. that "the 1999 RMA update has eliminated the Lancaster RMA and included the area previously covered under this RMA in the Los Angeles RMA." (February 19, 1999, decision, at 1.)<sup>9/</sup> The decision informed Antelope that the rental amount would therefore be calculated based upon the population ranking for the Los Angeles RMA, and that "rental in the amount of \$42,286.94 is due for the period from January 1, 1999, through December 31, 1999."<sup>10/</sup> Id. Antelope paid the rental on March 17, 1999 (see "Receipt for Payment, Case File Copy," dated March 17, 1999).

Upon receipt of BLM's billing notice for 2000, Citicasters paid rental in the amount of \$42,286.94. (BLM Receipt No. 117210.) In 2001, BLM forwarded a billing notice to Citicasters in the amount of \$41,292.20, which Citicasters paid. (BLM Receipt No. 268078.) In 2002, however, subsequent to receipt of BLM's request for payment in the amount of \$42,448.38, Citicasters apparently contacted BLM requesting information concerning the assessment.<sup>11/</sup> In response, BLM issued the May 15, 2002, decision on appeal.

In that decision, BLM provided the following explanation concerning the rental assessment:

You asked why rental was so high for a communication site serving only the city of Mojave. The increase in rental took place prior to your assignment from Antelope Broadcasting Co. Inc. A decision issued to Antelope \* \* \* on February 19, 1999, notified the holder of

<sup>9/</sup> There is no record that BLM served that decision on Citicasters.

<sup>10/</sup> The rental was increased from \$4,842.24 in 1998 to \$42,286.94 in 1999. The decision did not provide for a phase-in of the more than eight-fold increase.

<sup>11/</sup> The record contains no written inquiry, protest, or appeal to BLM from Citicasters.

the change in the [RMA] population ranking. The Lancaster RMA was included with the Los Angeles RMA causing the increase in rental. The User Inventory Worksheet provided to the BLM which includes your FM station and one microwave link has been calculated correctly. According to the calculations found in the 2002 Rent Schedule for Communications Uses, the FM rental is \$39,540.96 and the Microwave rental is \$2,907.25 (25% of \$11,629.69) for a total of \$42,448.38.

(Decision at 1.) Citicasters paid the rental (BLM Receipt No. 500864), but appealed the decision.

In its Statement of Reasons (SOR) attached to its June 17, 2002, Notice of Appeal, Citicasters states that KVVV "is a 3.5 kW station licensed to the City of Mojave." It avers that it "maintains a fully staffed studio in the city of Mojave per FCC regulations." The SOR further states:

We understand that the Lancaster RMA is now included with the Los Angeles RMA. However, Soledad Mountain, the KVVV transmitter site, is in Mojave \* \* \*. Most importantly, KVVV-FM is not a Lancaster Station nor is it even in the County of Los Angeles. \* \* \* KVVV-FM is a low power FM but can be heard outside the area; its furthest reach would be Palmdale, Ca. \* \* \*

KVVV is heard from Mojave, east to North Edwards and north to Lancaster / Palmdale. A population ranking \* \* \* [of] 5,000,000 seems out of proportion given the size of the area in which the station is licensed, more so given the low power of KVVV. It is clearly unreasonable to assess rent based on the RMA ranking of Los Angeles when KVVV is not in the city of Los Angeles, does not serve the city \* \* \*, and is not even located within the county of Los Angeles. \* \* \* Most telling is the fact that KVVV cannot even be heard in Los Angeles. Soledad Mountain is 80 miles away from Los Angeles and the KVVV signal reach is 30 miles, falling short by 50 miles of reaching Los Angeles.

(SOR at unnumbered 1-2.) Citicasters concedes that a population of over 200,000 can receive KVVV, but maintains that, "based on current census figures," no more than 299,000 people, none of whom are in Los Angeles, can receive the signal, and, therefore, the rental decision was "based on the erroneous assumption that KVVV should be included in the Los Angeles RMA." (SOR at unnumbered 2.)

Citicasters claims that based on the current schedule, annual rental for an FM radio right-of-way for a population of 100,000 - 299,000 is \$4,651.88 with an additional \$2,325.94 for one microwave they sub-lease, totaling \$6,977.82 annually. Id. They request a refund of the total "erroneous rental amount" of \$140,443.18 paid from 1999-2002. Id.

Citicasters' Notice of Appeal from the 2003 rental determination essentially restates the contentions previously raised. However, included in this Notice of Appeal was a request for a stay. On September 3, 2003, this Board issued an order granting the petition for stay of the rental increase in appeal IBLA 2003-340. By letter dated October 17, 2003, BLM notified Citicasters that, pursuant to the Board's stay order, BLM assessed rental for 2003 "based on the rental fee schedule for communication uses serving the population of Mojave and the surrounding areas instead of the population for Los Angeles, California." On February 6, 2004, BLM sent a similar letter with notification of the same rental amount due for 2004. BLM did not file an answer in either appeal.

[1] 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. Treasure Valley Broadcasting Company, 165 IBLA 113, 119 (2005). Whether a rental valuation is based upon an appraisal, or application of the rental schedule, it is incumbent upon BLM to provide an administrative record which adequately supports its fair market rental determination. See, e.g., Treasure Valley Broadcasting Company, 165 IBLA at 120-22; Scott Schmidt, 158 IBLA 183 (2003); Lone Pine Television, Inc., 158 IBLA 86, 97 (2002); Kitchens Productions, Inc., 152 IBLA 336, 345 (2000).

The preamble to the 1995 regulations explains that the Department "intends the approach taken in developing the final schedule to achieve a reasonable estimate of fair market value \* \* \* ." 60 FR 57060. To this end, "[t]he schedule, in its final form more closely reflects market rent and minimizes impacts on holders of sites serving smaller population areas." Under the schedule, "[r]ents will correlate with the population of the local community where the facility is situated or that it serves, or both, rather than distant communities served by the facility." 60 FR 57059.

Citicasters argues that BLM erroneously calculated rental for the Soledad communications site because it incorrectly based the rental determination upon the rental schedule rate for the Los Angeles RMA, which includes a far greater population

than KVV'S signal is capable of reaching, and, thus, a much greater population than the station actually serves. BLM did not respond to Citicasters' allegations.

The record reflects little information bearing on the issue of the "fair market value" of the station's annual rental, pursuant to section 504(g) of FLPMA and implementing regulations at 43 CFR 2803.1-2(a). The only technical information we could find in the record of possible relevance to the question of whether the station can be heard in most or part of the Los Angeles RMA is found in Antelope's application for CACA-38499. There, Antelope reported that the Soledad communications site houses a 6,000 watt transmitter, a 90-foot tower and a 50-foot tower. (Antelope Right-of-Way Application dated January 17, 1997.)

Otherwise, the record shows only that KVV'S previously was included in the Lancaster RMA and that BLM based its decision to increase the station's rental more than eight-fold on the 1999 RMA update which subsumed the Lancaster RMA in the Los Angeles RMA. BLM has not submitted answers to the appeals and has not otherwise provided support, in the record, for its decisions to base rental for this communication site right-of-way on the schedule for the Los Angeles RMA. Likewise, appellant has submitted no evidence to support its allegations that "the furthest reach [of KVV'S] would be Palmdale, Ca"; the station "cannot even be heard in Los Angeles"; "the KVV'S signal reach is 30 miles, falling short by 50 miles of reaching Los Angeles"; and no more than 299,000 people can receive the signal. (SOR at unnumbered 1-2.) Thus, it is impossible to determine, from the record, the serving capacity of the site.

While BLM may, pursuant to its policy for implementing 43 CFR 2803.1-2(d)(2)(i), assess a higher rental schedule rate for a communication site right-of-way based upon a modification combining two or more RMA's published in the "Rand McNally Commercial Atlas and Marketing Guide," it is nonetheless incumbent upon BLM to develop an administrative record that provides a rational basis for doing so. Citicasters has been assessed rental for ROW grant CACA-38499 based upon a population of more than 5 million, but alleges that its FM signal in fact reaches fewer than 300,000 people. To the extent that this may be the case, and BLM's administrative record currently provides no evidence or analysis to the contrary, BLM's assessment does not comport with the regulatory goal of assessing rental based upon "the population of the local community where the facility is situated or that it serves, rather than distant communities served by the facility." 60 FR 57,059. See also Lee Enterprises, 147 IBLA 88 (1998), which, although dissimilar in some respects, presented an analogous situation. In that case, the Board held that BLM should have adjusted the schedule rental assessed because the right-of-way holder served two RMA's, BLM's policy called for assessing rental based on the larger of the



two RMA's, but, as BLM conceded, "due to topographic intervention" service to all or part of the larger RMA was unavailable and, therefore, "not comprehensive." Id. at 91. We held in that case that the schedule rental rate should have been adjusted to reflect the actual population served. Id.

In Treasure Valley Broadcasting Company, 165 IBLA at 118, 120-22, the Board upheld a BLM decision raising Treasure Valley's rental based upon Rand McNally's combination of the Nampa/Caldwell and Boise RMA's, holding that the information in the record sufficiently established that the FM station owned and operated by Treasure Valley is located in and serves the Boise RMA. In that case, BLM's determination that Treasure Valley's station served the Boise RMA was based not only on consideration of the RMA information published in the "Rand McNally Commercial Atlas and Marketing Guide," but on maps of coverage published by the FCC on its website; information found at the Internet website identified as [www.radio-locator.com](http://www.radio-locator.com); information and analysis provided by BLM's communications expert; and marketing data generated by Treasure Valley corroborating BLM's finding that the FM station was generally available in the Boise RMA. Id. at 118.

We find no such evidence supporting the record in this case. We note, by contrast, that the predicted coverage pattern for "KVVS 97.7 FM, Mojave, CA" on the internet site, [www.radio-locator.com](http://www.radio-locator.com), shows Los Angeles to be outside the "fringe" band of possible coverage. Although not dispositive, this predicted coverage pattern, together with appellant's averments and the absence of evidence supporting the decisions, raises serious questions regarding the reasonableness of BLM's reliance on the Los Angeles RMA rental schedule in determining fair market value for KVVS' communication site rental. See Treasure Valley Broadcasting, Co., 165 IBLA at 120.

Since we find the current record insufficient to determine the reasonableness of BLM's rental decisions for ROW grant CACA-38499, we set aside and remand the decisions on appeal, instructing BLM to develop a record supporting a rational basis for BLM's decision to establish the fair market rental value for ROW grant CACA-38499 based on the rental schedule for Los Angeles. See Lee Enterprises, 147 IBLA at 91. In the alternative, BLM should redetermine a rental rate for ROW grant CACA-38499 that rationally reflects the fair market value of the rental, pursuant to 43 U.S.C. § 1764(g) (2000) and 43 CFR Part 2800.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the matter is remanded to BLM for action consistent with this order.

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Christina S. Kalavritinos  
Administrative Judge

I concur:

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H. Barry Holt  
Chief Administrative Judge