

# Frequency tendering or retendering in NZ

**Brent Impey questions the fairness of the second tender round**

**T**he focal point of the previous Labour Government's so called deregulation policy was the establishment of a property rights scheme for frequencies. The stated aim was to remove economic/viability criteria for entry to the radio spectrum and to replace it with a market system. This was based on the successful highest bidder paying the second highest bid price. The market of course, was dictated by the number of frequencies released for tender.

The Ministry of Commerce assured the industry that all available frequencies, the whole of the AM band and the FM band from 89 to 100MHz, excluding those reserved for non-commercial use, would be made available for tender.

## The discussion paper

**I**n preparation for the tender, the Ministry of Commerce released a discussion paper in May 1990 based on the expressions of interest. This followed planning by the department of frequencies available and the demand for new services, the outcome being "the development of draft plans for the exploitation of the AM and FM bands. The paper concluded in relation to AM, that the band has "little, if any, provision for future development" and for FM, that there is "some capability for expansion beyond that which is currently being made available. This capability has been reserved to ensure that future developments may also be made without unduly inhibiting current expansion".

There was criticism of the conservative technical approach, the main allegation being that more frequencies could have been made available for tendering. Notwithstanding, the Ministry of Commerce proceeded to call for tenders in July 1990 and the management rights to the frequencies were confirmed, and applied from 3 April 1991.

So far so good. There then emerged a number of issues relating to certain frequencies and a number of inconsistencies. Some successful tenderers found that there were no technical reasons why frequencies couldn't be relocated. In one case, a frequency which had been allocated to the Kapiti Coast was shown to be able to be relocated to Wellington servicing a population five times larger. In another, a high powered frequency in Auckland, which had been allocated to a

site where the successful tenderer would have needed to undertake difficult town planning applications before utilisation, found that it could be used at Waiatarua, which is where all Auckland's television and FM radio services are co-sited. The difference in value was \$400,000 in terms of price paid between that frequency and a comparative one at Waiatarua. There are other examples of tenderers obtaining frequencies which they knew could be enhanced in terms of power and coverage.

How to deal with these issues has resulted in philosophical and policy shifts. The original Government reports and Government policy referred to a market based system where only technical constraints should apply. Ever since, those principles have been watered down by a succession of policies which have restricted variations to existing licences. Now the Ministry is advising that if any power increase results in coverage improvement of more than ten per cent then the frequency shall be retendered.

## New frequencies

**O**n top of that, the Government has announced that there will be a further tender in September and October of this year. Further frequencies have been "discovered" including FM frequencies in the metropolitan markets.

Some of these frequencies will be reserved for Maori use, but others will be available for general tender. This raises several key questions. Why weren't these frequencies available when tenders were called? On what grounds have the technical criteria changed, if at all? What compensation is due to successful tenderers who find additional frequencies being placed for tender in their markets? Or alternatively, should there be a base below which the frequency will not be allocated, such as the lowest price paid for a comparable frequency in last year's tender?

Other frequencies are also going to be offered for tender; those where there were disputes surrounding their inclusion in the last call for tenders. One example is an AM frequency in Palmerston North where the existing user claimed incumbency. Another is a frequency which has been surrendered because the operator is using an alternative frequency on a short term basis in a different

location. There are issues here too. These frequencies will be the only ones offered for tender in these markets and are likely to attract more attention from bidders than would have been the case had they been included in last year's tender of the "whole" band. Given that the frequencies are, in most cases, presently being utilised, wouldn't a fairer solution be to set an annual rental for the 20 year period of the licence? The Crown answers that it has no power under the Act. It is a lame excuse. In these instances there is substantial opportunity for market manipulation.

## Changing policies

**T**he problem for the industry in all these areas is the changing policy. The change from the market deregulated policy to one of ad hoc decision making causes concern particularly when the same officials within the Ministry of Commerce draft the policy, advise the Minister, interpret the policy and enforce it. The only avenues of redress available to the industry are lobbying or civil proceedings, a costly and lengthy process, inappropriate in many cases given the technical nature of the issues involved.

The overall policy, however, has many positives and there are none within the industry who seek a return to the economic licensing system. Also, in many cases the Ministry of Commerce has been flexible and produced pragmatic solutions. The real danger now is that the exceptions to the policy are dealt with in such an ad hoc manner by officials who wear so many hats, that the value of what they have achieved in the past four years will be discredited.

*Brent Impey is Executive Director of the Independent Broadcasters Association and Chairman of Independent Broadcasting Company Limited. The Ministry of Commerce has indicated that it will reply to this article in the next edition of the CLB.*