

For that reason the tribunal decided it would be appropriate to make it a condition of this warrant that the applicant take all steps necessary to establish a relay station for the YC Concert Programme within 3 years of commencing broadcast, subject to programme reticulation being made available at the expense of the corporation to the transmitter site. If the corporation for whatever reason declines to make such service available to Fifehire, this condition will lapse. We accept that this is a considerable burden on Fifehire, but one it was prepared to undertake in the light of the present situation. The corporation may well see its duty, having regard to the financial outcome which now results, to make a greater effort itself to provide this programme service to the area. In the short term we believe that the corporation will be better placed to provide this service now than if the ZM application had been granted. But we concede that this may not be the case in the long term.

We also considered the question of a limitation on advertising minutes. The tribunal believes that where there is one FM station operating in a market, it should be prepared to accept a condition of 8 minutes per clock hour. Such a condition will be inserted in the warrant.

(n) *All relevant evidence or representations received by the Tribunal at the hearing—*

We have had particular regard for the submissions made by the Nelson School of Music and others who seek the YC/FM programme.

(o) *Such other matters as may be prescribed in regulations in that behalf—*

Regulation 15A of the Broadcasting Regulations requires the tribunal to have regard to the policy of the Government under which a frequency modulation broadcasting service is to be developed as an integral part of sound-radio broadcasting in New Zealand.

The tribunal is required to have regard to the policy of the Government as required by section 68 of the Broadcasting Act 1976.

The tribunal has had regard to the policy set out in the 1981 notice from the Minister of Broadcasting which, except in one irrelevant respect, remains in force. Also we have had regard to the further statement of Government policy in the notice of 14 August 1985 to the tribunal. The tribunal is given notice in paragraph (1) (e).

“That the Young Adult Programme currently broadcast on the ZM-AM stations should be broadcast from FM stations in such a manner that the programme becomes available progressively throughout New Zealand in conjunction with the extension of the Concert Programme.”

The weight that should be given to such statements was set out by Holland J. in *BCNZ and FM Radio Enterprises Ltd. v Metropolitan FM Broadcasting Ltd. and Others* M 363 and 364/82 High Court, Wellington Registry, at pages 13 and 14 where, in criticising the Tribunal's statement that:

“While the Tribunal must have regard to the criteria laid down in section 80, it must equally have regard to Government policy under section 68”.

His Honour said:

“The use of the word ‘equally’ is unfortunate. The tribunal must have regard to the provisions of section 68 and section 80, but section 80 prescribes the matters which the tribunal must take into account in considering an application for a warrant. A direction from a Minister cannot defeat the requirements of an Act of Parliament nor can it be equated with those requirements. The existence of Government policy is not to be balanced against the criteria in section 80 if it is in conflict with the criteria in section 80. If the Government wishes to change the criteria laid down in section 80 it must do so by Act of Parliament and not by Ministerial direction under section 68. . . .”

In our decision 16/84, known as the YC-FM decision, we said:

“We take the point that we should not give equal weight to the ministerial direction on its own, and we do not give equal weight to it with the other factors under section 80. In some respects and in some aspects of the application the Government policy carries considerable weight. This is particularly so in relation to the extension of services to provincial areas and the extension of hours.

In others we have not been convinced that it is a factor which should outweigh other considerations.

It is necessary to note, because it has been overlooked in the past, the regulation 15A overlooked in the past, that regulation 15A (. . . SR 1981/295) requires that the tribunal have regard to the policy of the Government under which a FM broadcasting service is to be developed as an integral part of sound radio broadcasting in New Zealand. That policy becomes a section 80 consideration.)”

We therefore do have regard to and give weight to Government policy on FM broadcasting both under section 80 and under section 68.

There is a ministerial notice to the corporation, also dated 14 August 1985 setting out the policy referred to in the notice to the tribunal. Paragraph 3 reads:

“(3) In pursuance of the general policy set out in clause (1) of this notice direct that you, the Broadcasting Corporation of New Zealand, shall—

(c) Whenever you are authorised to establish a commercial FM broadcasting station, seek to establish at that location, before its establishment or contemporaneously with its establishment, where practicable and where authorised by the tribunal, a FM broadcasting station or a FM broadcasting relay station for the broadcasting of the Concert Programme; . . .”

We therefore acknowledge the corporation's obligation under the policy that the ZM programme should be broadcast from FM stations in such a manner that the programme becomes available progressively throughout New Zealand in conjunction with the extension of the Concert Programme. We have commented on aspects of that policy before most recently in decision 4/87, and do not consider it necessary to repeat those comments here.

Having had regard to the ministerial notices and the policies set out therein and to the regulations and having given them appropriate weight in relation to section 80 considerations we have decided in all the circumstances of these applications to grant the Fifehire application and not to grant the ZM/FM application.

This is not to rule out the possibility of the establishment of such a station at a later date, or indeed at a not too distant date, should the corporation be prepared to accept some restriction on its advertising revenue from that station. But it appears unlikely that such a station can be established in this area in the near future without a serious impact on the corporation's ZZN. The corporation may be prepared to sustain that effect and incur the additional costs because of its desire to bring the ZM programme service to the area. At that stage we would have to have regard to effect on the private competitor and we cannot pre-judge that situation now.

Application for Concert Programme

The corporation applied for an amendment to the 2YC warrant to add a relay station at Grampian Hills to broadcast the Concert Programme in stereo FM. The application was not opposed.

There was opposition, notably from the IBA and Fifehire to linking the establishment of the relay to the grant of a ZM/FM warrant: the tandem approach.

Evidence in support was given by H. A. Young, manager of the Concert Programme and Richard Rainey on behalf of the Nelson School of Music.

Miss Young produced evidence of the demand for the service and described the area as one which is particularly culturally aware.

We do not need to traverse section 80 criteria since the application is not opposed and is in accordance with Government policy.

R. G. Davis in his evidence generally for the corporation traversed the tandem policy and the reasons for the application. M. J. P. Dunlop also gave evidence on the policy aspects.

A case was clearly made out for the application to be granted.

It is not clear at this stage however whether the corporation will, in the light of the Tribunal's decision, wish to proceed with the establishment of the Concert Programme in Nelson.

It is appropriate in the circumstances for the tribunal to indicate its willingness to see the YC programme established by granting the application which is an application to amend the 2YC warrant by the addition of a relay station, and we grant that application accordingly. It is clearly in the public interest for the service to be extended but if the corporation is unable to take up the opportunity