

Section 84 (7) Broadcasting Act 1976 provides that the operation of the decision appealed against should be suspended until the final determination of the appeal.

The stated purpose of this application was to commence the 2ZM-FM simulcasting which is the first state of the move of 2ZM from AM to FM. The applicant intends that the authorisation should continue to 25 March and thereafter it would apply to extend the transmission until such time as the appeal result was known.

The Tribunal is not privy to the details of the appeals. It has not been informed whether the other applicants are appealing against the decision only insofar as it relates to a refusal to grant those applicants warrants. If that were the position the Tribunal might have taken a different view. As the Tribunal understands it, the full decision of the Tribunal has been appealed against and, under section 81 (7), the decision is suspended.

We do not consider that we should lend ourselves to a procedure to by-pass a statutory provision by granting an authorisation which is not far a specified short term purpose related to the holiday period or any other such short term consideration, but rather to commencing the 2ZM-FM service earlier than would otherwise be possible.

The Tribunal indicated its willingness to defer the matter until the appeal had been determined or to decline the application. The BCNZ has requested the Tribunal to give a decision with reasons. For that reason the Tribunal now declines the application.

Dated the 5th day of December 1985.

Signed for the Tribunal:

B. H. SLANE, Chairman.

Decision No. 1/86
BRO 85/85

Before the Broadcasting Tribunal

IN THE MATTER of the Broadcasting Act 1976, and in the matter of an application by INDEPENDENT BROADCASTING COMPANY LIMITED for an amendment to Warrant AM/45 (1XW):

Chairman: B. H. Slane.

Member: Ann E. Wilson.

Hearing: Auckland, 3 December 1985.

Counsel: B. J. Paterson for the applicant.

B. Hudson for Broadcasting Corporation of New Zealand.

DECISION

The applicant (IBC) is the holder of an AM Warrant for 1XW known as Radio Waikato.

A subsidiary of the applicant, Waikato - Bay of Plenty FM Radio Ltd., was granted a warrant for a commercial FM station with studios in Hamilton and a transmitter co-sited with the BCNZ Television facilities at Mount Te Aroha.

The warrant was granted on certain conditions. One condition required to warrant holder for 1XW, IBC, the present applicant, to consent to an amendment to its warrant requiring the surrender of its warrant within a period of 2 years from the commencement of broadcasting by the FM station. Such consent was given.

Another condition required advertising by the FM station to be limited to 6 minutes per hour maximum until the warrant for 1XW had been surrendered upon which the limit could be increased to 8 minutes per hour. The coverage objectives of the station were modified since the full transmission facility could not immediately be provided from the Mount Te Aroha site.

Preliminary Legal Argument

Mr Hudson for the Corporation raised a preliminary point which the Tribunal reserved.

He said that the original application had first been dealt with on the basis that Waikato - Bay of Plenty FM Radio Ltd. was seeking a new warrant and appeared to be avoiding restrictions in the regulations. It was not until the opening of the FM application hearing that it was revealed that the principles applicable under the regulations would apply and so the case was conducted on the basis that there would be a surrender of the AM warrant. In the decision, he argued, the surrender of the AM warrant was given considerable emphasis as was the effect of the grant of the warrant on 1ZH if 1XW was to continue.

He argued that the present applicant should have appealed and that the present application was not the appropriate procedure.

In reply Mr Paterson submitted that there was no appeal right under section 84 as there had been no refusal of the application. The FM applicant had not indicated there would be no application for a new AM warrant when the present one was surrendered. IBC

had consented to an amendment to its warrant and was now applying to amend that condition, not to give it a permanent warrant, applying rather to extend the period before surrender to the maximum permitted under the regulation rather than the 2 years fixed by the Tribunal in its decision. It had to do this as an amendment to its warrant.

The basis of the present application is that an application for a new warrant could not be disposed of before the AM warrant would have to be surrendered and that this would leave a hiatus with the station closing down and going off the air and staff being dismissed. The applicant was not seeking to avoid the condition but to extend it.

Under section 81 (4) the Tribunal had power to consider the application and could consider deferring the new application when it was made to be heard when the ZM application was dealt with. He submitted there should be no gap in the provision of programmes.

In reply Mr Hudson submitted that IBC could have appealed.

We found the procedure followed to be a correct one as the application now lodged arose out of at least some circumstances occurring after the previous decision. We accept that a change of heart or a desire that the Tribunal should review its previous decision would not be adequate grounds.

The Application

IBC has now applied to amend its AM warrant to extend to 4 June 1988 "or such earlier date as the Tribunal may determine" the date by which the warrant must be surrendered.

In support of the application the applicant submitted:

1. That the condition for surrender within 2 years was imposed by consent at the time that the FM warrant was granted.
2. Waikato/Bay of Plenty FM Radio Ltd. commenced broadcasting on 4 June 1984 and it would be due to surrender its AM warrant by 4 June 1986.
3. To comply with the intent of regulation 4, Broadcasting Regulations 1977 Amendment No. 5 the Tribunal could have imposed a condition that the warrant be surrendered within a period of 4 years instead of 2 years from the date of commencement of the FM station.
4. The warrant is a regional one serving both the Waikato and Western Bay of Plenty but the AM warrant only covers in part the same geographical area and that they have distinctly different listening audiences programme content and advertisers.
5. The FM station would only garner a small portion of the advertising associated with 1XW when that station ceases broadcasting.
6. This would cause some existing advertisers to be unable to place their advertising on radio, the substantial portion of the listening public to transfer to other stations and the loss of the only truly community private radio station.
7. The applicant considered there was a need for another local community station in Hamilton and would be applying for a new warrant for such a station.
8. The application for the new warrant would be filed by 31 October 1985.
9. It is understood that present commitments of the Broadcasting Tribunal make it unlikely the application could be heard in time to have a new warrant operating by 4 June 1986.
10. Existing staff would need to be put off and there would be a lack of continuity both for staff, advertising, advertisers and the listening public.
11. The applicant would like to have its application surrendered no later than the date on which (if its application is successful) it commences broadcasting under a new warrant.

On 5 November the Broadcasting Corporation gave notice of its opposition to the amendment for the station to continue beyond 4 June 1986.

The Corporation's opposition could be summarised as follows:

1. The decision included an absolute requirement that the warrant be surrendered within 2 years.
2. The FM warrant applicant would not have been permitted to uplift the warrant unless it had consented to the surrender within 2 years.
3. The Tribunal granted the FM warrant for a period of 3 years stating:

"This will enable a review at an early date by the Tribunal after association of operation by Radio Waikato".