Mr Sorrell

Mr Sorrell's application was similar and was based on exactly the same grounds as set out in his letter to the Tribunal which is reproduced in the minute, with the exception that he no longer claimed difficulties created by the timing of the notice of hearing and the length of time available for the preparation of evidence.

He thought it was necessary that all the parties should make some comment on frequencies and that they would have to have knowledge of the frequency situation and his client believed there were an extremely limited number of frequencies available.

Mr Sorrell, unlike Mr Shale, argued that the Ministerial direction went beyond what could be considered a statement of general policy and consideration has been given to making an application to the High Court for a declaration to that effect in conjunction with an application for an injunction relating to this hearing.

He submitted that the lack of notice of the hearing and the brevity of the time given to prepare evidence in reply, was evidence that the directive had already impinged upon the Tribunal's freedom to act judicially.

He argued that the application should be adjourned for a period of time sufficient to enable publication of determinations regarding frequency and priorities for radio in Auckland.

Mr Impey

Mr Impey also applied for adjournment of the hearing on four grounds:

1. There was a haste in bringing on the hearing which prejudiced his client. It would not be possible to give the application full consideration and to do adequate research or analysis. The timetable was tight in respect of objectors.

2. A priority had been accorded to the BCNZ.

3. Frequency development on an unplanned basis was contrary to the previous development of FM broadcasting in New Zealand by the Tribunal which had not followed an ad hoc approach. There were good grounds for a planning type function.

4. The memorandum of 4 July (the news release) had been relied upon by the parties which should be able to rely on information from the Tribunal.

Mr Giles

Mr Giles for the IBA supported the applications for adjournment. He was concerned about fairness and equality. He submitted there were other signified interests in the applications and others should have been given the opportunity by the Tribunal calling for applications.

Mr Bryers

Mr Bryers did not ask to be heard on the question of adjournment.

Mr O'Brien

In opposition Mr O'Brien relied on the reasons set out in the Tribunal's minute.

He referred to the news release and pointed out that it was just that and did not purport to be anything more.

Mr O'Brien said there was nothing to prevent a concurrent hearing if anybody had bothered to apply. The only supervening factor had been the notice to the Tribunal and notice to the BCNZ that the BCNZ was directed to make an application for revocation of a condition and the substitution of an FM for an AM warrant. The BCNZ was obliged to follow that direction and the other parties knew of the direction since August 1985.

The necessary implication of a direction to the BCNZ to apply was that the application should be heard. There was no point in directing it to apply if the application was not to be heard.

Assuming a frequency was available, then in the absence of any other application at the same time the frequency was available for 1ZM.

He summarised the position by saying that the BCNZ has been directed to apply; that there were no other applications before the Tribunal; the hearing had been notified in the press and all the interested parties were able to file evidence in opposition and were present before the Tribunal. He submitted that nobody had been prejudiced in terms of the hearing.

With regard to Mr Shale's submission, Mr O'Brien said that there had been no indication of what rule of natural justice would be breached by the Tribunal proceeding. The Tribunal had given procedural latitude to objectors and there was support for the objectors at the hearing. The basic rules required the Tribunal to hear all parties. All the requirements for natural justice had been met.

With regard to the provisio to section 68, Mr Shale had appeared to put forward the proposition, said Mr O'Brien, that the news release indicated something of a judicial nature. Mr O'Brien submitted that the news release was no more than a statement of administrative intent. That document was not a judicial act and Ministerial notification does not all derogate from the duty to hear and consider the BCNZ's applications in accordance with the rules of natural justice.

With regard to Mr Impey's position as to prejudice, his clients had given full evidence; they may have wanted to do a survey but there was no prejudice in this instance and priority was not afforded to the BCNZ and the fact was that there was an application before the Tribunal and no other application.

(Mr Impey pointed out to the Tribunal that an application for a new FM warrant had been lodged. It was received on 19 December, after the Tribunal had advertised this matter for hearing. After that applications had been filed by Radio Rhema Inc for an FM warrant and by Hauraki Enterprises Ltd. for conversion to FM.)

Irrespective of that, Mr O'Brien submitted, the applicant is entitled to have it heard and determined and while there was a lack of substantial evidence on frequencies the statement given on 4 July 1985 had been given more status than was intended by the Tribunal.

There was no valid argument against the hearing proceeding.

Mr Shale

In reply Mr Shale said that if there were an inference that the application should be heard, the question was when it would be heard and the Tribunal should look at all applications at the same time. Everybody was told they would be heard at the same time.

Reasons

The Tribunal has never decided:

1. That it would have an investigation into frequencies. In fact it has no power to hold such an inquiry into frequencies.

2. The Tribunal has never decided that all applications would be dealt with at the same time or concurrently or in a continuous series of hearings.

3. The Tribunal's indication of an intention to look at all applications was an expression of an intention to see what applications were contemplated in order that it could give some order and tidiness to the procedure. It was not necessary that the applications be filed for this to be done.

It would, in the opinion of the Tribunal, be most undesirable to hear all applications relating to Auckland radio concurrently, or in a continuous series of hearings. In its experience the result would be lengthy hearings with many parties, all obliged to argue for or against all the possible combinations of grants and refusals of warrants. It would be expensive to parties, a bad use of resources and cause complications, delays and unexpected effects because of appeals. The Act and Regulations allow the Tribunal to settle such a procedure.

It is desirable for the Tribunal to consider whether some work on frequencies for AM stations might be carried out in order to make satisfactory long-term assignment of MF frequencies. It would be desirable to know what MF frequencies are to be available for AM stations from the finite number at present assigned to Auckland and whether it is possible that, on a complete analysis, it may be feasible to assign further AM frequencies to Auckland. That work, which would have to be undertaken by the New Zealand Post Office, is complex and would take some months.

In relation to the FM situation, the Tribunal is satisfied from its knowledge of the frequency assignments that it will be possible to make a decision to grant up to three more full power stations in Auckland in the reasonably near future in addition to existing stations. It will also be possible before very long to make assignments of a substantial number of additional frequencies for FM if that were considered desirable. In other words, in terms of the likelihood of available Tribunal sittings, decisions and appeals, no prejudice will be experienced by any party because of the unavailability of VHF frequencies by the Tribunal proceeding in the manner it has proposed.

We are satisfied that it would be completely unsatisfactory to adopt the course proposed by the parties. The Tribunal's procedure does however protect the parties.

What has happened is that Tribunal has invited interested people to notify their interest in making applications, either in relation to a change of frequency or to convert from AM to the FM band and to make new applications. Some of those applications are for AM and some for FM and the notice from Mr Shale's client is for either an AM or FM warrant.

We are not aware how many MF frequencies will be available until a decision is made as to the present application and as to the application by Hauraki Enterprises Ltd. and possibly as a result of further work to be done by the Post Office. It therefore seems logical to the Tribunal to deal with conversions to FM first so that it would then be in a position to decide what existing frequencies might be generally available for assignment in the MF band for AM stations.