We have ruled out the whole of 3 and 4. It would appear to be a situation where the Corporation could have provided such a statement at an earlier stage and to come along with a detailed statement at this stage with argument in support of the position is prejudicial.

The Economic Evidence is out. Aotearoa Broadcasting System evidence can stay in. No further deletion is made through to page 13. Paragraphs 6 and 7 we would suggest come out on pages 13 and 14. We have a query over paragraph 8,—sorry I think that was all right because there was previous reference by Mr Rennie in commercial and non-commercial elements. I haven't examined that closely. What I suggest is that perhaps Mr O'Brien could give that some attention."

The Corporation requested the Tribunal to put into writing its reasons for the ruling.

Without prejudice to the Corporation's rights to dispute the ruling, Mr Rennie gave evidence in accordance with his original brief of evidence as modified by his second brief limited in the ways indicated by the Tribunal.

The Corporation made no further submissions in respect of the paragraphs which the Tribunal raised doubt about but in respect of which it did not give a final ruling and no objection was taken by any other party.

The Tribunal does not intend to detail all the legal argument heard. In particular an extensive argument was put by Mr Baragwanath for ESTV which traversed a great deal of history which the Tribunal does not consider it necessary to examine here.

Nor does the Tribunal intend to set out again the procedural rulings that have previously been given in relation to the production of evidence. It is sufficient to say that the Tribunal set out a procedure which involved applicants and other parties filing evidence in support of their own case, later filing evidence in opposition to evidence filed by others and having an opportunity to reply on a third occasion by filing evidence in reply to the evidence of any other person in opposition.

The Corporation did file evidence from 5 witnesses of whom Mr Rennie was one. No evidence was filed for Mr Dick as he was not Chief Executive of the Corporation at the time when evidence was filed. No evidence was filed on behalf of the Corporation by the then Chief Executive of the Corporation, Mr Cross, who in fact gave evidence for Aotearoa Broadcasting System.

Mr Baragwanath submitted that the premise of the BCNZ's evidence was the existence of a third channel.

He and other counsel referred to the fact that it was not until 29 May 1986, after hearings lasting since mid-August 1985, that the BCNZ filed a memorandum proposing a second statement of evidence from Mr Rennie and that from Mr Dick.

ESTV had no objection to the updating of information for the assistance of the Tribunal upon existing issues if the Tribunal was satisfied the information was not previously available to the BCNZ and exclusion of the evidence would threaten a miscarriage of justice.

But Mr Baragwanath submitted that the change of direction by the Corporation was due not to a change of circumstances but apparently to a change of personnel and policy. The interests of justice did not permit an about turn at the eleventh hour.

It was also submitted that there would follow from the admission of the evidence a request to bring rebuttal evidence. Even that would not adequately deal with matters because a number of witnesses in each case dealt with aspects of the economic effect on the BCNZ and the parties could not be put back into the same position by being given a right to attempt to rebut the evidence of the Corporation. All their cases had been constructed on the basis of the first indicated BCNZ stance.

Mr O'Brien submitted that the Tribunal could waive any part of its procedures under Rule 3.2 and could issue directives under 3.3. Quite properly Mr O'Brien drew attention to the first and principal procedural direction dated 6 June 1985 in which, under the heading "Time Needed for Preliminary Procedures" paragraph 6, read:

> "The Tribunal is anxious to avoid any suggestion of surprise or late presentation of evidence and to allow all parties, whatever their resources, a reasonable opportunity to prepare properly beforehand."

He submitted that in this case there was no suggestion of surprise or inexcusable late presentation of evidence. Extensions had been given from time to time for the late filing of evidence by other parties and that direction on page 11, paragraph 15 contemplated leave being granted for exemption:

> "Failure to comply . . . or to obtain leave to be exempted in some respect from the direction . . . "

Leave was sought to adduce Mr Rennie's evidence early because he would be out of New Zealand during the time set down for hearing of evidence of Corporation witnesses. The original brief of evidence had been affected by various subsequent changes in Government policy.

Mr O'Brien submitted that there had been various changes in Corporation policy since the brief was filed, but there were also matters referred to in paragraph 2 of the evidence, namely:

(a) Subsequent Government policies with direct application to State corporations, including the BCNZ, i.e. dividend and taxation policies.

(b) Actual trading experience in respect of advertising revenues and audience demands.

(c) Difficulties which have developed in relation to the Aotearoa Broadcasting System and its application.

(d) Implementation of the first stages of the Corporation's reorganisation of television and radio.

(e) An increase in Mr Rennie's industry experience.

Mr O'Brien submitted that the Tribunal would be shutting its eyes to highly relevant evidence if leave were not granted. The evidence was relevant to section 80, (a), (b) and (c) and evidence was sought to be given on behalf of a party entitled to be heard under section 78 (1).

He said that the differences in the evidence were:

(a) It now conveyed some firm views that a grant of further television warrants at this time is not in the public interest.

(b) Previously Mr Rennie's brief of evidence supported the application of Aotearoa Broadcasting Systems as being the one best likely to comply with the need to fulfil programme standards, etc. That view was not altered in the evidence now sought to be adduced. However, Mr Rennie now indicated that the Corporation had withdrawn its support of the Aotearoa proposal because the previous commitment was based on conditions which that applicant had been unable to meet.

(c) There was additional evidence relating to special conditions in commercial and non-commercial activity.

Mr O'Brien claimed that Mr Rennie had already signalled the Corporation's concern regarding the issue of warrants as long ago as early 1985; that the Aotearoa position had been known for 4 months or so and that the Corporation's "new" evidence had been submitted for approximately 2 weeks.

He submitted that there was excusable late presentation of the evidence of Mr Rennie and there would be no departure from the procedural directive. In view of the Corporation's special position as an existing warrant holder, Mr O'Brien submitted, it would deny the Corporation the proper exercise of its rights and responsibilities under the Act. It would deny its right to be fully heard and it would deprive the Tribunal of relevant evidence which it would not be receiving from any other source.

As indicated, the Tribunal decided to permit some of the draft evidence of Mr Rennie to be given. Although the Tribunal's categorisation of the actual paragraphs in the evidence was tentative, it appears to have been accepted by the parties as in accordance with the Tribunal's ruling.

The conclusion that the Tribunal had arrived at was:

1. That the Corporation was obviously entitled to change its view on the wisdom of a third TV service.
2. That the question of whether or not an application should be granted was always an open question and it was open to the Corporation to oppose the grant of every one of the applications on whatever grounds it saw fit. Those grounds could include the effect on the Corporation.
3. That the Corporation had not given the parties adequate notice or opportunity to bring forward their own evidence or to counter any evidence for the Corporation based on the proposition that no third service warrant applications should be granted under any circumstances.
4. There would therefore be prejudice to the applicants by the introduction of new evidence at this late stage after a lengthy period of evidence and cross-examination. Such evidence would also lead to requests for rebuttal evidence to be called or for the recall of previous witnesses, which would lengthen the hearings.
5. That the calling of such rebuttal evidence would not overcome the prejudice they had suffered because their witnesses had not previously been cross-examined and because of the inter-relationship between a number of witnesses and their evidence in each case.
6. The Corporation had not cross-examined applicant witnesses on the question of available advertising revenue with a view to demonstrating the lack of room in the market for a third service or to demonstrate the effect on the Corporation.
7. Although the Corporation had filed evidence showing the effect on the Corporation, it was based on the estimates made by the applicants; and the Corporation had adduced no evidence of a substantial sort of its own assessment of the situation, nor