

Wesgo v Minister for Transport and Communications

Jack Ford and Andrew Chalk report on this recent case concerning
AM/FM metropolitan conversion scheme

Legal action by the Wesgo Group recently exposed significant anomalies and drafting errors in the National Metropolitan Radio Plan. In a successful challenge to decisions by the Minister for Transport and Communications in setting up stage 1 of the Plan, Justice Davies in the Federal Court found that the Broadcasting Act gave the Minister no power to discriminate between tenderers for FM conversion on the basis of existing restrictions to their licences. The effect of the decision is that some commercial radio licence holders will be able to extend their broadcast service areas and potentially avoid or change other existing licence restrictions by successfully tendering for FM conversion.

Wesgo holds the commercial AM radio licence for 2WS, a music based station in Sydney's west. The conditions of the licence restrict 2WS's broadcast service area to the western side of the city including the areas surrounding Campbelltown and the Blue Mountains.

The plan

Under the plan it was intended that two commercial radio licence holders in each large city or town be allowed to convert to FM. Selection was by tender. On 18 April 1989, the Minister published a notice in the Gazette inviting tenders for conversion in Sydney, Melbourne, Perth, Brisbane and Adelaide. The notice set out the technical conditions for the new licences. In respect of all Sydney licences except 2WS, the conditions included a provision specifying that transmission was to be from a site located at Willoughby, the nearest high ground to the CBD. The notice also specified beam direction strengths. These were sufficient to ensure that the new licensees transmitted to the whole of the Sydney metropolitan area.

Those licensees eligible to tender for conversion are defined in section 4(16) of the Broadcasting Act. In all cases but one (2WS), they comprise licensees whose service area includes the GPO of the town or city in which the new licences are being offered; section 4(16)(a). However, the deeming provisions in section 4(16)(b) enable other licensees to tender even if their service area does not encom-

pass the CBD provided that certain conditions are met. These conditions include being subject to a declaration under section 89T that the licensee shares a substantial market in common with another licensee whose service area covers the GPO. Wesgo's service area excluded the GPO, but it met the definition of a commercial metropolitan AM radio licence as set out in section 4(16)(b) making it eligible to tender.

Subject to licensees meeting certain standard requirements, tenders are decided solely on the value of the bid; section 89 DAL. To prevent Wesgo, in the event that it was a successful tenderer, from gaining the benefit of the new technical conditions and thereby dramatically increasing the population size of its service area, the Minister added a clause to the notice stating that the published technical conditions applied only to those tenderers whose existing service areas already included the Sydney GPO and that "other tenderers must, if successful, negotiate with the Department for approval for alternative FM transmitter sites and technical conditions which maintain their existing AM service areas."

Wesgo's position

Wesgo pointed out to the Minister that the notice did not comply with section 89 DAB in that, amongst other matters, the technical conditions which were intended to apply to Wesgo were not specified. The Minister responded by publishing an amending notice which set out alternative technical conditions to be applied depending on whether the tenderer's service area included the GPO or not. From its phrasing, the notice appeared to suggest that an additional licence was being offered in western Sydney to compliment the two planned for Willoughby. Thus, a further amending notice was published making it plain that only two FM conversion licences were being offered.

Wesgo challenged the notices claiming discrimination. Effectively, it was being ruled out of contention for FM conversion by being required to make a competitive bid for a restricted licence against stations who shared no such restrictions. In ranking the bids, no allowance was to be made for differ-

ences in licence conditions.

Justice Davies considered that the Act gave the Minister no power to differentiate between tenderers who were eligible to bid by reason of section 4(16)(a) as against those who qualified under section 4(16)(b). He said:

"Any licensee who meets the qualifications of section 4(16) for the holder of a licence in the particular large city or town is entitled to tender on an equal basis with every other such tenderer for the two licences which are offered. Subject to section 89 DAP(2), the successful tenderers are to be determined, not by planning considerations or by service area, but solely by reference to the competitiveness of their bids. The conversion of a licensee from AM to FM will therefore necessarily incorporate the technical conditions specified by the Minister for the FM frequency which is allocated."

Future options

For now, the ball is back with the Minister. The options are to proceed with the Sydney tendering on the basis that 2WS will be planning to convert not only its frequency but also its licence conditions. Alternatively, the Minister can defer the process until further amendments are passed that enable differing licence restrictions to be taken into account when valuing bids.

Finally, there is a third option which may avoid both the possibility of licence conditions being altered as well as amendments having to be made to the Act. That option is to offer 2WS an FM licence in western Sydney with conditions matching those currently applying to 2WS on AM in return for payment of a fixed fee (similar to the conversion process in other regional markets). The Sydney tendering could then proceed unimpeded.

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