

The grant of the application would inhibit and delay the development of that policy. We place considerable weight on this and explain the reasons later.

#### DECISION

WHILE the Tribunal decided that the proposed service had some desirable elements we had strong reservations as to the extent to which the service was desirable in the public interest. Although considerable emphasis was put on the news aspect and a new sound, the Tribunal was not satisfied that the programme material would be substantially different from existing stations or provide a valuable service to different groups within the communities it intends to serve. Although the sound may be better, that would have to be proved in the market place where RNZ programming has been notably successful in a variety of markets.

There were advantages over existing services, such as its private ownership, its 24-hour local service, its second radio news service to the area, its interest in news and current affairs and its regional emphasis, it would not to any significant extent fulfil needs in the area which are not being met by existing stations. We concluded that, broadly, all commercial stations would be aiming at the same age groups, providing for their needs in slightly different ways. The proposed station would not bring another dimension to radio broadcasting in the region.

Radio Hawke's Bay seeks substantially to fulfil the same needs as the existing commercial programmes aim to satisfy. The needs which appear to be unfulfilled in the area fall within the demographic groups below and above those served by the existing stations. Some of those needs might possibly be satisfied by a new programming dimension and music quality delivered by means of FM broadcasting.

We have considered the effect on the existing services of the BCNZ and have given considerable thought as to the weight we should place in our decision on the effect on the Corporation and in particular, on the services provided by the Corporation. The effect on the Corporation's revenue in Hawke's Bay is likely to be between \$300,000 to \$400,000 per annum.

In *New Zealand Broadcasting Corporation v. Independent Broadcasting Co. Ltd.* (unreported 24 July 1970, Wellington Registry, M. 137/70) the full Court said at page 16—

We have expressed the view that on the whole of the evidence it seems likely that the granting of the application may result in the elimination of the Corporation's present profit on the operation of its commercial station 1ZH. The economic effect on a station already in operation is not, however, the only nor necessarily the most important consideration that the Authority is required to take into account. It is only one of many factors. Moreover, having before it annually the reports and accounts required, by section 28 of the Broadcasting Corporation Act 1961, it is reasonable to assume that in enacting the Broadcasting Authority Act 1968 Parliament was aware of the general run of the Corporation's financial affairs, knew that it lost money on sound broadcasting, and must have contemplated that the establishment of private broadcasting stations would necessarily make further inroads into the Corporation's local returns. The fact that a local profit may therefore be turned into a local loss, is therefore not in itself a ground for allowing the Corporation's appeal. Indeed, in a case where the new service is shown to be necessary or desirable in the public interest, the allowance of an appeal on economic grounds only would amount to saying that the Corporation's finances come first and the public interest second."

In *Plimmer v. BCNZ* (unreported 1 August 1980) the Chief Justice said: "This passage makes it plain that the economic considerations are not to be elevated necessarily to be the prime factors which the Tribunal should take into account in reaching a decision." In effect, His Honour said that the Tribunal had in that case given too much weight, in the circumstances, to the considerations contained in section 80 (b) and (c).

We have, therefore, carefully considered what weight ought to be given to this factor in the present case and to relate that to the desirability of the new service.

We note that His Honour used the word "necessarily" which indicates to us that in some circumstances economic considerations can be prime factors. There is no obligation upon the Corporation to establish anything. The Act requires the Tribunal to take into account the provisions of section 80 (c).

What we have to decide is whether the desirability of the service is great or slight in relation to the economic or other factors.

After careful thought we are satisfied that the advantages of granting the application are slight in comparison with

the economic effect it would have on the Corporation stations in Hawke's Bay and the consequent effect on the Corporation's ability to provide services in the public interest.

Such services are, in part, financed by surpluses from some areas. Surpluses are needed to supplement deficits in more marginal and remote areas or those where competition severely limits profit potential.

The situation regarding broadcasting has changed a great deal since the judgment of the full Court in 1970, which related to an Act passed in 1968. At that time, as is referred to in the judgment, the Broadcasting Corporation was losing money on radio. For the past few years Radio New Zealand has been operating with a surplus and we were told was expected to do so again for the year ended 31 March 1982.

We accept Mr O'Brien's submission that the Corporation should not necessarily be reduced to a deficit situation by the introduction of stations which deprive it of revenue before it can gain protection from the statute. There would appear to be a danger of a reduction of services to the area if there was a severe curtailment in the Corporation's revenue.

After taking all the desirable features of the application into account, and the disadvantages of granting the application (but putting the question of FM to one side), the Tribunal on balance, decided to decline to grant the warrant.

As has been stated, the Tribunal is required to have regard to the Government's policy for the development of FM broadcasting as an integral part of sound radio broadcasting in New Zealand. The applicant invited us to grant the warrant with a condition that the applicant apply for a FM warrant at some later date. We could not accept this concept. For one thing, it would have pre-judged the grant of warrants. The applicant would have been placed in a special position having pre-empted the future of commercial FM broadcasting in the area by absorbing any revenue potential by the setting up of an AM station.

Therefore, we have been faced with considering in either granting or refusing the application what the effect would be on the development of FM broadcasting in the area. If this application were granted, at a later date FM applications could be called for, but it would seem almost impossible for any other applicant than an existing operator, to make a successful application for a FM warrant. We do not know whether, on performance, the present applicant (if the only applicant) would be suitable. We would almost certainly be faced with its opposition to a grant to the BCNZ of a third warrant (for FM broadcasting) in the area. The economic effect on 3 then existing stations may in fact outweigh the desirability of introducing a new service.

The reluctance of the present applicants to become involved in FM broadcasting from the beginning, would cast some doubt on their enthusiasm for doing it later, particularly when they had incurred heavy capital expenditure in establishing AM transmitters and antenna systems.

While it may not prove a profitable operation initially, the Tribunal considers that, having regard to the lower capital cost that would be involved, the lower running costs of a service which would not be so heavily news and information oriented and the desirability of introducing FM services as soon as practicable throughout New Zealand as an integral part of the sound radio system, FM radio would be set back by the grant of this application.

If we followed the course desired by the applicant and virtually required it to apply later for a FM warrant which was unopposed and it was found that a FM station could be established commercially, the outcome would be less satisfactory than if no AM warrant had been granted. For it is likely that simulcasting would have to be permitted which would lead to compromise programming and the delay, perhaps for many years, in the establishment of a properly programmed stand alone FM station for Hawke's Bay.

The economic effect of the grant of this application would, as has been stated, also affect the Corporation's ability to develop FM concert programme stations.

We conclude that even if we had found that the desirability of the existing service outweighed the other factors (except FM) we would have found the FM factor would have caused us to refuse the application.

The application is declined.

#### Co-opted Member:

Mr M. J. Henshall was co-opted as a person whose qualifications and experience would, in the opinion of the Tribunal, be of assistance to the Tribunal in dealing with the application. He took part in the hearings and the deliberations of the Tribunal, but the decision is that of the permanent members.

Dated the 23rd day of September 1982.

Signed for the Tribunal:

B. H. SLANE, Chairman.