

Under the heading "Conditions" the Tribunal said at page 18:
 "We have decided not to rule on timing at this stage for commencement of FM broadcasting. The successful applicants may make submissions. Normally we would have left the parties to make their own pace but two other considerations may apply—

- (1) The BCNZ is to provide facilities for co-siting. Negotiations may take time and should not put Canterbury FM at a disadvantage.
- (2) Existing stations will be affected by the new entrant. It could be argued that 3ZM should be able to start on FM at the same time as, or earlier than, Canterbury FM.

A condition may be inserted to deal with these matters after hearing submissions, if the parties cannot agree."

We were informed that an appeal was filed by Radio Avon Ltd. in the High Court.

On 17 October 1985, counsel for Canterbury FM Ltd. filed with the Tribunal a memorandum seeking to have a condition placed on both warrants that both stations should commence FM transmissions at the same time. Two grounds were given.

The first was that co-siting negotiations would take time and there was "a real prospect of Canterbury FM being disadvantaged as a result of the Corporation being able to prolong such negotiations while 3ZM was broadcasting on FM.

The second reason was the advantage of promoting the FM band with both services starting together.

On 28 February 1986 the Corporation recorded its opposition. It submitted that any delay on co-siting negotiations was of Canterbury FM's making, the Corporation being available for discussions.

The Corporation said the Tribunal had protected the existing operator in the Manawatu by permitting the existing station to broadcast on FM 6 months before the new FM service of the Corporation.

In a memorandum filed on 27 February 1986, Mr Mortlock, for Radio Avon Ltd., neither supported nor opposed Canterbury FM's request for a simultaneous start for both FM stations.

But he requested two conditions if 3ZM-FM commenced first:

- (1) A limit on advertising to 8 minutes per hour until a second station started.
- (2) A BCNZ undertaking to arbitrate any difference on co-siting terms.

On 3 March 1986 counsel for the Corporation, B. Hudson, filed a memorandum pointing out that there had been no appeal against the granting of the 3ZM-FM warrant to the Corporation, only against the failure to impose a condition limiting advertising.

Mr Hudson's memorandum set out the steps taken by the Corporation and the lack of response from Canterbury FM to enable co-siting negotiations to be opened.

We were later informed that the Corporation had applied to the High Court on 18 March 1986 to dismiss the appeal in so far as it affected the grant of a warrant to the BCNZ.

By letter dated 26 March 1986, Mr Mortlock sought a decision from the Tribunal on the advertising condition because, he said, the matter was one which ought to be dealt with by the Tribunal rather than the High Court.

The appellant did not take a position on the question of commencement date but said that, in the event of the Tribunal ruling that both FM stations did not need to go on the air at the same time, 3ZM's advertising of FM should be limited to 8 minutes in the hour until there were 2 commercial FM stations on air. Then the appeal in respect of 3ZM-FM could be struck out.

After considering all the submissions made, the Tribunal decided that it was not appropriate to make any decision on commencement dates before the application to the High Court had been heard.

We said consideration could be given to the matter again after the 14 April hearing in the High Court.

The question of a limitation of advertising on 3ZM if it were the only FM station broadcasting, would be addressed if an application were made for 3ZM to go on air before any other FM station.

Such an application has now been made by the Corporation. It has informed the Tribunal that, on 14 April, His Honour the Chief Justice made this minute:

"An application having been made by Canterbury FM to the Tribunal to determine the start date of the FM warrant, as per its counsel's (Mr Impey) memorandum of 14 October 1985 and the Broadcasting Corporation by its counsel, Mr O'Brien, Q.C., having undertaken to lodge forthwith with the Tribunal an application to fix the commencement date in accordance with the terms of the Tribunal's decision, and both Canterbury FM and the Corporation having undertaken to prosecute their applications before the Tribunal with all due diligence, the applicant, Radio Avon, withdraws the appeal as regards the Corporation."

The Corporation has sought permission from the Tribunal to uplift a warrant to commence FM transmission on 31 May 1986.

It repeated that it had used its best endeavours to advance the co-siting negotiations which were then taking place.

The Corporation renewed its previous arguments, adding that in the Manawatu a private applicant had not considered itself under any obligation to co-site even where it had proceeded before the Tribunal on that basis. It was quite unreasonable that the Corporation's right to uplift a warrant should be subject to the "whim" of a successful private applicant. It was submitted that the Corporation had already been delayed for many months by a spurious appeal (by Radio Avon Ltd.).

Counsel for Radio Avon Ltd. submitted that there was no legal impediment to the Tribunal dealing with the application before the outcome of any appeal, and that there would be a further right of appeal against any further decision of the Tribunal. In order to bring the matter to a conclusion at the earliest possible date the Tribunal should, he submitted, deal with the outstanding matters as soon as possible.

Canterbury FM has now submitted that 3ZM-FM should not commence until co-siting negotiations between Canterbury FM and the Corporation have been completed.

Commencement Date

The Tribunal has considered the points raised by all 3 parties and has decided that the warrant should issue to the Broadcasting Corporation of New Zealand to permit 3ZM-FM to commence broadcasting on 31 May 1986.

The Tribunal is satisfied that there is no evidence of delay on the part of the Corporation and its chronology of Corporation attempts to start negotiations has not been challenged by Canterbury FM. Furthermore we have been informed by Canterbury FM and the Corporation that negotiations are currently proceeding. They may be concluded very shortly. We have had no other information and certainly no suggestion from Canterbury FM of actual obstruction or delays by the Corporation.

Arbitration—Co-siting

Mr Mortlock has urged on us that the Tribunal ought to impose a condition requiring arbitration of any differences between the private operator and the Corporation over co-siting at Sugarloaf.

Mr Mortlock has pointed out that we drew attention on 3 October 1984 (in a ruling on the admission of evidence during the hearings of the applications) to the Tribunal's view on arbitration.

We are not satisfied that the Corporation would refuse to arbitrate or cause delays. If such a situation occurred we would expect that the Tribunal would be informed and the Corporation would be aware of the implications for future co-siting warrant grants. Mr Mortlock has referred to a statement made at the hearing by counsel for the Corporation.

In view of the actions taken by the Corporation in Christchurch co-siting negotiations up to now, and in view of the Corporation's assurances at the hearing, we do not consider that it is necessary in this case to impose a condition as to arbitration. We do not make any comment about the legality of such a condition.

Mr Mortlock inquires as to any condition regarding co-siting. The warrant will show the location of the transmitter and it is a usual condition that the private warrant holder co-site with the Corporation. Any change to that would have to be approved by the Tribunal.

Limitation on Advertising

Finally, Mr Mortlock has submitted that a condition ought to be imposed that, until such time as a second commercial FM station goes on air in Christchurch, 3ZM should be limited to a maximum of 8 minutes of advertising in any 1 hour.

The Tribunal said at page 15 of its decision:

"3ZM estimated 6 minutes per hour in the first year, 7 minutes in the second year and 8 minutes in the third year. This was less than that proposed by Canterbury and Avon. . ."

The reference here was to average, not maximum, minutes per hour.

"If one FM warrant were granted the Tribunal would impose a limit of 8 minutes per hour. The grant of 2 warrants would make that statutory limitation unnecessary as we believe the competitive element would tend to limit the amount of advertising."

Canterbury FM does not support the imposition of such a condition on 3ZM-FM.

We understand that the appeal by Radio Avon Ltd. is against the grant to Canterbury FM Ltd. upon the basis that the warrant ought to have been granted to Radio Avon Ltd.

It would therefore appear that there will eventually be 2 FM warrants—one in the hands of the BCNZ and the other in the hands of the appellant or the respondent.